

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE**

SOUTH VALLEY GROUND WATER
DISTRICT and GALENA GROUND
WATER DISTRICT,

Petitioners,

vs.

THE IDAHO DEPARTMENT OF WATER
RESOURCES and GARY SPACKMAN in
his official capacity as Director of the Idaho
Department of Water Resources,

Respondents.

Case No. CV07-2021-00243

IDWR Dkt. No. AA-WRA-2021-001

PETITIONERS' OPENING BRIEF

Appeal from the Idaho Department of Water Resources;
Concerning the Judicial Review of the *In the Matter of Basin 37 Administrative Proceeding*
initiated on May 4, 2021

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STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of the Director of the Idaho Department of Water Resources' ("Director," "Department," or "IDWR") *Final Order* dated June 28, 2021 and the *Final Order Denying Mitigation Plan* dated June 29, 2021. Administrative Record ("R."); R. 1882, 1948. These orders were based exclusively on Idaho Code § 42-237a.g. The Director summarily curtailed over 300 ground water rights that were providing irrigation water to approximately 23,000 acres in Blaine County. This unilateral curtailment based solely upon "strict priority" and without regard to material injury in the middle of an irrigation season was unprecedented and contrary to law. Petitioners South Valley Ground Water District and Galena Ground Water District (collectively "Petitioners" or "Districts"), submit that the Director erred and respectfully request this Court reverse and set aside the above referenced decisions.

II. Course of Proceedings

The Director issued a *Notice* of an administrative proceeding and hearing on May 4, 2021, approximately three weeks after the start of the irrigation season. R. 1. After the Director refused to dismiss or continue the case, or certify those orders as final, the Districts sought immediate relief from this Court. *See generally, Petition for Judicial Review et al.* (filed May 24, 2021). On May 27, 2021, the Court issued an *Order Denying Application for Temporary Restraining Order* explaining that until "such a determination is made and/or curtailment ordered, any injury, loss, or damage to the Petitioners is speculative." *Order* at 3.

After limited discovery, the Director presided over the administrative hearing held June 7-12, 2021. The Director received exhibits and testimony into evidence and the parties submitted post-hearing briefing. *See generally*, R. 1487-1539; 1548-59; 1597-1648; 1800-26;

1833-81; 2086-3148. The Districts also filed a proposed mitigation plan on June 24, 2021. R. 1649-1799.

The Director issued a *Final Order* on June 28, 2021, ordering curtailment of all groundwater rights to begin on July 1, 2021. R. 1882-1932. On June 29, 2021, the Districts filed a petition to stay curtailment and requested an expedited hearing on their previously filed mitigation plan. R. 1934-47. The Director summarily denied the stay and mitigation plan that same day. R. 1948. The Director granted a request for a hearing on the mitigation plan, but only after curtailment actually occurred. R. 1957.

Having exhausted all administrative options, the Districts again requested direct injunctive relief from this Court. *See First Amended Petition for Judicial Review et al.* (June 30, 2021). After a hearing, the Court issued its *Order Denying Second Application for Temporary Restraining Order et al.* (July 2, 2021) (“2nd Order”). The Court found the Petitioners did not meet the standard for a preliminary injunction but observed the case involves both “complex issues of law” and “complex issues of fact . . . that are not free from doubt.” 2nd Order at 4, 6.

Thereafter, the Director sent a letter to Governor Brad Little and Speaker Scott Bedke on July 3, 2021, addressing a potential agreement and mitigation. R. 1999-2000. The Director further stated that unless a “mutually acceptable” ground water management plan was submitted to him by December 1, 2021, that he would “immediately schedule a hearing for the Basin 37 Proceeding that is currently pending . . . to determine the actions the Director should take to ensure that ground water diversions in the Wood River Basin do not negatively affect the present or future use of any prior surface or ground water right.” R. 2000.

The Districts then negotiated an amended mitigation plan with the senior water users and filed it with the Director on July 7, 2021. R. 2001-08. The Director approved the plan on July 8,

2021, R. 2009-27, and mailed notice of the order approving the plan and staying curtailment to affected ground water right holders. R. 2028. Affected ground water rights were actually curtailed by Water District 37 and IDWR on July 1st, during one of the hottest and driest weeks of the summer.¹

The Petitioners and Respondents filed a *Stipulation and Joint Motion Regarding Motion to Amend* the petition for judicial review on July 23, 2021. IDWR filed a notice of lodging the agency record and transcripts on August 20, 2021. Following the Districts' objection to the record, the agency lodged the settled agency record and transcripts with the Court on September 17, 2021.

III. Statement of Facts

A. History of Conjunctive Administration in Basin 37

Idaho Code § 42-237a.g was added to Idaho's ground water code in 1953. *See* 1953 Idaho Sess. Laws, ch. 182, pp. 278-291. To the Districts' knowledge, IDWR has never used the statute to curtail ground water rights outside the context of an adverse claim proceeding before a local ground water board. *See e.g., Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969). Moreover, IDWR has never proposed to use § 42-237a.g to conjunctively administer ground and surface water rights together following the 1994 promulgation and approval of the *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11, *et seq.*) ("CM Rules").

The Snake River Basin Adjudication (SRBA) commenced in 1987. *See* Idaho Code § 42-1406A. The general stream adjudication evaluated all surface and ground water rights within

¹ The Director issued an order approving an amendment to the mitigation plan on August 16, 2021. R. 2036-55.

IDWR’s administrative Basin 37, which covers both the Big Wood River and Little Wood River basins. Conjunctive administration was an important issue in the SRBA:

Conjunctive management of ground water and surface water rights is one of the main reasons for the commencement of the Snake River Basin Adjudication. In fact, the Snake River Basin Adjudication was filed in 1987 pursuant to Idaho Code § 42–1406A, in large part to resolve the legal relationship between the rights of the ground water pumpers on the Snake River Plain and the rights of Idaho Power at its Swan Falls Dam. *Idaho Power Co. v. State*, 104 Idaho 575, 588, 661 P.2d 741, 754 (1983); *In re Snake River Basin Water System*, 115 Idaho 1, 2-3, 764 P.2d 78, 79-80 (1988).

Historically, conjunctive management has not occurred in Idaho, especially between the Snake River Plain Aquifer and the Snake River. To conjunctively manage these water sources a good understanding of both the hydrological relationship and legal relationship between ground and surface water rights is necessary.

Although these issues may need to be resolved by general administrative provisions in the adjudication decrees, they generally relate to two classic elements of a water right—its source and priority. The SRBA should determine the ultimate source of the ground and surface water rights being adjudicated. This legal determination must be made in the SRBA. The IDWR should provide recommendations to the SRBA District Court on how it should do so. Further, the SRBA District Court must determine the relative priority between surface and ground water rights.

If the SRBA proceeds and these issues are not addressed, a major objective for the adjudication will not have been served. Conjunctive administration will be set back, and another generation of ground and surface water users will be uncertain regarding their relationship to each other.

A&B Irr. Dist. v. Idaho Cons. League, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997).

While the adjudication was occurring, IDWR designated the Big Wood River Groundwater Management Area (BWRGWMA) pursuant to Idaho Code § 42-233b in 1991.² R. 2420-39. The primary concern was “potential injury to senior surface and groundwater rights.” R. 5989. Despite the designation and moratorium ordered 30 years ago, IDWR has yet to

² Unlike conjunctive administration, the designation of a groundwater management area is not contingent upon proceedings under the CM Rules. See *Memorandum Decision and Order* (Case No. CV01-20-8069, Ada County Dist. Ct., Fourth Jud. Dist., Nov. 6, 2020).

develop or approve a ground water management plan. R. 2430-39; *see* Idaho Code § 42-233b. In addition, the Director never determined: 1) an area of common ground water supply; 2) the reasonably anticipated average rate of future natural recharge; or 3) a reasonable groundwater pumping level. *See* Idaho Code §§ 42-226; 42-237a.g. The Director and IDWR have unequivocally left those tasks undone since the original GWMA designation.

Surface and ground water rights were recommended and decreed in Basin 37 throughout the 2005 to 2010 timeframe. Following the adjudication of various water rights, IDWR established a water measurement district in 2011. R. 2440-81. Two years later, the measurement district was abolished when IDWR combined certain water districts and added ground water rights to Water District 37 (“WD37”). R. 2482-98. The Department explained the reasons for its actions and represented the following in its September 17, 2013 order:

Ground water rights in the UWRWMD and most surface water rights in the Camas Creek drainage are not currently included in a water district subject to administration by a watermaster in an active water district. The UWRWMD has no authority to regulate ground water rights and is limited to measurement and reporting of ground water diversions only. Water rights not currently included in a water district whose sources of water have been adjudicated **must be placed in a water district** pursuant to Idaho Code § 42-604 “**to properly administer uses of the water resource.**”

The proposed combination of water districts and inclusion of surface water and ground water rights in one district **will provide for proper conjunctive administration of surface and ground water rights and the protection of senior priority water rights.**

The proposed combination of water districts and inclusion of surface water and ground water rights in one water district will provide for consistent, cost effective and efficient water district operations.

R. 2484 (emphasis added).

In the conclusions of law regarding the combination of the water districts and inclusion of ground water rights in WD37, the Department determined:

4. Idaho Code § 42-604 mandates the Director form water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. . . . Efficient distribution of water, in accordance with the legislative mandate, requires that IDWR implement sufficient administrative oversight to prevent conflicts from arising, where possible, and to furnish a framework of evenhanded oversight which allows for consistent planning by water users. *Id.* The combination and revision of water districts within Basin 37, parts 2 and 3 is necessary for the reasons set forth in Finding of Fact 13 and for the efficient administration of water rights in general.

R. 2489 (emphasis added).

16. ...Adversarial tensions between ground water and surface water users resulting from potential conjunctive administration of water rights should not negatively affect water district operations given the limited regulatory scope of the water district and the fact that conjunctive administration is guided by separate processes outlined in the Conjunctive Management Rules (CMR's) (IDAPA 37.03.11). . . . Moreover, the CMRs have been implemented and mitigation has been successfully implemented within WD130 without disruption to the operations of the water district despite the fact both surface water and ground water rights are included in the district.

17. ...The Department is statutorily obligated to create or modify water districts largely to provide a regulatory structure to address water distribution problems and minimize potential conflicts. Water districts are not authorized to address potential mitigation requirements of junior ground water right holders but they are authorized to enforce mitigation requirements that may be required pursuant to orders of the Director under the CMRs.

R. 2491 (emphasis added).

24. ...Based upon the above statutory authorities, the order of the SRBA District Court authorizing the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should take the following actions:

- i. Combine WD37 and WD37M into one water district to be designated as WD37;
- ii. Combine ground water rights in the Upper Wood River Valley and Silver Creek/Bellevue triangle area with surface water rights in a combined WD37 to regulate water rights, and protect senior priority water rights in Basin 37;

R. 2493 (emphasis added).

Thus, when groundwater rights were incorporated into WD37 in 2013, that decision was based on the Department's express representation that conjunctive administration would be handled pursuant to Chapter 6, Title 42 and the CM Rules. Not once did IDWR indicate that section 42-237a.g would be used to implement a "strict priority" version of conjunctive administration outside the agency's CM Rules' procedures.

B. Recent Delivery Calls in Basin 37

Shortly after IDWR combined the various water districts and included ground water rights in WD37, the Department addressed conjunctive administration and the formation of ground water districts at a public meeting held in Hailey, Idaho on March 7, 2014. Questions regarding the status of ground water rights were expected given historic administration and the fact surface and ground water rights had not been administered together. The Department's presentation identified the following with respect to conjunctive administration in the basin:



Conjunctive Management of Surface and Ground Water Resources

- Conjunctive Management Rules
 - IDAPA 37.03.11
 - Authorized by I.C. § 42-603
- IDWR Adopted 1994
 - (approved by Legislature 1995)

R. 162

Specifically, as to procedure and how the agency intended to distribute water to the various rights within the water district, IDWR represented the following:

Delivery Calls and Mitigation in a Water District (process/timeframe)

- Time from Delivery Call Petition to Hearing
 - May take up to one year or more:
 - May depend on complexity of case and parties
 - May depend on availability of ground water model
- Post Hearing
 - Director review and consideration
 - May require use of ground water model
 - Injury determination does not require model but model may be necessary to determine extent of injury & complete order

Delivery Calls and Mitigation in a Water District (process/timeframe)

- IDWR Director considers factors to determine material injury
 - Matter generally handled as contested case as per IDAPA Rules
 - Pre-hearing schedule
 - information gathered/provided by both senior and junior right holders; expert reports/analyses; motions; depositions etc.
 - Hearing scheduled and held

Delivery Calls and Mitigation in a Water District (process/timeframe)

- Senior must submit petition alleging injury by junior users and identify senior rights being injured
- Initial investigation by Water District watermaster and IDWR
 - Director may request additional information from Senior (senior does not bear burden to determine/prove injury)

R. 163-65.

As the Department explained, conjunctive administration was meant to follow the CM Rules, with a senior filing a petition, the Director determining “material injury,” and a contested case that could be expected to last several months depending upon the circumstances and complexity. Having responded to delivery calls throughout the ESPA, IDWR understood the complexity and time needed to evaluate and process conjunctive administration in an orderly and fair process.

On February 23, 2015, less than a year after IDWR's presentation, members of the Big Wood and Little Wood River Water Users Association ("Association") submitted letters to the Director requesting priority administration pursuant to the process outlined by IDWR. R. 2403-19. The Director created contested cases and considered the Association's delivery call under CM Rule 40. *Id.* The Director also requested detailed information and data from IDWR staff in the form of a memorandum that was due by August 21, 2015. *Id.* Sun Valley Company (SVC) objected to this process on due process grounds.

SVC moved to dismiss the calls for the Association's failure to comply with the procedure of CM Rule 30. *Id.* The Director denied the motion to dismiss but certified that decision as final for purposes of judicial review. On appeal, the Court set aside the Director's decision and remanded the case for proceedings consistent with the *Memorandum Decision and Order*. R. 2403-19.

The Court found the Director's decision violated the CM Rules and the substantial rights of the junior ground water right holders. The Court held that since there was no defined "area of common ground water supply," IDWR was required to process the delivery call under Rule 30. R. 2408. The Court further found that the determination of an "area of common ground water supply" had to be made pursuant to CM Rules 30 and 31 with proper notice and service to all potential junior priority ground water right holders that might be affected. IDWR did not appeal the district court's final judgment.

On March 6, 2017, the Association made another delivery call by filing a *Petition for Administration* with IDWR. The Director authorized discovery and then held a pre-hearing conference on May 11, 2017. SVGWD filed a motion to dismiss that was joined by other parties. After briefing by the parties, the Director entered an order dismissing the petition on

standing grounds on June 7, 2017.³ The Director concluded that CM Rules 30 and 42 require submittal of specific information unique to each senior surface water user, including water right numbers, delivery systems, beneficial use, and alternate water supplies. The Association did not appeal or seek further review of the Director’s order.

Between 2017 and 2020, IDWR took no action with respect to conjunctive administration or the groundwater management area. Although senior surface water users had filed two separate requests water right administration, and the Director was presumably aware of the alleged water shortages, no action was taken. The Director never offered to use section 42-237a.g as a substitute for the CM Rules.

In the Sun Valley decision this Court found that due process required the seniors to properly file and serve their petition, and that IDWR establish an “area of common ground water supply.” R. 2408-11. The Director ignored the ruling. R. 2815-2816. No action was taken to determine an “area of common ground water supply,” or what the Court found was “the single most important factor relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water.” R. 2411. As a result, there is no “area of common ground water supply” for Basin 37. *See* Tr. 317-138.

C. Lead-up to 2021 Section 42-237a.g Case and Curtailment

In response to a draft ground water management plan submitted by the Districts, IDWR convened an advisory committee in the fall of 2020 to develop a plan for the BWRGWMA. R. 5960, 6003. At the second meeting, IDWR presented the differences between “water administration” under the CM Rules and management within the groundwater management area. R. 5963-6007. Totally absent from IDWR’s presentation was any mention of section 42-237a.g

³ A copy of the order is publicly available at: <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2017-001/CM-DC-2017-001-20170607-Order-Dismissing-Petition-for-Administration.pdf>.

as alternative for conjunctive administration. The committee met at least monthly for the next five months, into April 2021. *See* R. 5956-6477, 6540-83.

In January 2021, the senior water users presented alleged “injury” claims to the advisory committee, claiming that junior groundwater pumping caused “Impact / Injury Estimates” of 13,780 acre-feet to Silver Creek during the irrigation season. R. 6250-55. This number was presented as part of the seniors’ “updated injury estimates” to their surface water rights. R. 6250-56. Director Spackman attended this meeting and heard the seniors’ claimed “injury.” R. 6272, 6275.

At the March 3, 2021 meeting, IDWR reported that the senior surface water users had explicitly demanded priority administration.⁴ R. 6413. At this time the 2021 water year did not look promising. The Little Wood River Basin only had a 52% median snowpack on January 1, 2021. *See* Addendum A.⁵ While the basin received some precipitation in January, the February 1, 2021 forecast had a -1.1 Surface Water Supply Index (SWSI) value for the basin. *See Id.* The NRCS further observed that “Magic Reservoir is notably below its capacity at 36% of normal.” *Id.* The lack of precipitation and snowpack resulted in a continued downward trend in the March and April water supply forecasts, as the SWSI index fell to -1.3 and -2.2 respectively. *See Id.*

The Director was aware of these deteriorating water supply conditions and internally stated his intent to initiate conjunctive administration as early as March. In an email to staff, including three employees who developed staff memoranda for this case, Director Spackman advised:

⁴ In the table regarding “Item as stated by BWLWUA/BWCC” IDWR identified their concerns as “The seniority of surface water rights is not being honored. i.e., groundwater rights that are junior to surface rights should be curtailed accordingly.” R. 6413 (emphasis added).

⁵ Included at Addendum A are excerpts of the NRCS January 1, February 1, March 1, and April 1, 2021 Idaho Water Supply Outlooks. This information is presented regularly to the Department’s water supply management committee.

From: Spackman, Gary
Sent: Wednesday, March 24, 2021 10:25:50 AM
To: Vincent, Sean; Sukow, Jennifer; Luke, Tim; Keen, Shelley; Weaver, Mathew
Subject: Wood River Water Administration

Folks,

I have been thinking a lot about the possibility of **initiating conjunctive water administration** in the Wood River basin during the irrigation season of 2021. Megan Carter confirms I have the authority to initiate the administration under Idaho code section 42-237a.g.

Because we would not have a delivery call and will not have evidence presented at a hearing prior to regulation, administration would have to be limited to the ground water rights unquestionably affecting flows in Silver Creek and would only be regulated to deliver water to holders of water rights that do not have AFRD#2 storage.

Is there a possibility of establishing a trimline that would separate groundwater diversions primarily affecting the Big Wood river flows from ground water diversions primarily affecting Silver Creek? Also, Tim, can we identify just those water users who do not hold any AFRD#2 storage?

Gary

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R. 2335 (emphasis added).

Jennifer Sukow explained that she could generate simulated response functions but that “it would take about two weeks to set up and run” as “**the Wood River model is more complex and has a higher computational demand than the ESPAM.**” R. 2334 (emphasis added). Ms. Sukow referenced the fact that the Wood River model had approximately 59,000 individual cells compared to about 11,000 for the Eastern Snake Plain Model. R. 2334. Although IDWR began working on modeling and other technical work as early as March 24th, the Department did not disclose that fact to anyone for nearly two months until information was posted on the Department’s website on May 18 and 20, 2021 (a little over two weeks before hearing was set to begin on June 7). *See* Tr. 173-74 (Jennifer Sukow testifying about the modeling work she began in March 2021 related to conjunctive administration).

While IDWR undertook these various technical tasks behind closed doors, the advisory committee met again in mid-April. At that meeting the senior water users reiterated their claims

of injury and updated their “projected 2021 shortfalls.” R. 6580 (emphasis added). Cooper Brossy stated “that they estimate a system injury of 38,850 acre-feet, with injury to individual users totaling 18,210 acre-feet . . .” *Id.* (emphasis added). Similar to the January meeting, the Director was present at the April meeting and heard the seniors’ injury claims. *Id.* The meeting continued with a proposal by representatives from the ground water districts and concluded with the Director’s remarks about modeling impacts that he did not disclose. R. 6581. Two days later, the seniors communicated their rejection of the Districts’ proposal.

D. Basin 37 Curtailment Notice and Hearing

Following the April 15th meeting, the Director waited nearly three weeks before issuing the *Notice of Administrative Proceeding* on May 4, 2021 (“*Notice*”). R. 1. The Director stated that he believed “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.*

The *Notice* was accompanied by a cover letter stating the following:

A drought is predicted for the 2021 irrigation season and the water supply in the Little Wood River-Silver Creek drainage may be inadequate to meet the needs of surface water users in that area. Therefore, the Director of the Department has initiated an administrative proceeding to determine if the surface water rights in the Little Wood-Silver Creek drainage **will be injured** in the 2021 irrigation season by pumping from junior-priority ground water rights in the Wood River Valley south of Bellevue. The administrative proceeding could result in curtailment of junior-priority ground water rights south of Bellevue this irrigation season.

R. 45 (emphasis added).

The proceeding was not initiated to determine a “reasonable pumping level” or the “reasonably anticipated average rate of future natural recharge.” Idaho Code § 42-237a.g. IDWR served the notice on some ground water right holders in Basin 37, but the service list contained multiple errors, resulting in the agency re-mailing the notice on May 7, 2021. R. 46,

175-76. The notice required any water user desiring to participate in the case to file a formal notice of participation with the agency by May 19, 2021.⁶ R. 1.

The Director issued a request for staff memoranda on May 11, 2021, seeking information on fourteen (14) complex technical subjects including hydrology, water delivery, ground water modeling, and potential injury to the senior surface water rights. R. 98-100. Despite the public notice of this request less than a month before the hearing, the Director had previously commissioned Department staff to begin conducting groundwater modeling work months prior, without any notice or public disclosure. R. 2335, Tr. 173-74. Consequently, the results of the agency's modeling were not made available to the Districts and their consultants until May 19, 2021, a mere 12 business days prior to the commencement of the hearing. R. 1883 at fn. 2.

Given the lack of information and data disclosed by IDWR, South Valley Ground Water District requested a continuance to provide adequate time for discovery and preparation of expert reports.⁷ R. 104-07, 111-15. Galena filed a joinder and declaration in support of the motion for continuance. R. 466-73, 477-82. South Valley simultaneously filed a request for production of necessary documents and information with IDWR on May 13, 2021. R. 177-81. Lacking any response from the agency, South Valley submitted a formal public records request on May 20, 2021, seeking the same information requested a week earlier on May 13. R. 370-72.

Sun Valley Company and certain cities also requested information related to the staff memorandums on May 21, 2021. R. 415-18. With the hearing scheduled to begin on June 7,

⁶ The Districts filed notices of intent to participate on May 10th and 13th, 2021 respectively. R. 88, 108. Numerous other parties filed notices as well, including the seven Little Wood River water users and one Silver Creek user claiming injury that ultimately testified at the hearing. Apart from the Districts and referenced senior users, 27 other individuals and entities filed notices of intent to participate in the case. *See generally*, R. 86-97, 101-03, 108-10, 210-11, 222-25, 313-16, 319-22, 333-69, 381-86, 393-99, 488-96, 546, 623, 704-24.

⁷ The Districts, R. 126-76, and Sun Valley Company, R. 192-209, also filed motions to dismiss the proceeding on various legal grounds, which the Director summarily denied, R. 436-52.

every day that passed without information was critical and prejudicial to the Districts and their consultants.

The agency waited until Saturday, May 22, 2021, to authorize discovery in the proceeding, barely two weeks prior to the hearing.⁸ R. 419-26. On Monday May 24, 2021, the Director conducted a pre-hearing conference. At that conference he represented the following with respect to the procedure and standards related to the hearing:

DIRECTOR SPACKMAN: . . . Let's talk about standard – standards of proof. I think the parties need to know what my expectations are. And I don't know that I want to go through 42-237a.g. in detail. But the burdens at least – burdens of proof are the presumption under Idaho law is that the senior is entitled to his decreed water right but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed.

And again, in Idaho a subsequent appropriator attempting to justify his diversion has the burden of providing that it will not injure prior appropriations. So at least from my perspective the senior water-right holders need to show that they hold water rights and at least bring forward some evidence of injury. . . .

So at least from my perspective, the senior needs to come in and assert that they hold or that the senior holds a water right and that the senior has been injured at least to some degree. Then I think the burden shifts to – fully to the junior.

And as the courts have said, the senior is entitled to the decreed water, but there may be other factors that will play into how much water is actually necessary to satisfy the right.

Pre-Hearing Tr. 41:12-42:19 (emphasis added).⁹

Well, Jerry, what I am saying is that the seniors just can't come in and say we have a water right and the model – and the model shows that there are depletions, therefore the juniors should be curtailed.

Pre-Hearing Tr. 45:20-24.

MR. BARKER: This is Al Barker. I just have one question about the injury analysis.

⁸ IDWR responded by email, and only in part, to the public records request at the close of business on May 24, 2021. R. 1605 at fn. 4.

⁹ The transcript for the pre-hearing conference on May 24, 2021 will be cited as “Pre-Hearing Tr.” while the transcript for the hearing, held June 7-12, 2021, will be cited as “Tr.”

And that is, are we looking at – are we looking at material injury, or are we looking at something other than material injury as the burden of proving what, I guess is the question.

DIRECTOR SPACKMAN: Well, I don't know what the difference is, Al.

Pre-Hearing Tr. 49:10-17.

Following the pre-hearing conference, the parties conducted depositions, disclosed witness lists, and filed various pre-hearing motions. *See generally* R. 547-1201. The Director addressed the pre-hearing motions on the first day of the hearing. Tr. 13:21-38:11. The hearing was conducted at IDWR's state office in Boise June 7-12, 2021. During the hearing, IDWR finally sent various emails and attachments responding to Sun Valley's requests for data and information related to the staff memoranda. R. 1404-74. However, the information was only disclosed after the agency staff had testified on June 7 and 8, 2021. Tr. 41-76 (Sean Vincent); Tr. 77-234 (Jennifer Sukow); Tr. 235-47 (Philip Blankenau); Tr. 274-389 (Tim Luke).

The following senior water right holders testified claiming injury to their senior surface water rights to the Little Wood River or Silver Creek. Tr. 390-410 (Lawrence Schoen); Tr. 430-80 (Fred Brossy, Barbara Farms LLC); Tr. 480-516 (Rod Hubsmith); Tr. 517-70 (Carl Pendleton, Big Wood Canal Co.); Tr. 571-642 (John Arkoosh); Tr. 644-672 (Alton Huyser, Big Wood Farms LLC); Tr. 673-714 (Don Taber, for himself, 7 Mile Ranch, and Jim Ritter); Tr. 715-31 (Carl Legg); Tr. 732-48 (Charles Newell). These senior surface water users represented a small fraction of the Little Wood and Big Wood water users.

Kevin Lakey, the Water District 37 watermaster, and Eric Miller, the senior's consultant, testified on June 10, 2021. Tr. 762-907 (Kevin Lakey); Tr. 908-1001 (Eric Miller). Fact and expert witnesses on behalf of the South Valley Ground Water District testified on June 10th and 11th. Tr. 1045-1063 (Mark Johnson); Tr. 1064-1093 (Stuart Taylor); Tr. 1105-46 (Gary Beck);

Tr. 1147-1177 (Justin Stevenson); Tr. 1178-1236 (Zach Hill); Tr. 1237-1328 (G. Erick Powell); Tr. 1329-1378 (David Shaw). On the final day Pat Purdy provided testimony as well as Greg Sullivan, expert for Sun Valley Company and the various cities. Tr. 1389-1414 (Pat Purdy); Tr. 1415-1458 (Greg Sullivan). Following post-hearing briefing the Director issued the final order and a separate order summarily denying the mitigation plan without first holding a hearing. R. 1882, 1933, 1948-56. This appeal followed.

ISSUES PRESENTED

The Districts present the following issues on appeal:

1. Whether the Director erred in pursuing conjunctive administration of water rights in Water District 37 under section 42-237a.g and not chapter 6, title 42 and the Department's CM Rules.
2. Whether the Director's Final Order is arbitrary and capricious and not supported by substantial evidence in ordering curtailment based upon "strict priority" and not material injury or the seniors' "reasonable in-season demand" and "crop water need" for the 2021 irrigation season.
3. Whether the Director's administrative process and Final Order violated the Districts' rights to due process.
4. Whether the Director's reliance upon the staff memoranda, including a pre-determination of the "area of common ground water supply" violated the Districts' rights to due process.
5. Whether the Director erred in denying the Districts' proposed mitigation plan and ordering curtailment without an opportunity for a hearing.
6. Whether the Director erred in failing to find that curtailment, at least for certain senior rights, was barred by the futile call doctrine?
7. Whether the Director's Final Order violates the state's policy of "optimum development and use" of groundwater.
8. Whether the Districts are entitled to attorneys' fees on judicial review pursuant to Idaho Code § 12-117.

STANDARD OF REVIEW

Any party “aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court.” *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 835, 70 P.3d 669, 673 (2003) The Court reviews the matter “based on the record created before the agency.” *Chisholm v. IDWR*, 142 Idaho 159, 162, 125 P.3d 515, 518 (2005)

Generally, a Court is charged with deferring to an agency’s decision. *See Mercy Medical Center v. Ada Cty.*, 146 Idaho 226, 229, 192 P.3d 1050, 1053 (2008) (Court should not substitute its judgment for that of the agency as to questions of fact so long as the decision is “supported by substantial and competent evidence”); *St. Joseph Reg. Med. Ctr. v. Nez Perce Cty.*, 134 Idaho 486, 488, 5 P.3d 466, 468 (2000) (same). The Court, however, is “free to correct errors of law.” *Mercy Medical Center, supra*. An agency’s decision must be overturned if (a) violates “constitutional or statutory provisions,” (b) “exceeds the agency’s statutory authority,” (c) “was made upon unlawful procedure,” (d) “is not supported by substantial evidence in the record as a whole”¹⁰ or is (e) “arbitrary, capricious or an abuse of discretion.” *Chisholm*, 142 Idaho at 162, 125 P.3d at 518 (citing Idaho Code § 67-5279(3)).

An agency action is “capricious” if it “was done without a rational basis.” *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547, 130 P.3d 1082, 1085 (2006). It is “arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles.” *Id.*

¹⁰ An agency’s decision must be supported by “substantial evidence”. *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 260, 715 P.2d 927, 930 (1985); *see also Chisolm*, 142 Idaho at 164, 125 P.3d at 520. The “reviewing courts should evaluate whether ‘the evidence supporting [the agency’s] decision is substantial.’” *Hunnicutt*, 110 Idaho at 261, 715 P.3d at 931. The Director cannot use his discretion as a shield to hide behind a decision that is not supported by substantial evidence. A court is not required to defer to an agency’s decision that is not supported by the record. *See Evans v. Board of Comm. of Cassia Cty.*, 137 Idaho 428, 431, 50 P.3d 443, 446 (2002).

ARGUMENT

This is a case of first impression. For the first time in history, the Director applied Idaho Code § 42-237a.g as an unprecedented stand-alone method for conjunctive administration without following the “local ground water board” or CM Rules procedures. Despite alleging that this statutory authority existed since 1953, the Director waited until May of 2021 to implement it for the first time, and then he exercised it only for a limited area within Blaine County and nowhere else across a state that had twenty-one drought declarations.

The Director initiated and concluded this complex conjunctive administration case just weeks after the irrigation season started. Despite instructing staff to begin model runs in March, the Director withheld the disclosure of pertinent agency information and data until late May, mere days before the hearing. Further, additional staff information was not even disclosed until after the hearing began. The failure to disclose such information was prejudicial to the Districts’ evaluation and use of the agency’s groundwater model, a simulation that looks at multiple aquifer layers, surface water sources, and has over 59,000 individual cells and calculated predictive uncertainty of at least 22%. R. 2316, 2335; Tr. 166-67; 1267:12-18.

Following the hearing, the Director summarily denied a proposed mitigation plan and curtailed groundwater to 23,000 acres effective July 1st, which occurred during a dry week of extreme heat.¹¹ The Director performed no analysis of the seniors’ beneficial use, and made no findings regarding a “reasonable in-season demand” or actual “crop water need.” Further, the Director disregarded the seniors’ available supplemental water supplies in evaluating material injury. In implementing this unprecedented chain of events, the Director cast aside the defined

¹¹ Although the Director scheduled a hearing on the denial of the mitigation plan pursuant to Idaho Code § 42-1701A(3) over a week later, and an amended plan was eventually stipulated to and approved, the post-deprivation process did not cure the 7-day curtailment of water to growing crops during the time when water was needed the most.

statutory process and promulgated rules for conjunctive administration of water rights in Water District 37 in favor of using a “strict priority” administration supposedly based upon Idaho’s Ground Water Act.

The Director waited until after the irrigation season had begun, when crops were planted and proceeding to harvest. Additionally, allowing for only limited discovery and preparation, the Director foreclosed a meaningful opportunity to contest the agency’s memoranda and evaluations disclosed just a few weeks prior to the hearing. Instead, the Director rushed to judgment as juniors were provided with no calculations as to injury or potential mitigation to avoid curtailment. The Director’s actions disregarded constitutional due process as well as the prior appropriation doctrine’s beneficial use tenet.

Compounding these errors, the Director adopted a “depletion to the source” standard rather than material injury to a senior water right in his outright denial of the Districts’ proposed mitigation plan. The resulting curtailment, intended to benefit the water rights of non-parties, changed the rules the Director set at the beginning of the case where he stated seniors had to participate and put on evidence of injury. *Compare* R. 1949 (denial of plan based upon juniors’ depletion to the aquifer) *with* Pre-Hearing Tr. 41-42 (Director requiring seniors’ to put on evidence of material injury to their water rights).

The Director ordered curtailment on June 28, 2021, denying the Districts an opportunity to mitigate prior to implementing widespread curtailment of 23,000 acres effective July 1st. The Director’s arbitrary and wrongful use of an isolated provision of the Ground Water Act and denial of due process should be reversed and set aside. The Districts respectfully requests this Court to reverse the agency’s decision accordingly.

I. The Director Failed to Apply the Proper Statutory and Regulatory Process for Conjunctive Administration of Water Rights in Basin 37.

This case concerns conjunctive administration of water rights in Water District 37. R. 2335. The question is whether the Department is required to harmonize appropriate statutes and follow its own regulations, the CM Rules, or whether its Director is free to inflict a wholly separate process under the Ground Water Act based upon “strict priority” only. The answer lies in proper statutory interpretation, the facts concerning the adjudication of ground water rights in the SRBA, and the ultimate inclusion of those rights in Water District 37 specifically for water right administration.

A. Water Right Administration Pursuant to Chapter 6, Title 42 of the Idaho Code.

Idaho law provides for an orderly and defined regime for water distribution within established water districts. Chapter 6, Title 42 sets out several “mandatory” or required duties of the agency and the various watermasters. For example:

The director . . . shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. **Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.**

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

Idaho Code § 42-602 (emphasis added).

The director . . . is authorized to adopt rules and regulations for the distribution of water from the streams, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.

Idaho Code § 42-603 (emphasis added).

The director . . . shall divide the state into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district . . .

* * *

Before entering an order creating, modifying, or abolishing a district, the director shall, by regular mail, send notice of the proposed action to each water user in the district or proposed district. The notice shall describe the proposed action to be taken, the reasons therefore, the time and place of a hearing to be held concerning the proposed action, and provide a time period within which written comment on the action will be accepted.

* * *

Each water district created hereunder shall be considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators under the laws of the state of Idaho.

Idaho Code § 42-604 (emphasis added).

It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams of water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply . . .

Idaho Code § 42-607 (emphasis added).

The above statutes share a common theme by using the word “shall,” a mandatory term in Idaho law. *See In re Order Certifying Question to the Idaho Supreme Court*, 167 Idaho 280, 283, 469 P.3d 608, 611 (2020); *Twin Falls County v. Idaho Comm’n on Redistricting*, 152 Idaho 346, 349, 271 P.3d 1202, 1205 (2012). The Director and watermasters have a “clear legal duty” to distribute water in accordance with Idaho law. *See Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994) (*abrogated on other grounds by Rincover v. State Dept. of Fin.*, 132 Idaho 547, 976 P.2d 473 (1999)).

Prior to the 1992 amendments to sections 42-602 and 42-603 that provided for the inclusion of ground water rights in water districts, ground water rights and surface water rights

had been administered as separate water sources in Idaho.¹² Idaho Code § 42-602 was amended during the 1994 legislative session in response to the *Musser* case then pending before the Idaho Supreme Court. The statute was amended to clarify that the “provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.” 1994 Sess. Laws, chp. 450, § 1. Whereas the *Musser* trial court had ordered the Director to respond to the surface water users’ call and administer ground water rights that were not within an organized water district at the time, the legislation changed that paradigm. Further, section 42-237a was amended at the same time as the Legislature added the phrases “in his sole discretion” to the introductory paragraph and the terms “discretionary” and “initiate administrative proceedings” to paragraph g. *See* 1994 Sess. Laws, chp. 450, § 3. The amendments were a direct result of the *Musser* writ of mandate and it was clear the Legislature contemplated a different administrative regime for ground water rights within a water district compared to those located outside of one.

Further, conjunctive administration cannot be carried out strictly based upon priority and depletion to a source. The Constitution and Ground Water Act require consideration of “optimum development” of the state’s water resources and “full economic development.” *See Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973); Idaho Code § 42-226. Further, “conjunctive administration requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.” *See A&B Irr. Dist. v. Idaho Cons. League*, 131 Idaho at 422, 958 P.2d at 579. In order to implement this mandatory duty in the context of surface and ground water right administration, IDWR

¹² *See* 1992 Idaho Sess. Laws, chp. 339 §§ 2, 4; pp. 1015-16.

promulgated the CM Rules pursuant to section 42-603. *See AFRD#2 v. IDWR*, 143 Idaho 862, 866, 154 P.3d 433, 437 (2007). During that same 1994 session where amendments were made to sections 42-602 and 237a.g, the Legislature also approved the Department’s CM Rules. *See A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013) (“[the rules] were approved by the Legislature and became effective on October 7, 1994”).

The CM Rules “provide a structure by which the IDWR can jointly administer rights in interconnected surface water (diverting from rivers, streams and other surface water sources) and ground water sources.” *AFRD#2*, 143 Idaho at 867, 154 P.3d at 438.¹³ Moreover, the Idaho Supreme Court found “[t]hat is precisely the reason for the CM Rules and the need for analysis and administration by the Director” as the “Rules give the Director the tools by which to determine” interconnection and potential material injury. *Id.*, 143 Idaho at 877-78, 154 P.3d at 448-49. As argued by IDWR to the Supreme Court in *AFRD#2*, the “Rules provide the necessary administrative framework for integrating the rule that ‘first in time is first in right’ with the other legal tenets of the prior appropriation doctrine that seek to promote optimum utilization of the resource.” *IDWR 2006 Br.* at 15 (emphasis added). By abjuring the rules, the Director lacked the constitutionally appropriate tools to determine injury in this case.

Following promulgation of the CM Rules, and the adjudication of surface and ground water rights in the Snake River Basin Adjudication (SRBA), IDWR specifically incorporated ground water rights in Water District 37 to implement conjunctive administration. R. 2420-39. Instead of following the statutory mandate and rules promulgated by the agency, the Director disregarded those processes in favor of a wholly new administrative regime untethered to any

¹³ In its argument to the Supreme Court in *AFRD#2*, IDWR represented that the “CM Rules are the first formal rulemaking attempt to establish a comprehensive framework for joint administration of rights in interconnected surface water and ground water sources.” *See Defendants-Appellants’ Opening Brief on Appeal* at 9 (Docket Nos. 33249 et al., Oct. 27, 2006) (“*IDWR 2006 Br.*”).

rules. In doing so, the Director misapplied the Ground Water Act and how it should be interpreted in light of amended provisions in chapter 6 and the Department’s CM Rules.

B. Idaho’s Ground Water Act and Chapter 2.

Idaho adopted the Ground Water Act in 1951, with more comprehensive amendments passed in 1953. *See* 1951 Sess. Laws, chp. 200; 1953 Sess. Laws chp. 182. Pursuant to statute, the Director is authorized to protect the state’s ground water resources and designate critical ground water and groundwater management areas. In addition, the Director is authorized to establish “reasonable groundwater pumping levels” and prevent aquifer mining.¹⁴ Further, section 42-237a.g prescribes a list of powers of the Director “in the administration and enforcement of this act.” Pertinent to this case, the statute provides:

g. To supervise and control the exercise and administration of all rights to the use of ground waters and in the exercise of discretionary power he 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. To assist the director . . . in the administration and enforcement of this act, and 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 as hereinafter provided. Water 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 or result in the withdrawing the ground water supply at a rate beyond the reasonably anticipated rate of future natural recharge. . . .

* * *

. . . The administration of water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of title 42, Idaho Code, as the same have been or may hereafter be amended, except that in the administration of ground water rights either the director . . . or the watermaster

¹⁴ The Director admits he is doing neither through this proceeding. R. 1 (identifying potential injury and administration as sole purpose of proceeding). Further, the evidence shows that the aquifer is not being mined and has remained stable since the BWRGWMA designation in 1991. Although some wells have declined and others have increased, there is no evidence of aquifer “mining.” *See* R. 158-59, 6046-6105; *see also*, Tr. 115: 4-7 (“Q. [MR. BARKER]: So would you agree that, that the water-level trends have stabilized since 1991? A. [MS. SUKOW]: I agree that the overall trend has stabilized since 1991”).

in a water district . . . shall, upon determining that there is not sufficient water in a well to fill a particular ground water right therein by order, limit or prohibit further withdrawals of water under such right as hereinabove provided . . .

Idaho Code § 42-237a.g (emphasis added).¹⁵

The statute allows the Director to initiate proceedings to prohibit or limit withdrawal of groundwater if he determines water is not available. To assist the Director “in making such determinations upon which said orders shall be based,” he is authorized to establish a ground water pumping level in “an area of a common ground water supply.” Idaho Code § 42-237a.g.

Further, water in a well is deemed unavailable if the withdrawal “would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in withdrawing of the use ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.” *Id.* (emphasis added). The declared policy of the Ground Water Act includes “requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation,” and “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 resources.” Idaho Code § 42-226. IDWR is further charged with construing and implementing the Ground Water Act “in harmony with the provisions of title 42, Idaho Code.” Idaho Code § 42-239.

Any water right holder who believes a right is harmed by another’s water use can initiate a process to have such an adverse claim heard by a local ground water board. *See* Idaho Code § 42-237b-d. The local ground water board process was used prior to the adoption of the CM

¹⁵ The Legislature’s subsequent amendment of various statutes in chapter 6, title 42 regarding “ground water” and conjunctive administration through the CM Rules clearly indicates how the Legislature intended conjunctive administration to be handled following *Musser*. *See* 1994 Sess. Laws, chp. 450, § 1. The Director’s new process, used for the first time in history, would set the agency back to the “priority only” administration that it argued against in *Musser*. The Director’s reading of the statute fails to take into account the history of amendments to chapter 6 and section 42-237a.g’s express requirement that “water rights,” both surface and groundwater, be administered through water districts and the water distribution statutes and rules.

Rules in various cases. *See e.g. Stevenson v. Steele, supra; Hart v. Stewart*, 95 Idaho 781, 519 P.2d 1171 (1974). For example, in *Stevenson*, the Director appointed a local ground water board which held a hearing. The Director then entered an order providing relief to the senior users which was upheld by the district court on review. The Director did not look to the chapter 6 administrative provisions because at that time chapter 6 did not apply to ground water. *See* 1992 Sess. Laws, chp. 339 §§ 2, 4, pp. 1015-16.

The ground water board statutes were repealed by the Legislature during the 2021 legislative session at the request of IDWR. In legislative committee hearings the Director represented the statutes and process were “obsolete” and “no longer necessary” because the CM Rules served as the agency’s “vehicle” to handle conjunctive administration.¹⁶ The statement of purpose for House Bill 43 expressly states that the Ground Water Act procedures are “obsolete since the adoption of the [CM Rules].”¹⁷ In other words, the Director represented that the mechanism to accomplish conjunctive administration is through the CM Rules, not some other unilateral process under the Ground Water Act. However, the local ground water board statutes were in place and effective when the Director issued his notice on May 4, 2021 because there was no emergency clause in the repeal legislation. *See supra*, n. 17. Despite this fact the Director chose not to follow the remaining provisions of section 42-237.

C. Statutory Interpretation / Harmonization of Chapters 2 and 6, Title 42.

In the BWRGWMA, the Director has made no determinations or findings regarding an area of common ground water supply, a reasonable groundwater pumping level, or the

¹⁶ Video of the Director’s presentation to the House Resources & Conservation committee is available at the legislature’s website at <https://legislature.idaho.gov/sessioninfo/2021/standingcommittees/HRES/> (Feb. 3, 2021) (minutes 2:20 – 9:00).

¹⁷ *See* <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/legislation/H0043SOP.pdf>.

reasonably anticipated average rate of future natural recharge. The notice states the water right administration proceeding was initiated solely to determine potential injury to senior surface water rights. R. 1. Although all water rights had been incorporated into Water District 37 several years ago, and IDWR had promulgated rules specifically for conjunctive administration, the Director cast that required administration aside in favor of a *sua sponte* “discretionary” process.

The powers under section 42-237a.g would apply if the Director seeks to prohibit or limit groundwater withdrawals that would either violate an established ground water pumping level or result in unlawful “mining” of the resource. *See e.g., Baker v. Ore-Ida Foods*, 95 Idaho 575, 583, 513 P.2d 627, 636 (1973) (“We now hold that Idaho’s Ground Water forbids ‘mining’ of an aquifer”). For example, IDWR has prohibited ground water withdrawals that exceeded a defined average annual rate of natural recharge of 4,000 acre-feet in a critical ground water area in Basin 45. *See Addendum B; Order (In the Matter of Ground Water Withdrawal in the Cottonwood Critical Ground Water Area, August 30, 2004)*.

A defined pumping level or annual rate of recharge dovetails with the Director’s statutory authority to prohibit or limit groundwater withdrawals that would violate such an objective standard. But here neither finding has been made, there is no pumping level and no mining of the aquifer. Where the statutory authority doesn’t fit is where the Director attempts to use it as a substitute for required water right administration within an established water district under chapter 6 and the CM Rules. Here the Director has taken “mandatory” or required administrative duties pursuant to statute and rule and set them aside in favor of a “discretionary” process. This violates well-established statutory interpretation principles. *See Eller v. Idaho State Police*, 165 Idaho 147, 443 P.3d 161, 168 (2019) (“A basic tenet of statutory construction is that the more

specific statute or section addressing the issue controls over the statute that is more general . . . Thus, where two statutes appear to apply to the same case or subject matter, the specific statute will control over the more general statute”).

The present case is a perfect example of the flaws in such a reading of the statutes. The Director initiated a proceeding to administer only selected ground water rights in Water District 37 that he pre-determined were injuring downstream senior surface water rights on Silver Creek and the Little Wood River. R. 1, 2335.¹⁸ The Director limited that area to the Bellevue Triangle and declined to initiate administration of ground water rights anywhere else in the BWRGWMA.

The Director made a conscious decision to not administer any ground water rights that may have injured senior surface water rights to the Big Wood River, even though Big Wood Canal Company ceased deliveries from Magic Reservoir on June 10, 2021. Tr. 478:23-479:5. In addition, drought declarations were made for twenty (20) other counties throughout the State of Idaho in 2021.¹⁹ The Director’s failure to initiate such proceedings in other areas of the State with known hydraulic connection to surface water is telling.

For example, the Rexburg Bench is hydraulically connected to the Snake River and located within the ESPA Ground Water Management Area. The Director has a groundwater model (ESPAM 2.2) that identifies estimated depletions caused by junior priority ground water rights. Further, the Director found material injury to senior surface water rights during the 2021 irrigation season.²⁰ While the Rexburg Bench is located outside the CM Rule 50 “area of common ground water supply,” it is located within an organized water district (WD 100), similar

¹⁸ This was a major flaw in the Director’s 2015 orders as found by the Court in the *Sun Valley* appeal.

¹⁹ Copies of the 2021 drought declarations are available at <https://idwr.idaho.gov/water-data/drought-declarations/>.

²⁰ See <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2010-001/CM-DC-2010-001-20210419-Final-Order-Re-April-2021-Forecast-Supply.pdf>.

to the situation in the Bellevue Triangle. Yet, unlike the Basin 37 matter, the Director did not initiate any proceedings under section 42-237a.g to prevent injury to senior surface water rights on the Snake River during the 2021 irrigation season. Consequently, the Director’s alleged authority to “pick and choose” where conjunctive administration occurs leads to arbitrary results.

Whereas a majority of the state suffered depleted water supplies this year, the Director chose to limit exercising his supposed discretionary authority to administer ground water to one isolated area in Blaine County. At a minimum, such an action is an arbitrary and capricious application of the Act. After all, if the Director’s interpretation stands, then water users will be left to a single person’s whim as to who is administered, including when and where, regardless of actual water shortages. This is not the result for conjunctive administration intended by the Legislature.

The Idaho Supreme Court has defined the canons of statutory construction that directly apply to this appeal. When interpreting a statute, the starting point is always the language itself. If the language is clear and unambiguous, the plain meaning controls. *See Nelson v. Evans*, 166 Idaho 815, 820-21, 464 P.3d 301, 306-07 (2020). A statute is ambiguous where reasonable minds might differ or be uncertain as to its meaning. *See City of Idaho Falls v. H-K Contractors, Inc.*, 163 Idaho 579, 582, 416 P.3d 951, 954 (2018). The “goal of statutory interpretation is to discover the intention of the legislature in drafting a statute, and to apply the statute accordingly, examining not only the literal words of the statute, but also the reasonableness of the proposed constructions, the public policy behind the statute, and its legislative history.” *Thompson Creek Mining v. IDWR*, 148 Idaho 200, 210, 220 P.3d 318, 328 (2009) (internal citations omitted); *see also Nelson v. Evans, supra*. Moreover, in *Marquez v. Pierce Painting, Inc.*, the Court explained:

A construing court's primary duty is to give effect to the legislative intent and purpose underlying a statute. Moreover, the court must construe a statute as a whole, and consider all sections of applicable statutes together to determine the intent of the [L]egislature. It is incumbent upon the court to give the statute an interpretation that will not deprive it of its potency. In construing a statute, not only must we examine the literal wording of the statute, but we also must study the statute in harmony with its objective.

166 Idaho 59, 63-64, 454 P.3d 1140, 1144-45 (2018) (emphasis added).

This case presents the question of how to properly construe provisions of chapter 6 in harmony with chapter 2 regarding the Legislature's intent for orderly and consistent conjunctive water right administration. Importantly, section 42-239 requires IDWR to read the provisions "in harmony." Idaho Code § 42-239. With respect to water districts, the Legislature clearly intended conjunctive administration to proceed through chapter 6 and the CM Rules, not a separate, undefined process in chapter 2. Consequently, the Director's proposed administration in this case runs afoul of the prescribed procedures adopted by the agency, affirmed by the Legislature, and defined by Idaho Supreme Court precedent. The Court should reverse and set aside the Director's orders accordingly.

As the Court is well aware, the State spent decades and valuable resources completing the SRBA and reaching a Final Unified Decree. Conjunctive administration was a "major objective" of the SRBA as recognized by the Legislature and the Idaho Supreme Court. *See A&B*, 131 Idaho at 422, 958 P.2d at 579; *see also, Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 795, 252 P.3d 71, 76 (2011). By defining the water rights' priority and source, the SRBA Court adjudicated critical elements necessary for administration. *See Id.* The adjudication provided the foundation to incorporate ground water rights into water districts, such as Water District 37, whose "essential governmental function" is water right administration. *See Idaho Code § 42-604*. Importantly, IDWR specifically represented to the water users that ground water rights

would be incorporated into Water District 37 so the water rights could be administered conjunctively pursuant to the CM Rules. R. 162-65; *see also*, Tr. 311-1313 (Tim Luke testifying about adjudication and incorporating ground water rights into Water District 37 for conjunctive administration).

The chapter 6 statutes set out the mandatory duties of the Director and the watermaster regarding water distribution. *See* Idaho Code §§ 42-602, 603, 604, 607. The Director is required to administer all water rights in Water District 37 in accordance with the prior appropriation doctrine and the CM Rules. On the other hand, under the Director's interpretation, section 42-237a.g authorizes the Director to prohibit ground water withdrawals if he determines "water to fill any water right in said well is not there available." Water is deemed unavailable if the pumping "would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge." Idaho Code § 42-237a.g. The crux of the statutory interpretation hinges on what do the terms "would affect, contrary to the declared policy of this act" mean in context with water right administration under chapter 6, title 42 of the Idaho Code?

To determine the Legislature's intent, the Court must read all relevant statutory provisions together. When the Court reads the provisions of chapters 2 and 6 together, including in context of the recent repeal of the "local ground water board" provisions, it is clear that conjunctive administration was intended to proceed through a water district and the CM Rules, not by chance under the Director's isolated "discretionary" authority.

In evaluating the term "affect" under section 42-237a.g, the Idaho Supreme Court previously held that it means "material injury." In *Clear Springs Foods, Inc.*, the Court stated:

“The statute merely provides that well water cannot be used to fill a ground water right if doing so would either: (a) cause material injury to any prior surface or ground water right or (b) result in withdrawals from the aquifer exceeding recharge.” 150 Idaho at 804, 252 P.3d at 85.

(emphasis added). Material injury is not defined by statute, but the term is defined by the CM Rules as “Hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set forth in Rule 42.” IDAPA 37.03.11.010.14. Consequently, the Director is required to follow the rules for proper conjunctive administration within Water District 37 in order to determine “material injury” to a senior surface water right. *See also*, CM Rule 42.

In general, the CM Rules should be “construed in the context of the rule and the statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement.” *Mason v. Donnelly Club*, 135 Idaho 581, 586 (2001). The Director is required to follow the agency’s own regulations, as they are integral to orderly conjunctive administration of surface and ground water rights and were promulgated to implement the water distribution statutes. *See* Idaho Code §§ 42-602, 603, 607; *see e.g.*, *Eller v. Idaho State Police*, 165 Idaho 147, 443 P.3d 161, 174 (2019); *Huyett v. Idaho State Univ.*, 140 Idaho 904, 908-09, 104 P.3d 946, 950-51 (2004) (“IDAPA rules and regulations are traditionally afforded the same effect of law as statutes”).

At the time of the original Ground Water Act and amendments in the early 1950s, ground water rights were not managed conjunctively within water districts that administered only surface water rights; this didn’t occur until amendments to the water district statutes in 1992. *See* 1992 Sess. Laws, chp. 339 §§ 2, 4, pp. 1015-16. Accordingly, the Act contains various statutes regarding well drilling, recharge, designation of special management areas, general

authorities, and determination of adverse claims. *See* Idaho Code § 42-226 et seq. With respect to administration, the local ground water board statutes provided a procedure to address adverse claims by a senior surface or ground water user. *See* Idaho Code § 42-237b. However, the local ground water board statutes were recently prospectively repealed during the 2021 Legislative Session pursuant to House Bill 43 (effective July 1, 2021).²¹ The bill, proposed by IDWR, included the following Statement of Purpose:

Consistent with the Governor’s Red Tape Reduction Act, this bill seeks to eliminate inactive provisions of law. The legislation eliminates outdated and obsolete sections of Idaho Code related to water delivery calls. The procedures outlined in these sections are obsolete since the adoption of the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11).

H0043 Statement of Purpose (emphasis added).

Having just told the Legislature that conjunctive administration is to be handled under the CM Rules, the Director erroneously abandoned the CM Rules just weeks later. Indeed, the CM Rules reference and implement various provisions of Idaho’s Ground Water Act. *See* CM Rule 010.01, 02, 09, 10, 18, 20, 30.06, and 31. Notably, in this case, the rules provide a detailed procedure for implementing the statute and determining “an area of common ground water supply.” *See* Idaho Code § 42-237a.g; CM Rule 31.

Accordingly, conjunctive administration of water rights under section 42-237a.g should not be viewed in isolation and must be read together with chapter 6, title 42 and its implementing regulations, the CM Rules. For proper conjunctive administration, “all sections of applicable statutes must be construed together so as to determine the legislature’s intent.” *See* 148 Idaho at

²¹ The local ground water board statutes were effective during the filing of the Director’s *Notice* and the administrative hearing in this case. Since senior surface water users were claiming an adverse effect on their water rights, the Director was required to review whether that claim complied with the statute and set the matter for hearing before a local ground water board. *See* Idaho Code § 42-237b. The Director’s *Notice* and *Final Order* included no discussion of this provision of the Ground Water Act or whether he was required to follow its provisions as well (at least until July 1, 2021). As such, the entire process violated section 42-237b and can be set aside for that reason as well.

211, 220 P.3d 319; *See also Nelson*, 166 Idaho at 821, 464 P.3d at 307. Regarding water right administration, the Idaho Supreme Court has specifically found:

In fact, efficient distribution of water, in accordance with the legislative mandate, requires that IDWR implement sufficient administrative oversight to prevent conflicts from arising, where possible, and to furnish a framework of evenhanded oversights which allows for consistent planning by water users. Under the other provisions of Idaho Code Title 42, chapter 6, the Director is granted broad authority to direct and control water, and to administer it according to the prior appropriation doctrine. The legislature has mandated that IDWR manage water resources in Idaho, and has provided IDWR with the water district as its principal tool in carrying out this mandate.

In re Idaho Dep't of Water Res. Amended Final Ord. Creating Water Dist. No. 170, 148 Idaho 200, 211-12, 220 P.3d 318, 329-30 (2009) (emphasis added).

“The Ground Water Act was the vehicle chosen by the legislature to implement the policy of optimum development of water resources.” *Id.* at 512, 650 P.2d at 654. The policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.

Clear Springs Foods, 150 Idaho at 808, 252 P.3d at 89.

Conjunctive administration “requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.” *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). That is precisely the reason for the CM Rules and the need for analysis and administration by the Director.

AFRD#2, 143 Idaho at 877, 154 P.3d at 448 (emphasis added).

When the applicable statutes in chapters 2 and 6 are harmonized and read together, it is clear that the Legislature intended that water districts, and the CM Rules, serve as the vehicle for efficient and proper conjunctive administration, not *sua sponte* discretionary proceedings by the Director. Indeed, the Idaho Supreme Court has expressly noted “the Director cannot distribute water however he pleases at any time in any way; he must follow the law.” *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014).

Furthermore, specifically related to irrigation water rights, the Supreme Court set forth the following three (3) step process for conjunctive administration:

1. The Director may develop and implement a pre-season management plan for allocation of water resources that employs a baseline methodology, which methodology must comport in all respects with the requirements of Idaho's prior appropriation doctrine, be made available in advance of the applicable irrigation season, and be promptly updated to take into account changing conditions.
2. A senior right holder may initiate a delivery call based on allegations that specified provisions of the management plan will cause it material injury. The baseline serves as the focal point of such delivery call. The party making the call shall specify the respects in which the management plan results in injury to the party. While factual evidence supporting the plan may be considered along with other evidence in making a determination with regard to the call, the plan by itself shall have no determinative role.
3. Junior right holders affected by the delivery call may respond thereto, and shall bear the burden of proving by clear and convincing evidence that the call would be futile or is otherwise unfounded. A determination of the call shall be made by the Director in a timely and expeditious manner, based on the evidence in the record and the applicable presumptions and burdens of proof.

A&B Irr. Dist., 155 Idaho at 653, 315 P.3d at 841 (emphasis added).

This process implements the Court's direction under chapter 6, for "a framework of evenhanded oversight which allows for consistent planning by water users." *In re Water District No. 170*, 148 Idaho at 211, 220 P.3d at 329. The above harmonization further is supported by this Court's prior reasoning and examination of how administration is to occur depending upon a ground water right's location in Basin 37. The Court explained:

The Rules do not provide a single set of procedures uniform to all calls. Rather they provide three sets of procedures, the application of which turns on the circumstances surrounding the call. These are set forth in Rule 30, 40 and 41 respectively. Rule 41 can be dispensed with for the purpose of this decision as it applies to calls made by senior ground water right holders. IDAPA 37.03.11.041.01. That leaves the Court to evaluate Rule 30 and Rule 40.

Neither Rule squarely applies to the circumstances of the Association's calls. Rule 30 presumes that the call is made "against the holders of junior-priority ground water rights within areas of the state not in organized water districts. . . ." IDAPA 37.03.11.030. That is not the case here. . . . Rule 40 presupposes that the call is made against "the holders of junior-priority ground water rights from *areas having a common ground water supply* in an organized water district." IDAPA 37.03.11.040 (emphasis added). Again, that is not the case here. All parties agree that the potentially affected juniors are *not* in an area of the state designated as having a common ground water supply. . . .

How did this happen? At the time the CM Rules were promulgated, most ground water rights in the state had not been incorporated into water districts. As a result, the CM Rules made some assumptions on how this would occur and the resulting effect. The Rules presume the boundary of a water district which encompasses ground water rights will be co-extensive with the boundary of an area of the state designated as having a common ground water supply. This presumption pervades the Rules. . . . However, for reasons that are not before the Court the presumption that the boundary of a water district will be co-extensive with the boundary of an area of common ground water supply has not materialized.

R. 2407-08.

As will be shown below, the fact that juniors are in organized water districts is not necessarily relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water. Much more relevant, in fact critical, to processing such a call is identifying that area of the state which has a common ground water supply relative to the senior's surface water source and the junior ground water users located therein. Since it is Rule 30 that provides the procedures and criteria for making this determination, the Court, for the reasons set forth herein, holds that the Director's determination that Rule 40 governs the calls must be reversed and remanded.

R. 2410.

Accordingly, although the Districts' members' ground water rights are all located within Water District 37, they are not within an area of the state determined to be an "area of common ground water supply." Consequently, the CM Rules provide the implementing "procedures and criteria" for making that determination for purposes of conjunctive administration. *See* CM Rule 31. The Director is required to follow the CM Rules and the Court's prior road map for proper conjunctive administration identified in the Sun Valley appeal.

D. The Seniors' Repeated Requests for Administration or Delivery Calls.

The Director avoided the CM Rules and alleged he was not bound by the CM Rules in this case. R. 436, R. 1911. The Director claimed “this administrative proceeding is not a response to a delivery call” and that he had “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 seniors surface water rights, even in the absence of a delivery call or ‘adverse claim.’” R. 440, R. 1911. At the argument on the Districts’ second request for injunctive relief, counsel for the Respondents erroneously represented that IDWR did not have a “letter” or an “express demand” for administration. *See* Tr. July 1, 2021 Preliminary Injunction Argument at pp. 53-54. This position ignores the facts and the seniors’ repeated demands for priority administration and claimed injuries that have been relayed to the Director for years, including as late as this spring.

The Director’s efforts to avoid the CM Rules, and the procedures and criteria to properly “designate an area of common ground water supply” are erroneous and should be reversed. The Director admits that the CM Rules apply to a “‘delivery call’ as that term is defined and treated in the CM Rules.” R. 1911. Yet he proceeded to ignore the definition of a “delivery call” in those rules.

The CM Rules define a “delivery call” as:

A request from the holder of a water right for administration of water rights under the prior appropriation doctrine.

IDAPA 37.03.11.010.04.

There is no particular criteria or form as to what qualifies as a “request.” Hence, the CM Rules were triggered by the senior’s requests for water right administration. In this case, the senior water right holders on the Little Wood River had made several “requests” for water right

administration. First, they submitted letters to the Director in February 2015. R. 2405. Next, the senior water users filed a petition with the Department in March 2017. *See Order Dismissing Petition for Administration* (Docket No. CM-DC-2017-001, June 7, 2017); *see also*, Tr. 559:18-21.

Importantly, the seniors communicated their requests for administration and claims of injury to the Director during the advisory committee meetings held during the winter and spring of 2021. *See* R. 5956-6477, 6540-83 (seniors estimating “system injury” and “injury to individual users” for “Little Wood River decreed rights). There was a constant drumbeat for “priority administration” and curtailment of groundwater both during and outside of these meetings. In the January meeting the seniors’ consultant stated that the water supply was a “zero sum game” and if water was used by pumping it was not available for surface water users. R. 6273. In February, Tim Luke of IDWR asked for written responses from the members about their goals. R. 6279. After receiving the written responses (which IDWR did not place in the record), Mr. Luke reported to the advisory committee that the seniors demanded curtailment of groundwater as required by the priority of their water rights. R. 6413 and R. 6418. Mr. Luke summarized the demands of the seniors as: “The seniority of surface water rights is currently not being honored. i.e., groundwater rights that are junior to surface rights should be curtailed accordingly.” R. 6413. Discussion at the meeting included “curtailment by priority, conjunctive management.” R. 6418. There is no other way to interpret these demands other than as requests for administration under the prior appropriation doctrine. Accordingly, no one can credibly assert there were no such demands in advance of the Director’s notice and hearing in this case.

In the context of the advisory committee meetings, Carl Pendleton, member of the Big Wood River and Little Wood River Water Users Association, explained:

A. [BY MR. PENDLETON]: . . . So if the legal term is “conjunctive management,” we submitted an answer to a management plan that was presented by the groundwater pumpers and our proposal which spurned the formation of the groundwater Advisory Committee. But **we are really seeking in this action priority administration.**

Tr. 550:12-24 (emphasis added).

Finally, the seniors left no doubt when they testified under oath that they were expressly requesting water right administration to protect their senior rights:

Q. [BY MR. RIGBY]: So are you asking then that the administration of this be done in priority regardless of surface or groundwater?

A. [BY MR. BROSSY]: That is correct.

* * *

A. We’re requesting administration of water within Basin 37 in priority. . .

Tr. 445:19-22; 455:12-13.

Q. [BY MR. THOMPSON]: So what are you requesting?

A. [BY MR. HUBSMITH]: **I’m requesting from the Director to administer water rights by senior priority doctrine.**

Q. Both surface and groundwater?

A. **Both surface and groundwater.**

Tr. 499:6-10 (emphasis added).

Q. [BY MR. RIGBY]: So last line of questioning then. You’re part of the organization that has asked that the curtailment of pumps in the Bellevue Triangle occur, is that correct?

A. [BY MR. ARKOOSH]: Yes.

Tr. 612:7-11.

Q. [BY MR. RIGBY]: And finally, are you seeking to have the water rights of both surface and ground water administered pursuant to their priorities?

A. [BY MR. NEWELL]: Yes I am.

Tr. 744:2-5.

There is no question the CM Rules were implicated as the seniors made repeated specific claims of injury and requests for administration. In his rush to use section 42-237a.g, the Director ignored these “requests” for delivery calls to avoid the CM Rules. The Director’s final order makes two fundamental errors in dismissing the CM Rules. First, he suggests that the requests for administration arose only in response to his Notice initiating this proceeding and only because he advised the seniors they would have to demonstrate injury. R. 1912. That statement is manifestly not true. As seen above the demands for administration and claims of injury preceded the Notice, and likely were the impetus for the Notice initiating the proceeding in the first place. The hearing was not the first time these “requests” were made. The Director’s claims that the demands for priority administration repeated in the hearing were merely a response to his statement that they would be required to demonstrate injury does not explain the pre-hearing demands. Second, the Director is aware of the difference in the law between injury (CM Rule 10.04) and the prior appropriation doctrine (CM Rule 20.02) yet his order conflates them into a single subject, R. 1912. *See IGWA v. IDWR*, 160 Idaho 119, 130, 369 P.3d 897, 909 (2016).

Rules 30 and 31 provide the procedures and criteria for determining an “area of common ground water supply” and how to handle the seniors’ requests for administration in this situation. The Director wrongly asserted his proceeding was “not a response to a delivery call.” R. 440. Instead, the Director erroneously forged ahead with his unprecedented proceeding under section 42-237a.g. after the irrigation season began, disregarding the process provided by the Idaho Supreme Court and the CM Rules. The Court should correct this error of law and reverse and set aside the final order.

E. No Agency Deference for Interpretation of Idaho Code § 42-237a.g.

No deference is owed the Department's new found interpretation of section 42-237a.g. To determine the appropriate level of deference that a court should give to an agency's construction of a statute, the Idaho Supreme Court established a four-prong test in *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991).

First, the court must determine if the agency has been entrusted with the responsibility to administer the statute at issue. Second, the agency's statutory construction must be reasonable. Third, the court must determine that the statutory language at issue does not expressly treat the precise question at issue. Finally, under the fourth prong of the test, a court must ask whether any of the rationales underlying the rule of deference are present.

Preston v. Idaho State Tax Comm'n, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998).

The Court in *J.R. Simplot Co.* expanded on the "underlying rationales" for the fourth prong, which include: (1) the rationale of repose; (2) the rationale requiring that a practical interpretation of the statute exists; (3) the rationale requiring the presumption of legislative acquiescence; (4) the rationale requiring contemporaneous agency interpretation; and, (5) the rationale requiring agency expertise. *See Id.*, 120 Idaho at 857-60, 820 P.2d at 1215-17.

"If the underlying rationales are absent then their absence may present 'cogent reasons' justifying the court in adopting a statutory construction which differs from that of the agency." *J.R. Simplot Co.*, 120 Idaho at 862, 820 P.2d at 1219. When only some of the rationales are present, the court must balance the supporting rationales, as all are not weighted equally. *See Id.* "If one or more of the rationales underlying the rule are present, and no 'cogent reason' exists for denying the agency some deference, the court should afford 'considerable weight' to the agency's statutory interpretation." *Id.*

The rationale of repose is the reliance upon the citizens of the state over a period of substantial time, "their undoing by the judiciary unsettles the repose of all those who have detrimentally relied on these agency interpretation." 120 Idaho at 857, 820 P.2d at 1214. The

rationale of repose does not exist in this case because the Department’s interpretation of section 42-237a.g is both novel, and because it departs from prior agency interpretations of the same statute. When the rationale of repose is absent, the Idaho Supreme Court has found that even a reasonable agency interpretation would not be given deference. *Id.*, 120 Idaho at 863, 820 P.2d at 1220 (“Even though the Tax Commission's interpretation is reasonable we hold that it is not entitled to considerable weight because our balancing of the rationales supporting the rule of judicial deference provide ‘cogent reasons’ for leaving the Tax Commission's interpretation merely to its persuasive value”).

The second rationale is not present in this case because the Districts’ interpretation of the statute, i.e., administration of water in this case requires use of the CM Rules, is simpler and more straightforward than the Department’s interpretation that allows the Director unfettered authority to initiate a case under haphazard procedures undefined by either statute or regulation. *See J.R. Simplot Co.*, 120 Idaho at 863-64, 820 P.2d at 1220-21 (determining that the second rationale was absent from the case because Simplot provided a simpler statutory interpretation than the Tax Commission).

Next, the third rationale, the presumption of legislative acquiescence, is also absent. The third rationale is that the legislature is charged with knowledge of how its statutes are interpreted. By not altering the statutory text the legislature is presumed to have sanctioned the agency interpretation. *Ada County v. Bottolfsen*, 61 Idaho 363, 102 P.2d 287 (1940); *United Pac. Inc. Co. v. Bakes*, 57 Idaho 537, 67 P.2d 1024 (1937); *Pocatello v. Ross*, 51 Idaho 395, 408, 6 P.2d 481, 485 (1931). Idaho courts will “require ‘something’ more to determine *actual* legislative intent than merely reenacting the statute after it has received an agency construction. *J.R. Simplot Co.*, 120 Idaho at 864, 820 P.2d at 1221 (emphasis in original). Here, the Department’s

interpretation is less than six-months old and no expression of legislative intent has been made acquiescing or agreeing with the interpretation.

Further, the Director's request to repeal the "local ground water board" statutes was predicated on his representation that conjunctive administration would be handled through the CM Rules, not some undefined unilateral process under section 42-237a.g. The Legislature was not presented with the Director's current interpretation of the statute this past session, hence there is no acquiescence.

The fourth rationale requiring agency interpretation contemporaneous with the passage of the statute in question is also absent. Section 42-237a.g was passed several decades before the Department's novel interpretation and application of the statute in May 2021, the first-time section 237a.g had been applied in this manner. Tr. 343:16-19; 345:7-13.

Finally, the fifth rationale, requiring agency expertise, is also missing in this case. While the Department has expertise regarding the distribution of water in the state of Idaho, the Director failed to use the Department's settled set of procedures and rules for the administration of surface and ground water that have been developed over the preceding decades, and approved by the Legislature. *See J.R. Simplot Co.*, 120 Idaho at 866, 820 P.2d at 1223.

As none of the rationales supporting the rule of deference are present, this Court has cogent reasons for not deferring to the Department's new found interpretation. Because the Department has promulgated and the Legislature has approved the CM Rules for the conjunctive administration of surface and ground water rights, the Department's interpretation eschewing those rules should be overturned. Instead, the Districts' interpretation of section 42-237a.g requiring use of the CM Rules and other procedures should be applied.

II. The Director's Injury Determination is Contrary to Idaho Law and Fails to Properly Analyze the Senior's Actual Beneficial Use.

The Director made a finding of injury to the senior water rights at issue without determining what the seniors' "reasonable in-season demand" or "crop water need" for the 2021 irrigation season. The Director's conclusion contradicts well-established precedent and violates the statutes the Director relies upon for conjunctive administration.

First, the concept of "beneficial use" is well known in Idaho water law. *See Idaho Const., Art XV, § 3; Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2*, 59 F.2d 19, 23 (9th Cir. 1932) ("The extent of beneficial use is an inherent and necessary limitation upon the right"). Water rights are limited to the amount necessary to fulfill the authorized beneficial use. *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 435 n.5, 546 P.2d 382, 390 n.5 (1976). As argued by IDWR in the *AFRD#2* case: "The prior appropriation doctrine as established by Idaho law does not allow curtailment of vested junior rights when the senior does not need additional water to achieve the authorized beneficial use." *IDWR 2006 Br.* at 35.

The Idaho Supreme Court succinctly summarized the methodology for conjunctive administration of irrigation water rights in *A&B Irr. Dist. v. Spackman*, 155 Idaho 640, 315 P.3d 828 (2013). In reviewing the district court's decision in that case, the Court recited:

Although the [Rules] do not expressly provide the use of a "baseline" or other methodology, the Hearing Officer concluded that: "Whether one starts at the full amount of the licensed or decreed right and works down when the full amount is not needed or starts at base and works up according to need, the end results should be the same." Ultimately the Hearing Officer determined that the use of a baseline estimate to represent predicted in-season irrigation needs was acceptable provided the baseline was adjustable to account for weather variations and that the process satisfied certain other enumerated conditions. This Court affirms the reasoning of the Hearing Officer on this issue.

155 Idaho at 648, 315 P.3d at 836.

Reviewing the Director’s baseline methodology in both the context of “water management” and “in determining material injury in the context of a water call,” the Court reaffirmed the legal precepts the Director must apply:

The prior appropriation doctrine is comprised of two bedrock principles – that the first appropriator in time is the first in right and that water must be placed to a beneficial use. . . .

The concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent theme in Idaho water law. . . .

This case illustrates the tension between the first in time and beneficial use aspects of the prior appropriation doctrine. . . . The authority of the Director to prepare and implement a water allocation plan as part of his management responsibility has not been challenged by any party in this proceeding, perhaps in recognition of the fact that an interconnected system of ground and surface water as complicated as the Snake River Basin, with as many variables, moving parts, and imponderables that present themselves during any particular irrigation season, simply cannot be managed without a great deal of prior analysis and planning toward determining the proper apportionment of water to and among the various water right holders according to their priority. The use of a baseline methodology in this context is, therefore, not inconsistent with Idaho law.

* * *

Thus, any determination of a delivery call requires application of established evidentiary standards, legal presumptions and burdens of proof. Based on the foregoing, we conclude as follows:

1. The Director may develop and implement a pre-season management plan for allocation of water resources that employs a baseline methodology, which methodology must comport in all respects with the requirements of Idaho’s prior appropriation doctrine, be made available in advance of the applicable irrigation season, and be promptly updated to take into account changing conditions.

155 Idaho at 650-51, 315 P.3d at 838-39.

Regarding conjunctive administration of senior surface water rights on the Snake River, the Director employs such a “reasonable in-season demand” based upon the seniors’ calculated “crop water needs” and projected “demand shortfalls.” The analysis includes an in-depth technical evaluation of several factors. *See Fourth Amended Final Order Regarding for*

Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover at 12-17 (Docket No. CM-DC-2010-001; Apr. 19, 2016) (“*SWC Order*”).²² The Director explained that this “baseline methodology” was acceptable based on the following:

13. . . . To the extent water is available, members of the SWC are authorized to divert and store water in accordance with the terms of their licenses or decrees. Nothing established herein reduces that authorization. The question that the CM Rules require the Director to answer in this proceeding is, when water is not available to fill the water rights of the SWC, how much is reasonably necessary for the SWC to accomplish the beneficial purpose of raising crops; because what is needed to irrigate crops may be less than the decreed or licensed quantities. . . . Again, “[t]he concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent theme in Idaho water law.” *Id.*

14. Holders of senior-priority water rights may receive less than their licensed or decreed quantities and not suffer material injury within the meaning of the CM Rules. As a result, in-season demand should be viewed in light of reasonableness and optimum development of water resources in the public interest.

SWC Order at 31 (emphasis added).

Unlike the Supreme Court’s directive concerning “beneficial use” and the Director’s use of a “reasonable in-season demand” based upon actual “crop water need” for the Coalition case, here the Director based conjunctive administration on “strict priority” without regard to the quantity of water actually needed by the seniors for beneficial use. The Director did not view the administration “in light of reasonableness and optimum development of water resources in the public interest.” Instead, the Director just recited the seniors’ perceived water supply shortfalls and alleged impacts on crop production. *See generally*, R. 1894-99.

The Director even concluded the seniors’ estimates were based on changing conditions “and on assumptions and computations that may not be entirely accurate or correct.” *Id.* (emphasis added). Nonetheless, the Director vaguely determined that curtailment “will help

²² The order is publicly available at <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2010-001/CM-DC-2010-001-20160419-Fourth-Amended-Final-Order-Regarding-Methodology-for-Determining-Material-Injury-to-Reasonable-In-Season-Demand-and-Reasonable-Carryover.pdf>

minimize surface water users' crop and revenue losses, by preventing curtailment of some surface water rights and allowing surface water rights that have been curtailed to come back on sooner than would otherwise have been the case." R. 1910.

Despite having testimony and evidence about the seniors' types of crops, irrigated acres, and irrigation systems, the Director made no calculations concerning the seniors' actual beneficial use. Consequently, the Director failed to determine the seniors' "reasonable in-season demand" and actual demand shortfalls.²³ The Director made no findings about the actual water available and used by the seniors to the date of the hearing during the week of June 7-12, or by the date of his final order on June 28, 2021. Moreover, the Director did not take into account unauthorized irrigated acres; rented supplemental water, and supplemental ground water rights that would all factor into the seniors' actual beneficial use and crop water needs for the 2021 irrigation season thereby reducing any projected demand shortfalls.

For example, Fred Brossy, on behalf of Barbara Farms LLC, testified that he had rented 66 inches of AFRD#2 water from the City of Shoshone for the 2021 irrigation season. Tr. 448:18-20. Mr. Brossy expected to receive this surface water for the full irrigation season. Tr. 462:9-12. Mr. Brossy also testified about available water from the Big Wood Canal Company that he chose not to divert and use. Tr. 464:3-16. John Arkoosh similarly testified that he has "supplemental water" from "American Falls" and a groundwater right in addition to his Little Wood River rights, and that he intended to rent additional water from the Snake River. Tr. 606:18-25; 608:2-8; 640:19-25. Rod Hubsmith testified that his pivot irrigated 9-10 acres more than what was authorized by his water right. Tr. 502:13-19. This unauthorized irrigation

²³ Each senior provided testimony about their respective water rights and farming operations. *See generally* (Barbara Farms LLC) Tr. 438-444; (Hubsmith) Tr. 482-488; (Big Wood Canal Company) Tr. 523-535; (Arkoosh) Tr. 574-602; (Big Wood Farms LLC) Tr. 647-659; (Taber, 7 Mile Ranch, Ritter) Tr. 673-94; (Legg) Tr. 717-19; (Newell) Tr. 733-39.

amounts to 16-18% of his irrigated land. Finally, Don Taber testified both about irrigating unauthorized BLM land and using his supplemental ground water right to irrigate 248 acres when surface water is insufficient. Tr. 701:17-25; 702:1-8. All of this information was pertinent to the seniors' alleged injury and actual "crop water need" consistent with the beneficial use tenet of the prior appropriation doctrine. The Director ignored all of this evidence. By failing to make specific findings regarding beneficial use and material injury, the Director's decision is not supported by substantial evidence and should be set aside under the APA's standard of review.

Instead, the Director chose to administer on "strict priority" under the guise of his "broad powers" in section 42-237a.g. The Director concluded that curtailment was warranted solely on the "conclusion that the effects of ground water withdrawals in the Bellevue Triangle on senior water rights diverting from Silver Creek and the Little Wood River during the 2021 irrigation season are contrary to 'the doctrine of 'first in time is first in right.' Idaho Code § 42-226." R. 1907. Besides not limiting the seniors' water use to the decreed elements of their water rights (i.e. total irrigated acres and authorized place of use), the Director's failure to identify a "reasonable in-season demand" and actual "crop water need" violates Idaho's appropriation doctrine and is arbitrary and capricious given how the Director performs conjunctive administration of irrigation water rights to the Snake River.

Further, where certain seniors had available supplemental water supplies to achieve their beneficial use, the Director completely disregarded that critical information in favor of rote curtailment of all junior ground water rights. *See e.g., A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 515-16, 284 P.3d 225, 240-41 ("The CM Rules provide a list of factors that the Director may consider in his determination of a senior right holder's material injury. The most pertinent provision is IDAPA Rule 37.03.11.042(g) which allows the Director to consider '[t]he extent to

which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices").

Because the seniors in this case had supplemental water supplies and facts regarding unauthorized water use, the Director had an obligation to take those factors into account in determining material injury. The Director made no such inquiry but chose a blanket curtailment of all groundwater use. Ironically, the Director applied the very standard that IDWR argued against in the *AFRD#2* case: "Idaho water rights are 'administered according to the prior appropriation doctrine as opposed to strict priority.'" *IDWR 2006 Br.* at 18. Since the Director's final order administers based on "strict priority" and ignores the seniors' actual beneficial use, it should be set aside accordingly.

III. The Director's Proceeding and Hearing Process Violated the Districts' Constitutional Due Process Rights.

The Department's curtailment order should be overturned because the Department's actions and administrative hearing violated the Districts' right to due process protected by the constitution under the Fourteenth Amendment of the U.S. and Idaho Constitutions.²⁴ *See* Idaho Code § 67-5279(3)(a, d) (the agency decisions were in violation of constitutional provisions and were made upon unlawful procedure).

Water rights are real property rights that come with entitlements to due process before they are administered, curtailed, or taken. *See In re Water District No. 170*, 148 Idaho at 213,

²⁴ The Idaho Supreme Court has held that the Idaho Constitution "guarantees substantially the same protections for due process of law" as the United States Constitution. *See Williams v. Idaho State Bd. of Real Estate Appraisers*, 157 Idaho 496, 505, 337 P.3d 655, 664 (2014). The Court in *Williams* further found that state agencies are subject to these due process requirements. *See Id.*

220 P.3d at 331; *Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048, 1051 (1977); *Sanderson v. Salmon River Canal Co.*, 34 Idaho 145, 199 P. 999 (1921). By initiating conjunctive administration of hundreds of surface and groundwater rights within the complex hydrology of Basin 37 using an abbreviated and inadequate hearing process, the Director has plainly violated any notion of fundamental fairness and has failed to adequately provide for the “opportunity to be heard in a meaningful time and in a meaningful manner.” *Ayala v. Robert J. Meyers Farms, Inc.*, 165 Idaho 355, 362, 445 P.3d 164, 171 (2019).

The Director’s decision to initiate proceedings and administration of water well after the beginning of the irrigation season creates additional due process hurdles, as it resulted in an order to curtail thousands of acres of previously planted crops during a critical week in the middle of the irrigation season. This “after-the-fact” proposal is clearly not what the Idaho Supreme Court required when it referenced the Director having the authority to “develop and implement a pre-season management plan” for conjunctive administration. *A&B Irr. Dist.*, 155 Idaho at 653, 315 P.3d at 841 (emphasis added).

Procedural due process requires that there be some process to ensure that an individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. *See Union Bank, N.A. v. JV L.L.C.*, 163 Idaho 306, 317, 413 P.3d 407, 418 (2017). Determining whether an individual's Fourteenth Amendment due process rights have been violated requires this Court to engage in a two-step analysis. *Guzman v. Piercy*, 155 Idaho 928, 939, 318 P.3d 918, 929 (2014).

The Court must first determine whether the individual is threatened with the deprivation of a liberty or property interest under the Fourteenth Amendment. *Newton v. MJK/BJK, LLC*, 167 Idaho 236, 244, 469 P.3d 23, 31 (2020). The second step requires the Court to determine

what process is due. *Id.* “A deprivation of property encompasses claims where there is a legitimate claim or entitlement to the asserted benefit under either state or federal law.” *Union Bank*, 163 Idaho at 317, 413 P.3d at 418 (quoting *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 72-73, 28 P.3d 1006, 1015-16 (2001)). “Only after a court finds a liberty or property interest will it reach the next step of the analysis in which it determines what process is due.” *Bradbury*, 136 Idaho at 73, 28 P.3d at 1016.

A. Procedural Due Process First Step: Deprivation of a Property Interest.

Water rights are real property right interests in Idaho. *See* Idaho Code § 55-101. Water rights “must be afforded the protection of due process of law before they may be taken by the state.”²⁵ *Clear Springs Foods, Inc.*, 150 Idaho at 814, 252 P.3d at 95; *Nettleton*, 98 Idaho at 90, 558 P.2d at 1051; *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 150 P. 336 (1915).

The Districts’ members’ private property interests were deprived in this case. The individual ground water rights were curtailed, depriving water to thousands of acres of planted crops and forage during a critical period in July. An agency’s action cannot be upheld when a party is deprived of due process rights. *See e.g., Newton*, 167 Idaho at 244, 469 P.3d at 31 (“This Court will not affirm the validity of an encroachment permit where an opposing party was deprived of their due process rights”). The Districts’ members, as holders of real property interests in their water rights, meet the first step of the due process analysis.

B. Procedural Due Process Second Step: What Process is Due?

²⁵ The Supreme Court has noted that issuing curtailment orders without prior notice and an opportunity for hearing can constitute an abuse of discretion and violation of the right to process. *See Clear Springs Foods, Inc.*, 150 Idaho at 815, 252 P.3d at 94 (“Under these circumstances, the Director abused his discretion by issuing the curtailment orders without prior notice to those affected and an opportunity for hearing”).

The second step asks what process is due under the law. Due process requires that parties “be provided with an opportunity to be heard at a meaningful time and in a meaningful manner.” *City of Boise*, 129 Idaho at 910. Due process includes “the right to be fairly notified of the issues to be considered.” *See Haw v. Idaho State Bd. of Medicine*, 140 Idaho 152, 159 (2004) (emphasis added).

Procedural due process requires IDWR provide a process to ensure that an individual is not arbitrarily deprived of his or her rights in violation of the state or federal constitutions. *See Newton*, 167 Idaho at 244, 469 P.3d at 31. The Idaho Supreme Court has explained that “[p]rocedural due process is an essential requirement of the administrative process, and notice is a critical aspect of that due process.” *City of Boise v. Industrial Com’n*, 129 Idaho 906, 910, 935 P.2d 169, 173 (1997). The Court further observed that a “hearing is not a mere formality – it is an integral component of due process because it provides a claimant with an opportunity to be heard in a meaningful time and in a meaningful manner.” *Ayala*, 165 Idaho 355 at 362, 445 P.3d at 171 (emphasis added).

The concept is flexible, “calling for such procedural protections as are warranted by the particular situation.” *City of Boise*, 129 Idaho at 910, 935 P.2d at 173. The Idaho Supreme Court has used the U.S. Supreme Court’s balancing test in evaluating the adequacy a particular process:

Due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances . . . Due process is flexible and calls for such procedural protections as the particular situation demands . . . Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Boise Tower Assocs., LLC v. Hogland, 147 Idaho 774, 780-81, 215 P.3d 494, 500-01 (2009), quoting *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (internal brackets and citations omitted).

Thus, to determine what process is due in light of the nature of a deprivation of liberty or property, Courts use the test enunciated in *Mathews*, which requires courts to balance: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the value of additional or substitute procedural safeguards; and, (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See Id.*

1. *High Risk of Erroneous Deprivation.*

“Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” *Carey v. Phipus*, 435 U.S. 247, 259 (1978).

i. **Initiation of the Curtailment Proceedings After Crops were Planted Created an Extremely High Risk of Erroneous Deprivation.**

In considering factors for judicial review of a Department order for curtailment, Idaho courts have looked to the timing of curtailment in relation to whether or not crops have already been planted. *See e.g. IGWA v. IDWR, Order Dismissing Application for Temporary Restraining Order, Complaint for Declaratory Relief, Writ of Prohibition and Preliminary Injunction*, CV 2007-526 (June 12, 2007) at Tr. 8 (Court explaining that IGWA being notified of curtailment *after* the planting season had commenced would bear on the argument that justice requires an exception to the exhaustion doctrine).

By the time the hearing process was initiated, Petitioners were well past planting season and into the irrigation season. The risk of deprivation was therefore inherently high, as Petitioners stood to lose upwards of \$12 million dollars from contracts and lost crops that had been planted in anticipation of the 2021 irrigation season. *See Dec. of SVGWD Chairman Kristy Molyneux in Support of Petition for Judicial Review at ¶ 8* (filed May 24, 2021). Perhaps the Department’s abbreviated hearing process would have satisfied the dictates of due process were they conducted and concluded *prior* to the planting season. But, as here happened, the potential loss and deprivation of the Districts’ members’ property interests was severely heightened with crops already in the ground and irrigation having commenced for half of the season. Moreover, the Department owed the Districts due process protections commensurate with that potential for great harm and deprivation. Whereas the Director was aware of poor water conditions in the basin as early January, and had instructed staff to start working on technical analysis for administration in March, the Director nevertheless provided no notice of a section 42-237a.g curtailment until May 4th. *See R. 1, 2334; see also Addendum A.*

The Department’s proffered process did not satisfy the requirements of due process as necessitated by this situation. *See City of Boise*, 129 Idaho at 910, 935 P.2d at 173 (“procedural protections as are warranted by the particular situation”).

ii. **The Director’s Notice Process was Inadequate.**

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). The notice must

be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest.

The Director's process, initiated after the irrigation season has begun, was not "evenhanded" and denied any notion of "consistent planning" by the Districts' members. IDWR wrongly took it upon itself to serve various junior water right holders of its own choosing in Basin 37. There was no notice to the water users of the boundaries of an "area of common groundwater supply" as provided by CM Rule 30. Furthermore, the Director effectively pre-determined an area of common ground water supply by identifying a limited area of potential curtailment (Bellevue Triangle) in violation of CM Rules 30 and 31.

iii. **The Director's Discovery and Preparation Process was Inadequate.**

The Department's inadequate discovery process, necessitated by the abbreviated schedule, violated the Districts' due process rights because it did not provide adequate time to review complex technical data, some data was not available until mid-hearing, and the limited time did not afford Petitioners adequate time to offer alternative modeling or to reasonably refute the sufficiency of the models used by the Department. "[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959), *quoted with approval in Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (emphasis added).

(a) The Complexity of the Issues Required More Time than was Afforded in which to Adequately Prepare and Defend the Department's Curtailment Hearing.

On May 11, 2021 the Director issued a *Request for Staff Memorandum* listing seventeen different technical subjects and subparts. Although agency staff were requested to provide the

information to the Director “on or before May 17, 2021,” the reports were not released until the afternoon of May 18, 2021 on IDWR’s website.²⁶ The information consisted of four different staff reports totaling over 150 pages (collectively, “staff memoranda”). R. 2089-2402. The Districts further filed a *Request for Information* with IDWR on May 13, 2021. R. 177-81. The Department waited to produce any documents in response to this request until the close of business on May 24, 2021. R. 1605, n. 4. Further, the Director withheld authorization of discovery until Saturday May 22, 2021, nearly three weeks after the *Notice* was issued. R. 419-26. By this time IDWR staff had been working on these analyses for at least two months, maybe longer. It simply does not comport with due process for the agency to justify the Director’s preferred outcome and then give parties mere days or weeks to respond.

Cutting discovery time in half, particularly when the case was supposed to begin and end within 4 weeks clearly prejudiced the Districts and their consultants. R. 106. The technical information was voluminous and required extensive expert analyses that was not possible during the truncated discovery and hearing schedule. R. 1288:20-24; *see also, Dec. of David B. Shaw in Support of Petition for Judicial Review* at ¶¶ 8-10 (May 24, 2021); *Dec. of G. Erick Powell in Support of Petition for Judicial Review* at ¶¶ 7-10 (May 24, 2021). Further, while Sun Valley Company filed a request for information related to the staff Memoranda, IDWR did not even produce this information until mid-week of the hearing through a series of emails. R. 1465-72.

Having adequate time to evaluate and review such information was critical to protect the Districts’ right to reasonably prepare and present defenses to the delivery calls and “material injury” determinations that the Director proposed to decide at the hearing. The use of experienced and highly trained experts, evaluation of complex hydrologic systems, and review of

²⁶ To the Districts’ counsels’ knowledge, no party was provided notice of this internet posting or actual copies of the staff reports.

hundreds of water rights, their delivery systems and individual uses is a time-consuming and intense endeavor. *See AFRD#2*, 143 Idaho at 875, 154 P.3d at 446 (“It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts”).

As illustrated in the staff memoranda, there were numerous reports and extensive data and information to compile and review. Forcing the Petitioners and other parties subject to threatened curtailment to absorb this information (without knowing how complete and comprehensive the information was) and then come prepared to a hearing to debate and review this highly technical information, in two and a half weeks, was highly prejudicial and violated due process. *See e.g., State v. Doe*, 147 Idaho 542, 546, 211 P.3d 787, 791 (2009) (“In addition, notice must be provided at a time which allows the person to reasonably be prepared to address the issue”).

Since the Districts were not afforded a reasonable time to prepare for hearing through a review of the complex data and information relied upon by the Department, the risk of curtailment without a meaningful and fair process was high and in fact, did occur.

(b) The Abbreviated Discovery and Preparation Period Failed to Provide the Districts Adequate Time to Refute the Department’s Insufficient and Outdated Model Relied upon in Finding for Curtailment.

There are multiple uncertainties with the Model as well as aquifer parameters questions, such as hydraulic conductivity, that make the Model an insufficient tool to use for the purpose intended by the Director in this case, which is a partial season curtailment to benefit downstream senior surface water users for irrigation purposes from July through September 2021. In this matter it is undisputed that IDWR’s model runs and supporting information were not supplied

and available to the Districts until May 18th and 21st respectively. R. 1883, n. 2, n.3; Tr: 1470, 1472.

Through the Department's last-minute disclosures, the Districts were prevented from conducting any meaningful analysis or recalibration to evaluate water data and information gathered since 2014 (the last year used to calibrate the Model). Tr. 1288. Moreover, the modeled boundary of curtailment is arbitrary and capricious as it is not based upon actual groundwater hydrology in the basin.

For instance, the Model's uncertainty, as explained by Allan Wylie, the Department's chief modeler in charge of this Model, is at least twenty-two (22%) percent over a ten (10) month span. R. 2310-2331. Dr. Wylie's analysis only included two (2) cells within the Bellevue Triangle. *Id.* Given the limited review of cells within the proposed curtailment area, it is possible that the Model's uncertainty in that area may be even greater than twenty-two (22%) percent. Tr. 1267:12-18.

And, as Dr. Powell, an engineer at Brockway Engineering testified, the more the response time-period is reduced, the more the Model's uncertainty increases. Tr. 1267:9-1268:4. Thus, Ms. Sukow's analysis, which was based upon a three (3) month time-period, likely has an uncertainty of greater than twenty-two (22%) percent – a fact which Ms. Sukow admitted in her staff memo as well as at the hearing. Tr. 220:7-18. No one, including the Department's staff, had sufficient time to determine what the actual uncertainty of Ms. Sukow's analysis was. Ms. Sukow explained such a technical analysis would take months. Tr. 169:8-170:19 (“Q: Do you have any understanding of how long it would take for you or somebody else to do [a new predictive uncertainty analysis]. A: I think we'd be looking at something on the order of months to look at that”) (emphasis added).

Dr. Powell also provided testimony about how long it would take to perform his own model runs and calibrate those based upon adjusted cell values to respond to the Department's simulations. Tr. 1287-1288 ("Q. So as far as testing the results of the Department's memo in this case, would you have had time to undertake the type of analysis between May 17th and the start of this hearing? A. Absolutely not"). The Director's short-circuited process effectively prevented any such analysis.

There is additional uncertainty regarding the Model's results based on a lack of data. In fact, the Model Final Report which was authored by Mr. Wylie and Ms. Sukow among others, recognized that there are significant gaps in data and in the Department's understanding of the aquifer that are "apparent" – which Ms. Sukow corroborated during her testimony at the hearing. Tr. 152:23-156:22. Specifically, Mr. Sullivan, a senior water resources engineer with Spronk Water Engineering, testified that the Model is based on assumed values for pumping prior to 2014, especially in the proposed curtailment area, even though additional data has been collected since that time which includes pumping data, ET, stream measurements, aquifer levels and efficiency. Tr. 1439:5-1440:7. That additional data, however, has not been included in the calibrated Model. Tr. 1270:2:7. The Model also does not account for lands being left fallow throughout the Bellevue Triangle in 2021.

Certainly, this additional data was important and should have been used to re-calibrate the Model to allow for more accurate evaluations, which was extremely important in this case since the Department relied on data that was more than seven (7) years old to make a decision regarding curtailment. Although the Model's lack of data was originally pointed out in the Model Final Report, the Model has not been recalibrated to incorporate this additional data so the data gaps still exist today. Tr. 1268:16-1270:12.

Given the Department's short notice of this proceeding, the junior groundwater users were hamstrung by not being able to perform a different analysis with seven (7) years of additional data that may have disclosed a different result. Tr. 1288:11-24. As such, there has been no meaningful or fair opportunity to conduct this work and provide it in the context of this case.

iv. The Director's Hearing Process was Inadequate.

A complex case with over 40 participants, including numerous water districts, irrigation companies, and several technical experts does not lend to itself to being fairly heard and resolved in only days as ordered by the Director. Consequently, the Districts urge this Court to carefully consider the context and timing of what was done, particularly in light of reasonable schedules and fact gathering required for such a conjunctive administration case. Where a single application for permit and transfer cases can routinely several months, a complex conjunctive administration matter involving hundreds of water rights, multiple aquifer levels and surface water sources deserves adequate time for the analysis that was required for a "fair" process.

The violation of the Districts' due process rights is amplified by the fact the issue of what process is required has previously been decided by this Court. Where the Court found that determining an "area of common ground water supply" is the most critical factor in such a case, performing that evaluation pursuant to the procedures and criteria in the rules was paramount to efficient and proper administration. R.2411. When considering the short-circuited process that provided, the hearing was clearly inadequate and in violation of Districts' due process rights.

A "hearing at which the applicant is fully advised of the claims of the opposition and of the facts which may be weighed against him, and at which he is given full opportunity to test and refute such claims and such facts, and present his side of the issues in relation thereto, is essential

to due process.” *Application of Citizens Utilities Co.*, 82 Idaho 208, 215, 351 P.2d 487, 494 (1960) (emphasis added). The Districts were not “fully advised” of all the facts when the agency delayed responding to information requests and waited until a few weeks before the hearing to authorize discovery. R. 370, 419.

v. The Director Wrongly Curtailed in Favor of Non-Party Seniors.

Moreover, in this case, the Director curtailed all junior groundwater rights for alleged injury to senior water users that did not even participate at the hearing. R. 1949. Based on the order denying the Districts’ mitigation plan, the Director decided to administer groundwater rights based upon depletion to the source and to satisfy senior water rights that were not a part of this case. Although the Director set the rules for the case when he issued the *Notice and Pre-Hearing Order*, he changed the playing board after-the-fact. R. 1, 520-30; 1919, 1949.

The Districts had no opportunity to discover the facts related to these un-named seniors, their proposed water use, or whether they would be injured during the 2021 irrigation season. Consequently, the Districts had no basis or notice to be able to present or prove any defenses at the hearing as to these senior water rights. This type of agency action plainly violates due process. *See Hawkins v. Idaho Transportation Dep’t*, 161 Idaho 173, 177, 384 P.3d 420, 424 (Ct. App. 2016) (In order to effectuate a meaningful defense against an administrative license suspension, a driver should have sufficient prehearing access to the very evidence deemed relevant enough to warrant the issuance of a subpoena by the very administrative hearing officer deciding the case).

The Districts had no way of knowing that the water rights of these un-named seniors, who did not participate in the case, would be at issue or subject to this proceeding. In fact, the Director made it clear at the pre-hearing conference that proof of injury by individual water users

was essential beyond simple proof of depletion to the stream. Pre-Hearing Tr. 46:3-5. The Director was aware of no difference between material injury as that term is used in the case law and the CM rules and injury for purposes of this administrative proceeding. Pre-Hearing Tr. 49:10-20. The Districts were not allowed to conduct any discovery into any injury claims of water users who chose not to participate in the administrative proceeding.

In essence, the Director proceeded to curtail junior rights in favor of unidentified senior rights despite no allegation of injury, and certainly without any actual evidence of injury. The Director wrongly assumed, without any supporting evidence, that seniors who choose not to participate would beneficially use any water resulting from his curtailment order. Stated another way, the Districts were precluded from conducting discovery and putting on a defense as to water rights and users of senior water right holders who made no appearance and no showing of any kind at the hearing. This course of action and finding violates the Districts' right to due process as they were deprived of a "meaningful opportunity" to have a meaningful hearing as to any alleged injury to these un-named seniors and their unidentified water rights. Moreover, the Director's decision as to these water rights is not supported "substantial evidence" in the record.

2. Consideration of the Department's Interests.

There was little fiscal or financial burden on the Department to provide for the proper procedure and hearing, ideally those outlined by the CM Rules. Whereas the Director has erroneously initiated this effort on his own to provide notice to some subset of juniors, that can be corrected through the procedures already set out in CM Rule 30. Any proper hearing process will inevitably involve the same issues, parties, and facts. *See Citizens Allied for Integrity and Accountability, Inc. v. Schultz*, 335 F.Supp.3d 1216, 1228 (D. Idaho 2018). Ensuring any

hearing complies with due process will “set an example for future hearings and thereby reduce the probability of further litigation.” *Id.*

3. *Balancing Analysis Conclusion.*

The Director’s proceeding clearly failed the balancing test for adequate process identified by the Supreme Court in *Ayala*. The Districts recognize that the Department has an interest in the administration of water rights; that interest however, is outweighed by the significant interests of the Districts and the high risk or erroneous deprivation caused by the Department’s inadequate notice, discovery, and hearing process.

At its heart, a “procedural due process inquiry is focused on determining whether procedure employed is fair.” *State v. Roth*, 166 Idaho 281, 458 P.3d 150 (2020). The Director short-circuited the established process, ignored his recent representations to the Legislature, and held a contested case hearing within a matter of weeks. With extensive technical information made available for the first time on May 18th, affected junior ground water users and their technical experts were given only 19 days (inclusive of weekends and a holiday) to review and analyze this material and prepare any opinions and defenses. The time for discovery was even less as the Director waited to authorize discovery until May 22, 2021. Moreover, certain information was not even disclosed by the agency until the middle of the hearing. R. 1605, n. 4.

Evaluated in context of what is necessary for a unique and complex conjunctive administration hearing, the Department’s proceedings do not satisfy constitutional due process rights and provide for a “meaningful opportunity to be heard.” It is just this type of action “that undermines public confidence in a fair and impartial tribunal.” *See e.g., Ayala*, 165 Idaho 355 at 363, 445 P.3d at 172. Moreover, “the right to due process is the right to be free from arbitrary

actions of government officials.” *Browning v. Vernon*, 874 F.Supp. 1112, 1121 (D. Idaho 1994).

In summary, in light of the unique circumstances and complexity of such highly technical administrative cases, the Director’s proceedings violated the Districts’ constitutional rights to due process.

IV. The Director’s Reliance Upon Staff Memorandums, Including the Effective Pre-Determination of an ACGWS, Violated the Districts’ Due Process Rights.

Apart from the other violations of due process concerning the Director’s case, the process was flawed from the outset in the way the Director relied upon analysis and information generated by agency staff, including essentially pre-determining an “area of common ground water supply” (ACGWS). As the Court previously held, “determining the applicable area of common ground water supply is the single most important factor relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water.” R. 2411. The Director made such a decision, behind closed doors, in advance of the hearing in this case. Such an action plainly violates constitutional due process and the Idaho APA and should be reversed and set aside accordingly. *See* Idaho Code 67-5279(3)(a) and (c).

First, the Director commissioned staff to begin working on conjunctive administration back in March 2021, unbeknownst to any party, including the Districts. R. 2333-35. The Director then used this information to identify the area of potential curtailment. R. 523; Pre-Hearing Tr: 56:5-57:9. In other words, the Director, as the hearing officer, engaged with Department staff to come up with this finding before the case was even initiated. Notably, the process did not follow CM Rule 30 or 31, and it relieved the seniors from having to describe “the area having a common ground water supply within which petitioner desires junior-priority

ground water diversion and use to be regulated.” CM Rule 30.01.d. The Director made this decision for the seniors, without any input from any party, including the Districts.

The purpose of any contested case before IDWR is the presentation of evidence which in this case should have related to establishing an ACGWS upon the proper procedure. The parties, not the Department, gather and present the information and data that could be admitted by the Director as evidence subject to objection and cross-examination. *See* IDAPA 37.01.01.600-606. The Director, as the hearing officer, was supposed to oversee proper development of a record and to consider admitted evidence presented by the parties at the hearing. *See* IDAPA 37.01.01.600. The Department’s staff role is to evaluate evidence, only after it is admitted at hearing, as the Director’s technical advisor. *See Id.* Staff are not allowed to engage in gathering, assembling, and organization of information on behalf the parties, in this case, the senior water users. The Department and its staff should not engage in analysis or evaluation of such information before it is actually admitted into evidence either. Nothing in the Department’s Procedural Rules or the Idaho Rules of Civil Procedure allow discovery by the Director or Department staff without statutory authority. *See* IDAPA 37.01.01.520-532; I.R.C.P. 26-37.

The gathering, compilation and organization of information by Department staff relating to the ACGWS resulted in pre-determination by the Director violating due process. Ms. Sukow began modeling work in March 2021 without any notice to, or participation by, the Districts. Using this information as the foundation for the Directors’ area of curtailment in her staff memo violated the Districts’ right to due process. Employing staff, prior to the hearing, to collect data and information as to what amounted to an ACGWS is not contemplated by the Procedural Rules or the CM Rules and prejudiced the Districts’ rights. By adopting the area of curtailment presented in the Sukow memo, the Director acted in violation of Department rules, Idaho statutes

and common law, as well as the Idaho and U.S. Constitutions. Instead, the Director was required to allow the development of a record on this issue in accordance with due process.

The Director used the remaining staff memoranda to determine injury in this matter as well. *See* R. 1891-1893. The Director admitted that he was asking for staff analysis to identify lands that could be injured by groundwater pumping. R. 1891. Similar to the pre-determination of an ACGWS, the other memos were developed without any due process or input by the Districts. Just the opposite, the seniors were consulting with IDWR at this time and supplying and exchanging information that was included for such analysis. Tr. 332:7-16; 333:7-17; 965:13-20.

Consequently, the staff memoranda were essentially “expert reports” generated by the very agency charged with objectivity and the duty to provide due process protections to all parties in the contested case. *See e.g.* Idaho Code § 42-101 (“shall equally guard all the various interests involved”). The process used by the Director significantly compromised that objectivity and the Districts’ right to due process. *See Idaho Historic Pres. Council v. City Council of Boise*, 134 Idaho 651, 654, 8 P.3d 646, 649 (2000) (“when a governing body deviates from the public record, it essentially conducts a second fact-gathering session without proper notice, a clear violation of due process”).

The Director drew conclusions and issued findings in this matter based upon staff memos and analysis used for those memos in violation of fundamental concepts of procedural due process. Critically, the Director’s pre-determination of the area of curtailment was made prior to the contested case hearing. R. 523. The preparation and submission of those memos, along with the Director’s participation and reliance upon the same, show the Director failed to conduct a

contested case in accordance with Idaho law. The Court should hold the Director's reliance upon such memos is procedurally deficient and a violation of the Districts' right to due process.

V. The Director Erred in Summarily Denying Mitigation Plan and Ordering Curtailment.

The Districts filed a proposed mitigation plan to address potential injury to the three affected senior water rights for the rest of the 2021 irrigation season. R. 1649-1655. In general, the plan proposed to deliver 500 acre-feet of storage to Barbara Farms LLC and pump and deliver groundwater to Silver Creek to increase flows for diversion by Don Taber for the 1883 water rights for his farm and the property he leased from Jim Ritter. R. 1652-1653.

The Director denied the mitigation plan without any process or pre-deprivation hearing. R. 1948. As explained above, this action violates the constitutional due process requirements and should be set aside on judicial review. *See infra*, Argument, Part III; Idaho Code § 67-5279(3). Ignoring the evidence and potential injury to the other seniors that would have received water from curtailment for the rest of the irrigation season, the Director concluded:

The *Proposed Plan* assumes that the mitigation obligation of the junior water right holders is limited to protecting three senior surface water rights bearing 1883 priority dates. *Proposed Plan* at 3. This assumption is based on the Ground Water Districts' interpretation of testimony presented at the contested case hearing conducted on June 7-12, 2021. The Ground Water Districts have combined an analysis by Tim Luke, an IDWR employee, and Kevin Lakey, Watermaster for Water District 37, to narrowly limit the mitigation obligation.

The record shows that the ground water rights in the Bellevue Triangle are junior in priority to virtually all of the surface water rights for Silver Creek and the Little Wood River. The *Final Order* did not determine that the only surface water rights on Silver Creek and the Little Wood River that must be protected are those bearing priority dates equal to or earlier than 1883. The *Final Order* determined that consumptive ground water pumping in the Bellevue Triangle should be curtailed as soon as possible in order to protect all senior surface water rights diverting from Silver Creek and the Little Wood River.

* * *

. . . Thus, even assuming that the *Proposed Plan* provides sufficient detail and assurances to conclude that the proposed mitigation will actually materialize – which it does not, as discussed below—the *Proposed Plan* is not sufficient to offset depletions resulting from ground water pumping in the Bellevue Triangle, and is not equivalent to the “the best-case scenario” for senior surface water users. *Proposed Plan* at 3.

R. 1949 (emphasis added).

The Director did not evaluate “material injury” to senior surface water rights that would receive water from curtailment, but instead applied a “strict priority” and absolute “depletion” to the resource standard that is not consistent with what is required under Idaho law for conjunctive administration. The use of this standard to justify denying the mitigation plan outright is contrary to law and violated the Districts’ right to due process.

By claiming the Districts’ mitigation plan failed because it did not protect all senior water rights or all depletions caused by groundwater pumping, it is clear the Director applied a standard not found anywhere in any prior water right administration case. The question is whether diversions by juniors caused “material injury” to the participating seniors’ surface water rights. As argued by IDWR to the Supreme Court in the *AFRD#2* appeal:

The decreed quantity for a water right is not necessarily conclusive for purposes of conjunctive administration because water rights are limited by actual beneficial use, regardless of decreed quantity. *Briggs*, 97 Idaho at 435, n.5, 546 P.2d at 390, n.5; Idaho Code § 42-220. While a senior has a right to use up to the full amount of his decreed right when necessary to achieve the authorized beneficial use, beneficial use is a “fluctuating limit” that depends on the circumstances as the district court recognized. Order at 87. It is also “a continuing obligation,” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997), and properly taken into account in the administration of water rights under chapter 6, Title 42 of the Idaho Code.

IDWR 2006 BR. at 31.

This argument follows IDWR’s rationale for evaluating material injury to the Surface Water Coalition’s water rights in that underlying case where the Director found:

. . . Because the amount of water necessary for beneficial use can be less than decreed or licensed quantities, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury. Thus, senior surface water right holders cannot demand that junior ground water right holders diverting water from a hydraulically-connected aquifer be required to make water available for diversion unless that water is necessary to accomplish an authorized beneficial use.

* * *

47. Contrary to the assertion of the Surface Water Coalition, depletion does not equate to material injury. . . .

Amended Order at 43 (In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irr. Dist. et al., May 2, 2005).

The Director completely ignored the senior's actual beneficial use and instead denied the mitigation plan without evaluating the non-participating senior's water use and reasoning that the Districts did not mitigate for all of their pumping depletions. This is an about-face from IDWR's prior conjunctive administration requirements, and plainly violates Idaho law.

Next, the statute the Director used for his proceeding does not include any "mitigation plan" standard or process. *See* Idaho Code. § 42-237a.g. At hearing Tim Luke stated that he didn't believe the Districts had any options to mitigate under the process used by IDWR. Tr. 378:5-9.

Consequently, the Districts filed their plan pursuant to CM Rule 43, the only agency rule that addresses mitigation plans in conjunctive administration. R. 1649-1650. Under CM Rule 43, IDWR is required to publish notice and hold a hearing on any proposed mitigation plan. *See* IDAPA 37.03.11.43. The rule includes a number of factors that the Director may consider in evaluating the efficacy of the plan. *See* CM Rule 43.03.a-o. The Director did not publish notice of the Districts' plan and performed no such analysis under the Rule 43 criteria. Instead, the

Director denied the plan outright on assumptions and a list of questions that he had about the plan. R. 1949-1950.

The failure to provide any process on the Districts’ plan led to Director’s immediate curtailment of all groundwater rights effective July 1, 2021. This action violated the Districts’ right to due process and should be reversed and set aside. *See infra*, Argument Part III (regarding standard for due process). Further, the Director’s failure to follow CM Rule 43 is similar to the failed “replacement water plan” process the Director attempted to employ years ago in response to the Surface Water Coalition delivery call. In that case on judicial review, the Court found as follows:

The Court sees no distinction between the “replacement water plans” ordered in this case and a mitigation plan. . . . *Once a mitigation plan has been proposed*, the Director must hold a hearing as determined necessary and follow the procedural guidelines for transfer, as set out in I.C. § 42-222, . . .

See Order on Petition for Judicial Review at 29 (A&B Irr. Dist. v. Spackman, Gooding County Dist. Ct., Fifth Jud. Dist., Case No. 2008-551, July 24, 2009) (emphasis in original).

IDWR did not appeal this decision or attempt to save its alleged “replacement water plan” process that did not follow CM Rule 43. It follows then that IDWR and its Director have no authority to deny a mitigation plan in this case without applying the procedure required under its own regulations.

Whereas the Director’s summary denial of the plan led to actual curtailment of the Districts’ members’ water rights for a critical week of the irrigation season, the Court should reverse and set aside the agency error accordingly.

VI. The Director Erred in Denying the Districts’ Futile Call Defense.

The Director’s error in failing to properly address the seniors’ actual beneficial use through a “reasonable in-season demand” and “crop water need” analysis led to his erroneous

denial of the Districts’ futile call defense. The conjunctive administration of senior surface water rights and junior ground water rights in Water District 37 requires consideration of certain “post-adjudication” factors, including those identified in CM Rule 42. *See* Pre-Hearing Tr. 50:17-20 (Director admitting CM Rule 42 factors are “an important guide”).

A senior is not entitled to his or her decreed quantity if that water will not be put to beneficial use. *See AFRD#2 v. IDWR*, 143 Idaho 862, 878 (2007) (“there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed”); *A&B Irr. Dist. v. IDWR*, 153 Idaho 500, 515 (2012) (“The CM Rules provide a list of factors that the Director may consider in his determination of a senior right holder’s material injury”). Moreover, depletion to a water source does not automatically constitute material injury to a water right.

With respect to those seniors potentially impacted by groundwater pumping the following evidence was presented at the hearing. First, Barbara Farms LLC (“Barbara”) owns water right 37-344A, priority date 4/6/1883, diversion rate 4 cfs (200 miner’s inches), place of use 301.9 acres. R. 2379. Mr. Fred Brossy testified at hearing as to the following crop mix²⁷ and acres irrigated for 2021:

<u>Crop Type</u>	<u>Acres</u>	<u>Last Day Irrigation</u>
Organic garden seed beans	21	Aug 30
Organic edible pinto beans	20	Aug 25
Organic purple barley	11	July 15
Organic malt barley/new seeding alfalfa	49.5	July 15
Organic winter wheat/new seeding alfalfa	12	July 15
Organic no-till edible pinto beans	16	Aug 25
Organic alfalfa green chop	71	Aug 30

²⁷ Barbara was also growing organic processing potatoes (21 acres) and organic garden seed beans (45 acres). However, these acres were supplied by water from American Falls Reservoir District #2 through a rental with the City of Shoshone. *See* R. 2733. The 2021 crop water requirement on these acres was met by an alternate water supply previously obtained by Barbara and AFRD#2’s water rights are not supplied by the Little Wood River. *See* CM Rule 42.01.g; *see also*, Water Right Nos. 01-6; 01-2064. The Director wholly ignored this additional water supply in his injury analysis.

Organic rye green chop/new seeding alfalfa	17	Sep 15
Total	217.5 acres	

Accordingly, Barbara’s 4 cfs was only used to irrigate 217.5 acres in 2021, not the full 301.9 acres identified on the water right. The Director failed to take into account the actual number of acres being irrigated in 2021 for purposes of his material injury analysis. See CM Rule 42.01.d.

Barbara irrigates with wheel line and pivot sprinklers, and gated pipe, and has unmeasured losses, including from pivot pump ponds back to the Little Wood River. Tr. 443:22-25; 444:1-6; 458:1-23. Again, the Director did not take into account the irrigation and conservation efficiencies for purposes of calculating actual crop water need for the 2021 irrigation season.

Next, Don Taber irrigates his “Home Farm” with water right 37-423, priority date 4/1/1883, diversion rate 0.3 cfs, place of use 295 acres.²⁸ R. 2861. Mr. Taber testified at hearing as to the following crop mix²⁹ and acres irrigated for 2021:

<u>Crop Type</u>	<u>Acres</u>	<u>Last Day Irrigation</u>
Alfalfa	61	Sep 30
Silage Corn	106	Sep 10
Malt Barley	62	July 10
Total	229 acres	

Accordingly, Mr. Taber’s 0.3 cfs was only being used to irrigate 229 acres at most in 2021, not the full 295 acres identified on the water right. Moreover, the quantity is insufficient to irrigate all of those acres (30 inches on 229 acres = 0.13 inch/acre). The Director failed to

²⁸ Mr. Taber identified 202 acres (96 alfalfa and 106 silage corn) irrigated with water right nos. 37-424 (4/1/1884) and 37-425 (4/1/1887). Curtailment of junior groundwater to fill these surface water rights would be futile in 2021. See *infra*.

²⁹ Mr. Taber also irrigates alfalfa (60 acres), silage corn (112 acres), and spring wheat (43 acres) (total=215 acres) with a supplemental ground water right 37-8401. R. 2889. However, his ground water right authorizes a diversion of 3 cfs for use on 248 irrigated acres. Accordingly, the Districts applied the balance of the supplemental ground water use (35 acres) to reduce the alfalfa acreage from 96 acres to 61 acres for purposes of this analysis.

take into account the actual number of acres being irrigated in 2021 as well as the availability of Mr. Taber’s supplemental ground water right 37-8401 for use on 248 acres. *See* CM Rule 42.01.d.; 42.01.g. Mr. Taber irrigates with hand and wheel lines, pivot sprinklers, and has piped his entire system from the point of diversion to the point of application. Tr. 680:21-22

Don Taber also leases and irrigates the adjacent “Ritter Farm” with water right 37-49, priority date 4/1/1883, diversion rate 4.2 cfs, place of use 215.7 acres. R. 2851. Mr. Taber testified at hearing as to the following crop mix and acres irrigated for 2021:

<u>Crop Type</u>	<u>Acres</u>	<u>Last Day Irrigation</u>
Alfalfa	73	Sep 20
Silage Corn	75	Sep 10
Sugar Beets	20	Sep 20
Total	168 acres	

Accordingly, Mr. Taber’s 4.2 cfs is being used to irrigate 168 acres in 2021, not the full 217.5 acres identified on the water right. Tr. 707:11-14. The Director failed to take into account the actual number of acres being irrigated in 2021. *See* CM Rule 42.01.d. Mr. Taber irrigates with wheel line and pivot sprinklers, and has piped his entire system from the point of diversion to the point of application. Tr. 689:13-17.

Mr. Taber further testified that he operates his “Home Farm,” the “Ritter Farm”, and the “7 Mile Ranch” as “one operation.” Tr. 703:5-11. Accordingly, the Director should have taken into account whether water rights are temporarily moved between properties and whether that supply is available for use at times when other rights may be curtailed. Tr. 703:10-11 (“Q. Able to move water back and forth if needed? A. Yes.”).

As to any water rights held by the above seniors with priority dates April 1, 1884 and junior, and all other seniors that testified at the hearing, the Director should have denied the

request for conjunctive administration as futile.³⁰ As set forth below, even assuming for argument's sake that the Model is correct in predicting an increase in flows in Silver Creek on a monthly basis, full curtailment of approximately 23,000 acres in the Triangle was only estimated to produce the following quantities (by the end of each month):

<u>Month</u>	<u>Curtailed CU AF</u>	<u>Silver Creek</u>	<u>CFS</u>	<u>AF</u>
July	7,214		22.7	1,398
August	6,737		28.0	1,720
September	3,502		26.5	1,578

R. 2116 (Table 2).

Applying IDWR's 2020 measured and calculated losses between the Sportsman's Access Gage and Station 10 on the Little Wood River, the table would be further revised as follows:

<u>Month</u>	<u>Curtailed CU AF</u>	<u>Silver Creek</u>	<u>CFS</u>	<u>AF</u>	
July	7,214		15.7	937	(33% loss)
August	6,737		22.4	1,376	(20% loss)
September	3,502		21.2	1,262	(20% loss)

R. 2119 (Table 3); R. 2116 (Table 2) (emphasis added).³¹

Kevin Lakey, the Watermaster, testified at the hearing regarding projected curtailment dates of water rights to the Little Wood River:

Q. [MR. FLETCHER]. Have you analyzed which senior priorities in Little Wood and Silver Creek will benefit if junior groundwater rights are curtailed in 2021?

A. [MR. LAKEY]. Yes.

³⁰ The water rights that the defense of futile call apply to are as follows: April 1, 1884 (37-472, Rod Hubsmith), (37-424, Don Taber), (37-973, Barbara Farms LLC); April 30, 1884 (37-321, 7 Mile Ranch LLC); May 5, 1884 (37-10561A, 37-10561B, Big Wood Farms LLC); May 15, 1884 (37-327, Bill Arkoosh); June 3, 1884 (37-460, John Arkoosh); July 17, 1884 (37-461, John Arkoosh); April 1, 1885 (37-328, John Arkoosh); April 15, 1885 (37-432, Charles Newell); May 15, 1885 (37-21401, BWCC); April 1, 1886 (37-272, BWCC); May 15, 1886 (37-329, Bill Arkoosh); June 1, 1886 (37-351B, Lawrence Schoen); April 1, 1887 (37-425, Don Taber), (37-21403, BWCC); June 15, 1887 (37-352B, Lawrence Schoen); April 1, 1890 (37-176, Bill Arkoosh); April 1, 1905 (37-1127, John Arkoosh); November 6, 1905 (37-13114, BWCC); August 1, 1906 (37-1131, Bill Arkoosh); November 13, 1907 (37-13043, BWCC); April 8, 1908 (37-1126, Carl Legg). See R. 2970-73.

³¹ IDWR's losses were calculated and measured between the 20th of each month. The August estimated value (20%) was applied to September.

Q. Can you explain how you did that analysis?

A. I used numbers from Jennifer Sukow's work that gave me an idea of how much water would return to Silver Creek or show up in Silver Creek over certain days. So using her numbers, I went back to my estimated priority cut dates and said if there were certain priority cuts that we're estimating, and what Jennifer was estimating would be in Silver Creek more than what we had, and so I made the comparison of the two, and started saying, well, which priority dates might be left on.

* * *

Q. And what was your conclusion in that analysis? What priority dates would be restored if curtailment took place on July 1?

A. There were varying effects on priority rates – or priority dates and the rates we would be able to deliver. The September of '83 would have gotten some, but not their full right. The June of '83 would have gotten, I believe, all of their water. The April 6th and April 1st priorities would receive water with the July 1 curtailment.

Tr. 787:12-25; 788:11-20.

As set forth above, the Watermaster testified that based on the Model's simulated curtailment of all groundwater use in the Bellevue Triangle, only the April 1, 1883, the April 6, 1883, and a portion of the September 9, 1883³² Little Wood and Silver Creek water rights would receive water as a result of that curtailment. *See Id.* Greg Sullivan, the expert for Sun Valley Company and the Cities, confirmed this testimony reviewing the list of water rights and the fact that other water users (not calling seniors in this case) would receive water as well. Tr. 1427:25; 1428-1430. There was no contrary evidence. Curtailing all 23,000 acres of junior groundwater use to supply any water rights beyond the three 1883 rights held by Barbara (4 cfs) and Taber/Ritter (4.5 cfs), would therefore be futile and should have been denied accordingly.

³² The September 1883 rights are held by Picabo Livestock which did not make a demand for administration. *See* Tr. 1391:10-11, 1405:6-26.

In general, the “underlying idea behind the Futile Call Doctrine is that the primary purpose of water appropriation is to put water to beneficial use. . . . If a junior is required to respond to a call for water and the outcome will result in no beneficial use by the senior but only in the waste of water, then the junior is excused from responding to the call, and the waste, which is factually and legally undesirable, will be avoided.” Law of Water Rights and Resources § 5:35 (2020) (citing *Kelly v. Teton Prairie LLC*, 376 P.3d 143 (Mont. 2016)).

The Idaho Supreme Court recently addressed “futile call” in *Sylte v. IDWR*, 165 Idaho 238 (2019).³³ In *Sylte* the Court noted:

The futile call doctrine in Idaho “embodies a policy against the waste of irrigation water.” *Gilbert v. Smith*, 97, Idaho 735, 739, 552 P.2d 1220, 1224 (1976); *see also, Hill v. Green*, 47 Idaho 157, 274 P. 100, 110-11 (1928). Generally, this provides if . . . seepage, evaporation, channel absorption of other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water.

165 Idaho at 245 (citing *Gilbert*, 97 Idaho at 739).

Applying the facts of this case to the Supreme Court’s “futile call” standard it is clear that water in a “sufficient quantity” would not reach the senior water rights in this matter with priorities of April 1, 1884 and junior in order to apply it to beneficial use during the 2021 irrigation season. *See infra*, fn.9. Moreover, the evidence is undisputed that were large conveyance losses in the Little Wood River below the Bellevue Triangle at the Highway 93 crossing, including at various beaver dams that were present during the hearing. R. 2119-21; R. 1576; R. 3145-48. The pictures of the various dams is striking as it shows pooling of water,

³³ The CM Rules define “futile call” as “A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource.” CM Rule 10.08.

inducing losses and preventing water from moving downstream. The Director did not take this factor into account at all in evaluating the results of curtailment.

Furthermore, the various seniors testified at the hearing that their rights had been or would be curtailed, which even if curtailed groundwater would supply a right junior to September 9, 1883, it would be too late anyway. *See* Tr. 506-07 (Mr. Hubsmith explaining that his right is projected to go off June 15th and that he will not “make another cutting”); Hubsmith R. 2787 (timothy grass hay and pasture, last irrigation 9/30); Tr. 630:15-19 (Mr. Arkoosh testifying that his water will be off shortly after his first cutting and he’ll be lucky to get it watered again to get a second cutting); R. 2897(Alfalfa, last irrigation 9/1); R. 2792 (potatoes and new seeding oats/alfalfa, last irrigation 9/15); Tr. 697:24-25 (“It probably would not benefit the corn because it would be dead.”); Tr. 710:20-25; 711:1-5 (Mr. Taber explaining that there would be no benefit for wheat or sugar beets); R. 2856, R. 2723; Tr. 724:23-24 (Mr. Legg testifying he is “not currently irrigating” his pasture); R. 2822 (new seeding pasture, last irrigation 9/30, but not planted); Tr. 736:13-18 (Mr. Newell testifying that his 4/15/1885 right was going off “tomorrow or the next day”); R. 2832 (alfalfa hay, grass hay and pasture, oat hay, last irrigation 9/30); Tr. 653:5-6, 662:3-11 (Mr. Huyser explaining his 1884 right was cut on June 2nd, and explaining what happens to his wheat crops for remainder of irrigation season); R. 2747 (winter wheat, last irrigation 7/15; spring wheat, last irrigation 7/25).

Moreover, the evidence showed that in prior drought years, rights junior to 1883 have been regularly curtailed during the irrigation season regardless of groundwater pumping. Tr. 504:15-21; 626:3-4; 700:3-16; 702:10-12. The fact such administration would be “futile” is further proven by the Model curtailment scenarios which predict that 67% of the curtailed groundwater would remain in the aquifer for July, August, and September 2021. *See* R. 2116,

Table 2 (predicting 67% increase in aquifer storage). The seniors' own expert confirmed that such action was not an "optimum utilization of the water resource" for the balance of the 2021 irrigation season. Tr. 986:5-25; 987:1-2.

As set forth above, the evidence in the record showed that only the water rights of April 1, 1883 and April 6, 1883 would suffer possible injury due to groundwater pumping in the Triangle in 2021. Even if all 23,000 acres are curtailed, only water rights 37-49 (Ritter), 37-423 (Taber), and 37-344A (Barbara Farms LLC), were projected to receive any water resulting from curtailment during the 2021 irrigation season.

Similar to the surface rights with priorities April 1, 1884 and junior, the Director should have denied conjunctive administration of any ground water rights in order to satisfy BWCC's water right 37-444 (April 6, 1883) during the 2021 irrigation season. At hearing, BWCC's President Carl Pendleton testified that the company does not deliver water right 37-444 once it closes the Dietrich Canal. Tr. 41:1; 542:1-17. ("Q. . . would Big Wood Canal Company be able to take delivery of any of its Little Wood rights this year? A. We would not.") (emphasis added). Instead, the water dedicated to that right remains in the Little Wood River, available to fill other senior water rights or those just junior (i.e., June 14, 1883 or September 1, 1883). Since BWCC discontinued deliveries on June 10th, it was not possible for the company to put water right 37-444 to beneficial use for the rest of the 2021 irrigation season. Tr. 548:24-25; 549:1-10. As such, any curtailment of junior ground water rights for the benefit of that right was futile.

Despite the above evidence, the Director denied the Districts' "futile call" defense on the following grounds:

As previously discussed, the record establishes that curtailment of junior ground water pumping in the Bellevue Triangle will provide water in useable quantities for at least some of the senior water users, a fact that South Valley and Galena concede. The fact that curtailment will not provide usable quantities to all senior

surface water right holders who have an insufficient supply, therefore does not render the curtailment “futile.” It simply means that, in years of drought, some senior water right holders would have been curtailed regardless of ground water pumping in the Bellevue Triangle. That does not change the fact that curtailment will provide useable quantities of water to some senior surface water users.

* * *

Further, South Valley’s and Galena’s argument that curtailment would be futile incorrectly assumes that the Director may only consider the benefits of curtailment to the senior water rights held by water users who appeared in this proceeding. This case is not a response to a delivery call by individual senior water right holders, however, and Idaho Code § 42-237a.g., does not limit the Director to considering the benefits of curtailment to senior water users who have appeared in an administrative proceeding. In addition, the senior water right holders who appeared in this proceeding are not necessarily the only water users on Silver Creek and the Little Wood River who would benefit from curtailment. Almost all water rights on Silver Creek and the Little Wood River are senior to ground water rights in the Bellevue Triangle. Any of these surface water rights would be allowed to divert flows resulting from curtailment, within the limits of their individual priorities. Tr. p. 898.

R. 1909.

In essence, the Director admitted that curtailment would be futile for those surface water rights that would not receive any water (i.e. May 1, 1884 and junior). However, the Director determined that since some water rights (1883 and senior) would receive water from curtailment then the futile call doctrine did not apply at all. The Director’s failure to analyze the individual “reasonable in-season demand” and “crop water needs” of the individual water users in this case does not excuse his misapplication of the futile call doctrine. While it may not be futile to some water users, it certainly was to the majority of water rights to the Little Wood River. The Director was obligated to perform such an individual analysis for purposes of administration and potential mitigation as the water rights were held by individual water users. Further, the Director’s determination had critical implications for the Districts’ right to mitigate and compounded the error in his denial of the proposed mitigation plan.

Further, the Director justified his denial of the defense on the basis of water rights and water users not participating in this case. At the outset of his proceeding, the Director stated that he would require the seniors to put on evidence of actual injury to a water right. *See* Pre-Hearing Tr. 50:1-3. However, that representation proved false as the Director rearranged the table after it was set. After all, why did the Director set a “notice of participation” deadline if a senior water user could reap the benefits of curtailment without having to participate or put on any evidence?
R. 1.

Despite claiming that curtailment would benefit these water rights, there was no evidence or testimony in the record to support that finding. The Director’s decision in this regard violates Idaho’s APA as it is not supported by substantial evidence and it completely violates the Districts’ right to due process as they were precluded from discovering the basis of this finding since the water users did not have to participate. In sum, the Director’s denial of the futile call defense is erroneous and should be set aside.

VII. The Director’s Order Violates Optimum Utilization of the State’s Water Resources.

The Director was required to evaluate the proposed 2021 conjunctive administration in the context of Idaho’s constitution and caselaw regarding “optimum use” of the State’s water resources. The Director curtailed 23,000 acres in Blaine County in order to support the temporary irrigation of 650 acres located downstream. As a comparison, the administrative action would be the equivalent of curtailing ninety-eight (98) acres in order to supply water to two (2) acres ($23,000/650 = 0.02$). Idaho law provides the following policy considerations when evaluating conjunctive administration in this context.

First, the Idaho Constitution requires consideration of “optimum use” of the state’s water resources. *See* Idaho Const., Art XV, § 7. The Legislature passed the Ground Water Act in part, to promote such optimum use and development as the Idaho Supreme Court explained in *Baker*:

We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. art 15, § 7. Full economic development of Idaho’s ground water resources can and will benefit all of our citizens.

Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 584, 513 P.2d 627, 636 (1973).

The Court in *Clear Springs Foods, Inc.* affirmed the same when it stated that “the policy of securing the maximum use and benefit, and least wasteful use, of the State’s water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.” 150 Idaho 808, 252 P.3d at 89. Proper conjunctive administration requires the Director to take “beneficial use” into account, as well as optimum use of available water.

Further, Idaho Code § 42-101 charges the Director with the following concerning irrigation rights:

Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, providing for its use, shall equally guard all the various interests involved.

Idaho Code § 42-101 (emphasis added).

While the prior appropriation doctrine controls distribution of water to the various rights, this provision has important consideration in the context of this proceeding where the Director did not initiate the matter until May 4, 2021, well after the irrigation season began. Faced with a decision as to how to administer for the balance of the irrigation season, the Director was required to “equally guard all the various interests” of the seniors and juniors and make a decision in the best interest of the State at this late date. Curtailing 98% of the acres already

receiving irrigation water in order to supply water to 2% was not “optimum utilization of the resource” or “economical,” and such arbitrary action thwarted the continued industrial prosperity of the state for the rest of the 2021 irrigation season.³⁴

Next, the Ground Water Act specifically requires consideration of the following:

The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, 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.

Idaho Code § 42-226.

The Idaho Supreme Court addressed the Ground Water Act’s concepts of “reasonable use,” “beneficial use, and “full economic development” or “optimum development of water resources” in *IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897 (2016) (hereinafter “*Rangen*” case).

In *Rangen*, the Court held the following:

The Court has previously held that hydrologically connected surface and ground waters must be managed conjunctively. . . . “While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception . . . the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost.” . . . As we recently stated in *Clear Springs*, the policy of securing the maximum use and benefit, and least wasteful use of Idaho’s water resources, has long been the policy in Idaho. . . . This policy limits the prior appropriation doctrine by excluding from its purview water that is not being put to beneficial use. . . . Necessarily, not all of the water collected due to the curtailment will accrue to the senior water right holder; some will remain in the aquifer and some will flow to other tributary springs. This complexity can make it very difficult to balance a senior right holder’s interest in receiving additional water against the State’s interest in securing the maximum use and benefit, and least wasteful use, of its water resources. In light of this challenging balancing requirement, it is necessary that the Director have some discretion to determine in an delivery call proceeding whether there is a point where curtailment is unjustified because vast amounts of land would be curtailed to

³⁴ There were 23,614 acres at issue (23,000 in the Bellevue Triangle, 614 in the Little Wood), of which Little Wood comprises only 2.6%. The Director’s claim that curtailment would benefit non-parties’ surface water rights is not supported by substantial evidence in the record as none of those seniors participated in the hearing or confirmed their beneficial use for the 2021 irrigation season. R. 1949.

produce a very small amount of water to the caller. As discussed, Idaho law contemplates a balance between the “bedrock principles” of priority of right and beneficial use. . . . The Director is authorized to undertake this balancing act, subject, as he acknowledged here, to the limitations of Idaho law.

369 P.3d at 908-910.

The Director’s discretion and “balancing requirement” in conjunctive administration in this proceeding is further tempered by the arbitrary timing. This is a case where crops were planted, receiving irrigation water, and proceeding to harvest. Despite having below average forecasts as early as January, and performing modeling work in March, the Director chose to wait until May to initiate the contested case and until July 1st to implement actual curtailment.

The optimum use of water resources under these unique circumstances required the Director to consider the best use of available water in the public interest. Curtailing 23,000 acres to supply a limited quantity of water to 650 acres was not “securing the maximum use and benefit, and least wasteful use” of water supplies in the Triangle and Silver Creek/Little Wood area for the balance of the 2021 irrigation season. Whereas, IDWR’s own staff report showed that 67% of the curtailed water would remain in the aquifer and not be put to beneficial use by anyone, senior or junior, that waste of resources tipped the scale in the favor of the juniors at that point in time. R. 2116. Stated another way, this state policy does not condone curtailing 23,000 acres in order to save 650 for the balance of the 2021 season, particularly where the Districts had a plan to mitigate and provide water to those acres.³⁵

The timing of the proposed curtailment further warranted against its order this summer. Junior ground water users entered into contracts, planted crops, and initiated two months of

³⁵ Any of the drought induced losses suffered by Mr. Taber were covered by a multi-peril drought insurance policy. Tr. 706:1-5; 708:7-9; 712:2-7. Given that remedy, the disparity is even greater as the Director would be curtailing 23,000 acres to supply limited water to Barbara Farms’ 217.5 acres, less than 1% of the acres curtailed (23,000/217.5 = 0.09).

irrigation. The Director and IDWR never indicated that a new proceeding under section 42-237.a.g would be initiated during the irrigation season for purposes of water right administration. Instead, IDWR and the Director had always contemplated using the CM Rules for conjunctive administration of surface and groundwater resources in Water District 37. Those representations were made when ground water rights were brought under the administrative regime of Water District 37 back in 2014. R. 162-65.

At no time did anyone at the State indicate a different process would be employed for administration. Tim Luke admitted the same at hearing. Tr. 312-13. This “unfair surprise” to the groundwater users was not in the interest of the maximum use of available water for the balance of the 2021 irrigation season. On the flip side seniors had made decisions anticipating a lower water supply due to a lower snowpack and lack of precipitation. Tr. 457:8-15 (“we chose not to grow corn or as many acres as of beans based on potentially shorter water season . . .Q. That decision was made last winter? A. It was made during the course of the winter, yes”); 485:23-25; 486:1-7; 506:24-25 (“I planted [Timothy hay] 2 years ago to survive shortfalls of water”); 680:7-9. Seniors testified they planted grain and rented additional water for purposes of their crop decisions this year. Those decisions were made well in advance of any proposed conjunctive administration that was initiated on May 4, 2021.

Despite these facts, the Director proceeded to curtail all groundwater use on July 1st. R. 1919. The Director failed to consider the “optimum use of the resource” for the 2021 irrigation season and only alleged that section 42-226 did not apply. R. 1913-14. While a reasonable pumping level may only apply as between ground water rights, the Director’s justification fails to take into account the constitution, the Supreme Court’s decisions in *Baker* and *Rangen*, and the prejudicial timing of his decision that precluded use of 67% of the available groundwater in

order to supply limited surface water to 615 acres. Choosing to curtail groundwater acres in the middle of the season pursuant to an unprecedented process was contrary to optimum use of available water for planted crops.

The Director's complete failure to consider the optimum use of the state's water resources for 2021 is erroneous and should be set aside pursuant to Idaho Code § 67-5279(3). The Director had an obligation to apply the principle, particularly in light of the timing and the fact mitigation could have been supplied by the Districts.

VIII. The Districts are Entitled to Attorneys' Fees on Judicial Review Pursuant to Idaho Code § 12-117.

As a result of the Director's errors and violation of Idaho's APA, the Districts have been forced to pursue this appeal and petition for judicial review. The Court should award the Districts' reasonable attorneys' fees under Idaho law.

Idaho Code § 12-117(1) provides the following:

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency ... and a person ... the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees ... if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

Whereas the Director failed to follow established statutes and rules for the proper conjunctive administration of water rights in Water District 37, the agency acted without a reasonable basis in fact or law. The violation of the Districts' rights to due process is further cause to support an award of fees in this case. In sum, the Court should award the Districts' attorneys' fees pursuant to Idaho Code § 12-117 accordingly. *See Rangen, Inc. v. IDWR*, 159 Idaho 798, 367 P.3d 193 (2016).

CONCLUSION

The Department can properly implement conjunctive administration within Water District 37 provided it adheres to the process intended and approved by the Legislature. *See* Idaho Code §§ 42-602, 603, 607, CM Rule 30. The CM Rules serve as the vehicle to accomplish such administration. IDWR and this Court previously agreed.

Here, the Director for the first time in the history of the Ground Water Act relied on section 42-237a.g to create a contested case to curtail groundwater in a limited portion of a greater groundwater management area, without determining an area of common groundwater supply. The Director exacerbated this error by reverting to a “strict priority” curtailment order, with no regard for the senior’s beneficial use or reasonable in season demands. In doing so, he violated Idaho law and erroneously curtailed 23,000 acres of groundwater rights.

In addition, the Director violated well-established principles of due process by completing technical work behind closed doors, ramming through a complex and highly technical contested case within a matter of days, and curtailing 23,000 acres during the middle of the irrigation season. The Director’s outright denial of the Districts’ mitigation plan without a hearing before curtailment compounded this error and deprived crops of water during an extremely hot and dry week.

The Director failed to follow the CM Rules, the prior appropriation doctrine, and deprived the Districts of constitutional due process. The Court should correct these errors and set aside the Final Order and the Order summarily denying the mitigation plan.

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DATED this 22nd day of October, 2021.

BARKER ROSHOLT & SIMPSON LLP

/s/ ALBERT P. BARKER

Albert P. Barker

*Attorneys for South Valley Ground Water
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of October, 2021, the foregoing was filed, served, and copied as shown below.

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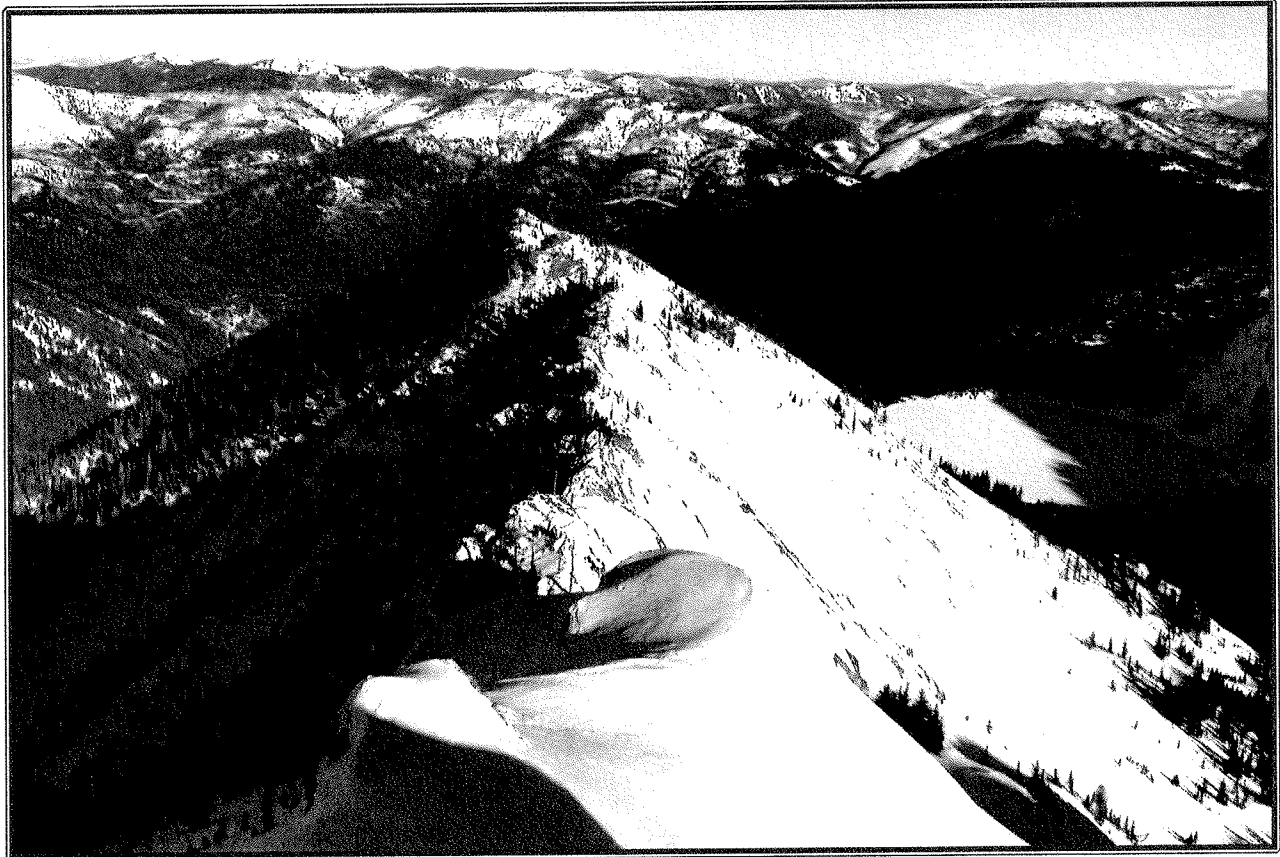
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ADDENDUM A

Natural Resources Conservation Service

Idaho Water Supply Outlook Report

January 1, 2021



At 6,838 feet, Stevens Peak is the highest mountain in the Bitterroot Range along the Idaho-Montana divide. Photo taken by Peter Youngblood, December 6, 2020

Water year 2021 started off slowly across Idaho, except in high elevation areas within the Panhandle basins as seen near Mullan, Idaho on the popular hike to Stevens Peak. October 1 is generally the start of the climatological wet season in the Intermountain West and marks the start of each water year. Typically, the combination of precipitation and sustained sub-freezing daily temperatures align in November to start the seasonal snowpack building process across Idaho's mountains, but can start as early as September in the highest elevations. Our "wet season", beginning in Autumn and lasting through approximately May, builds the mountain snowpack reservoir that is critical to delivering water supply security through the West's subsequent hot and dry summer months.

IDAHO WATER SUPPLY OUTLOOK REPORT

January 1, 2021

Overview

Water year 2021 (WY 2021) started off slowly with below normal precipitation during the fall across most of Idaho and the Snake River headwaters (Fig. 2). As of January 1, total snowpack and precipitation are below normal across all basins, with the Snake Basin above Palisades, Clearwater, Coeur d'Alene-St. Joe, and Pend Oreille-Kootenai basins faring closest to normal conditions (Fig. 2 and 3).

Despite the slow start, there's no need to fret; the water-year is young and there are several months left in our snow accumulation season. At the time of compiling this report, early January storms increased total snowpack across all basins. The Panhandle and Clearwater basins have near or slightly above normal snowpack. Basin snowpack conditions at report time are: Salmon Basin at 84%, West Central basins range from ~84 to 93%, Wood and Lost basins are ~57 to 82%, Upper Snake basins are ~90%, Southern Snake basins range from ~63 to 90%, and Bear Basin is 79% of normal. Although these early January storms increased precipitation and snowpack levels in the Wood, Lost, and Southern Snake basins, these areas remain well below normal snowpack levels. Hopefully favorable storm tracks will bring much needed moisture to these basins in the months to come.

Water year 2020 antecedent conditions

At the end of the 2020 water year (September 30, 2020), dry conditions prevailed across Idaho with 71% of the land area designated as experiencing drought according to the U.S. Drought Monitor. The most severe drought levels were felt in the Wood and Lost basins. Infrequent winter storms from the southwest in 2020 resulted in a thinner mountain snowpack (e.g. lower snow water equivalent) that was approximately 30% below normal for that region. If folks thought it was drier than other years, your perception was correct; 2020 was the driest water year on record in the Big and Little Wood basins based on 38 years of NRCS SNOTEL precipitation data.

An often forgotten influence on the timing and amount of spring streamflow is how saturated the soil is before winter starts. Typically, fall rainstorms increase soil moisture before the ground freezes and the snow starts piling up. Once temperatures warm, a portion of the snowmelt water that would normally runoff, is captured and 'fills the soil reservoir' before contributing to increased streamflow. Right now, water supply users can expect dry soil conditions due to a lack of rain this fall across Idaho and the Upper Snake basins. Dry, pre-existing soil conditions may delay streamflow volume and peak timing. Keep in mind, however, that differences in local soil moisture and geological

conditions will influence how this stage of the 2021 snowmelt season occurs across Idaho.

Reservoir storage is in good shape to provide adequate water supply for the upcoming irrigation season. With the exception of Magic and Mackay, reservoirs statewide have sufficient carryover. Based on 30-year average winter base streamflow data into reservoirs, the majority of reservoirs are projected to need less than 76% of average streamflow during the 2021 runoff season to meet downstream water supply needs (Boise 59%, Snake Basin above Palisades 69%). The exceptions are Mackay and Magic reservoirs, which require near normal streamflow volume to meet demand.

By the end of December 2020, drought conditions across Idaho improved slightly with 63% of land area under a drought designation (an 8% reduction). Conditions improved primarily in northern Idaho (within and north of Idaho County/ the Salmon Basin).

Water year 2021 winter snowpack development

Northern Idaho (Panhandle and Clearwater basins) received the most early season precipitation in October resulting in an above normal early season snowpack. The Snake Basin above Palisades also received early snowfall and started WY 2021 off strong.

During the second and third weeks of November, wet conditions increased total snowpack and precipitation statewide, with all basins, except for the Little Wood and Big Lost, recording near or above normal snowpack. Even with prevalent wet conditions in mid-November, the Wood and Lost basins did not receive as much precipitation compared to other watersheds south of the Clearwater basin. Throughout the fall, predominant storm tracks lead to higher precipitation amounts in basins either north or south of the Salmon-Clearwater basin boundary. The last week of November was dry, leaving a majority of the basins with below normal total precipitation this month.

December was a particularly dry month with below normal total precipitation across the state (Fig. 1). The Panhandle and Clearwater basins received the most precipitation in December; these basins were the only ones with total precipitation above 77% of the 30-year historic average. During December, the Big and Little Wood basins, and the Big Lost Basin were the driest in the state with precipitation totaling ~30 to 50% of normal.

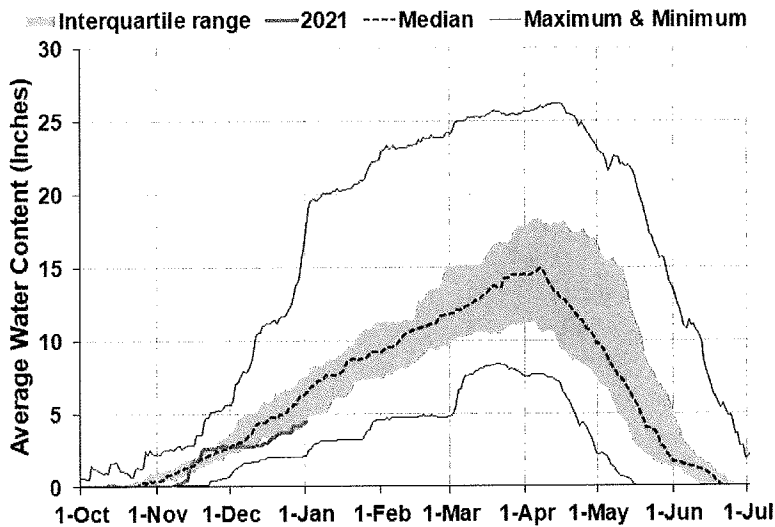
At the end of 2020, three months into WY 2021, much of the Idaho's snowpack remains below normal (Fig. 3). The Clearwater Basin, Boise Basin, and Snake Basin above Palisades fared the best with snowpack near 90% compared to the 30-year normal. Several basins, including the Payette, Raft, Henry Fork, Salmon, and the Panhandle basins were ~80 to 88% of normal, which bodes well for reaching the normal snowpack peak by April 1. As of January 1, the majority of the Southern Snake basins have below normal snowpack and range from ~60 to 80%. The Big and Little Wood



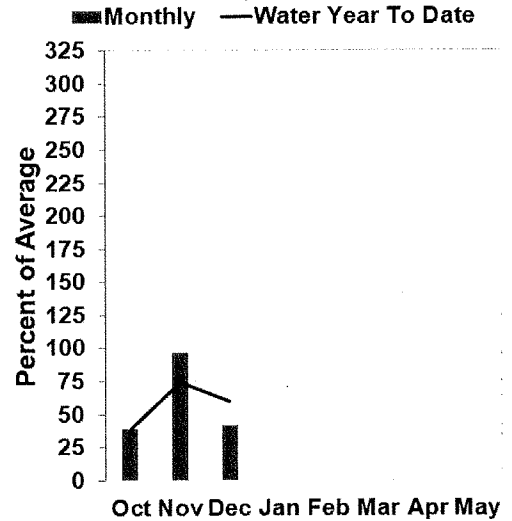
Wood & Lost River Basins

January 1, 2021

Current Snowpack and Historic Range



Precipitation



WATER SUPPLY OUTLOOK

Northwest trending storm tracks across Idaho and the Pacific Northwest resulted in the majority of precipitation falling before reaching the Wood and Lost basins, leaving these basins with below normal total precipitation. Water year precipitation totals are: 64% of normal in the Big Wood, 52% of normal in the Little Wood, and 49% of normal in the Big Lost Basin (Fig. 2). Outside of one wet week in mid-November, the water year has been very dry in these basins. The snowpack was only marginally better with respect to the 30-year normal, with the Big Wood at 69% of normal, the Little Wood at 52% of normal, and the Big Lost at 57% of normal (Fig. 3). Current snowpack values compared to 2020 January 1 conditions show the Big Wood snowpack is slightly above, while the Little Wood and Big Lost basins are slightly below last year's snowpack total. At report time, early January snowstorms increased snowpack across these basins to ~60 to 70% of normal. These basins need above normal total precipitation during the coming months to make up the observed snowpack deficit.

Reservoir storage in the Big and Little Wood basins reflect both the current below normal snowpack conditions and last year's below normal water year (snowpack and runoff). Magic Reservoir storage is 32% of January 1 normal storage, and Little Wood is 74% of normal. Mackay Reservoir is at 99% of normal storage. Due to high uncertainty with early season forecasts, no streamflow forecasts are available for January 1 in the Wood and Lost basins.

Wood and Lost Basins Streamflow Forecasts - January 1, 2021

Forecast Point	Forecast Exceedance Probabilities for Risk Assessment							
	Forecast Period	Projected Volume						30yr Avg (KAF)
		90% (KAF)	70% (KAF)	50% (KAF)	% Avg	30% (KAF)	10% (KAF)	

Reservoir Storage (KAF): End of December					Watershed Snowpack Analysis: January 1, 2021			
Reservoir Name	Current (KAF)	Last YR	Average (KAF)	Capacity (KAF)	Basin Name	# of Sites	% of Median 2021	% of Median 2020
Mackay Reservoir	21.6	34.2	21.8	44.4	Camas-Beaver Creeks	4	64%	96%
Little Wood Reservoir	10.3	18.8	13.8	30.0	Birch-Medicine Lodge Creeks	2	70%	87%
Magic Reservoir	20.7	123.0	64.5	191.5	Little Lost River	3	67%	75%
					Big Lost River ab Mackay	4	58%	64%
					Big Lost Basin Total	5	57%	67%
					Fish Creek	0		
					Little Wood ab Resv	4	52%	61%
					Big Wood River ab Hailey	6	62%	67%
					Camas Creek	4	80%	48%
					Birch-Medicine Lodge-Camas-Beaver	6	66%	93%
					Total	6	66%	93%
					Little Wood Basin Total	4	52%	61%
					Big Wood Basin Total	10	69%	60%

Natural Resources Conservation Service

Idaho Water Supply Outlook Report

February 1, 2021



This is how we protect others and ourselves while sampling snow. Mores Creek Summit Snow Course and SNOTEL is a frequently visited site due to its proximity to Boise, ID.

Photo taken by Mark Robertson, January 29, 2021

During January, drier and warmer than normal conditions persisted for the majority of Idaho, delaying significant snowpack (and future water supply) increases across the state. We started the water year with the hope of a strong La Niña pattern bringing us an abundance of snow but are still waiting... However, we have a 'reservoir half-full' attitude and are optimistic there's plenty of winter left to make up the below normal conditions. On the bright side, the Panhandle, Weiser, Payette, Boise, Wood and Lost basins received near to above normal precipitation in January. This field photo at the Mores Creek Snow Course in the Boise River Basin, one of eighty snow courses measured this month across the Idaho network, shows the near normal snowpack and the not so normal action of wearing masks in the field. Like everyone, we've adapted to the COVID-19 pandemic and although there's been a few curveballs, our team and cooperators have risen to the challenge. Throughout the winter, 50 to 115 snow courses are manually measured each month as we carry out the NRCS mission to provide valuable water supply information to water users and forecast hydrologists.

IDAHO WATER SUPPLY OUTLOOK REPORT

February 1, 2021

Overview and winter outlook

Across all basins, the snowpack continues to increase slowly during water year 2021 (WY21). Despite a few large storms at the beginning and end of January, snowpack and precipitation totals are below normal across all basins as of February 1. An atmospheric river event that dumped several feet of snow in the Sierra Mountains of California, also benefited Idaho's Wood and Lost basins. During the last week of January, this region finally experienced large increases in their snow water content. Hopefully, storm tracks will continue to bring much needed moisture to the Southern Snake River, Wood, and Lost basins and help relieve drought conditions affecting these regions. The one month outlook from NOAA's Climate Prediction Center indicates that temperatures will likely remain colder than normal throughout Idaho. Increased probability of more precipitation than normal is predicted across the eastern half of Idaho, from the Panhandle down to Utah.

Snowpack

At the end of January, four months into WY21, snowpack across Idaho remains below normal. Bear River basin is the driest at 67%, the Pend Oreille-Kootenai-Spokane basin is at 83%, and the Snake River basins (lower, middle, and upper) are 81 to 86% of normal. Thanks to a few large storm events during January, snow water content (SWE) increased in all basins from 0.8" to 13" over the month. Storm tracks favored central Idaho with near or above normal snowfall in this region. The rest of the state, for the most part, experienced below normal snowfall in January.

Despite SWE increases across the state, some basins fell further behind compared to the 30-year normal and some basins started to catch up to the historical normal snowpack levels. As of February 1, basins that gained more snow and moved closer to a normal snowpack include: Pend Oreille-Kootenai basin (90%), Salmon (86%), Weiser (92%), Payette (95%), Boise (92%), Big Wood (82%), Little Wood (73%), Big Lost (70%), Little Lost (82%), Birch-Medicine Lodge-Beaver-Camas (83%), Henrys Fork-Teton (89%). Basins that fell further behind by the end of January include: Coeur d'Alene-St. Joe (70%), Clearwater (81%), Snake basin above Palisades (82%), Bear (68%), Willow-Blackfoot-Portneuf (72%), and all the Southern Snake River basins. February 1 snowpack levels in the Southern Snake River basins are: Owhyee (53%), Bruneau (58%), Salmon Falls (62%), Goose Creek (70%), and Raft at (81%).

Precipitation

During January, storm tracks heavily favored the Pend Oreille-Kootenai, West Central, Wood, and Lost basins with near to above normal precipitation for the month. The Salmon Basin received 92% of normal precipitation for January. All other basins were well below normal, and only received 57% to 88% of the normal amount of precipitation that typically occurs in the month. The basins south of the Snake River plain fared the worst and were very dry. Looking at the total precipitation since October 1, 2020, all basins in Idaho are below normal and range from 63% to 91% of normal.

Above average air temperatures across Idaho in January resulted in a few rain on snow events in Northern Idaho that melted previously fallen snow. Throughout Idaho, less snow has accumulated at lower elevations compared to the 30-year normal because either precipitation has fallen as rain instead of snow or air temperatures were warm enough to melt the snow.

Water supply

NRCS generates streamflow forecasts for a range of exceedance volumes in order to provide water users with information specific to their needs. Currently, forecast streamflow volumes at the 50% exceedance probability indicates streamflow will be below normal across most of Idaho. Streamflow conditions are predicted to be near normal in the Pend Oreille-Kootenai basin. We have concerns about adequate water supply in the Southern Snake River basins where there is less time remaining to accumulate more snow. In these basins, for the period between March through July, forecasts range from 40 to 60% of normal streamflow volume. Despite the below normal snowpack, we anticipate there's enough reservoir storage to meet water supply demands in the Upper Snake River system, Bear and Owyhee River basins at report time.

Please keep in mind that February 1 streamflow forecasts are affected by the inherent uncertainty in (1) how the snowpack develops during the remaining winter months and (2) the frequency and amount of spring precipitation. Water users can expect streamflow forecasts, issued by the National Water and Climate Center team, to become more accurate as we near peak snowpack. Streamflow, snowpack, and precipitation data for each basin can be accessed [here](#).

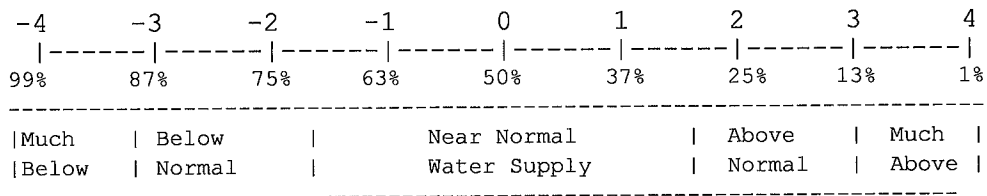
IDAHO SURFACE WATER SUPPLY INDEX (SWSI) February 1, 2021

The Surface Water Supply Index (SWSI) is a predictive indicator of surface water availability within a watershed for the spring and summer water use season. The index is calculated by combining pre-runoff reservoir storage (carryover) with forecasts of spring and summer streamflow. SWSI values are scaled from +4.0 (abundant supply) to -4.0 (extremely dry), with a value of zero indicating a median water supply as compared to historical occurrences. The SWSI analysis period is from 1981 to present.

SWSI values provide a more comprehensive outlook of water availability by combining streamflow forecasts and reservoir storage where appropriate. The SWSI index allows comparison of water availability between basins for drought or flood severity analysis. Threshold SWSI values have been determined for some basins to indicate the potential for agricultural irrigation water shortages.

BASIN or REGION	SWSI Value	Most Recent Year With Similar SWSI Value	Agricultural Water Supply Shortage May Occur When SWSI is Less Than
Spokane	-0.5	2019	NA
Clearwater	-1.6	2013	NA
Salmon	-2.2	2004	NA
Weiser	0.0	2003	NA
Payette	-1.3	2020	NA
Boise	-0.5	2016	- 1.7
Big Wood above Hailey	-0.8	2008	- 2.8
Big Wood	-1.6	2003	0.7
Little Wood	-1.1	2020	- 1.5
Big Lost	-0.3	2016	0.7
Little Lost	---	---	1.5
Teton	-0.8	2015	- 3.9
Henrys Fork	0.5	2010	- 2.6
Snake (Heise)	-1.1	2016	- 1.7
Oakley	-1.6	2013	0.4
Salmon Falls above Jackpot	-2.7	2018	NA
Salmon Falls	-1.3	2008	- 0.9
Bruneau	-2.2	2013	NA
Owyhee	-1.3	2010	- 2.6
Bear River	1.3	2013	- 3.6

SWSI SCALE, PERCENT CHANCE OF EXCEEDANCE, AND INTERPRETATION



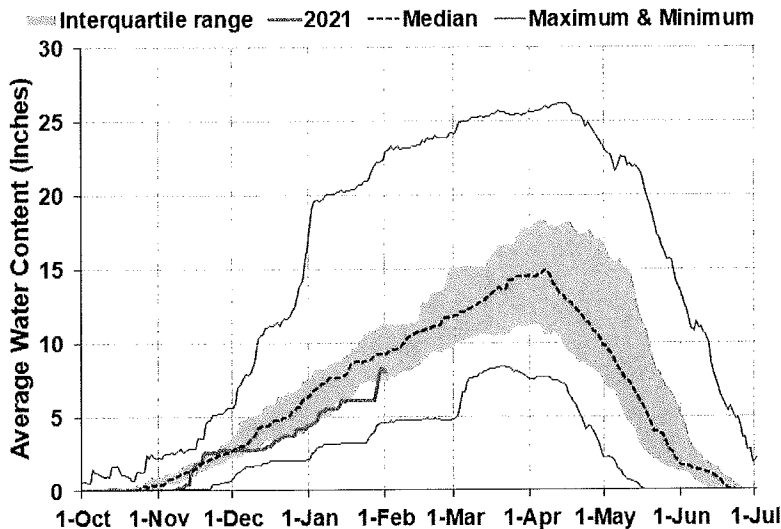
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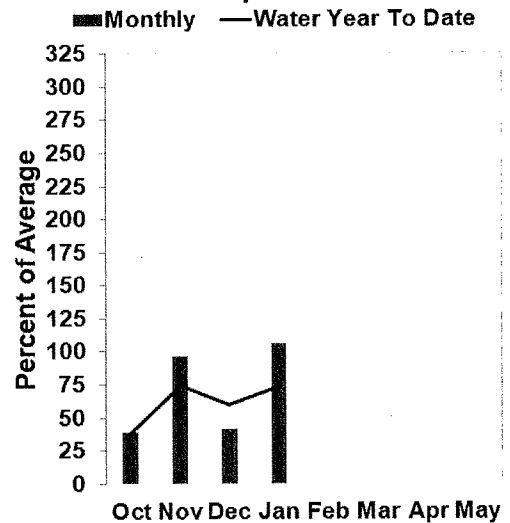
Wood & Lost River Basins

February 1, 2021

Current Snowpack and Historic Range



Precipitation



WATER SUPPLY OUTLOOK

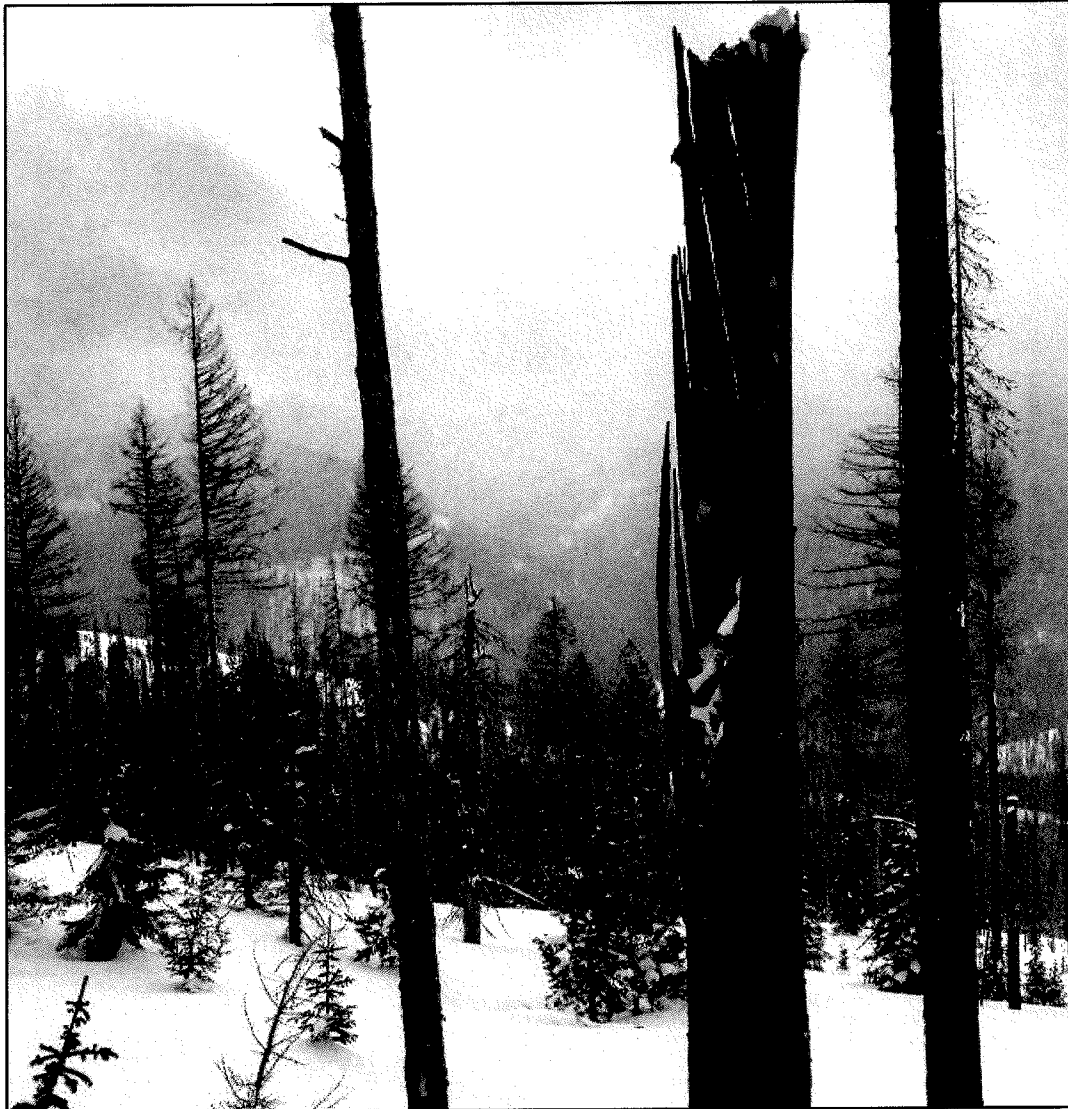
An atmospheric river event finally brought much needed precipitation to the Wood and Lost basins from January 27th to 30th. The Little Wood, Big Lost, and Little Lost basins received the most precipitation during this storm. The storm brought an otherwise dry January to normal precipitation totals, with basins receiving between 102% of normal January precipitation in the Big Wood and 120% in the Little Wood (Fig. 1). Despite the significant boost in late January, water year total precipitation still remains below normal in all of the Wood and Lost basins. Total water year precipitation in all basins ranges from 66% of normal in the Big Lost Basin to 75% in the Big Wood (Fig. 2). February 1 snowpack increased significantly with respect to normal compared to January 1 from this atmospheric river storm; snowpack conditions are 70% of normal in the Big Lost, and 82% in the Big Wood and Little Lost basins (Fig. 3). Several sites in the Little Wood Basin received over 30% of their current total SWE from this storm. Hiltz Creek SNOTEL, on the boundary between the Big and Little Lost basins, received 44% of its current total SWE in this single event. In order to reach normal precipitation conditions by April 1, precipitation during February and March needs to be above average (~90th percentile) in these basins.

Despite relatively low precipitation in WY21 so far, Mackay Reservoir is at 99% of normal capacity for February 1. Little Wood Reservoir is below average at 78% of normal, and Magic Reservoir is notably below its capacity at 36% of normal. The 50% exceedance streamflow forecasts in the Wood and Lost basins predict below normal streamflow. For most forecast points in these basins, the 30% exceedance values are close to, or even slightly below normal streamflow volumes. However, at the Big Wood below Magic Dam forecast point and at Little Wood, streamflow forecasts are still below normal runoff volume for all exceedance probabilities (Fig. 4). La Niña conditions continue; NOAA

Natural Resources Conservation Service

Idaho Water Supply Outlook Report

March 1, 2021



Northern Idaho Mountains near Lookout Pass Ski Area

Photo taken by Peter Youngblood, February 20, 2021

Cloudy days and frequent snowfall occurred throughout February over much of Idaho's mountains. In some areas, particularly in northern Idaho, record increases in snow water content for the month were observed! Most of Idaho now holds a normal to above normal snowpack, which bodes well for water supplies. Continue reading the full report for in-depth details and learn which areas we still have concerns about (*hint: déjà vu*).

IDAHO WATER SUPPLY OUTLOOK REPORT

March 1, 2021

Overview and winter outlook

A wet and cold February brought snowpack levels to near or above normal conditions across most of Idaho. For this water year (WY21), basin-wide snowpack ranges from 67% to 120% (Fig. 3). Especially heartening was the improvement in the Southern Snake River basins' snowpack. Dry conditions persist in the Wood and Lost basins; the combination of a low snowpack, previous dry water year, and low to moderate reservoir storage levels raise concerns about ample water supply in this region. At report time, we expect near normal irrigation water supply across most basins. Northwest River Forecast Center ten day forecasts predict cold temperatures and lower than normal precipitation. The one month outlook from NOAA's Climate Prediction Center (CPC) indicates temperatures may remain slightly colder than normal in western Idaho and near normal in the eastern part of the state. Near normal precipitation is predicted across much of Idaho except in the southeast, where March could be slightly drier than the historical average. For an insightful analysis about how this winter compares to previous La Niña winters, check out this NOAA blog post.

Snowpack

Although late to the party, La Niña finally arrived this February with above average monthly snowfall throughout most of Idaho. Storms brought snow to both low and high elevations which bodes well for Snake River aquifer recharge efforts. Snowpack throughout the major river systems is near to above normal conditions on March 1 (Fig. 3). The Bear River Basin continues to be the driest but has improved from last month's dismal 68% and is now 85% of normal. The Pend Oreille-Kootenai-Spokane Basin is at 100% and the Snake River basins (lower, middle, and upper) are 95 to 112% of normal. Observations show a steady increase in snow water content in the mountains with record high February snowfall totals in the Clearwater and Coeur d'Alene-St. Joe basins. A few SNOTEL sites in the Salmon Falls and Owyhee drainages also received record high snowfall. Despite near to above normal snowpack conditions across the majority of Idaho, dry conditions persist in the Wood and Lost basins with snowpack ranging from 67% to 85% of normal.

The average date of peak snowpack primarily depends on elevation. Most SNOTEL sites reach peak snowpack in April, leaving four to six weeks left in the snow accumulation season. In the Owyhee Basin, however, winter is shorter with an average snowpack peak date in March. At the high elevation sites in the Snake River headwaters, maximum snow water content occurs between late April to early May. For

basins with above normal snowpack, it's likely that snowmelt onset will occur around the usual time. Basins with lower snowpack levels are more susceptible to warm weather events. Despite short-term forecasts for less than normal precipitation, freezing levels are not predicted to increase, thus limiting loss of snowpack during this period. Looking ahead at the spring snowpack melt season, the CPC three month outlook indicates that slightly colder and wetter conditions may occur in northern Idaho. Everywhere else, they predict seasonal average temperatures and accumulated precipitation.

Precipitation

February accumulated precipitation was near to above normal in all basins except for the majority of the Wood and Lost basins (Fig. 1). Precipitation totals ranged from 103% (Little Lost) to 206% (Salmon Falls) compared to the historical monthly average. Despite wet conditions throughout February, if we look at total precipitation for the water year to date, storms clearly have favored northern Idaho (Fig. 2). Water year precipitation ranges from 94% to 105% from the Clearwater Basin northward. All other basins are below normal and range from 64% (Big Lost) to 93% (Bruneau). Differences between basin-wide total precipitation and snow water content likely result from more precipitation falling as snow than rain due to colder than average air temperature in February.

Water supply

NRCS generates streamflow forecasts for a range of exceedance volumes in order to provide water users with information specific to their needs. Currently, forecast streamflow volumes at the 50% exceedance probability indicates streamflow will be near to above normal in the Boise, Payette, Weiser, Clearwater, and Panhandle basins (Fig. 4). Within the Salmon and Upper Snake basins, streamflow conditions are predicted to range from 70 to 100% of normal depending on the forecast point. Streamflow conditions are predicted to be below normal in the Southern Snake River basins and quite a bit below normal in the Bear River, Wood and Lost basins as of March 1. We recommend using the 70% or 90% exceedance forecast volumes to water users concerned about shortages and who need more confidence in the amount of water most likely to be available.

Below normal precipitation, snowpack, and low reservoir storage in the Wood and Lost basins cause concern about ample water supply. It is possible that a few big storms in the next few months could switch this narrative. In these basins, forecasts range from ~40 to 70% of normal streamflow volume (50% exceedance). In other regions, sufficient reservoir storage leads us to believe there will be near normal irrigation water supply at report time. Reports of dry conditions in low elevation areas are raising concerns for

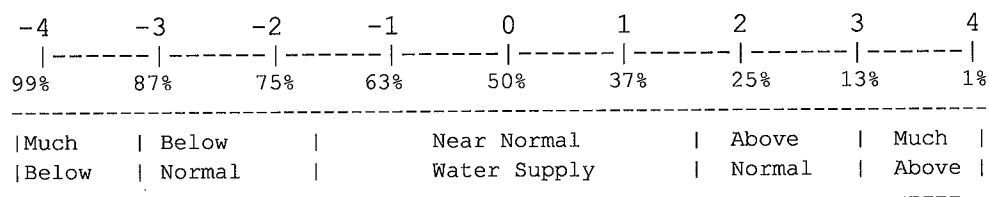
IDAHO SURFACE WATER SUPPLY INDEX (SWSI) March 1, 2021

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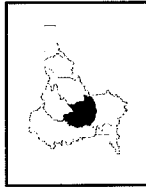
SWSI values provide a more comprehensive outlook of water availability by combining streamflow forecasts and reservoir storage where appropriate. The SWSI index allows comparison of water availability between basins for drought or flood severity analysis. Threshold SWSI values have been determined for some basins to indicate the potential for agricultural irrigation water shortages.

BASIN or REGION	SWSI Value	Most Recent Year With Similar SWSI Value	Agricultural Water Supply Shortage May Occur When SWSI is Less Than
Spokane	1.6	2018	NA
Clearwater	1.3	2019	NA
Salmon	-1.1	2002	NA
Weiser	0.0	2003	NA
Payette	-0.3	2014	NA
Boise	-0.3	2016	- 2.0
Big Wood above Hailey	-1.1	2014	- 2.8
Big Wood	-2.2	2014	0.4
Little Wood	-1.3	2020	- 1.7
Big Lost	-0.8	2013	0.7
Little Lost	---	---	1.5
Teton	0.3	2019	- 3.9
Henry Fork	0.8	2014	- 2.6
Snake (Heise)	-0.3	2012	- 1.7
Oakley	-0.5	2008	- 0.4
Salmon Falls above Jackpot	0.0	2020	NA
Salmon Falls	-0.8	2005	- 0.9
Bruneau	-0.3	2004	NA
Owyhee	-0.3	2008	- 2.6
Bear River	1.3	2013	- 3.6

SWSI SCALE, PERCENT CHANCE OF EXCEEDANCE, AND INTERPRETATION



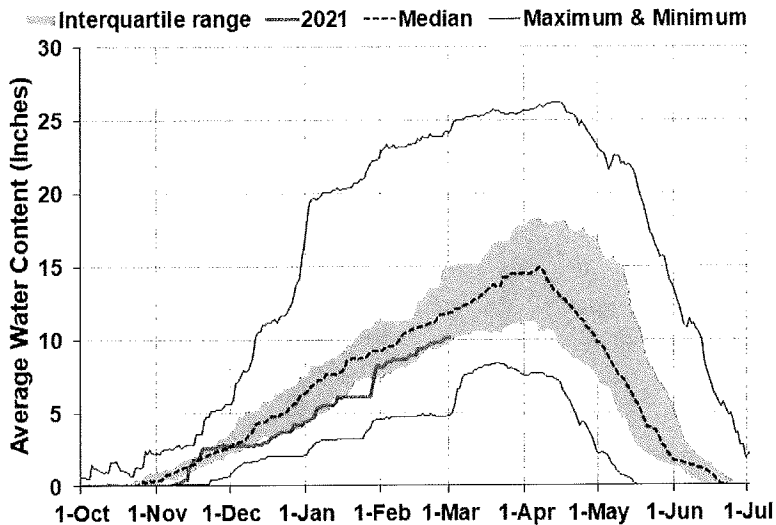
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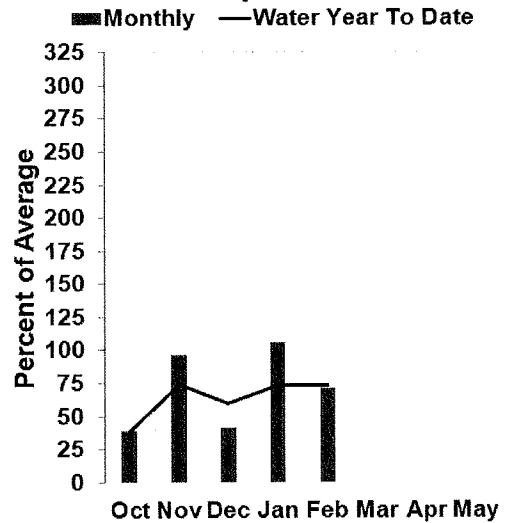
Wood & Lost River Basins

March 1, 2021

Current Snowpack and Historic Range



Precipitation



WATER SUPPLY OUTLOOK

February precipitation continued to be below normal for most of the Wood and Lost basins, from 53% of normal in the Little Wood Basin to 77% in the Birch-Medicine Lodge-Camas basins (Fig. 1). The Little Lost Basin was an outlier; February precipitation was 103% of normal and was driven by near normal February precipitation at two of the three SNOTEL sites within the basin. Water year to date precipitation continued to be below normal, from 64% normal in the Big Lost to 76% in the Little Lost (Fig. 2). The current snowpack is below normal; from 67% of normal in the Big Lost to 85% of normal in the Little Lost Basin (Fig. 3). In the Little Lost Basin there is variability in individual SNOTEL site SWE values with respect to normal; 74% of normal at Hiltz Creek SNOTEL to 113% of normal at Moonshine SNOTEL. In the Big Lost Basin, Smiley Mountain SNOTEL set record low SWE values since February 7, with records going back to 2001. Chances of reaching normal peak SWE snowpack levels continue to diminish, especially in the Little Wood and Big Lost basins. Currently they are less than 60% of their normal peak SWE with only about a month left in a typical accumulation season. Both the Little Wood and Big Lost basins would need snowpack accumulation over the 90th percentile in March to reach normal peak SWE values. The Big Wood and Little Lost basins currently have about 70% of a normal peak snowpack.

Despite the relatively dry water year in these basins so far, Mackay Reservoir is at 98% of normal capacity for March 1. Little Wood Reservoir is below average at 86% of normal, and Magic Reservoir remains well below its storage capacity at 37% of normal. April to July 50% exceedance streamflow forecasts continue to predict well below normal streamflow, from 35% of normal for Camas Creek at Camas to 69% of normal for Big Lost at Howell Ranch (Fig. 4). At this time, water shortages appear likely for some users in the Wood and Lost basins.

Wood and Lost Basins Streamflow Forecasts - March 1, 2021

Forecast Point	Forecast Period	Forecast Exceedance Probabilities for Risk Assessment						30yr Avg (KAF)
		<--Drier-->		Projected Volume		>--Wetter-->		
		90% (KAF)	70% (KAF)	50% (KAF)	% Avg	30% (KAF)	10% (KAF)	
Camas Ck at Camas	APR-JUL	1.7	5.7	9.7	35%	14.8	24	28
Little Lost R bl Wet Ck nr Howe								
Big Lost R at Howell Ranch	APR-JUL	47	84	109	69%	134	170	159
	APR-SEP	53	95	123	68%	152	193	180
Big Lost R bl Mackay Reservoir	APR-JUL	11.1	48	73	59%	98	135	123
	APR-SEP	24	66	95	63%	124	167	150
Little Wood R ab High Five Ck	MAR-JUL	19	32	42	55%	54	75	77
	MAR-SEP	21	35	46	56%	59	81	82
Little Wood R nr Carey 2	MAR-JUL	19.3	33	45	52%	59	82	86
	MAR-SEP	21	36	48	52%	63	88	92
Big Wood R at Hailey	APR-JUL	49	105	144	61%	182	240	235
	APR-SEP	58	120	163	62%	205	270	265
Big Wood R ab Magic Reservoir	APR-JUL	16.6	44	70	41%	102	160	170
	APR-SEP	19.4	49	77	42%	111	173	182
Camas Ck nr Blaine	MAR-JUL	22	42	59	60%	79	115	99
	MAR-SEP	22	42	59	60%	79	115	99
Big Wood R bl Magic Dam 2	APR-JUL	28	68	104	42%	148	230	250
	APR-SEP	32	74	112	42%	158	240	265

Normals based on 1981-2010 reference period: streamflow, precipitation, & reservoir normals are averages, SWE normals are medians.

1) 90% and 10% exceedance probabilities are actually 95% and 5%

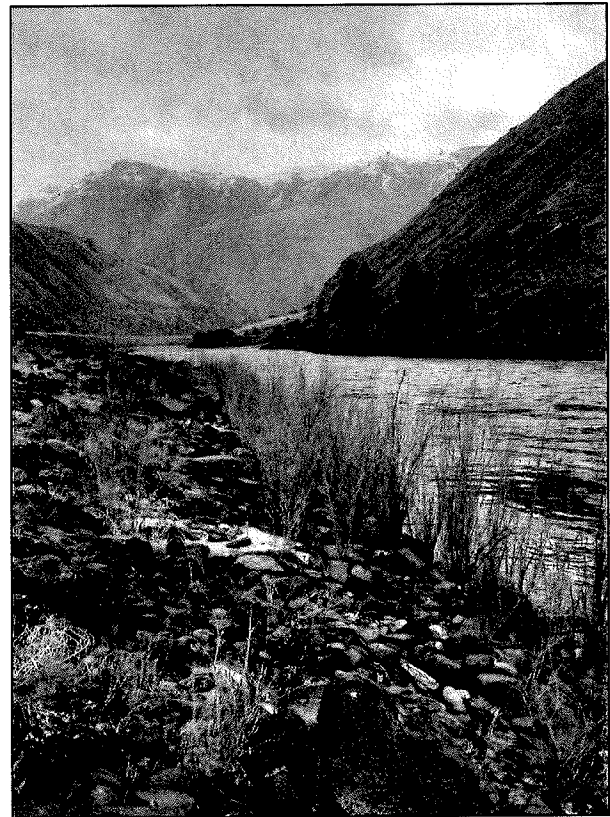
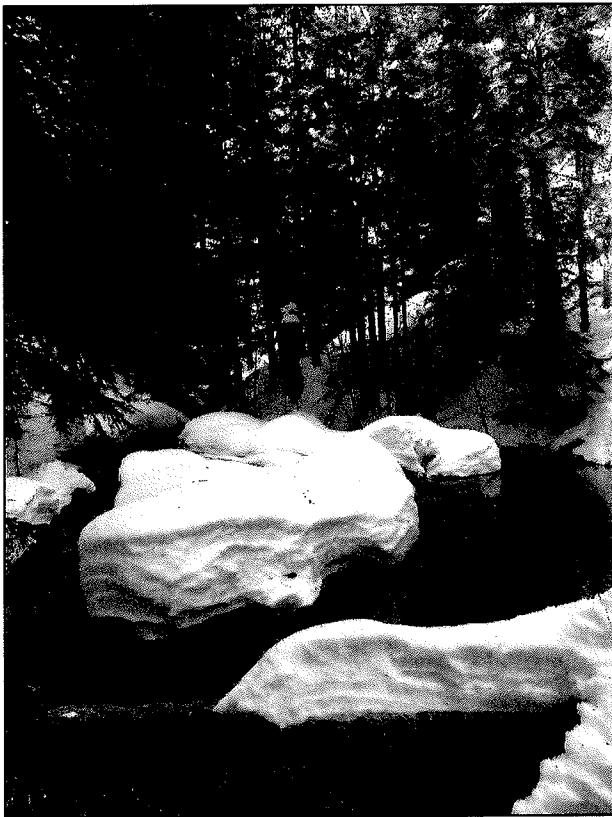
2) Forecasts are for unimpaired flows. Actual flow will be dependent on management of upstream reservoirs and diversions

Reservoir Storage (KAF): End of February					Watershed Snowpack Analysis: March 1, 2021			
Reservoir Name	Current (KAF)	Last YR	Average (KAF)	Capacity (KAF)	Basin Name	# of Sites	% of Median 2021	% of Median 2020
Mackay Reservoir	28.7	39.4	29.3	44.4	Camas-Beaver Creeks	4	83%	96%
Little Wood Reservoir	14.9	25.3	17.4	30.0	Birch-Medicine Lodge Creeks	4	79%	105%
Magic Reservoir	26.6	134.5	72.5	191.5	Little Lost River	4	85%	89%
					Big Lost River ab Mackay	5	66%	59%
					Big Lost Basin Total	7	67%	64%
					Fish Creek	3	71%	70%
					Little Wood ab Resv	5	71%	60%
					Big Wood River ab Hailey	6	81%	65%
					Camas Creek	4	88%	74%
					Birch-Medicine Lodge-Camas-Beaver	8	81%	100%
					Total	8	71%	63%
					Little Wood Basin Total	8	71%	63%
					Big Wood Basin Total	10	84%	68%

Natural Resources Conservation Service

Idaho Water Supply Outlook Report

April 1, 2021



Coeur d'Alene Basin (left) and Salmon River downstream of Riggins (right).

Photos taken by Peter Youngblood and Danny Tappa, March 2021.

Welcome, Spring of 2021! The first half of March was extremely dry over nearly all of Idaho. Although some snow fell in the mountains in late March, Idaho's snowpack is beginning to melt as the calendar turns to April. In most basins across the state, the peak snowpack volume has likely already occurred and was generally several days earlier than normal. Despite the dry end to winter, most reservoirs are expected to fill, with some exceptions in the Wood and Lost basins.

IDAHO WATER SUPPLY OUTLOOK REPORT

April 1, 2021

Overview

This La Niña winter proved to be drier than hoped for across much of the state. Except for the Clearwater Basin, the lack of precipitation during March resulted in near to below normal snowpack across Idaho as of April 1. For the water year (WY21) winter, basin-wide snowpack ranges from 63% to 110% (Fig. 3) and total precipitation ranges from 61% to 98%. In general, the WY21 fall and winter are slightly drier than WY20.

Thankfully, current reservoir storage is on pace with the historical 30-year average storage level, indicating normal winter baseflow into reservoirs. Dry conditions in the Wood and Lost basin indicate water supply concerns for irrigators, dryland grazing operations and folks relying on natural streamflow. There will likely be agricultural water shortages in these basins this summer. Dry conditions in the Bear River Basin are of concern for ranchers using non-irrigated pastures for forage, however reservoir storage appears sufficient for irrigators. Drought conditions in central and southern Idaho are expected to persist during spring. Across the Snake River basins, except for Oakley and Salmon Falls, we expect sufficient reservoir supply for irrigators. At report time, we expect normal irrigation water supply across the rest of Idaho.

Spring outlook

How will the melt season shape up? In general, average air temperature in March was warmer than normal in northern and central Idaho, and colder than the historical average in the southern and headwater Snake River basins. Current SNOTEL data indicate that peak snowpack has been reached this winter and the melt season has begun in earnest below high elevation sites. Although the warm March temperatures kicked off the melt season a little earlier than normal, weather forecasts indicate a few storms are headed our way in the next 10 days. Depending on elevation and location, this precipitation could either fall as rain or snow. Intermittent cold temperatures will slow the snowmelt rate, but since the snowpack is isothermal at low and mid-elevations, these slowdowns are temporary. The one month outlook from NOAA's Climate Prediction Center (CPC) forecasts slightly warmer and drier conditions in April for central and southern Idaho. Across the rest of the state, there are equal chances of above, below or normal April conditions (white color). The three month outlook predicts warmer and drier conditions than normal across most of Idaho and in the Snake River headwaters. For a recap of this winter and how it compared to the seasonal predictions issued this fall, please check out this ENSO blog post. For a recap of how drought conditions evolved this winter, check out this NIDIS article.

Snowpack

Lack of precipitation in March curtailed the February snowpack gains leaving all basins in Idaho with near normal snowpack levels (Fig. 3). The Bear River, Wood and Lost basins continued to be the driest in the state with snowpack levels ranging from 63% (Little Wood) to 80% (Little Lost). All other basins range from 90% to 110% of normal. Compared to WY20 at the basin level, this winter's snowpack contains slightly less water content than last year's snowpack. Although snowpack is near to slightly below normal across much of Idaho, take heart that this winter's snowpack is much, much healthier compared to 2015 or 2001. Those were the lowest snowpack years we've encountered this century so far. At report time, the snowmelt season has begun in earnest with SWE loss observed at the majority of SNOTEL stations. Once the snowpack reaches 32°F throughout its entire thickness it's considered isothermal. When the snowpack reaches this point, runoff from snowmelt begins. Cold snaps can temporarily slow down snowmelt, but once the snowpack is isothermal, winter is over and spring is here to stay. These are the conditions we are observing across the state. A more commonsense approach you and your family can use is to watch nearby streams for increases in the amount of water in the streambed. Watching the weather and corresponding increases and decreases in streamflow is a great way to understand what the snowpack is doing in your backyard.

Precipitation

Precipitation during March was well below normal in all basins across Idaho (Fig. 1). Monthly precipitation ranged from 34% (Weiser) to 74% (Bruneau) compared to the historical monthly average. The Bear River Basin experienced record low precipitation in March. Looking at basin-wide precipitation for WY21 so far, all basins are below normal except for the Clearwater (98%). Most basins have received 80% to 90% of normal precipitation for the year, except for the Wood, Lost, Owyhee, Bear, Willow-Blackfoot-Portneuf basins. These basins all experienced a drier than normal winter (61% to 77%). With the exception of the Clearwater and Boise basins, most basins across Idaho are slightly drier at this point in time compared to WY20.

Water supply

NRCS generates streamflow forecasts for a range of exceedance volumes in order to provide water users with information specific to their needs. Currently, forecast streamflow volumes at the 50% exceedance probability predict streamflow will be normal in the Clearwater and Panhandle basins (Fig. 4). Basins with 70% to 85% of normal streamflow volume are: Salmon, Weiser, Payette, Boise, Little Lost, Henrys Fork-Teton, Snake Basin above Palisades, Goose Creek, and Bruneau. Basins with well below normal forecasts for natural streamflow include: Big Wood (35%), Little

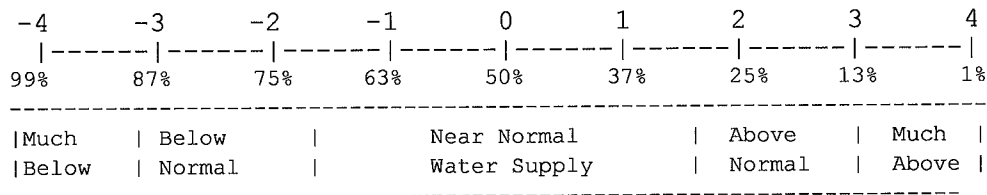
IDAHO SURFACE WATER SUPPLY INDEX (SWSI) April 1, 2021

The Surface Water Supply Index (SWSI) is a predictive indicator of surface water availability within a watershed for the spring and summer water use season. The index is calculated by combining pre-runoff reservoir storage (carryover) with forecasts of spring and summer streamflow. SWSI values are scaled from +4.0 (abundant supply) to -4.0 (extremely dry), with a value of zero indicating a median water supply as compared to historical occurrences. The SWSI analysis period is from 1981 to present.

SWSI values provide a more comprehensive outlook of water availability by combining streamflow forecasts and reservoir storage where appropriate. The SWSI index allows comparison of water availability between basins for drought or flood severity analysis. Threshold SWSI values have been determined for some basins to indicate the potential for agricultural irrigation water shortages.

<i>BASIN or REGION</i>	<i>SWSI Value</i>	<i>Most Recent Year With Similar SWSI Value</i>	<i>Agricultural Water Supply Shortage May Occur When SWSI is Less Than</i>
Spokane	0.0	2020	NA
Clearwater	-0.5	2004	NA
Salmon	-1.9	2013	NA
Weiser	-1.1	2018	NA
Payette	-1.6	2004	NA
Boise	-1.1	2003	- 2.6
Big Wood above Hailey	-2.7	2020	- 2.8
Big Wood	-2.7	2004	0.4
Little Wood	-2.2	2013	- 1.5
Big Lost	-2.4	2003	0.7
Little Lost	-1.1	2015	1.5
Teton	-0.8	2015	- 3.9
Henry Fork	0.5	2010	- 3.1
Snake (Heise)	-0.5	2010	- 1.7
Oakley	-1.1	2016	- 0.4
Salmon Falls above Jackpot	-0.5	2008	NA
Salmon Falls	-1.1	2008	- 0.9
Bruneau	-0.3	2008	NA
Owyhee	-1.1	2009	- 2.6
Bear River	1.3	2013	- 3.6

SWSI SCALE, PERCENT CHANCE OF EXCEEDANCE, AND INTERPRETATION



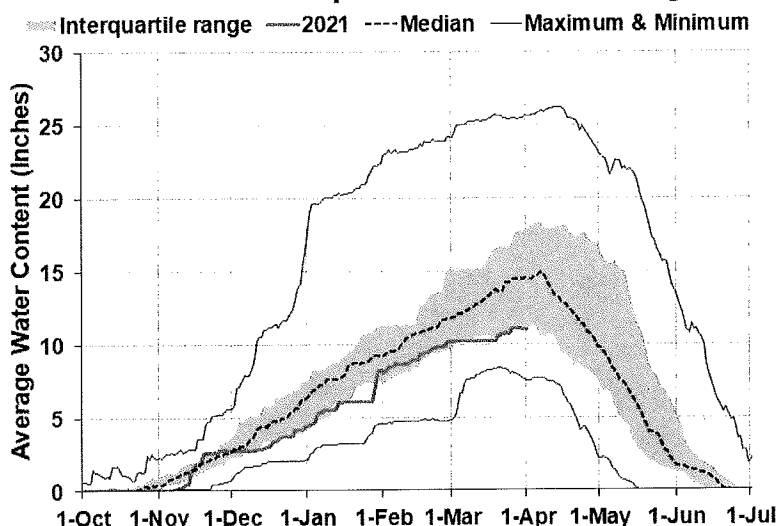
NA=Not Available / Not Applicable; Note: The Percent Chance of Exceedance is an indicator of how often a range of SWSI values might be expected to occur. Each SWSI unit represents about 12% of the historical occurrences. As an example of interpreting the above scale, the SWSI can be expected to be greater than -3.0, 87% of the time and less than -3.0, 13% of the time. Half the time, the SWSI will be below and half the time above a value of zero. The interval between -1.5 and +1.5 described as "Near Normal Water Supply," represents three SWSI units and would be expected to occur about one-third (36%) of the time.



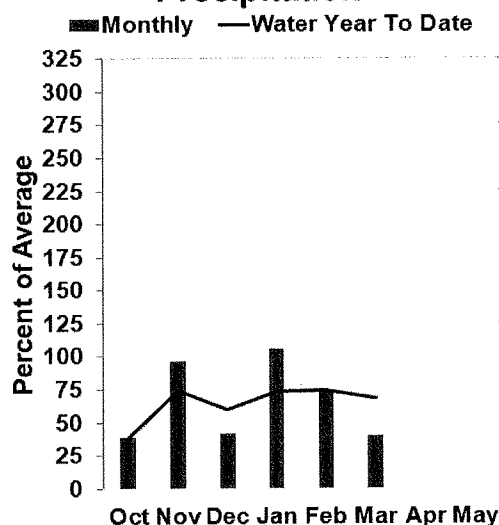
Wood & Lost River Basins

April 1, 2021

Current Snowpack and Historic Range



Precipitation



WATER SUPPLY OUTLOOK

The first half of March was exceptionally dry across the Wood and Lost basins. Although several small systems came through in the second half of March, monthly precipitation was only 39% to 56% of normal (Fig. 1). As of April 1, water year precipitation in the Wood and Lost basins is 61% to 73% of normal (Fig. 2). Following the year-long trend, the snowpack is well below normal, from ~67% of normal in the Little Wood and Big Lost basins, to ~75% to 80% normal in the Big Wood, Little Lost, and Birch-Medicine Lodge-Beaver-Camas basins (Fig. 3). As of report time, snowmelt has begun at low and mid-elevations across the Wood and Lost basins, and even at some higher elevation locations. Although peak SWE was below normal, it appears likely that the snowpack peaked within a day or two of normal in the Big Wood and Big Lost basins. Peak SWE was likely about a week earlier than normal in the Little Wood and Little Lost basins, and about 10 days early in the Birch-Medicine Lodge-Beaver-Camas Basin.

Magic Reservoir is reflecting the poor snowpack conditions of the past few years and is at 36% of normal. Little Wood and Mackay reservoirs are much closer to normal, at ~95% of normal. April to July 50% exceedance streamflow forecasts for the Big Wood are ~20 to 50% of normal, Little Wood ~45%, Little Lost ~70%, and Big Lost ~50% of normal (Fig. 4). NOAA Climate Prediction Center's one month outlook does not indicate significant departures from mean April temperature and precipitation, and the 10-day forecast does not show meaningful precipitation for the Wood and Lost basins. It appears WY21 will be similar to WY20, another year with a below normal snowpack and reduced streamflow.

Wood and Lost Basins Streamflow Forecasts - April 1, 2021

Forecast Point	Forecast Period	Forecast Exceedance Probabilities for Risk Assessment						
		<--Drier-->			Projected Volume		>--Wetter-->	
		90% (KAF)	70% (KAF)	50% (KAF)	% Avg	30% (KAF)	10% (KAF)	30yr Avg (KAF)
Camas Ck at Camas	APR-JUL	2.7	6.3	9.5	34%	13.4	20	28
Little Lost R bl Wet Ck nr Howe	APR-JUL	10.8	16.1	19.8	71%	23	29	28
	APR-SEP	12	19	24	71%	29	36	34
Big Lost R at Howell Ranch	APR-JUL	47	72	89	56%	106	131	159
	APR-SEP	53	81	101	56%	120	149	180
Big Lost R bl Mackay Reservoir	APR-JUL	8.8	36	54	44%	73	100	123
	APR-SEP	20	53	74	49%	96	129	150
Little Wood R ab High Five Ck	APR-JUL	18.1	25	31	45%	37	47	69
	APR-SEP	20	28	34	45%	41	52	75
Little Wood R nr Carey 2	APR-JUL	18.6	26	32	42%	38	49	77
	APR-SEP	20	28	35	42%	42	53	83
Big Wood R at Hailey	APR-JUL	48	86	111	47%	137	175	235
	APR-SEP	57	99	127	48%	156	198	265
Big Wood R ab Magic Reservoir	APR-JUL	5.8	20	35	21%	53	88	170
	APR-SEP	7.6	24	40	22%	60	97	182
Camas Ck nr Blaine	APR-JUL	14.5	25	34	41%	45	63	82
	APR-SEP	14.7	26	35	42%	45	63	83
Big Wood R bl Magic Dam 2	APR-JUL	26	53	76	30%	104	153	250
	APR-SEP	31	59	84	32%	113	163	265

Normals based on 1981-2010 reference period: streamflow, precipitation, & reservoir normals are averages, SWE normals are medians.

1) 90% and 10% exceedance probabilities are actually 95% and 5%

2) Forecasts are for unimpaired flows. Actual flow will be dependent on management of upstream reservoirs and diversions

Reservoir Storage (KAF): End of March					Watershed Snowpack Analysis: April 1, 2021			
Reservoir Name	Current (KAF)	Last YR	Average (KAF)	Capacity (KAF)	Basin Name	# of Sites	% of Median 2021	% of Median 2020
Mackay Reservoir	31.0	41.0	31.2	44.4	Camas-Beaver Creeks	4	80%	105%
Little Wood Reservoir	18.4	27.8	19.8	30.0	Birch-Medicine Lodge Creeks	4	71%	104%
Magic Reservoir	32.4	149.7	89.3	191.5	Little Lost River	4	80%	100%
					Big Lost River ab Mackay	5	62%	73%
					Big Lost Basin Total	7	64%	78%
					Fish Creek	3	62%	81%
					Little Wood ab Resv	5	63%	74%
					Big Wood River ab Hailey	5	75%	74%
					Camas Creek	4	72%	62%
					Birch-Medicine Lodge-Camas-Beaver	8	76%	104%
					Total	8	76%	104%
					Little Wood Basin Total	8	63%	77%
					Big Wood Basin Total	9	74%	69%

ADDENDUM B

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

IN THE MATTER OF GROUND WATER)
WITHDRAWAL IN THE COTTONWOOD)
CRITICAL GROUND WATER AREA)
_____)

ORDER

The Director of the Department of Water Resources ("Director" or "Department") has the duties of protecting vested water rights, enforcing specific statutes of the State of Idaho, and enforcing rules promulgated by the Department. As part of these duties, the Director is authorized to order the cessation or reduction of ground water withdrawals within a critical ground water area.

Based upon the Department's investigation of ground water withdrawals and the sufficiency of the water supply to meet the demands for ground water under water rights within the Cottonwood Critical Ground Water Area ("Cottonwood CGWA") and his understanding of the law, the Director enters the Following Findings of Facts, Conclusions of Law, and Order.

FINDINGS OF FACT

1. On January 16, 1962, the Director established the Goose Creek – Rock Creek CGWA pursuant to Idaho Code § 42-233a. The Goose Creek – Rock Creek CGWA included the area that is currently known as the Cottonwood CGWA. On September 6, 1967, the Director modified the boundaries of the Goose Creek – Rock Creek CGWA by designating three separate CGWAs including the Cottonwood, Artesian City, and West Oakley Fan CGWAs. The Director designated the original Goose Creek – Rock Creek CGWA and the subsequent Cottonwood CGWA upon a determination that there was not a sufficient amount of ground water available to fill the water rights within the area at the then current rates of withdrawal.

2. In 1969, the United States Geological Survey ("USGS") published a report that estimated the total surface water yield for the hydrologic basin overlying the Cottonwood CGWA at approximately 10,000 acre-feet per annum (AFA). Of the 10,000 AFA, approximately 5,000 AFA is ground water recharge and about 5,000 AFA is surface water runoff. The USGS also estimated that about 15,000 acre-feet of ground water was withdrawn in the Cottonwood CGWA each year for irrigation. When the report was prepared, the annual rate of ground water withdrawal was three times the amount of annual natural recharge to the aquifer. Ground water levels in two separate observation wells within the Cottonwood CGWA declined at an average rate of about 20.5 feet per year, or a total average decline of 175 feet, between 1961 and 1970.

3. On October 1, 1971, the Idaho Fifth Judicial District Court, Cassia County, adjudicated the water rights within the Cottonwood CGWA (Baker v. Ore-Ida, Civil Case No. 7876) ordering that water right holders in the area are:

... prohibited from removing more water than the average annual rate of natural recharge, which is fixed by this decree as 5,500 acre feet per year, and which may be subsequently fixed by the Department of Water Administration at a greater or lesser amount. After January 1, 1972, no water may be removed from the aquifer ... except through a well equipped with a meter approved by the Department of Water Administration.

4. On May 3, 1973, the Department created Water District No. 45-O, Golden Valley, pursuant to Idaho Code § 42-604. The water district boundaries were identical to the boundaries of the Cottonwood CGWA. The water district was created to provide for a watermaster to control withdrawal and distribution of water from the aquifer within the Cottonwood CGWA.

5. On June 25, 1980, the Idaho Fifth Judicial District Court, Cassia County, issued a judgment in Civil Case No. 9818 (Briggs v. Higginson), ordering that the average annual withdrawal from all irrigation wells in the Cottonwood CGWA shall not exceed 5,500 AFA during any consecutive five year period, and allowing each user to carryover the unused portion of any water right entitlement from the preceding year. The judgment further provided that:

The Department may limit or expand the amount of water which may be pumped from the aquifer without exceeding its average annual rate of recharge in accordance with ... the Amended Decree made and entered on October 1, 1971, in said Civil Case No. 7876.

6. In 1984, the USGS published a report that revised the estimated ground water recharge in the Cottonwood CGWA to 4,000 AFA.

7. On January 4, 1985, the Director issued an order limiting the average annual withdrawal of ground water from the Cottonwood CGWA to 4,000 acre feet. The Director stayed the order on February 15, 1985, contingent upon the success of a managed ground water recharge project being implemented at that time. On January 15, 1987, the Director sent notice to holders of water rights in the Cottonwood CGWA advising them of a continued stay of the order of January 4, 1985, based on the apparent success of managed ground water recharge within the area. This latter notice further advised the right holders that the "January 4, 1985 order was stayed and not permanently set aside."

8. Between 1970 and 2003, ground water levels in the Cottonwood CGWA have declined about 80 feet, or an average rate of about 2.5 feet per year. One observation well maintained by the Department in the area shows a decline of about 50 feet between 1989 and 2003. According to records of the watermaster for Water District No. 45-O, ground water withdrawals in the Cottonwood CGWA have varied between 2,550 and 5,520 AFA between 1985 and 2003. Average annual ground water withdrawals from 2000 to 2003 were 4,763 AFA.

Ground water levels in several monitoring wells in the Cottonwood CGWA have declined about 20 feet between 2000 and 2003.

9. The watermaster for Water District No. 45-O has confirmed that there is currently no active managed ground water recharge being implemented in the Cottonwood CGWA. The Department has no record of any active managed recharge occurring in the Cottonwood CGWA since 1996.

10. On August 4, 2004, the Department sent correspondence to water right holders in the Cottonwood CGWA and Water District No. 45-O advising them that the Director was considering lifting the stay of the order of January 4, 1985, which would limit average annual ground water withdrawals to 4,000 acre-feet to bring average annual ground water withdrawals back in balance with average annual ground water recharge. Holders of ground water rights were requested to provide any data or information about recent or past managed recharge efforts and to provide an update regarding any future plans for managed ground water recharge. The Department also asked for comments or input regarding the proposed restriction of annual ground water withdrawals to 4,000 acre-feet. The Department received no response to this inquiry as of August 30, 2004.

CONCLUSIONS OF LAW

1. The Director has a statutory responsibility to administer the use of ground water in the State of Idaho in a manner that protects prior surface and ground water rights while allowing for full economic development of the state's underground water resources in the public interest. See Idaho Code §§ 42-226, 42-237a.g, and 42-602.

2. The Director has general responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts through watermasters supervised by the Director, as provided in chapter 6, title 42, Idaho Code and Department regulations.

3. The establishment of Water District No. 45-O, which includes all of the area included within the boundaries of the Cottonwood CGWA, provides the Director with the water administration authorities available under chapter 6, title 42, Idaho Code.

4. Idaho Code § 42-233a provides in pertinent part:

The Director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or a portion of a critical ground water area, shall order those water right holders on a time priority basis, within the area determined by the Director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. Such order shall be given only before September 1 and shall be effective for the growing season during the year following the date the order is given.

5. The Fifth Judicial District Court of Idaho issued two judgments regarding the amount of annual ground water use in the Cottonwood CGWA. Civil Case No. 7876 dated October 1, 1971, and Civil Case No. 9818 dated June 25, 1980, both ordered that the Director may, by order, limit or expand the amount of water that may be withdrawn from the aquifer underlying the Cottonwood CGWA without exceeding its average annual rate of natural recharge.

6. The Department has determined, based on the USGS 1984 report, that the average annual rate of natural recharge in the Cottonwood CGWA is 4,000 acre-feet. Authorization of ground water withdrawals in excess of 4,000 AFA is not warranted given that ground water levels have further declined in the aquifer since 1980. The Director should limit annual ground water pumping in the Cottonwood CGWA to 4,000 acre-feet.

ORDER

IT IS HEREBY ORDERED AS FOLLOWS:

1. The stay of the Director's order dated January 4, 1985, is hereby lifted.
2. The annual withdrawal of ground water for those water rights located within the Cottonwood CGWA and identified in the Water Right Delivery Schedule, Attachment A to this order, shall not exceed 4,000 acre-feet per year. This limitation applies only to those water rights listed in Attachment A and does not apply to existing water rights or uses of water for domestic and stockwater purposes as defined in Idaho Code § 42-111.
3. All diversions of ground water under those water rights identified on the Water Right Delivery Schedule in Attachment A shall be measured using flow meters or measuring devices of a type acceptable to the Department. The watermaster for Water District No. 45-O shall shut off and refuse to distribute water to any diversion in the water district that does not have an adequate measuring device.
4. The watermaster for Water District No. 45-O shall continue to monitor diversions of ground water during the irrigation season and shall regulate the diversions in accordance with the Water Rights Delivery Schedule in Attachment A.

DATED this 30th day of August, 2004.



KARL J. DREHER
Director

ATTACHMENT A

WATER RIGHT DELIVERY SCHEDULE
FOR THE COTTONWOOD CRITICAL GROUND WATER AREA

Priority	Water Right Number	Flow Rate (CFS)	Decreed Volume (AF)	Maximum Deliverable Volume (AF)	Owner
12-13-1948	45-2283	1.64			Joe Tugaw
01-16-1950	45-2322	3.33			Joe Tugaw
04-03-1959	45-2575	0.55	1,663*	1,663*	Joe Tugaw
04-29-1959	45-2578	3.56	978	978	Don McFarland
06-16-1959	45-2582A	1.99	474	474	Russell Patterson
06-16-1959	45-2582B	2.01	478	478	Russell Patterson
07-20-1959	45-2585A	3.19	714	206	Russell Patterson
07-20-1959	45-2585B	3.12	699	201	Russell Patterson
01-13-1960	45-2597		1,271	0	Don McFarland
Total			6,277	4,000	

*Rights 45-2283, 45-2322, and 45-2575 have a combined annual diversion volume limit of 1,663 acre-feet.

**EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER**

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 30th day of August 2004, the above and foregoing document was served upon the following individuals by placing a copy of the same in the United States Mail, postage prepaid, certified as requested and properly addressed as follows using the attached list of names

USGS
230 COLLINS ROAD
BOISE ID 83702

S W IRRIGATION DIST
PO 668
BURLEY ID 83316

TUGAW RANCH
C/O JOE TUGAW
3277 WOODRIDGE DR
TWIN FALLS ID 83301

RUSSELL PATTERSON
1800 Z STREET
HEYBURN ID 83336

DON MCFARLAND
PO BOX 268
EDEN ID 83325-0268



Crystal N. Calais
Administrative Assistant
Water Distribution Section
Idaho Department of Water Resources