



2. I am one of the attorneys representing the South Valley Ground Water District (“SVGWD”) in the above captioned matter and am assigned to assist in the scheduled hearing in this matter, June 7-11, 2021, in Boise, Idaho.
3. Attached hereto as **Exhibit A** is a true and correct copy of an excerpt from a presentation given by Craig Tesch (IDWR) at the Idaho Water Users Association Annual Conference entitled *Ground Water Conditions Throughout Idaho* (dated Jan. 21, 2020).
4. Attached hereto as **Exhibit B** is a true and correct copy of the *Preliminary Order* from *In the Matter of the Proposed Combination of Water District Nos. 37 et al.* issued by the Idaho Department of Water Resources (“IDWR”) on September 17, 2013. The order became a final agency action by operation of law.
5. Attached hereto as **Exhibit C** is a true and correct copy of excerpts of a March 7, 2014 PowerPoint presentation titled: *Idaho CM Rules and Ground Water District Formation* presented by Tim Luke (IDWR) to water users in Basin 37. Through this presentation Mr. Luke, on behalf of IDWR, represented that a contested case for conjunctive administration in Basin 37 could take a “year or more.”
6. Attached hereto as **Exhibit D** is a true and correct copy of the *Memorandum Decision and Order* issued on April 22, 2016 in *Sun Valley Co. v. Spackman*, Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV-WA-2015-14500.
7. Attached hereto as **Exhibit E** is a true and correct copy of the *Judgment* issued on April 22, 2016 in *Sun Valley Co. v. Spackman*, Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV-WA-2015-14500.



8. Attached hereto as **Exhibit F** is a true and correct copy of the minutes from the April 7, 2021 meeting of the Big Wood River Basin Groundwater Management Area (“BWRBGWMA”) advisory committee.
9. Attached hereto as **Exhibit G** is a true and correct copy of the agenda from the April 15, 2021 meeting of BWRBGWMA advisory committee.
10. Attached hereto as **Exhibit H** is a true and correct copy of the minutes from the April 15, 2021 meeting of BWRBGWMA advisory committee.
11. Attached hereto as **Exhibit I** is a true and correct copy of the Director’s May 4, 2021 *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing (“Notice”)*.
12. Attached hereto as **Exhibit J** is a true and correct copy of the IDWR Director’s May 4, 2021 *Letter to “Water Right Holder”* cover letter.
13. Attached hereto as **Exhibit K** is a true and correct copy of the May 7, 2021 email from Tim Luke to BWRGWMA advisory committee members.
14. Attached hereto as **Exhibit L** is a true and correct copy of the Statement of Purpose for Idaho House Bill 43 from the 2021 legislative session.
15. Attached hereto as **Exhibit M** is a true and correct copy of IDWR’s June 7, 2017 *Order Dismissing Petition for Administration* in the matter CM-DC-2017-001.
16. Attached hereto as **Exhibit N** is a true and correct copy of IDWR’s *Request for Staff Memorandum* issued on May 11, 2021.
17. On May 13, 2021, SVGWD filed its: (1) *Motion Dismiss / Supporting Points & Authorities / Motion to Shorten Time for Response / Request for Oral Argument (“Motion to Dismiss”)*; (2) *Motion to Appoint Independent Hearing Officer*; (3)

*Motion for Continuance of Hearing; (4) Motion for Order Authorizing Discovery; and, (5) Request for Information.*

18. Attached hereto as **Exhibit O** is a true and correct copy of IDWR's *Order Denying Motions to Dismiss, for Continuance or Postponement, and for Clarification or More Definite Statement* ("Dismiss Denial Order") issued on Saturday, May 22, 2021.
19. Attached hereto as **Exhibit P** is a true and correct copy of the Director's May 21, 2021 *Order Denying Motion to Appoint Independent Hearing Officer*.
20. Attached hereto as **Exhibit Q** is a true and correct copy of the Director's May 21, 2021 *Order Authorizing Discovery*. Although the order is dated May 21, 2021 it was not served until Saturday May 22, 2021 by email.
21. Attached hereto as **Exhibit R** is a true and correct copy of the order designating the Big Wood River Groundwater Management Area issued on June 28, 1991.
22. Attached hereto as **Exhibit S** is a true and correct copy of Petitioner's *Request for Information* with IDWR on May 13, 2021. As of the filing of this case IDWR has not produced any documents in response.
23. On May 18, 2021, IDWR posted four different staff reports in response to a *Request for Staff Memorandum*; these reports were not served on Petitioner, and Petitioner was not aware of these reports until late in the day of May 18, 2021. Background information supporting certain portions of the technical reports were not made available until 11:27 a.m. on May 21, 2021 when a new file was emailed to Albert Barker. The staff reports total more than 150 pages, and the background data contains additional information and maps spanning numerous documents.

24. On May 22, 2021, Petitioner filed a motion requesting the Director to designate the *Dismiss Denial Order* as a final agency order under the Idaho Administrative Procedure Act.
25. During the pre-hearing conference, “from the table,” the Director denied Petitioner’s motion to designate his dismissal of Petitioner’s *Motion to Dismiss* as final; the Director issued a written dismissal later on May 24, 2021. Attached hereto as **Exhibit T** is a true and correct copy of the Director’s *Order Denying South Valley Ground Water District’s Motion to Designate Order Denying Motion to Dismiss as Final Order* issued on May 24, 2021.
26. On May 21, 2021, after eight (8) days and no response to its *Request for Production*, Petitioner was forced to file a public records request with the agency pursuant to Idaho Code § 74-102.
27. To the best of my knowledge and experience, the following outlines prior delivery call cases and their timeframes to complete discovery, motion practice, and hold an administrative hearing on the issues raised by affected senior surface and junior ground water users.
- a. Spring Users (Blue Lakes / Clear Springs): May 2005 to November 2007;
  - b. Surface Water Coalition: January 2005 to February 2008;
  - c. A&B Irrigation District: January 2008 to June 2009;
  - d. Rangen, Inc.: Sept. 2011 to March 2014; and,
  - e. Big Wood and Little Wood Users (Basin 37): Feb. 2015 to Jan. 2016.
28. Attached hereto as **Exhibit U** is a true and correct copy of the screen printout of the IDWR contested case (Docket No. AA-WRA-2021-001) identifying filings and

entities and individuals that have filed notices of participation. The original *Notice* included a certificate of service list that was over 40 pages long.

29. Attached hereto as **Exhibit V** is a true and correct copy of the *Declaration of Fred Brossy in Support of BWLWWUA Motions to Dismiss*.

DATED this 24<sup>th</sup> day of May, 2021.

BARKER ROSHOLT & SIMPSON LLP

/s/ TRAVIS L. THOMPSON

Travis L. Thompson

*Attorneys for South Valley Ground Water  
District*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24<sup>th</sup> day of May, 2021, the foregoing was filed, served, and copied as shown below.

IDAHO DEPARTMENT OF WATER RESOURCES  
P.O. Box 83720  
Boise, ID 83720-0098  
Hand delivery or overnight mail:  
322 East Front Street  
Boise, ID 83702  
Fax: (208) 287-6700

☐ U. S. Mail  
☐ Hand Delivered  
☐ Overnight Mail  
☒ iCourt  
☒ Fax

Gary L. Spackman  
Director  
IDAHO DEPARTMENT OF WATER RESOURCES  
PO Box 83720  
Boise, ID 83720-0098  
gary.spackman@idwr.idaho.gov  
Fax: (208) 287-6700

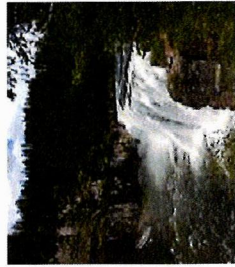
☐ U. S. Mail  
☐ Hand Delivered  
☐ Overnight Mail  
☒ iCourt  
☒ E-mail

Hand delivery or overnight mail:  
322 E Front St  
Boise, ID 83702

/s/ Albert P. Barker

Albert P. Barker

# Exhibit A



# Ground Water Conditions Throughout Idaho

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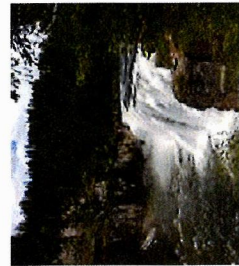
IWUA Annual Conference

Craig Tesch, P.G.

IDWR

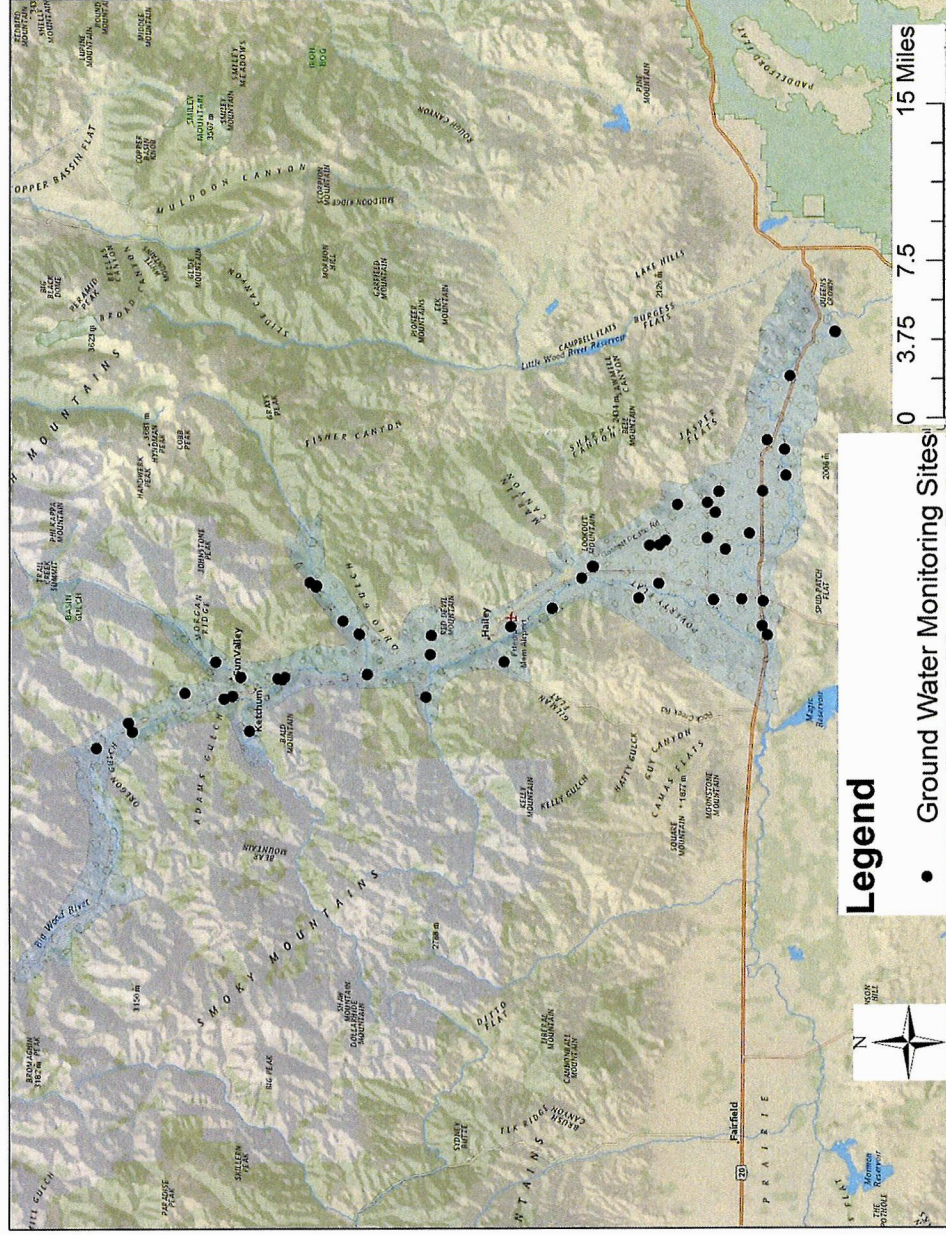
January 21, 2020



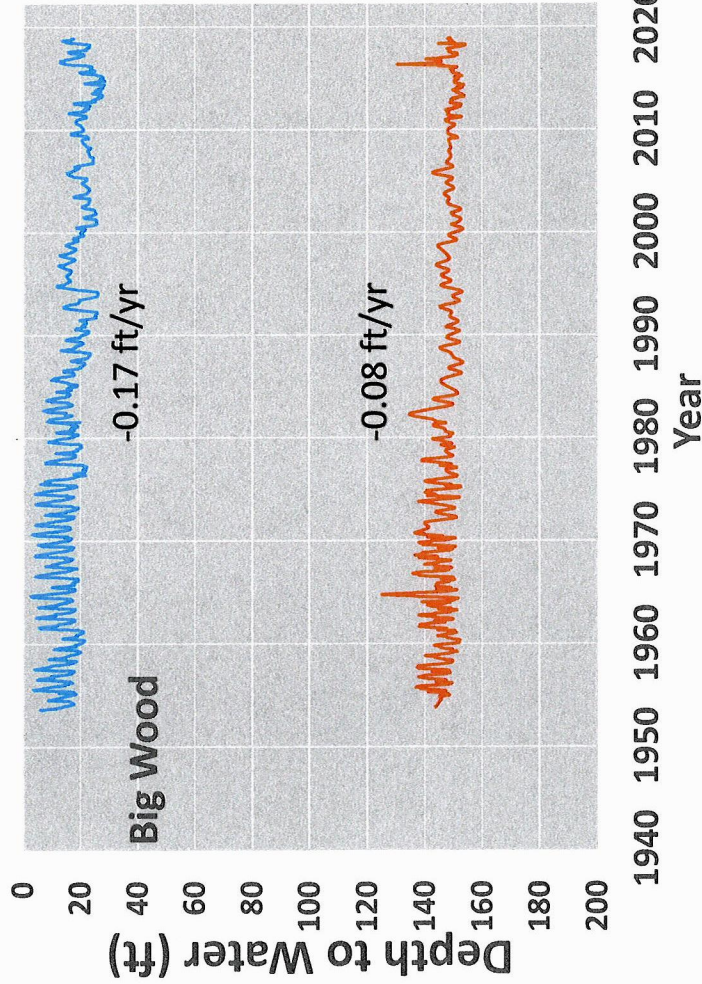


## Big Wood

- GWMA (1991, includes Camas Prairie)
- Model Developed (2016)
- ESPA Tributary
- ~ 25 wells monitored







# Exhibit B





State of Idaho

## DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: [www.idwr.idaho.gov](http://www.idwr.idaho.gov)

C.L. "BUTCH" OTTER  
Governor

GARY SPACKMAN  
Director

September 19, 2013

**RE: Preliminary Order Combining Water Districts in Basin 37 and Inclusion of both Surface and Ground Water Rights in the Combined Water District; and Abolishing the Upper Wood Rivers Water Measurement District**

Dear Water Right Holder,

Enclosed please find a copy of the Preliminary Order regarding the above referenced matter. This order creates a new water district for administration of surface water and ground water rights in the Camas Creek drainage area, including merger of Water Districts 37A and 37C with the new district; combines Water Districts 37 and 37M and includes ground water rights from the Upper Wood River Valley and the Silver Creek drainage in the combined district; and abolishes the Upper Wood Rivers Water Measurement District. The records of the Idaho Department of Water Resources ("Department" or "IDWR") show that you own or have an interest in one or more water rights that are located within the water districts or water measurement district affected by the enclosed Preliminary Order.

Also enclosed is an informational sheet that explains options for responding to preliminary orders. Please note that any party subject to the order may file a petition for reconsideration within fourteen (14) days of the service date of the order, which is the date of this letter. The Department will act upon petitions within twenty-one (21) days of their receipt.

The Department will send a separate notice to water users specifying a date, time and location of annual meetings for the new or revised water districts. The water users present at the meetings must consider election of a watermaster, selection of an advisory committee and adoption of a budget. IDWR will organize a steering committee of representative water users within the districts to assist with preparation for the annual meetings. IDWR is considering scheduling at least one steering committee for each water district prior to the annual meetings. If you are interested in participating in a steering committee, please contact Tim Luke, IDWR at 208-287-4959 or by e-mail at [tim.luke@idwr.idaho.gov](mailto:tim.luke@idwr.idaho.gov).

Please contact this office or the IDWR regional office in Twin Falls (208-736-3033) if you have any questions concerning the attached order.

Sincerely,

Tim Luke  
Water Compliance Bureau

Enclosures: *Preliminary Order*  
*Responding to Preliminary Orders issued by IDWR*

c: IDWR Southern Region

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

IN THE MATTER OF THE PROPOSED )  
COMBINATION OF WATER DISTRICT NOS. )  
37, 37A, 37C AND 37M AND THE INCLUSION )  
OF BOTH SURFACE WATER AND GROUND )  
WATER RIGHTS IN THE COMBINED WATER )  
DISTRICT; AND IN THE MATTER OF )  
ABOLISHING THE UPPER WOOD RIVERS )  
WATER MEASUREMENT DISTRICT )  
\_\_\_\_\_ )

**PRELIMINARY ORDER**

The Director (“Director”) of the Idaho Department of Water Resources (“Department”) is required by statute to divide the state into water districts for the purpose of performing the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). Idaho Code § 42-604 provides the Director with discretion in determining how these mandatory water districts shall be structured, allowing the Director to create new districts, revise existing districts, or even abolish districts, as the Director finds necessary for the efficient distribution of water resources. *Id.* Idaho Code § 42-706 authorizes the Director to create or abolish a water measurement district if such action is required to properly administer water uses. Based upon the record in this matter, the Department finds, concludes and orders as follows:

**FINDINGS OF FACT**

1. Water District No. 37 (“WD37”) includes surface water sources and water rights in the Big Wood and Malad River drainages excluding Water District Nos. 37M, 37A and 37C, and is located within portions of Blaine, Camas, Lincoln and Gooding Counties. WD37 annually elects a watermaster and adopts a budget to provide for the distribution of water from the Big Wood River and tributaries in accordance with the priorities of the water rights from those sources. WD37 has provided annual water delivery reports since 1920.

2. Water District No. 37M (“WD37M”) includes surface water sources and water rights in the Little Wood River drainage area from the mouth of Silver Creek to the confluence of the Big Wood River, including the Silver Creek drainage, and is located within portions of Blaine, Camas, Lincoln and Gooding Counties. WD37M annually elects a watermaster and adopts a budget to provide for the distribution of water from the Little Wood River and Silver Creek drainage in accordance with the priorities of the water rights from those sources. WD37M has provided annual water delivery reports since 1920.

3. WD37 and WD37M share the same watermaster, administrative staff and office. This practice of sharing staff and office resources along with submittal of combined annual reports for the two districts has occurred since 1921. Although the two districts still maintain separate budgets, they have in recent years combined their annual meetings to jointly adopt the same resolutions and select a common advisory committee.



4. Water District No. 37A (“WD37A”) includes surface water sources and water rights in the Corral Creek drainage located in Camas County. Corral Creek is tributary to Camas Creek. WD37A has been an inactive water district for over 33 years.

5. Water District No. 37C (“WD37C”) includes surface water sources and water rights in the Soldier Creek drainage located in Camas County. Soldier Creek is tributary to Camas Creek. WD37C has been an active water district over the past twenty years. The district holds annual meetings and elects a watermaster but does not consistently provide annual meeting minutes or other reports required of water districts pursuant to chapter 6, title 42, Idaho Code.

6. In 1980, the Director issued a policy memorandum declaring surface water in the Big Wood River basin upstream from Magic Reservoir, including Camas Creek, was fully appropriated.

7. On June 28, 1991, the Director issued an order creating the Big Wood River Ground Water Management Area pursuant to Idaho Code § 42-233b. The management area included ground water located within the Wood River Valley and the Camas Creek drainage above Magic Reservoir, and the Silver Creek/Bellevue triangle area. Finding of Fact 2 from the order stated the following:

The surface and ground waters of the Big Wood River drainage are interconnected. Diversion of ground water from wells can deplete the surface water flow in streams and rivers. New ground water uses can also deplete available supplies for other users and affect basin underflow which presently accumulates in the Magic Reservoir.

8. On September 21, 2011, the Department created the Upper Wood Rivers Water Measurement District (“UWRWMD”) for the purpose of measuring and reporting ground water diversions located within the Department’s Administrative Basin No. 37 (“Basin 37”) and the Upper Big and Little Wood River drainages outside of the Eastern Snake Plain Aquifer (“ESPA”).<sup>1</sup> The measurement district included ground water rights in the Camas Creek drainage area. Camas Creek is tributary to the Big Wood River at Magic Reservoir.

9. On February 20, 2013, the Snake River Basin Adjudication (“SRBA”) District Court issued an order authorizing the Director to distribute water pursuant to chapter 6, title 42, Idaho Code, in accordance with the Director’s Reports and partial decrees that have superseded the Director’s Reports for those surface and ground water rights located in Basin 37, part 2 (Camas and Clover Creek drainage areas) and part 3 (Upper Big and Little Wood River drainage areas). The District Court’s order found that “interim administration ... is reasonably necessary to efficiently administer water rights and to protect senior water rights.”

10. On July 10, 2013, the Director prepared a notice of public hearing proposing the following actions pursuant to the provisions of Idaho Code §§ 42-604 and 42-706:

- i. Combine WD37, WD37M, WD37A and WD37C;
- ii. Include surface water rights from the Camas Creek drainage in the combined water district, except surface water rights used for domestic and stock water purposes as defined by Idaho Code §§ 42-111 and 42-1401A(11) and surface water rights used for in-stream watering of livestock as defined by Idaho Code § 42-113;

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<sup>1</sup> The UWRWMD included ground water rights located within the Snake River Basin Adjudication reporting areas of Basin 37, Parts 2 and 3.



- iii. Include in the combined water district ground water rights from the UWRWMD overlying the combined district in that portion of Basin 37 outside of the ESPA, except ground water rights for domestic and stock water uses as defined by Idaho Code §§ 42-111 and 42-1401A(11); and,
- iv. Abolish the UWRWMD.

The notice was sent by regular U.S. Mail on July 12, 2013, to each holder of a water right affected by the proposed actions above except holders of ground water rights used for domestic and stock water purposes as defined by Idaho Code §§ 42-111 and 42-1401A(11), and surface water rights used for in-stream watering of livestock as defined by Idaho Code § 42-113. The hearing notice described the proposed actions, the reasons therefore, and the time and place for a hearing to be held on July 30, 2013 concerning the proposed actions. The notice also provided a time period within which written comments on the proposed action would be accepted.

11. The notice explained that the proposed combination and revision of water districts is necessary in order to properly administer the water uses and water rights from both surface water and ground water sources in the combined water district area. The notice also explained that the UWRWMD was created in 2011 for the purpose of measuring and reporting ground water right diversions only and that regulation of ground water rights within the UWRWMD can only be accomplished through a water district created or modified pursuant to Idaho Code § 42-604.

12. On July 30, 2013, commencing at approximately 6:30 p.m. at the Blaine County School District Community Campus Auditorium in Hailey, Idaho, the Department conducted a public hearing concerning the proposed combination and revisions of water districts, and the abolishment of the UWRWMD. Allen Merritt, the Department's Southern Regional Manager, presided as hearing officer. Approximately 65 people attended the hearing.

13. The hearing officer initiated the hearing by explaining the hearing process. Department representative Tim Luke gave a presentation that described the proposed water district combination and revisions, the features and operation of water districts, the reasons for the proposed actions, and the rights and uses proposed to be included in the combined water district. The Department presented the following reasons for the proposed actions:

- Combining surface water rights from WD37 and WD37M will formalize a merger that has essentially been accomplished for a number of years. Combining the two districts will promote efficiency by eliminating dual budgets and duplication of certain processes.
- 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 water 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.
- Maintaining all of the ground water rights from the UWRWMD in one water district with surface water rights from WD37/37M will provide a consistent organizational structure



that can manage the measurement of ground water diversions as required by the Department.

- About 100 ground water rights in the Wood River Valley above Magic Reservoir and in the Silver Creek drainage are already regulated by the WD37/WD37M watermaster. Most of these rights require WD37/37M watermaster control because they are mitigated by surface water rights or because ground water is commingled with surface water sources. The Department believes it is more efficient and practical for all the ground water rights in the same area to be administered by one water district rather than separate water districts. It is not practical to remove the approximate 100 ground water rights in WD37 and WD37M to a separate water district given the existing watermaster control conditions and relationship with surface water rights and sources.
- The proposed combination of water districts and inclusion of surface water and ground water rights in one water district would simplify administration of the SRBA General Provisions for Basin 37, Part 2. These provisions stipulate that a large number of surface water rights in the Camas drainage are to be administered separately from all other rights in Basin 37. An additional but much smaller group of surface water rights are to be administered separately from all other water rights in Basin 37 but certain rights held by the Big Wood Canal Company may call for water delivery of water against this smaller group. All other Camas drainage surface water rights not listed in these General Provisions, and all Camas drainage ground water rights are to be administered with other water rights in Basin 37.
- Abolishing the UWRWMD is necessary if ground water rights in the UWRWMD are placed in a water district.

14. Following the presentation, the hearing officer provided time for hearing participants to ask questions' regarding the Department's proposed actions.

15. Persons attending the hearing were provided an opportunity to make oral statements for the record. In addition, the hearing officer held the record open through August 9, 2013 to receive written testimony.

16. Eleven (11) individuals testified at the hearing. Thirteen (13) individuals submitted written comments, including four (4) of the individuals who testified at the July 30, 2013 public hearing. One of the individuals submitting both oral testimony and written comments represented two separate groups of affected water users.

17. Five (5) individuals holding water rights or representing the holders of water rights within the Camas drainage testified against the Department's proposal to include the Camas drainage in a combined water district with water rights from WD37/37M and ground water rights from the Big Wood River Valley upstream of Magic Reservoir and the Silver Creek drainage. These five individuals proposed a single water district for the Camas drainage composed of both surface water and ground water rights, including rights from WD37A and WD37C. Four (4) additional individuals submitted written comments in supporting a separate Camas drainage water district.

18. Jim Speck, one of the five individuals who testified in support of a separate Camas drainage water district, spoke as a representative of numerous surface water and ground water right holders in the Camas drainage who had signed petitions requesting the Department "to create a new and separate water district for the administration of our rights and not add them to Water District 37." Copies of the signed petitions with associated water right owner names and water right identification



numbers were submitted to the Department before the close of the written comment period. Mr. Speck testified that fifty-four (54) of seventy-seven (77) surface water users, and thirty-nine (39) of forty-one (41) ground water users in the Camas drainage had signed petitions supporting a separate water district. Mr. Speck further testified that the users signing the petitions supported the merger or inclusion of WD37A and WD37C with all other surface and ground water rights in the Camas drainage under one water district separate from WD37.

19. Reasons cited by the supporters of a separate water district for surface water and ground water rights in the Camas Creek drainage, including rights from WD37A and WD37C include:

- The Camas drainage area aquifer is different and separate from the Wood River Valley aquifer and the two aquifers are not connected. The two aquifers may be considered “independent” sources of water supply in accordance with Idaho Code § 42-604, thereby justifying creation of separate water districts.
- A ground water model is currently being developed for the Wood River Valley and Silver Creek/Bellevue triangle area (most of Basin 37, part 3). This model does not include the Camas Creek area aquifer (most of Basin 37, part 2) and no effort is currently being made to develop a model for the Camas Creek area aquifer. Lack of a ground water model for the Camas drainage aquifer prohibits the ability to implement conjunctive administration of water rights from that portion of Basin 37. Moreover, mitigation that might be provided from the Camas drainage would be completely separate from mitigation that might be developed in the Upper Wood River Valley and the Silver Creek/Bellevue triangle area.
- Upper Wood River Valley water issues are not present or do not exist in the Camas Creek drainage area. There are almost no common water administration issues between Basin 37, parts 2 and 3.
- The SRBA General Provisions for Basin 37, part 2 stipulate that many surface water sources are to be administered separately from all of the water rights in Basin 37.
- A separate water district for the Camas drainage area would better serve the right holders in the area due to local control and supervision. A bigger water district does not necessarily translate to a better water district. Users in the area are willing to pay some additional costs if necessary for the benefit of local control.
- Water users in the Camas drainage would not be adequately represented in a larger combined water district because water use in the Camas drainage may be relatively smaller than other areas of the proposed combined district.
- Ground water pumping in the Camas drainage has minimal impact on the Big Wood River, and the surface water in the drainage is intermittent or separate from the Big Wood River after the early spring snow melt and high flow runoff.

20. In accordance with the SRBA General Provisions for Basin 37, part 2, nearly all of the consumptive use surface water rights in the Camas drainage (about 215 out of 267 rights) are to be administered separately from all other water rights in Basin 37. There are about seventeen (17) rights in the Camas drainage that are to be administered separately from all other rights in Basin 37 but these seventeen rights may be subject to a delivery call of certain rights held by the Big Wood Canal Company. This leaves only about thirty-five (35) rights in the drainage that do not enjoy the benefits of any separate administration provisions.

21. Ground water rights in the Camas drainage are subject to administration with other rights in Basin 37 and are also subject to measurement and reporting requirements established by the Department when it created the UWRWMD. There are approximately 80 ground water diversions in the



UWRWMD and Camas drainage. Many of the owners of these 80 ground water diversions and associated ground water rights also hold surface water rights in the Camas drainage.

22. Three (3) individuals holding ground water rights or representing the holders of ground water rights within the Big Wood River drainage above Magic Reservoir or within the Silver Creek drainage area testified against the Department's proposal to include ground water rights with surface water rights in a combined WD37. These individuals instead supported a separate water district for the holders of ground water rights. One of these three individuals also voiced support for formation of a ground water sub-district within a combined WD37.

23. Five (5) individuals submitted written comments opposing the inclusion of ground water rights in the same water district as surface water rights, including Mr. Speck; Mike Creamer, representing the City of Hailey; Bruce Smith, representing the City of Ketchum; Evan Robertson, representing the Sun Valley Water and Sewer District; and James Laski, representing himself as the owner of a small surface water right. Two (2) of these five individuals (Speck and Creamer) provided oral testimony at the hearing. Mr. Speck testified at the hearing that he represented nine (9) ground water users in the Big Wood Valley or Silver Creek area but he submitted written comments on behalf of twenty-seven (27) ground water right holders. The written comments submitted by Mr. Speck and Mr. Robertson stated support for the testimony and comments provided by Mr. Creamer. Mr. Creamer's written comments supported a separate water district of ground water rights located within Basin 37, part 3. The written comments submitted by Mr. Laski also voiced opposition to include water rights from the Camas drainage with those from the Wood River Valley in one combined water district. The comments submitted by Mr. Smith on behalf of the City of Ketchum also opposed the abolishment of the UWRWMD.

24. Reasons cited by those opposing the inclusion of ground water rights in a water district with surface water rights include:

- Adversarial interests between ground water users and surface water users resulting from any potential conjunctive administration process would compromise the operations of a water district where surface and ground water rights are combined. Conflicts between surface and ground water users may negatively impact the ability of the combined district to function efficiently and cooperatively.
- Ground water right holders would be out voted in a combined water district because the amount of ground water use is significantly less than the amount of surface water use in the proposed water district.
- Ground water users may not be adequately represented on an advisory committee selected for the proposed water district.
- Ground water users may bear a disproportionate cost of water district operations because the budget of the UWRWMD is significantly less than the combined budgets of WD37 and 37M.
- Water districts have been created in the ESPA that are composed primarily of ground water rights. Those water districts have worked well and provide a good model for Basin 37, parts 2 and 3.
- The ground water model for Upper Wood River and Silver Creek/Bellevue triangle area must be completed before ground water and surface water rights can be combined in a single water district.
- The Department should have presented a budget for the proposed water district as part of its' hearing notice or hearing presentation. Costs, management and potential



administrative conflicts between ground and surface users should be explained before combining surface and ground water rights in one district.

- It may be difficult or legally impossible to address potential delivery calls from holders of senior surface water rights and potential mitigation requirements of junior ground water right holders if surface and ground water users are combined in one water district.

25. Two (2) individuals owning surface water rights in WD37 or WD37M testified at the hearing in support of the Department's proposal of a combined water district for both surface water and ground water rights. One of these 2 individuals, Fred Brossy, spoke on both his own behalf and on behalf of the WD37 and WD37M Advisory Committee. Mr. Brossy is the chairman of the WD37/WD37M Advisory Committee.

26. One (1) individual owning several small irrigation ground water rights in the Upper Wood River Valley and the UWRWMD submitted written comments supporting the Department's proposal for combining surface water and ground water rights in one water district.

27. Reasons cited by those supporting the Department's proposal include:

- The WD37/37M advisory committee has long supported the administration of ground water rights above Magic Reservoir (including the Camas drainage) and the Silver Creek drainage with surface water rights in WD37/37M. The committee petitioned the Director to begin administration of ground water rights many years ago.
- Ground water and surface water sources within Basin 37, parts 2 and 3 are connected as one water source so administration of rights in one district is reasonable.
- Combining surface water and ground water rights in one water district will generally provide for more effective, efficient, lawful and equitable administration of water rights.
- More effort is needed to complete the measurement of ground water diversions in the area. Ground water measurement compliance may be accomplished under one water district.
- Cost assessments to ground water users and surface water users under one combined water district should not be more than the current level of assessments.
- A combined water district will promote an opportunity for ground water and surface water users to work together on problems affecting the two groups. A single district will create a more regional approach to water management and resolution of basin wide issues whereas separate districts may provide more local control but result in more local conflicts.
- Delays in combining surface water rights and ground water rights in one water district may delay effective conjunctive administration of water resources.

28. The watermaster of WD37 and WD37M, Kevin Lakey, submitted written comments that addressed some of the testimony at the hearing regarding concerns about conjunctive management. Mr. Lakey noted that water users at annual water district meetings only vote on district "budget, hiring and resolutions" and not "on how conjunctive management will be enforced." Mr. Lakey also noted that representation on the WD37/37M advisory committee is not based on the amount of water delivered but rather on geographical areas and types of beneficial use. Mr. Lakey believed that a fair representation of water users can be established in a combined water district.

29. One (1) individual representing himself as the owner of a small irrigation ground water right in the Bellevue triangle area testified at the hearing that he did not support the Department's proposal and generally did not support the inclusion of his ground water right in any water district because such action will derive no benefit to him. This individual however did state that he was more



supportive of smaller units of administration because his right and interests “would not be lost in the shuffle.”

## CONCLUSIONS OF LAW

1. Idaho law declares all surface water, when in natural channels or springs or lakes, and all ground water within the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. *See* Idaho Code §§ 42-101, 42-103, and 42-226.
2. The Director, acting on behalf of the State of Idaho, has the statutory authority to control the appropriation and use of all surface and ground waters within the state in accordance with, but not limited to, Idaho Code §§ 42-101, 42-103, 42-202(1), 42-220, 42-226, 42-237a.g., 42-351, and 42-602 *et seq.*
3. The Director has 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 to be accomplished through watermasters supervised by the Director, and subject to removal by the Director, as provided in chapter 6, title 42, Idaho Code.
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. *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). 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.
5. Idaho Code § 42-1417 provides that the district court having jurisdiction over a general water rights adjudication may authorize the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, prior to the entry of a final decree, in accordance with Director's Reports filed with the court, with or without modification by the court, or in accordance with partial decrees that have superseded the Director's Reports.
6. All of the surface and ground water rights claimed in the SRBA and within Basin 37, parts 2 and 3, have been partially decreed or reported to the SRBA District Court.
7. Idaho Code § 42-227 provides that a water right permit may be issued, but shall not be required for appropriation of ground water for domestic and stock water purposes as defined under Idaho Code § 42-111.
8. Idaho Code § 42-113 provides that a water right permit may be issued, but shall not be required for appropriation of water for the in-stream watering of livestock.



9. Idaho Code § 42-706 provides that the Director may create, revise the boundaries of, or abolish a water measurement district or combine two or more water measurement districts by entry of an order if such action is required in order to properly administer uses of the water resource.

10. Much of the oral testimony from the hearing and the written testimony received after the hearing focused on the creation of a separate water district for the Camas drainage that would include both surface and ground water rights, including rights from WD37A and WD37C. Reasons that water users cited for creation of a separate district are listed in Finding of Fact 19.

11. The Department concludes that a separate water district for the Camas Creek drainage composed of surface water rights may provide for proper administration of surface water rights. The Department concludes that the small number of surface water rights in the drainage that are required to be administered with other rights in Basin 37 as described in Finding of Fact 20 may not justify including Camas drainage surface water rights in a large water district. The Department concludes that administration of these limited numbers of rights can be accomplished by a watermaster in a separate Camas drainage water district working in coordination with the watermaster from WD37 and with both watermasters working under the direction of the Director.

12. The Department concludes that the Camas drainage aquifer system is characteristically different from the Upper Wood River Valley aquifer system but the aquifer systems are hydraulically connected to each other and the Big Wood River<sup>2</sup>. The Department agrees with testimony that the amount of ground water use from the two aquifer systems are different and water resource issues in the two areas may vary. The Department also agrees with testimony that conjunctive administration of surface and ground water rights in the Wood River basin is likely imminent. The Department does not conclude that ground water rights in the Camas drainage are immune to conjunctive administration simply because ground water use is less or because the drainage has not yet been included in the development of a ground water model.

13. Although ground water rights in both the Camas drainage and the Upper Wood River Valley and Silver Creek drainages may need to be conjunctively administered together with surface water rights in Basin 37, the Department concludes that the limited number of ground water rights and wells in the Camas drainage can be administered properly by including them with surface water rights in a separate Camas drainage water district that is under the direction and control of the Director.

14. The Department adopts this structure with some hesitation because conjunctive administration of water rights in Basin 37 may be more challenging when the water rights are in separate water districts and because many ground water diversions in the Camas drainage are not yet in full compliance with Department measurement orders. The Department would prefer to place the Camas drainage in a well established operational water district such as WD37 that has experienced staff, equipment and other resources rather than start a new water district that has no existing staff or resources. If ground water or surface water rights in the Camas drainage cannot be administered or properly measured in a separate water district, then the Director may abolish the district, revise the boundaries of the district or combine the district with another water district in accordance with Idaho Code §42-604.

15. Much of the oral testimony from the hearing and the written testimony received after the hearing also focused on the creation of a separate water district for ground water rights in the Upper

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<sup>2</sup> Bartolino and Adkins, 2012. Hydrogeologic Framework of the Wood River Valley Aquifer System, South-Central Idaho, USGS Report 2012-5053, p. 26; and Wlaton, W.C., 1962. Ground Water Resources of Camas Prairie, Camas and Elmore Counties, Idaho, USGS Water Supply Paper 1609, pp. 1, 20, and 42-43.



Wood River Valley and the Silver Creek/Bellevue triangle drainage area. Reasons that water users cited for creation of a separate district are listed in Finding of Fact 24.

16. Testimony was provided opposing the proposed combination of ground water and surface water rights in a water district due to concerns that “conjunctive administration of surface and ground water rights is imminent and is an inherently adversarial process” which will “bleed over into the business of WD37.” Water districts are limited to administration of water rights, including measurement and regulation of diversions. 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). The Department agrees with the testimony of Kevin Lakey, WD37 watermaster, which notes that decisions regarding conjunctive administration will be made and enforced by the Director. Conjunctive administration will not be resolved within the venues or forums of a combined water district. Moreover, the CMRs have been implemented and mitigation has been successfully implemented within WD130 without disruption to the operations of that water district despite the fact that both surface water and ground water rights are included in the district.<sup>3</sup>

17. Additional testimony suggested that it may be “legally impossible to address potential delivery calls from holders of senior surface water rights and potential mitigation requirements of junior ground water right holders if surface and ground water users are combined in one water district” and that “management and potential administrative conflicts should be explained before combining surface and ground water rights in one district.” This testimony appears to confuse conjunctive administration issues with the narrow and limited regulatory scope of water district operations. Again, conjunctive administration and mitigation has been implemented “legally” in WD130 where surface water and ground water rights coexist. The Department proposed combining ground water rights and surface water rights in one district for the reasons stated in Finding of Fact 13. 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. Potential mitigation requirements must be addressed by the holders of junior ground water rights working independent from a water district and preferably through a ground water district organized in accordance with chapter 52, title 42, Idaho Code.

18. Witnesses opposed combining ground water rights with surface water rights in a water district because surface water use is significantly more than ground water use in the proposed district and surface water users may out vote ground water users under the alternative method of voting allowed under Idaho Code § 42-605(4). The testimony cited concerns that the interests of ground water users will not be represented “because implementing conjunctive administration in the Big Wood River Basin will be contentious.” The Department notes that voting at annual water district meetings is limited to the adoption of a budget, election of a watermaster and treasurer, selection of an advisory committee and adoption of resolutions related to the operation of the water district. Conjunctive administration issues and decisions will not be subject to voting at annual water district meetings. Moreover, the concern that ground water users will be outvoted or “unrepresented” discounts the fact that about 100 ground water rights have been included in WD37 and WD37M for a number of years. The Department is not aware of complaints or concerns from those ground water users regarding “unrepresented” interests or control by

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<sup>3</sup> WD130 includes ground water rights in the ESPA overlying Basins 36, 37 and 41 and surface water rights from the Thousand Springs area overlying the ESPA and Basins 36 and 37.



surface water users. Additionally, the holders of many ground water rights in the proposed combined water district also hold surface water rights in WD37 or WD37M.<sup>4</sup> It is not clear that the interests of ground water users would be poorly represented when so many ground water users also own surface water rights that are presently administered by WD37/37M.

19. Witnesses opposed the proposed combination of ground water and surface water rights in a water district because ground water users may not be adequately represented on an advisory committee due primarily to the disparity in the amount of water use between surface and ground water users. Idaho law does not vest specific power in an advisory committee. The committee provides advice to the watermaster, the Director and the water users of the water district. The WD37/37M watermaster testified that the WD37/37M advisory committee representation is not based on the amount of water diverted but rather on geographical regions and types of beneficial water use. He added that if a combined district is formed, a steering committee will be selected to recommend, among other things, the organization of an advisory committee. The steering committee concept is consistent with the recommendation made by the Department during its presentation at the public hearing. The WD37/37M advisory committee chairman testified at the public hearing that he was confident that concerns about representation of ground water users on an advisory committee could be addressed. The Department concludes that an advisory committee can be selected that provides adequate representation of all water users in the proposed water district comprised of both surface water and ground water rights.

20. Witnesses testified that ground water rights in the Upper Wood River Valley and Silver Creek drainage should be placed in a separate water district because several water districts already exist in the ESPA that are composed primarily of ground water rights which provide a good model for ground water administration in the Big Wood River Basin. The Department acknowledges that there are several ESPA water districts that are limited to ground water rights but there is at least one ESPA water district, WD130, which includes both surface water and ground water rights. WD130 was created in 2002 when conjunctive administration of surface water and ground water rights within the district was imminent. Subsequently, conjunctive administration delivery calls have been made and the CMRs have been implemented. WD130 has functioned successfully despite contention among surface water and ground water users in the district. The Department recommends that ground water rights in the Upper Wood River Valley and Silver Creek drainage be combined with WD37 and WD37M because administration of the rights would be more efficient.

21. Witnesses testified that ground water rights in the Upper Wood River Valley and Silver Creek drainage should be placed in a separate water district due to concerns that water district administration costs can't be fairly allocated in a combined district. Specifically, a concern was expressed that ground water users "would wind up bearing a disproportionate cost of water district operations." In accordance with Idaho Code §42-610, water district costs are assessed to individual users based on the amount of water delivered. The WD37/37M advisory committee chairman testified at the public hearing that the current advisory committee members are concerned that surface water users could actually end up paying a disproportionate share of district costs because the costs of measuring the wells may be higher than expected since so many wells are not yet in compliance with the Department's ground water measurement order. The committee chairman testified that the WD37/37M advisory committee wishes to maintain the water district assessment rates. The Department's limited analysis indicates that if the WD37 2013 assessment rate were adopted and applied to both surface water and ground water deliveries in a combined water district, most ground water users would have an

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<sup>4</sup> Assessment records of the UWRWMD and WD37/37M show that about 41% of the water users assessed by the UWRWMD are also assessed by WD37/37M. A majority of the holders of large irrigation ground water rights in the UWRWMD also hold surface water rights in WD37/37M.



assessment that is less than or roughly equivalent to their 2013UWRWMD assessment.<sup>5</sup> While the testimony raised concerns about ground water users bearing a disproportionate share of district costs, no evidence was given to substantiate the concern.

22. Written testimony suggested that suggested the Department should have presented a budget for the proposed combined water district. Chapter 6, title 42, Idaho Code does not require the Department to present a proposed budget when creating a water district, modifying the boundaries of a water district or combining two or more water districts. Rather, Idaho Code § 42-605 requires that the water users at an annual water district meeting must adopt a budget. The Department presented information at the hearing suggesting that a steering committee be formed consisting of affected ground water users and members from the WD37/37M advisory committee to consider a budget that could be presented at the first annual meeting of a combined water district. Department representatives at the public hearing cautioned about the appropriateness of the Director dictating a budget to the users in contrast with the requirements of § 42-605. The Department representative stated at the hearing that the current budgets for WD37/37M were adequate for administration of surface water rights, but the budget needed for administration and on-going measurement of ground water rights might need to be somewhat higher than the 2013 UWRWMD budget. The Department finds that combining the 2013 WD37/37M and UWRWMD budgets and deliveries, or estimate of deliveries for the UWRWMD, would result in an assessment rate that is similar to the 2013 WD37/37M and UWRWMD assessment rates.

23. Witnesses suggested the ground water model for the Upper Wood River and Silver Creek/Bellevue triangle area must be completed before ground water and surface water rights can be combined in a single water district. Again, this testimony appears to confuse conjunctive administration issues with the narrow and limited regulatory scope of water district operations. Completion of a ground water model is not a legal requirement or prerequisite for including both surface water and ground water rights in one water district. The Department has created several water districts in the State that include both surface and ground water rights without having a ground water model completed.

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 the 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;
- iii. Create a separate water district to administer both surface and ground water rights in the Camas Creek drainage including water rights from WD37A and WD37C to regulate water rights, and protect senior priority water rights in Basin 37; and
- iv. Abolish the UWRWMD.

## ORDER

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<sup>5</sup> This was determined by applying the WD37 2013 assessment rate to reported annual water use from certain municipal providers and 2013 water use from several UWRWMD metered ground water irrigation wells. The 2013 minimum assessment rate for the UWRWMD was over \$50 whereas the minimum assessment rate in WD37 and WD37M was only \$40. Given the significantly larger proportion of surface water use in a combined district, many of the smaller ground water users would be subject to a minimum rate assessment not to exceed \$50.



IT IS HEREBY ORDERED that:

1. Water District No. 37 and Water District No. 37M are hereby combined as one water district together with all ground water rights located within the boundaries of the combined water district but outside the boundaries of the ESPA and Water District No. 130 as shown in the map appended hereto as Attachment A, except water rights used for domestic and stock water purposes as defined by Idaho §§ 42-111 and 42-1401A(11) and water rights used for in-stream watering of livestock as defined by Idaho Code § 42-113. The combined water district shall be designated as Water District No. 37, Big and Little Wood Rivers, and shall become effective January 6, 2014. The map attached hereto as Attachment B shows the boundaries of Water District Nos. 37 and 37M prior to the districts being combined pursuant to this Preliminary Order.
2. Water District No. 37 shall include ground water and all streams tributary to the Big Wood River and Little Wood River except Camas Creek and tributaries, and shall exclude Water District No. 37N (Upper Little Wood River and tributaries), Water District No. 37-O (Muldoon Creek and tributaries) and Water District No. 37U (Fish Creek and tributaries), and the lower portion of the Malad River and tributaries downstream and west of the point where the boundary common to Township 6 South and Range 13 East and Township 6 South and Range 14 East crosses the Malad River (approximately where Interstate 84 crosses the Malad River). The map attached hereto as Attachment B shows the locations of Water District Nos. 37-N, 37-O and 37-U.
3. The annual meeting of Water District No. 37 shall be held on January 6, 2014 to elect a watermaster, select an advisory committee, if desired, and set a budget for operating the district. The Director will send a separate notice to the holders of water rights in the water district providing a reminder of the meeting date and announcing the time and location for the meeting.
4. The water users attending the Water District 37 annual meeting shall adopt one budget for administration and measurement of both surface water rights and ground water rights. Ground water rights that are subject to assessment shall be assessed in the same manner as surface water rights and in accordance with the provision of chapter 6, title 42, Idaho Code. In cases where water delivery records do not exist for water rights, the assessments must be based on a reasonable estimate of water use during the previous season or seasons, not exceeding five seasons.
5. Water District No. 37-B is created to include all surface water and ground water rights in the Camas Creek drainage in Basin 37 as shown in the map appended hereto as Attachment A. Water District No. 37A and Water District No. 37C shall be merged with Water District 37-B. Water District 37-B shall exclude water rights used for domestic and stock water purposes as defined by Idaho §§ 42-111 and 42-1401A(11) and water rights used for in-stream watering of livestock as defined by Idaho Code § 42-113. The map attached here to as Attachment B shows the boundaries of former Water District Nos. 37-A and 37-C.
6. As soon as practicable in calendar year 2014, the holders of water rights within Water District No. 37-B shall meet at a date, time and place to be announced by the Director to conduct its annual meeting to elect a watermaster, select an advisory committee, if desired, and set a budget for operating the district.



7. The Director shall issue a separate order requiring the installation of measuring devices and controlling works for surface water right diversions within Water District No. 37-B.

8. The Director shall consider combining all or portions of Water District No. 37-B with Water District No. 37 if Water District No. 37-B does not comply with the provisions of chapter 6, title 42, Idaho Code or if a majority of water users in the water district do not comply with existing or future orders of the Department requiring water measurement devices or controlling works.

9. The watermasters for Water District Nos. 37 and 37-B shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:

- a. Measure, collect, and record the diversions under water rights;
- b. Administer and enforce water rights in priority; and
- c. Curtail unauthorized or excessive diversions as necessary (i.e., any diversion without a water right or in excess of the elements or conditions of a water right).
- d. Coordinate delivery by priority of rights that do not enjoy the benefits of any separate administration provisions as decreed in the SRBA.

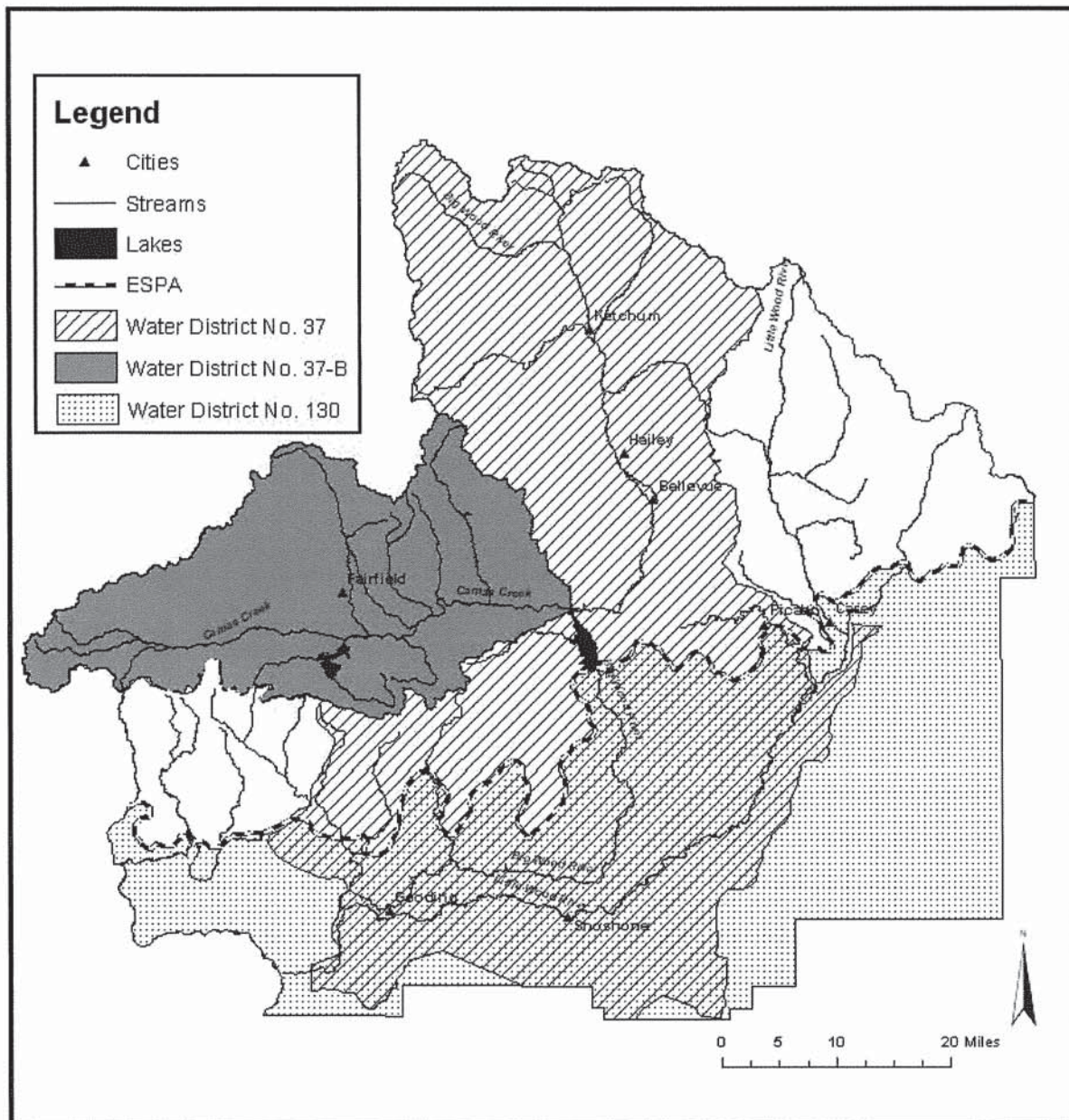
IT IS FURTHER HEREBY ORDERED that:

1. The Upper Wood Rivers Water Measurement District is hereby abolished effective December 31, 2013. The measurement district will continue to operate in accordance with chapter 7, title 42, Idaho Code, until December 31, 2013. The map attached hereto as Attachment B shows the boundaries of the measurement district.

DATED this 17<sup>th</sup> day of September, 2013.

  
Allen Merritt  
Hearing Officer

**ATTACHMENT A**  
**Water District No. 37 and Water District 37-B Pursuant to Preliminary Order**





**Legend**

- ▲ Cities
- Streams
- Lakes
- - - ESPA
- [Diagonal Lines] Water District No. 37
- [Light Gray Box] Water District No. 37-A
- [Dark Gray Box] Water District No. 37-C
- [Cross-hatch Box] Water District No. 37-M
- [Medium Gray Box] Water District No. 37-N
- [Light Gray Box] Water District No. 37-O
- [Dark Gray Box] Water District No. 37-U
- [Dotted Box] UNRWWD

The map displays the geographical distribution of Water District No. 37 and its sub-districts. The main area is labeled "37". Sub-districts are labeled as follows:

- 37-A**: Located in the northwest.
- 37-C**: A dark gray area in the west-central part.
- 37-M**: A large cross-hatched area covering much of the central and southern parts.
- 37-N**: A medium gray area in the northeast.
- 37-O**: A light gray area in the far northeast.
- 37-U**: A dark gray area in the southeast.

Cities shown include Marcham, Hales, Salisbury, and Shoshone. Rivers such as the Snake River, Big Lost River, and Little Lost River are depicted. A scale bar indicates distances from 0 to 20 miles, and a north arrow is present in the bottom right corner.

## **EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER**

**(To be used in connection with actions when a hearing was held)**

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 67-5243(3) Idaho Code.

### **EXCEPTIONS AND BRIEFS**

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

### **ORAL ARGUMENT**

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.



### **CERTIFICATE OF SERVICE**

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

### **FINAL ORDER**

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

### **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19<sup>th</sup> day of September 2013, the above and foregoing document was served on each individual or entity on the service list for this matter on file at the Idaho Department of Water Resources, 322 East Front Street, Boise, Idaho, and posted on the Department's website: [www.idwr.idaho.gov](http://www.idwr.idaho.gov). Each individual or entity on the service list was served by placing a copy of the above and foregoing document in the United States mail, postage prepaid and properly addressed.

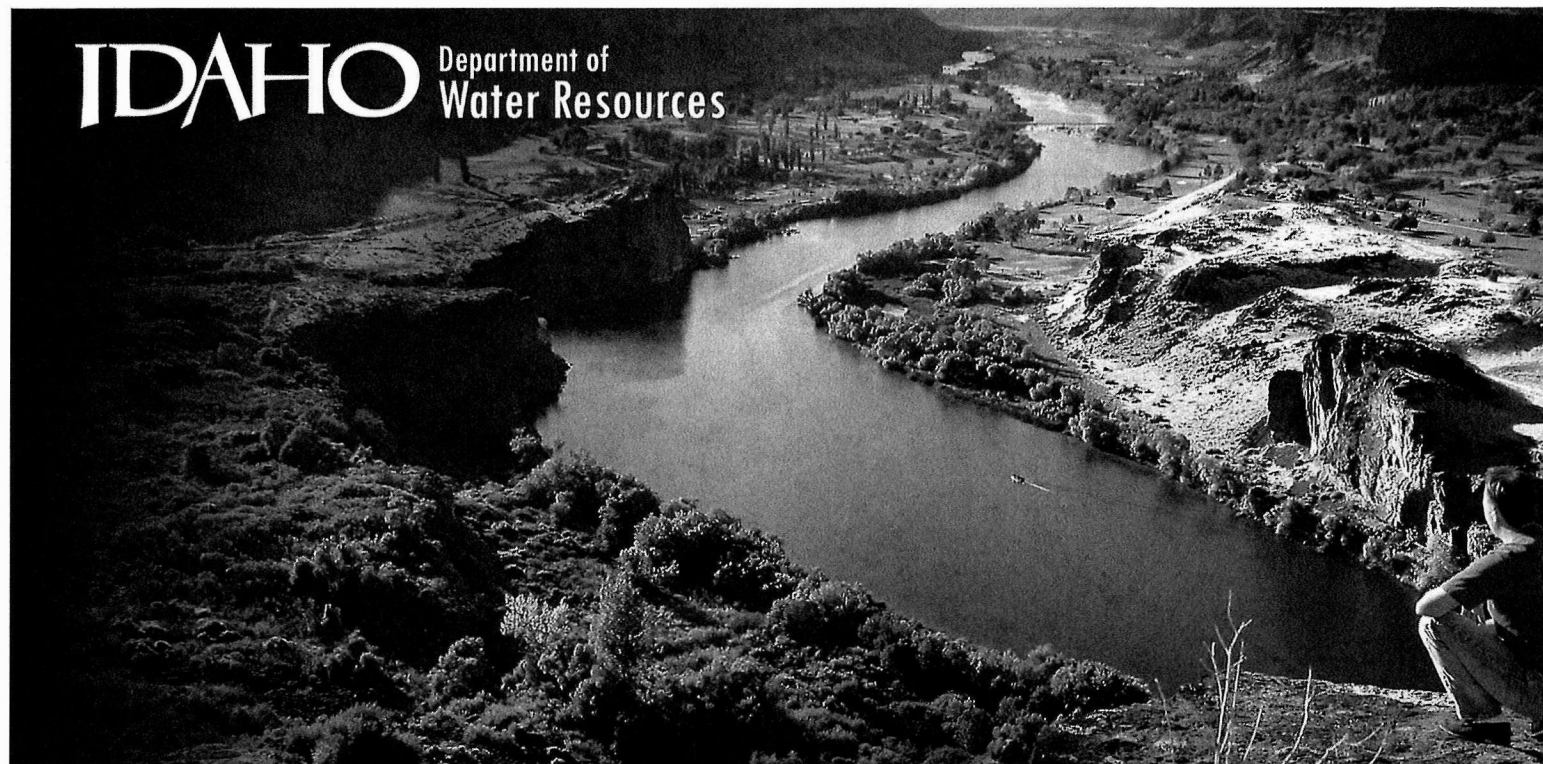
Documents served: **Preliminary Order In the Matter of the Proposed Combination of the Water District Nos. 37, 37A, 37C and 37M and the Inclusion of Both Surface Water and Ground Water Rights in the Combined Water District; and in the Matter of Abolishing the Upper Wood Rivers Water Measurement District**



Sarah Garceau  
Technical Records Specialist  
Idaho Department of Water Resources

# Exhibit C

**IDAHO** Department of  
Water Resources



# Idaho Conjunctive Management Rules & Ground Water District Formation

Boise, Idaho

March 7, 2014

Tim Luke, IDWR





# 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)

## 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)



## 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)

- 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

# Exhibit D

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

SUN VALLEY COMPANY, a Wyoming corporation,

Petitioner,

vs.

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

Respondents,

and

CITY OF KETCHUM, CITY OF FAIRFIELD,  
WATER DISTRICT 37-B GROUNDWATER  
GROUP, BIG WOOD & LITTLE WOOD WATER  
USERS ASSOCIATION, SOUTH VALLEY  
GROUND WATER DISTRICT, ANIMAL  
SHELTER OF WOOD RIVER VALLEY, DENNIS J.  
CARD and MAUREEN E. MCCANTY, EDWARD  
A LAWSON, FLYING HEART RANCH II  
SUBDIVISION OWNERS ASSOCIATION, INC.,  
HELIOS DEVELOPMENT, LLC, SOUTHERN  
COMFORT HOMEOWNER'S ASSOCIATION,  
THE VILLAGE GREEN AT THE VALLEY CLUB  
HOMEOWNERS ASSOCIATION, INC., AIRPORT  
WEST BUSINESS PARK OWNERS ASSN INC.,  
ANNE L. WINGATE TRUST, AQUARIUS SAW  
LLC, ASPEN HOLLOW HOMEOWNERS, DON R.  
and JUDY H. ATKINSON, BARRIE FAMILY  
PARTNERS, BELLEVUE FARMS LANDOWNERS  
ASSN, BLAINE COUNTY RECREATION  
DISTRICT, BLAINE COUNTY SCHOOL  
DISTRICT #61, HENRY and JANNE BURDICK,  
LYNN H. CAMPION, CLEAR CREEK LLC,  
CLIFFSIDE HOMEOWNERS ASSN INC, THE  
COMMUNITY SCHOOL INC, JAMES P. and JOAN

Case No. CV-WA-2015-  
14500

**MEMORANDUM  
DECISION AND ORDER**

District Court - SRBA Fifth Judicial District In Re: Administrative Appeals County of Twin Falls - State of Idaho	
APR 22 2016	
By _____	Clerk
_____	Deputy Clerk





**I.**  
**STATEMENT OF THE CASE**

**A. Nature of the case.**

This case originated when the Sun Valley Company (“Sun Valley”) filed a *Petition* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources (“IDWR” or “Department”). Under review is the Director’s *Order Denying Sun Valley Company’s Motion to Dismiss* issued on July 22, 2015 (“*Final Order*”). The *Final Order* denies Sun Valley’s request to dismiss two requests for administration submitted by members of the Big Wood and Little Wood Water Users Association (“Association”). Sun Valley asserts that the *Final Order* is contrary to law and requests that the Court set it aside and remand with instructions to dismiss the requests for administration.

**B. Course of proceedings and statement of facts.**

This case involves a demand for the priority administration of water. The seniors are Association members located in water district 37. R., pp.1-5; LW R., pp.1-5.<sup>1</sup> They hold approximately 80 senior water rights that divert from the Big Wood and Little Wood Rivers. *Id.* In two letters to the Director dated February 23, 2015, the seniors assert they are short water due to junior use. *Id.* They demand priority administration of their surface water rights and hydrologically connected ground water rights within water district 37. *Id.* The Director informed the seniors he would treat the requests for administration as delivery calls under the CM Rules and proceeded to initiate two contested case proceedings.<sup>2</sup> R., p.6; LW R., p.6. The first, designated IDWR docket number CM-DC-2015-001, involves those seniors that divert from the Big Wood River. *Id.* The second, designated IDWR docket number CM-DC-2015-002, involves those diverting from the Little Wood River. *Id.*

The Director identified junior water users he determined may be affected by one or both of the calls. R., p.12. He proceeded to serve notice of the filing of the calls on those juniors. *Id.*

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<sup>1</sup> Two agency records make the record in this matter. The first arises out of IDWR Docket No. CM-DC-2015-001, relating to the requests for priority administration of water rights diverting from the Big Wood River. The citation “R., p.” refers to that agency record. The second arises out of IDWR Docket No. CM-DC-2015-002, relating to the requests for priority administration of water rights diverting from the Little Wood River. The citation “LW R., p.” refers to that agency record.

<sup>2</sup> The term “CM Rules” refers to Idaho’s *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

The notice invited the juniors to participate in contested case proceedings and warned that if they did not they “may still be legally bound by the results of the contested case proceedings.” *Id.*

On June 25, 2015, Sun Valley moved the Director to dismiss the calls for their failure to comply with applicable filing requirements. *Id.* at 382-402. Among other things, it argued that Rule 30 of the CM Rules governs the calls and that the seniors did not satisfy the filing requirements of that Rule. *Id.* In his *Final Order*, the Director denied Sun Valley’s *Motion*. *Id.* at 888-898. He held the calls are governed by Rule 40 of the CM Rules and that the seniors’ letters meet the filing requirements of that Rule. *Id.* Sun Valley subsequently filed a *Motion* asking the Director to review and revise his *Final Order*. *Id.* at 963-977. The Director denied the *Motion* on October 16, 2015. Supp. R., pp.84-88.

Meanwhile, on August 19, 2015, Sun Valley filed a *Petition for Judicial Review*, asserting that the Director’s *Final Order* is contrary to law. The case was reassigned by the clerk of the court to this Court on August 28, 2015. On September 29, the Court entered an *Order* permitting the Intervenor to appear as parties to this proceeding. Although the administrative proceedings pertaining to the calls have not concluded, the Director entered an *Order* designating the *Final Order* as final and subject to judicial review on October 15, 2015. Supp. R., pp.71-74. This was done pursuant to the joint motion and stipulation of the parties. *Id.* at 9-13; 72. Sun Valley subsequently filed an *Amended* and *Second Amended Petition for Judicial Review*. A hearing on the *Second Amended Petition* was held before this Court on March 3, 2016. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day, or March 4, 2016.

## II.

### STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (“IDAPA”). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency’s findings, inferences, conclusions, or decisions are: (a) in violation of



constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or, (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

### III. ANALYSIS

#### A. Introductory analysis.

The issue before the Court is whether the Director properly denied Sun Valley's *Motion to Dismiss*. To address the issue the Court must determine what set of procedures govern the calls. The CM Rules provide the "procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." IDAPA 37.03.11.001. 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 purposes 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. There are numerous organized water districts in IDWR Basin 37, including water district 37, 37B, 37N, 37O and 37U. 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. Thus, while the CM Rules purport to “apply to all situations in the state” where junior ground water use causes material injury to a senior, an argument can be made that one situation is unaccounted for. IDAPA 37.03.11.020.01. That situation, which is present here, is where juniors potentially subject to a call are in organized water districts, but are not within 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.<sup>3</sup> 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 of common ground water supply.<sup>4</sup> This presumption pervades the Rules. Were this presumption true, the procedures set forth in Rule 30 and Rule 40 would interact flawlessly with one another. Where affected ground water rights are not in an organized water district, the Rules assume that area of the state has not been designated as having a common ground water supply. In that situation, Rule 30 clearly applies. On the other hand, where affected ground water rights are in an organized water district, the Rules presume the water district has been designated as an area of the state having a common ground water supply. In that situation, Rule 40 applies. 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.

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<sup>3</sup> See e.g., I.C. § 42-604 (providing that the statutory criteria for the creation of water districts “shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts having jurisdiction thereof”).

<sup>4</sup> There is some basis in law for this assumption. In many instances ground water rights, once decreed, are incorporated into an existing water district. That existing water district would have been formed originally to effectuate the administration of solely surface water rights on a given surface water source. To incorporate ground water rights into the district, the Director is required to make the determination that the ground water rights are hydraulically connected to the surface water source. I.C. § 42-237a.g. Further, if the Director determines that no hydraulic connection to the surface source exists then incorporate such rights into a separate water district. *Id.* Therefore, the assumption could be made that once ground water rights are incorporated into an existing water district, the boundary of that district will be co-extensive with the area of the state having a common ground water supply relative to the surface water source that acted as the basis for the original formation of the district. However, for reasons set forth herein, this assumption has not materialized in reality.

An example is illustrative. Consider the Eastern Snake Plain Aquifer (“ESPA”). Through the rulemaking process, the ESPA was designated as an area of the state having a common ground water supply relative to the Snake River. IDAPA 37.03.11.050. It is the only area of the state to have been designated as having a common ground water supply under the CM Rules. *Id.* A contemporary review of the boundary of the ESPA area of common ground water supply reveals that it is not coextensive with the boundary of any single water district. To the contrary, it encompasses many water districts (i.e., water district 110, 120, 130, etc.). There are even water districts, such as water district 37, that straddle the boundary of the ESPA area of common ground water supply. R., p.126. That the ESPA area of common ground water supply encompasses many water districts and partially encompasses others is not a possibility envisioned by the CM Rules.

That such is the case is evidenced by the Rules themselves. The ESPA area of common ground water supply was created well before ground water rights in that area were incorporated into water districts. The CM Rules contemplated that those ground water rights would eventually be incorporated into a single water district co-extensive with the ESPA area of common ground water supply:

The Eastern Snake Plain Aquifer area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated . . . .

IDAPA 37.03.11.050.01.d. This has not occurred. Although adjudicated, ground water rights located in the ESPA area of common ground water supply have been incorporated into many water districts, the boundaries of which appear to bear no relation to the boundary of the area of common ground water supply.<sup>5</sup> Therefore, although the CM Rules presumed the boundary of the ESPA area of common ground water supply would be co-extensive with a single water district, this presumption is not reflected by reality.

The ESPA example is representative of a larger trend. The CM Rules’ assumption that the boundary of a water district will reflect the boundary of an area designated as having a common ground water supply is not materializing. Water district 37 – the district in which the

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<sup>5</sup> Ground water rights incorporated into a water district must share a common ground water supply. However, not all ground water rights within the area of common ground water supply have been incorporated into the water district. As such, the area of common ground water supply extends beyond the boundaries of the water district.



seniors in this case reside – is representative of this trend. The southern portion the district is within the boundary of the ESPA area of common ground water supply. *Id.* at 125. The northern portion of the district is not. *Id.* at 126. It lies in an area of the state that has not been designated as having a common ground water supply. *Id.* The district is inclusive of both surface and ground water rights, all of which are hydraulically connected to the Big Wood and Little Wood Rivers. However, no party argues that the boundary of water district 37 is one and the same with that area of the state having a common ground water supply relative to those rivers. The consensus appears to be that that area is larger than water district 37 and, like the ESPA area of common ground water supply, encompasses multiple water districts.

In this case, the Director denied Sun Valley's *Motion to Dismiss* because he determined the Association's calls are governed by Rule 40. He arrived at that decision by applying the simple dichotomy that Rule 40 applies when affected juniors are in organized water districts and Rule 30 applies when they are not. Applying that dichotomy would suffice if, as the Rules presume, the boundary of a water district is co-extensive with that of the area of common ground water supply. This introductory analysis establishes that is not the case, and it should be noted that the Director does not even argue that such is the case. 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 sets forth herein, holds that the Director's determination that Rule 40 governs the calls must be reversed and remanded.

**B. Rule 30 of the CM Rules sets forth the procedures governing the Association's calls and, in conjunction with Rule 31, provides the procedures and criteria for determining that area of the state having a common ground water supply relative to the Big Wood and Little Wood Rivers.**

All parties agree that an area of common ground water supply applicable to the Big Wood and Little Wood Rivers must be determined. They disagree how this should happen and as to the rules and procedures that should govern. An area having a common ground water supply is defined in pertinent part as "[a] ground water source within which the diversion and use

of ground water or changes in ground water recharge affect the flow of water in a surface water source.” IDAPA 37.03.11.010.01. Determining an area of common ground water supply is critical in a surface to ground water call. Its boundary defines the world of water users whose rights may be affected by the call, and who ultimately need to be given notice and an opportunity to be heard. In the Court’s estimation, 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.

There is only one area of the state that has been determined as having an area of common ground water supply under the CM Rules. That area is the ESPA area of common ground water supply. IDAPA37.03.11.050. Some parties argue that the fact the seniors are located within the ESPA area of common ground water supply has some legal significance. It does not. While it is true a portion of water district 37 is located within the ESPA area of common ground water supply, the ESPA area of common ground water supply is not relevant to the instant calls. It defines an area of the state having a common ground water supply relative to the Snake River. The seniors do not divert from the Snake River, but rather from the Big Wood and Little Wood Rivers. Therefore, to process the Association’s calls, a determination must be made identifying an area of the state that has a common ground water supply relative to the Big Wood and Little Wood Rivers and the junior ground water users located therein.

By their terms, the CM Rules “provide the basis for the designation of areas of the state that have a common ground water supply . . . .” IDAPA 37.03.11.020.06. The Director argues that this determination may be made under Rule 40. Sun Valley and the Water District 37-B Groundwater Group argue the determination must be made under Rule 30. The Court agrees with the latter.

- i. **Rule 30 provides procedures and processes necessary to safeguard juniors’ due process rights when determining an area of common ground water supply.**

The area of common ground water supply in a surface to ground water call defines the world of juniors whose rights to use ground water may be curtailed. It is paramount that junior users who may be found to be within that area be given proper notice and the opportunity to be heard. Rule 30 of the CM Rules provides the procedural safeguards necessary to ensure these



basic due process rights. Where, as here, the senior seeks to curtail juniors in an area of the state that has not been determined as having a common ground water supply, Rule 30 requires the senior to include certain information in his petition. IDAPA 37.03.11.030.01. The senior must allege the area he believes to be the area of common ground water supply relative to his water source. IDAPA 37.03.11.030.01.d. The senior must then identify the junior users within that area he alleges are causing material injury (i.e., respondents). IDAPA 37.03.11.030.01.b. To ensure proper notice, Rule 30 requires the senior to serve his petition on those respondents. IDAPA 37.03.11.030.02. To ensure an opportunity to be heard, it requires the Director to initiate a contested case proceeding under the Department's Rules of Procedure. *Id.* These safeguards provide juniors proper notice of the alleged area of common ground water supply as well as the opportunity to be heard and present evidence in opposition to the petitioner's allegations.

Rule 40 lacks these procedural safeguards. It does not require the senior to allege the area of common ground water supply nor to identify juniors alleged to be within that area causing injury. It does not require the senior to serve his petition on junior users nor the Director to initiate a contested case proceeding. The reason Rule 40 lacks these safeguards is that it presupposes the area of common ground water supply applicable to the call has already been determined. IDAPA 37.03.11.040. It contemplates a process of administration that is more efficient than that set forth in Rule 30. *Id.* The process contemplated is similar to the administration of surface water rights within a water district by a watermaster. *Id.* Since Rule 40 assumes the world of juniors subject to curtailment is already determined and known, it does not include the same procedural safeguards set forth in Rule 30. Therefore, the Court finds that Rule 30 provides the procedures and processes necessary to safeguard juniors' due process rights. It follows that when a call is made by a senior surface water user against junior ground water users in an area of the state that has not been determined to be an area having a common ground water supply, the procedures set forth in Rule 30 must be applied to govern the call.

**ii. Rule 30 provides the Director the authority to determine an area of common ground water supply.**

In addition to providing procedural safeguards, it is Rule 30 of the CM Rules that provides the Director with the express authority to determine an area of common ground water supply. It provides that following consideration of a contested case, the Director may enter an

order determining “an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district.” IDAPA 37.03.11.030.07.c. Rule 40 provides no such authority, as it presupposes that determination has already been made. That such a determination must be made under Rule 30 is further evidenced by Rule 31. That Rule sets forth the criteria for determining whether an area of the State may be designated as having a common ground water supply. IDAPA 37.03.11.031.03. Critically, it instructs that the Director’s findings with respect to those criteria must “be included in the Order issued pursuant to Rule [30].” IDAPA 37.03.11.031.05. Therefore, the Court finds that it is Rule 30 that provides the Director the authority to determine an area of common ground water supply. It follows the procedures set forth in Rule 30 must be applied to govern the calls.

The Court rejects the Director’s arguments that a determination of an area of common ground water supply can be made under Rule 40. There are simply no procedures, criteria or authorization under that Rule for making such a determination. The Director applied Rule 40 due to the fact that the juniors here are in organized water districts. However, applying the dichotomy that Rule 40 applies when juniors are in an organized water district and Rule 30 applies when they are not does not provide the critical information needed to process a surface to ground water call under the circumstances present here. Most notably, the fact that junior water right holders are in organized water districts does not address the issue of which areas of the state may be subject to curtailment as a result of a given call. It is the designation of an area of common ground water supply relative to the senior’s surface water source that answers this question. Since the procedures and criteria for making this determination are associated with Rule 30, it is Rule 30 that must govern a call where a senior surface water user seeks to curtail junior ground water users in an area of the state that has not been designated as an area having a common ground water supply.

Finally, Rule 30 addresses when administration is to occur pursuant to Rule 40. It provides that “[u]pon a finding of an area of common ground water supply and upon the incorporation of such area into an organized water district, or the creation of a new water district, the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40.” IDAPA 37.03.11.030.09 (emphasis added). Clearly the first prerequisite to Rule 40 administration is the determination of an area of common ground water



supply.<sup>6</sup> This prerequisite is expressly addressed in Rule 30 and Rule 30 provides the only mechanism for making such a determination. The application of Rule 40 presumes that the determination has already been made.

**C. The requests for administration submitted to the Director by the Association do not satisfy the filing and service requirements set forth in Rule 30.**

Having determined that Rule 30 governs the Association's calls, the Court turns to evaluating whether their requests for administration satisfy that Rule's filing and service requirements. The Court finds they do not. Rule 30 requires a senior making a delivery call to include at least the following information in his petition:

- a. A description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water.
- b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of public records.
- c. All information, measurements, data or study results available to the petitioner to support the claim of material injury.
- d. A description of the area having a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated.

IDAPA 37.03.11.030.01.

In this case, the seniors submitted letters to the Director seeking administration on February 23, 2015. R., pp.1-5; LW R. pp.1-5. A review of those letters reveals that they lack much of the information expressly required by Rule 30. Among other things, absent is a description of the area having a common ground water supply within which the seniors seek administration. Likewise absent is the identification of the "names, addresses and description" of the respondents the seniors allege are causing the material injury. Therefore, the Court finds that the seniors' letters fail to satisfy the filing requirements set forth in Rule 30.

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<sup>6</sup> Thereafter, the other prerequisite is to incorporate the rights into an existing water district or into a new water district. See also I.C. § 42-237a.g.

More troubling, however, is the fact that the letters were not served by the seniors on the juniors they seek to curtail. This lack of service violates Rule 30, which expressly requires that “[t]he petitioner shall serve the petition upon all known respondents as required by IDAPA 37.01.01, ‘Rules of Procedures of the Department of Water Resources.’” IDAPA 37.03.11.030.02. It also raises issues regarding due process of law. The Director engaged in correspondence with counsel for the seniors regarding the calls, including a request for further information and clarification, before junior users had notice the calls had been filed. R., p.6; LW R. p.6. The seniors filed their *First Amended Petitions for Administration* in response to that correspondence before any notice of the filing of the original letters had been provided to juniors. R., pp.7-9; LW R. pp.7-9. Again, when the seniors submitted their *First Amended Petitions for Administration* to the Director they did not serve them on the juniors.

The Director attempted to address the notice and service concerns by taking it upon himself to provide notice of the calls to juniors. On March 20, 2015, he sent out a letter to certain junior users informing them of the filing of the calls and inviting them to participate in contested case proceedings. R., p.12. Since the seniors did not identify respondents in their petitions, the Director was placed in the unenviable position of unilaterally determining whom to serve with the letter. To do this, the Department undertook the exercise of identifying those junior water right users in those areas of the state it believed may be affected by one or both of the calls. *Id.* These included junior ground water users in water district 37 and water district 37B. *Id.*

At the time, no explanation was given as to how the Director determined whom to serve, or as to what areas of the State may be affected by the calls. Nor was an explanation given as to why junior water users in other organized water districts within IDWR Basin 37 (i.e., water district 37N, 37O and 37U) were not served. However, the exercise undertaken by the Director leads Sun Valley and other juniors<sup>7</sup> to assert that he has already prejudged the area of common ground water supply relative to the Big Wood and Little Wood Rivers to be the boundaries of water district 37 and 37B. They assert this determination was made without notice to them and without an opportunity for them to present evidence and be heard on the issue. The Director denies these allegations, but the Court understands the concerns of the juniors. To them, the

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<sup>7</sup> Specifically, the City of Fairfield, the City of Ketchum and the Water District 37B Ground Water Association.



Director appears as having determined issues relevant to the contested case proceedings before they were noticed or joined to the proceedings. These include determining that area of the state having a common ground water supply relative to the seniors' sources and which juniors are properly identified as respondents. The Director, as the decision maker, should not have been placed in the position of appearing to have made these kinds of determinations prior to the juniors having been given notice of the calls. The reason Rule 30 requires the calling senior to identify and serve the respondents he seeks to curtail is so that the Director is not placed in the position of appearing to prejudice any issues relevant to the contested case proceeding.

Therefore, the Court finds that the seniors failed to satisfy both the filing and service requirements of Rule 30 to the prejudice of the substantial rights of Sun Valley, the Cities of Fairfield and Ketchum, and the Water District 37B Ground Water Association. These include the right to have the seniors comply with the mandatory filing and service requirements of Rule 30. *See e.g., Jasso v. Camas County*, 151 Idaho 790, 796, 264 P.3d 897, 903 (2011) (holding that due process rights are substantial rights). Since the seniors' requests for administration fail to meet these mandatory requirements of Rule 30, the Director's decision to deny Sun Valley's motion to dismiss is in violation of the CM Rules and violates the substantial rights of the juniors. As a result, the *Final Order* must be reversed and remanded. I.C. §§ 67-5279(3) and (4).

**D. The Court rejects the South Valley Groundwater District's argument.**

Intervenor South Valley Groundwater District argues that neither Rule 30 nor Rule 40 of the CM Rules may be applied to the Association's calls. It asks this Court to take the following action:

The Court should remand to the Director to initiate a comprehensive proceeding to determine which ground water rights in Basin 37 are in an Area of Common Ground Water Supply that would be subject to the Association's delivery call, rather than simply assuming that only ground water rights in Water District 37 are subject to the call and that all ground water outside Water District 37 are not. Once that determination has been made in a properly convened contested case or, as in the ESPA by regulation, then the delivery call can commence or resume.

South Valley Ground Water District Reply Brief, p.9.

There are several problems with this argument. First, although it asks this Court to remand this proceeding to the Director to initiate a comprehensive proceeding, it does not

identify the rules, procedures or criteria that should govern. It simply asserts that neither Rule 30 nor Rule 40 may be applied, but does not proffer any alternative set of rules, procedures or criteria to be applied. Second, the District raises this argument for the first time in a reply brief.<sup>8</sup> It is the only party to take the position that neither Rule 30 nor Rule 40 may be applied. Yet, by raising the issue for the first time in a reply brief, the South Valley Groundwater District has not allowed any other party to respond to this position. For this reason, issues raised for the first time in a reply brief are not addressed by reviewing courts on appeal. *See e.g., State v. Raudenbaugh*, 124 Idaho 758, 763, 864 P.2d 595, 601 (1993) (raising an issue for the first time in a reply brief “does not allow for full consideration of the issue, and we will not address it”); *Henman v. State*, 132 Idaho 49, 51, 966 P.2d 49, 51 (Ct. App. 1998) (“Issues raised for the first time in a reply brief will not be addressed on appeal”). The Court therefore rejects the South Valley Groundwater District’s argument and holds that the procedures set forth in Rule 30 govern the Association’s calls.

**E. The Court does not reach issues concerning the propriety of the Director’s request for staff memoranda or his decision to conduct a site visit.**

Sun Valley raises issues concerning the propriety of the Director’s requests for the preparation of certain staff memoranda in this matter, as well as his decision to conduct a site visit of certain property. The Court need not reach these issues. For the reasons set forth above, the Director’s decision to deny Sun Valley’s motion to dismiss is reversed and remanded. The issues are therefore moot. The Court also finds that the issues regarding the propriety of the Director’s requests for staff memoranda are not properly before the Court. The Director issued a *Request for Staff Memoranda* in the underlying administrative proceedings on June 12, 2015. R., pp.334-344. Various parties moved the Director to modify and/or withdraw the *Request*. *Id.* at 435-451; 616-635. The Director entered *Orders* denying those motions on July 22, 2015. *Id.* at 870-879; 899-908. Unlike his *Final Order*, the Director has not designated his *Orders* denying the parties’ motions to modify and/or withdraw his *Request for Staff Memoranda* as final orders subject to judicial review. Therefore, those *Orders*, and the issues addressed therein, are not properly before the Court in this proceeding. I.C. §§ 67-5270(3) and 67-5271.

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<sup>8</sup> The South Valley Ground Water District did not file an opening brief in support of the appeal raised by the Petitioner.



**F. Sun Valley is not entitled to an award of attorney fees on judicial review.**

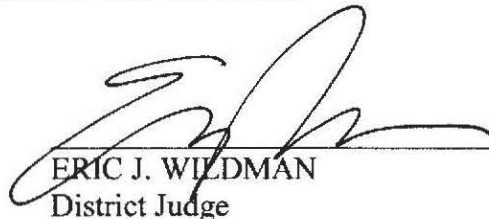
Sun Valley seeks an award of attorney fees under Idaho Code § 12-117. The decision to grant or deny a request for attorney fees under Idaho Code § 12-117 is left to the sound discretion of the court. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). The Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a “legitimate question for this Court to address.” *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, the Court holds that the Respondents have presented legitimate questions for this Court to address regarding the *Final Order*. These include, but are not limited to, whether the delivery calls at issue should be governed by the procedures set forth in Rule 30 or Rule 40 of the CM Rules. The circumstances surrounding the Association’s calls present issues of first impression under the CM Rules. In light of that, the Court does not find the Respondents’ arguments to be frivolous or unreasonable. Therefore, the Court in an exercise of its discretion denies Sun Valley’s request for attorney fees.

**IV.**

**ORDER**

Therefore, based on the foregoing, IT IS ORDERED that the Director’s *Order Denying Sun Valley Company’s Motion to Dismiss* issued on July 22, 2015, **is hereby set aside and remanded for further proceedings consistent with this Order.**

Dated April 22, 2016

  
ERIC J. WILDMAN  
District Judge

**CERTIFICATE OF MAILING**

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on April 20, 2016, with sufficient first-class postage to the following:

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Phone: 208-287-4800

HEATHER E O'LEARY  
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675 SUN VALLEY RD STE A  
PO BOX 3310  
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Phone: 208-725-0055

JAMES P SPECK  
120 EAST AVENUE  
PO BOX 987  
KETCHUM, ID 83340-0987  
Phone: 208-726-4421

JAMES R LASKI  
LAWSON LASKI CLARK POGUE PLLC  
675 SUN VALLEY RD STE A  
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Phone: 208-725-0055

JOSEPH F JAMES  
130 FOURTH AVE WEST  
GOODING, ID 83330  
Phone: 208-934-8185

MATTHEW J MC GEE

101 S CAPITOL BLVD, 10TH FL  
PO BOX 829  
BOISE, ID 83701-0829  
Phone: 208-345-2000

MCLAIN, CHERESE D  
950 W BANNOCK ST STE 250  
BOISE, ID 83702  
Phone: 208-331-1800

NORMAN M SEMANKO  
101 S CAPITOL BLVD 10TH FL  
PO BOX 829  
BOISE, ID 83701-0829  
Phone: 208-345-2000

SCOTT L CAMPBELL  
101 S CAPITOL BLVD 10TH FL  
PO BOX 829  
BOISE, ID 83701-0829  
Phone: 208-345-2000


SUSAN E BUXTON  
950 W BANNOCK ST STE 520  
BOISE, ID 83702  
Phone: 208-331-1800

DIRECTOR OF IDWR  
PO BOX 83720  
BOISE, ID 83720-0098

ORDER

Page 1 4/22/16

FILE COPY FOR 80044

  
Deputy Clerk



# Exhibit E

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

SUN VALLEY COMPANY, a Wyoming corporation,  
Petitioner,

vs.

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

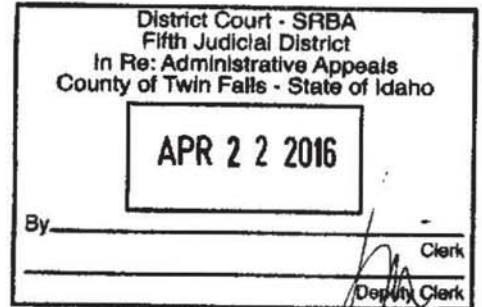
Respondents,

and

CITY OF KETCHUM, CITY OF FAIRFIELD,  
WATER DISTRICT 37-B GROUNDWATER  
GROUP, BIG WOOD & LITTLE WOOD WATER  
USERS ASSOCIATION, SOUTH VALLEY  
GROUND WATER DISTRICT, ANIMAL  
SHELTER OF WOOD RIVER VALLEY, DENNIS J.  
CARD and MAUREEN E. MCCANTY, EDWARD  
A LAWSON, FLYING HEART RANCH II  
SUBDIVISION OWNERS ASSOCIATION, INC.,  
HELIOS DEVELOPMENT, LLC, SOUTHERN  
COMFORT HOMEOWNER'S ASSOCIATION,  
THE VILLAGE GREEN AT THE VALLEY CLUB  
HOMEOWNERS ASSOCIATION, INC., AIRPORT  
WEST BUSINESS PARK OWNERS ASSN INC.,  
ANNE L. WINGATE TRUST, AQUARIUS SAW  
LLC, ASPEN HOLLOW HOMEOWNERS, DON R.  
and JUDY H. ATKINSON, BARRIE FAMILY  
PARTNERS, BELLEVUE FARMS LANDOWNERS  
ASSN, BLAINE COUNTY RECREATION  
DISTRICT, BLAINE COUNTY SCHOOL  
DISTRICT #61, HENRY and JANNE BURDICK,  
LYNN H. CAMPION, CLEAR CREEK LLC,  
CLIFFSIDE HOMEOWNERS ASSN INC, THE  
COMMUNITY SCHOOL INC, JAMES P. and JOAN

) Case No. CV-WA-2015-  
) 14500

) **JUDGMENT**



JUDGMENT

S:\ORDERS\Administrative Appeals\Ada County 2015-14500\Judgment.docx



CONGER, DANIEL T. MANOOGIAN )  
REVOCABLE TRUST, DONNA F. TUTTLE )  
TRUST, DAN S. FAIRMAN MD and MELYNDA )  
KIM STANDLEE FAIRMAN, JAMES K. and )  
SANDRA D. FIGGE, FLOWERS BENCH LLC, )  
ELIZABETH K. GRAY, R. THOMAS GOODRICH )  
and REBECCA LEA PATTON, GREENHORN )  
OWNERS ASSN INC, GRIFFIN RANCH )  
HOMEOWNERS ASSN and GRIFFIN RANCH PUD )  
SUBDIVISION HOMEOWNERS ASSN INC, )  
GULCH TRUST, IDAHO RANCH LLC, THE )  
JONES TRUST, LOUISA JANE H. JUDGE, RALPH )  
R. LAPHAM, LAURA L. LUCERE, CHARLES L. )  
MATTHIESEN, MID VALLEY WATER CO LCC, )  
MARGO PECK, PIONEER RESIDENTIAL & )  
RECREATIONAL PROPERTIES LLC, RALPH W. )  
& KANDI L. GIRTON 1999 REVOCABLE TRUST, )  
RED CLIFFS HOMEOWNERS ASSOCIATION, F. )  
ALFREDO REGO, RESTATED MC MAHAN 1986 )  
REVOCABLE TRUST, RHYTHM RANCH )  
HOMEOWNERS ASSN, RIVER ROCK RANCH )  
LP, ROBERT ROHE, MARION R. and ROBERT M. )  
ROSENTHAL, SAGE WILLOW LLC, SALIGAO )  
LLC, KIRIL SOKOLOFF, STONEGATE )  
HOMEOWNERS ASSN INC, SANDOR and TERI )  
SZOMBATHY, THE BARKER LIVING TRUST, )  
CAROL BURDZY THIELEN, TOBY B. LAMBERT )  
LIVING TRUST, VERNON IRREVOCABLE )  
TRUST, CHARLES & COLLEEN WEAVER, )  
THOMAS W. WEISEL, MATS and SONYA )  
WILANDER, MICHAEL E. WILLARD, LINDA D. )  
WOODCOCK, STARLITE HOMEOWNERS )  
ASSOCIATION, GOLDEN EAGLE RANCH )  
HOMEOWNERS ASSN INC, TIMBERVIEW )  
TERRACE HOMEOWNERS ASSN, and )  
HEATHERLANDS HOMEOWNERS )  
ASSOCIATION INC., )


Intervenors. )

IN THE MATTER OF DISTRIBUTION OF WATER )  
TO WATER RIGHTS HELD BY MEMBERS OF )  
THE BIG WOOD & LITTLE WOOD WATER )  
USERS ASSOCIATION DIVERTING FROM THE )  
BIG WOOD AND LITTLE WOOD RIVERS )

JUDGMENT IS ENTERED AS FOLLOWS:

The Director's *Order Denying Sun Valley Company's Motion to Dismiss* issued on July 22, 2015, is set aside and remanded for further proceedings as necessary.

Dated Apr. 1 22, 2016

  
\_\_\_\_\_  
ERIC J. WILDMAN  
District Judge



**CERTIFICATE OF MAILING**

I certify that a true and correct copy of the JUDGMENT was mailed on April 20, 2016, with sufficient first-class postage to the following:

ALBERT P BARKER  
1010 W JEFFERSON ST STE 102  
PO BOX 2139  
BOISE, ID 83701-2139  
Phone: 208-336-0700

DYLAN B LAWRENCE  
VARIN WARDWELL LLC  
242 N 8TH ST STE 220  
PO BOX 1676  
BOISE, ID 83701-1676  
Phone: 208-922-7060

GARRICK L BAXTER  
DEPUTY ATTORNEY GENERAL  
STATE OF IDAHO - IDWR  
PO BOX 83720  
BOISE, ID 83720-0098  
Phone: 208-287-4800

HEATHER E O'LEARY  
LAWSON LASKI CLARK & POGUE  
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Phone: 208-345-2000

SUSAN E BUXTON  
950 W BANNOCK ST STE 520  
BOISE, ID 83702  
Phone: 208-331-1800

DIRECTOR OF IDWR  
PO BOX 83720  
BOISE, ID 83720-0098

  
Julie Murphy

# Exhibit F



**Meeting Minutes**  
**Big Wood River Ground Water Management Area Advisory Committee**  
**IDWR State Office at Idaho Water Center, Boise, Idaho**  
**April 7, 2021**

The meeting started at 1:35 p.m. Director Gary Spackman, Deputy Director Mat Weaver, Tim Luke, and Shelley Keen attended at the IDWR State Office in Boise. Other attendees participated via Zoom video conferencing or telephone. See the attached list of attendees.

After a brief introduction, old business items were discussed. Comments were solicited regarding IDWR's response to questions/comments from the Galena and South Valley Groundwater Districts relating to IDWR's March 17<sup>th</sup> observations, but no comments were given. Cooper Brossy gave an update from surface water users on predicted shortfalls. Cooper's update prompted discussion about BOR-AFRD2-BWCC exchange contracts, river rights with exchange conditions, and supplemental AFRD2 water. Tim Luke said he will draft watermaster instructions regarding delivery of water rights with exchange conditions. . The instructions will be shared with the committee. Sean Vincent of IDWR updated the committee on 2021 hydrologic conditions and the predicted water supply. IDWR staff then reported on its' review of BWRGWMA groundwater rights having supplemental use conditions. On April 8, 2021, IDWR will send notice to holders of supplemental groundwater rights summarizing their groundwater use and reminding them of the requirement to use their surface water supplies before using groundwater.

After the discussion of old business, the meeting transitioned to discussing mitigation proposals that the Wood River Valley groundwater districts may take during the 2021 irrigation season. The South Valley Groundwater District offered a 10% reduction in pumping compared to its five year average excluding 2017 (resulting average = 33,569 acre-feet) and recharge of 3,500 acre-feet to the aquifer using recharge pits located in the southern area of the Bellevue Triangle. The Galena Groundwater District also offered a 10% pumping reduction, plus \$50,000 for the one year purchase of water and an additional \$10,000 to complete an engineering study for a water conservation/pipeline conveyance project within the Big Wood Canal Company North Shoshone tract.

The lower valley surface water users made a counter proposal that included limiting groundwater within the Galena Groundwater District to 12,000 acre feet, limiting groundwater pumping within the South Valley Groundwater District to 25,000 acre feet, an August 15<sup>th</sup> end date for groundwater irrigation pumping, a minimum flow target of 50 cfs on the Little Wood River at Station 10, increased monitoring and enforcement by the groundwater districts, monetary penalties of \$40 per acre-foot for exceeding pumping reduction limits and for pumping after the August 15<sup>th</sup> date, and \$200 per cfs for not meeting the proposed minimum flow target on the Little Wood River. The lower valley surface water users also proposed an 800 acre-foot allowance that could be utilized by the districts after the August 15<sup>th</sup> shutoff date.

These proposals led to further discussion but not to agreement among the committee members. When it was clear that there would not be agreement between the ground water users

and the surface water users, Director Spackman addressed the committee. The Director stated that the previously submitted groundwater management plans lacked details and metrics, and that we now have an inadequate water supply for the 2021 irrigation season. He stated that for 2021 he is exploring all options, consistent with the prior appropriation doctrine, to protect water users having senior priority water rights.’ The Director further stated that the proposed mitigation proposals and counter proposals made by both the groundwater districts and lower valley surface water users were either inadequate or unreasonable. He said that he may move forward with administrative actions that will not likely meet the full objectives of either side.

IDWR staff and committee members discussed potential next steps, including reconsideration of the mitigation proposals for the 2021 season. Reconsideration would require the groundwater districts and the surface water users to confer with their members over the following week. After further discussion, the committed proposed meeting again on April 15, 2021 .

The meeting adjourned at 4:35 p.m.

Next Committee Meeting: April 15, 2021, 1:00 p.m., IDWR State Office at IDWR Water Center – Boise, with Zoom and teleconference participation.



**Big Wood River Ground Water Management Area Advisory Committee**  
**April 7, 2021 Attendance**

**Advisory Committee**

Corey Allen  
Cooper Brossy  
Rod Hubsmith  
Sharon Lee  
Pat McMahon  
Kristy Molyneux  
Carl Pendleton  
Pat Purdy  
Bill Simon  
Nick Westendorf  
Brian Yeager

**IDWR Staff**

Tim Luke  
Cherie Palmer  
Corey Skinner  
Gary Spackman  
Jennifer Sukow  
Sean Vincent  
Shelley Keen  
Nathan Erickson  
Mat Weaver

**Members of the Public**

Kevin Lakey  
Larry Schoen  
Mary Beth Collins  
Zach Hill  
Al Barker  
Chris Bromley  
Dave Shaw  
Eric Miller  
Jim Speck  
Judd McMahan  
Erick Powell  
Chris Simms  
Jim Bartolino  
Dennis Strom  
Mark Johnson  
Travis Thompson  
Thomas Beck  
Kent Fletcher  
Megan Stevenson  
W. Strasley  
Neil Crescent  
Michael Lawrence  
Sunny Healy

# Exhibit G

## MEETING NOTICE

### Big Wood River Ground Water Management Area Advisory Committee

**DATE:** Thursday, April 15, 2021

**TIME:** 1:00 – 4:00 p.m.

**LOCATION:** Idaho Department of Water Resources, 322 E Front St., Suite 648, Boise, ID.

(See below for remote participation)

### AGENDA

- 1) Introductions and Attendance
- 2) Old Business
  - a) Quick update from IDWR on 2021 hydrologic conditions and predicted water supply
- 3) Consider proposals for 2021/short-term management implementation
- 4) Public Comment
- 5) Next Meeting: Planning & Assignments

### REMOTE PARTICIPATION VIA ZOOM

<https://zoom.us/j/95794550839?pwd=SzBDcVYrSkhZcFN3SHAzaE90Y0xkdz09>

Meeting ID: 957 9455 0839

Passcode: 217017

Dial in Number: (253) 215-8782

Meeting ID: 957 9455 0839

**COVID-19 Considerations:** Due to restrictions related to the COVID-19 pandemic, in-person space is limited. Please consider participating via Zoom or telephone. If you intend to participate in person, please RSVP to Caitlin McCoy, [caitlin.mccoy@idwr.idaho.gov](mailto:caitlin.mccoy@idwr.idaho.gov) or 208-287-4803.

**ADA Accommodations:** If you require special accommodations to attend, participate in, or understand the meeting, please contact Caitlin McCoy at [caitlin.mccoy@idwr.idaho.gov](mailto:caitlin.mccoy@idwr.idaho.gov) or 208-287-4803 at least 72 hours prior to the meeting.



# Exhibit H

**Meeting Minutes**  
**Big Wood River Ground Water Management Area Advisory Committee**  
**IDWR State Office at Idaho Water Center, Boise, Idaho**  
**April 15, 2021**

The meeting started at 1:02 p.m. Director Gary Spackman, Tim Luke, Sean Vincent, Cherie Palmer, and Shelley Keen attended at the IDWR State Office in Boise. Other attendees participated via Zoom video conferencing or telephone. See the attached list of attendees.

After a brief introduction and taking of attendance, Sean Vincent of IDWR updated the committee on 2021 hydrologic conditions and the predicted water supply. Sean stated that the NRCS has now published the April Snow Water Supply Index (SWSI). He indicated that the anticipated water supply continues to decrease, and it now appears that 2004 might be a more appropriate analog year for 2021. Previous discussions used 2002 and 2014. Sean stated that in 2002 and 2014 the Magic Reservoir was empty in mid-July, and the current forecast suggests the water supply will last two weeks less than suggested by the last forecast. In 2004, Magic Reservoir was empty on July 1<sup>st</sup>. Magic Reservoir currently has a storage volume of 38,549 acre-feet with predictions indicating 50-70 days of water supply.

Cooper Brossy then provided an update on the lower valley surface water users' projected 2021 shortfalls. He indicated that they estimate a system injury of 38,850 acre-feet, with injury to individual users totaling 18,210 acre-feet (11,460 acre-feet for Big Wood Canal Company/Magic Reservoir and 6,750 acre-feet for decree users, including 3,000 acre-feet for Big Wood River decreed rights, and 3,771 acre-feet for Little Wood River decreed rights). Ground water users asked Kevin Lakey, Water District 37 watermaster, several questions about how he estimated the 2021 shortfalls.

After Cooper Brossy's presentation, the meeting transitioned into discussions about the proposed actions by the groundwater districts for the 2021 irrigation season. Since the last (April 7<sup>th</sup>) committee meeting, the South Valley Groundwater District increased its offer to a 17% reduction in pumping and monitoring of pumping on a bi-weekly basis. The Galena Groundwater District also proposed a 17% pumping reduction, \$50,000 for the purchase of water, and an additional \$10,000 for a Big Wood Canal Company (BWCC) project engineering feasibility study. Discussion among committee members followed on how the money offered by the Galena Groundwater District could be spent. One idea was to use the money to pay for renting water, infrastructure costs, and power costs for a project to use Snake River water in the Dietrich area. Carl Pendleton indicated that the BWCC has recently received a \$10,000 grant from another funding source for the BWCC project and inquired about the possibility of using the \$10,000 offered by the Galena Groundwater District for other purposes. The committee also discussed surface water flow targets in Silver Creek or the Little Wood River. The groundwater districts expressed reluctance to agree to flow targets, but they are open to the idea of monitoring and reporting of surface water flows. After discussion of these offers, Carl Pendleton stated that he thought that the Big Wood Canal Company would be on board. Cooper Brossy indicated that he would need more time to discuss the offers with other lower valley surface water users.

The meeting was opened for public comment and discussion. Robin Lezamiz and Fred Brossy expressed concerns about the 2021 water supply and suggested the groundwater districts' proposals might not be enough to help surface water users.

Director Spackman also spoke. He stated that he is ready to act and that further delays will not help in the 2021 season. He also provided clarification on the percent reduction amounts that have been proposed. He stated that the groundwater-flow model of the Wood River Valley Aquifer system will likely show that the impact of groundwater pumping on surface water flows varies by location, with some pumpers impacting surface flows more than others. Consequently, some groundwater pumpers could be required to reduce their pumping much more than the amounts that have been proposed by the groundwater districts.

The meeting wrapped up with Cooper Brossy stating that the lower valley surface water users would have their response to the groundwater districts' proposal by mid-day on April 16 (next day).

The meeting adjourned at 3:47 without a follow up meeting being scheduled.



**Big Wood River Ground Water Management Area Advisory Committee**  
**April 15, 2021 Attendance**

**Advisory Committee**

Corey Allen  
Cooper Brossy  
Rod Hubsmith  
Sharon Lee  
Pat McMahon  
Kristy Molyneux  
Carl Pendleton  
Pat Purdy  
Bill Simon  
Nick Westendorf  
Senator Michelle Stennett  
Brian Yeager

**IDWR Staff**

Tim Luke  
Cherie Palmer  
Corey Skinner  
Gary Spackman  
Sean Vincent  
Jennifer Sukow  
Shelley Keen  
Nathan Erickson  
Alex Moody

**Members of the Public**

Kevin Lakey  
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Chris Bromley  
Dave Shaw  
Eric Miller  
Jim Speck  
Judd McMahan  
Chris Simms  
Travis Thompson  
Sunny Healy  
Pete Van Der Meulen  
Greg Loomis  
Kira Finkler  
Justin Stevenson  
Chris Johnson  
Norm Semanko  
Fred Brossy  
Robin Lezamiz  
Kent Fletcher

# Exhibit I

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

IN THE MATTER OF BASIN 37  
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**NOTICE OF ADMINISTRATIVE  
PROCEEDING, PRE-HEARING  
CONFERENCE, AND HEARING**

A drought is predicted for the 2021 irrigation season and the water supply in Silver Creek and its tributaries may be inadequate to meet the needs of surface water users. Curtailment model runs of the Wood River Valley Groundwater Flow Model v.1.1 ("Model") show that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for the holders of senior surface water rights during the 2021 irrigation season. Pursuant to Idaho Code § 42-237a.g., "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...the present or future use of any prior surface or ground water right." Based on the information from the Model, the Director of the Idaho Department of Water Resources ("Department") believes that 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. Therefore, the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights, excluding water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-1401A(11), within the Wood River Valley south of Bellevue, as depicted in the attached map. If the Director concludes that water is not available to fill the ground water rights, the Director may order the ground water rights curtailed for the 2021 irrigation season.

**NOTICE OF ADMINISTRATIVE PROCEEDING**

NOTICE IS HEREBY GIVEN that pursuant to Idaho Code § 42-237a.g. and IDAPA 37.01.01.104, the Director is initiating an administrative proceeding to determine whether water is available to fill the ground water rights, excluding ground water rights for domestic uses as defined in Idaho Code § 42-111 and stock watering uses as defined in Idaho Code § 42-1401A(11), within the Wood River Valley south of Bellevue, as depicted in the attached map. Additional information and maps will be posted on the Department's website at: <https://idwr.idaho.gov/legal-actions/administrative-actions/basin-37.html>.

If you wish to participate in the administrative proceeding, **please send written notice to the Department by May 19, 2021, to P.O. Box 83720, Boise, Idaho 83720-0098 stating your intent to participate in AA-WRA-2021-001. If you do not participate, you may still be legally bound by the results of the proceedings.**

**NOTICE OF PREHEARING CONFERENCE**

NOTICE IS HEREBY GIVEN that the Department will hold a prehearing conference to discuss the Administrative Proceeding on May 24, 2021, at 9:00 a.m. (MDT), in Conference Rooms 602C and 602D of the Department's State Office, located at 322 E. Front Street, 6<sup>th</sup> Floor, Boise, Idaho. Parties may appear in person or via Zoom teleconference. However, due to gathering restrictions, in-person



attendance is limited. Contact Kimberle English to reserve an in-person spot at: Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4815.

All parties must be present at the prehearing conference in person, by telephone or by video conference. Parties will be provided with login information for the video conference a few days before the conference.

Parties should come to the prehearing conference prepared to discuss the following:

- Procedure at Hearing
- Remote Participation at the Hearing
- Discovery
- Witnesses
- Burdens

The prehearing conference will be held in accordance with the provisions of Chapter 17, Title 42 and Chapter 52, Title 67, Idaho Code, and the Department's Rules of Procedure. IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at <https://adminrules.idaho.gov/rules/current/37/index.html>.

The prehearing conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the Department no later than five (5) days prior to the conference. Inquiries for special accommodations should be directed to Kimberle English, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4815.

#### NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the Department will hold a hearing in the matter on June 7-11, 2021, at 10:00 a.m. (MDT), in Conference Rooms 602A, 602B, 602C, and 602D of the Department's State Office, located at 322 E. Front Street, 6<sup>th</sup> Floor, Boise, Idaho. All parties must be present at the hearing. The possibility of remote participation will be discussed at the pre-hearing conference.

The hearing will be held in accordance with the provisions of Chapter 17, Title 42 and Chapter 542, Title 67, Idaho Code, and the Department's Rules of Procedure. IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at <https://adminrules.idaho.gov/rules/current/37/index.html>.

The conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the Department no later than five (5) days prior to the hearing. Inquiries for special accommodations should be directed to Kimberle English, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4815.

DATED this 4<sup>th</sup> day of May, 2021.

  
\_\_\_\_\_  
GARY SPACKMAN  
Director

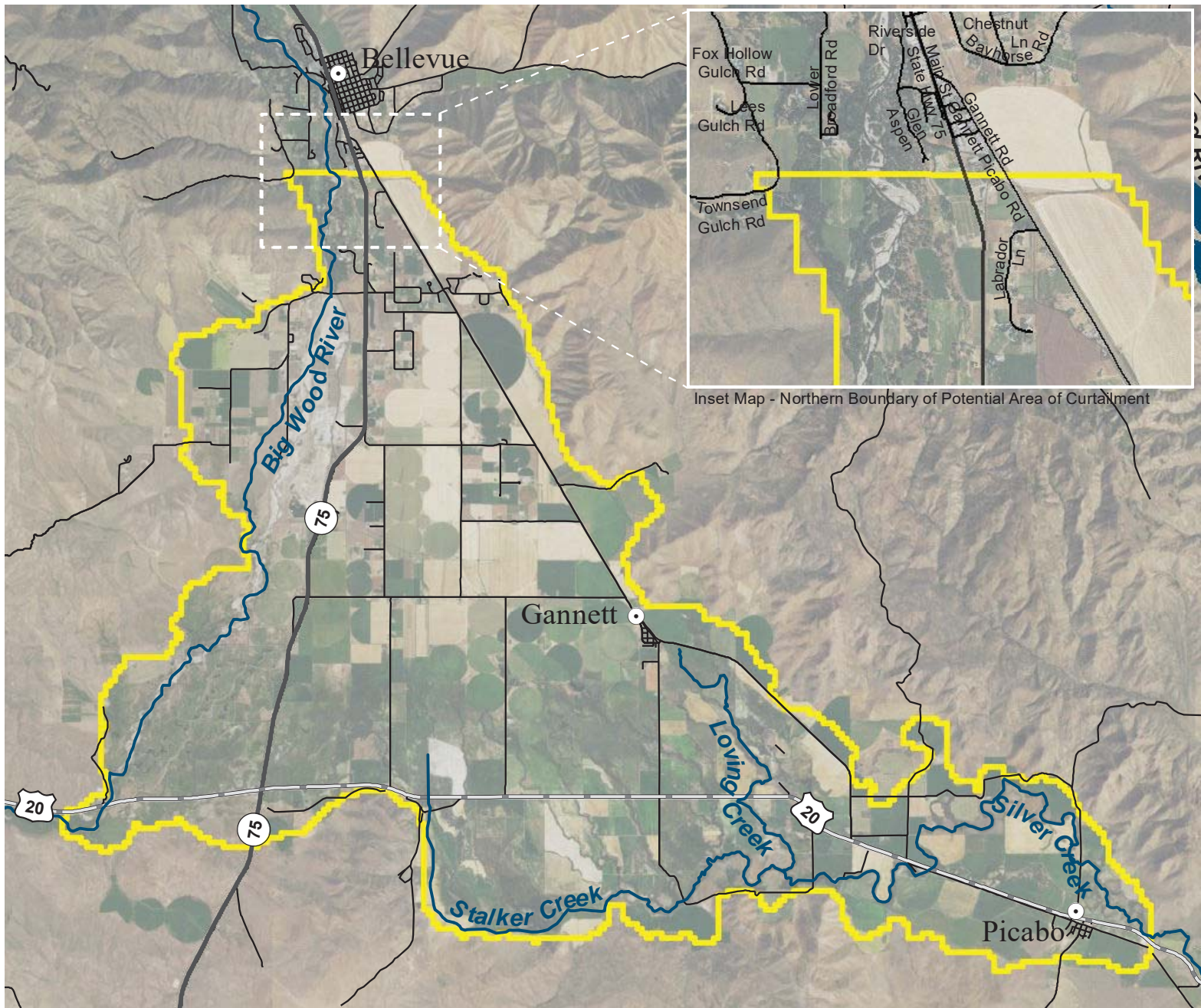
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this 4 day of May, 2021, the above and foregoing **NOTICE OF ADMINISTRATIVE PROCEEDING, PRE-HEARING CONFERENCE, AND HEARING** was mailed through United States Postal Service to the service list posted on the Department's website: <https://idwr.idaho.gov/legal-actions/administrative-actions/basin-37.html>.

  
Kensie Thorneycroft



# Basin 37 Administrative Proceeding

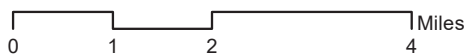


Inset Map - Northern Boundary of Potential Area of Curtailment

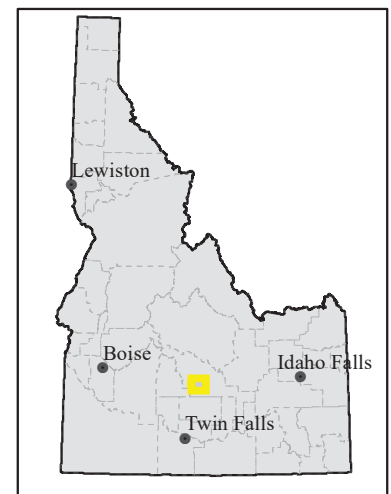
## Legend

- Selected Rivers and Creeks
- Cities
- Potential Area of Curtailment

Imagery is 2019 (NAIP/FSA source)



April 29th, 2021



Location Map



# Exhibit J



## State of Idaho

# DEPARTMENT OF WATER RESOURCES

322 E Front Street, Suite 648 • PO Box 83720 • Boise ID 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700

Website: [idwr.idaho.gov](http://idwr.idaho.gov) • Email: [idwrinfo@idwr.idaho.gov](mailto:idwrinfo@idwr.idaho.gov)

BRAD LITTLE  
Governor

GARY SPACKMAN  
Director

May 4, 2021

«OwnerName»  
«StreetAddress1»  
«StreetAddress2»  
«City» «ST» «PostalCode»

### RE: Notice of Basin 37 Administrative Proceeding

Dear Water Right Holder,

You are receiving this letter because, according to the records of the Idaho Department of Water Resources ("Department"), you are the holder of one or more ground water or surface water rights within Water District 37 (Big and Little Wood River basin, including Silver Creek) or Water District 37B (Camas Creek basin).

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 River-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. Domestic uses as defined in Idaho Code § 42-111, and stock watering uses as defined in Idaho Code § 42-1401A(11) are not subject to curtailment under the administrative proceeding.

Attached to this letter is the *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing*. The notice provides details of the administrative proceeding and explains how you may participate in the administrative proceeding. The administrative proceeding may affect surface and ground water rights beyond the Little Wood-Silver Creek drainage and Bellevue areas. Therefore, this notice has been sent to holders of ground and surface water rights administered by Water Districts 37 and 37B, except domestic and stock water rights described above.

Many ground water right holders in the Wood River Valley are members of either South Valley or Galena Ground Water Districts and may be represented by those ground water districts in this matter. A list of ground water district contacts is available on the Department's website at: <https://idwr.idaho.gov/files/districts/groundwater-district-contacts.pdf>

Any questions regarding the administrative proceeding may be directed to the Department's State Office at (208) 287-4800, or Southern Region Office at (208) 736-3033. If you have questions regarding notice of intent to participate or details of the pre-hearing conference you may contact Kimberle English at (208) 287-4815.

Sincerely,

Gary Spackman  
Director

# Exhibit K



## Travis Thompson

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**From:** Albert Barker  
**Sent:** Friday, May 7, 2021 12:31 PM  
**To:** Travis Thompson  
**Subject:** FW: Notice of Basin 37 Administrative Proceeding  
**Attachments:** 20210507\_Basin 37 Notice.pdf

**From:** Sharon Lee <slee247@mac.com>  
**Sent:** Friday, May 7, 2021 12:28 PM  
**To:** Dave Shaw <dshaw@erresources.com>; Albert Barker <apb@idahowaters.com>  
**Subject:** Fwd: Notice of Basin 37 Administrative Proceeding

Sent from my iPhone

Begin forwarded message:

**From:** "Luke, Tim" <Tim.Luke@idwr.idaho.gov>  
**Date:** May 7, 2021 at 11:25:22 AM PDT  
**To:** [brian.yeager@haileycityhall.org](mailto:brian.yeager@haileycityhall.org), [callen@sunvalley.com](mailto:callen@sunvalley.com), [cooper.brossy@gmail.com](mailto:cooper.brossy@gmail.com), [jkmoly78@gmail.com](mailto:jkmoly78@gmail.com), [kaysi10@live.com](mailto:kaysi10@live.com), [mstennett@senate.idaho.gov](mailto:mstennett@senate.idaho.gov), [nick@4lfarms.com](mailto:nick@4lfarms.com), [pat@purdyent.com](mailto:pat@purdyent.com), [pat@svwsd.com](mailto:pat@svwsd.com), [pendletonranch@hotmail.com](mailto:pendletonranch@hotmail.com), [slee247@mac.com](mailto:slee247@mac.com), [wasimon9@gmail.com](mailto:wasimon9@gmail.com)  
**Cc:** "Van Der Meulen, Peter (IWRB Member)" <[vandermeulenpete@yahoo.com](mailto:vandermeulenpete@yahoo.com)>, [watermanager@cableone.net](mailto:watermanager@cableone.net), Rusty Krame <[waterdistrict37b@outlook.com](mailto:waterdistrict37b@outlook.com)>, "Skinner, Corey" <[Corey.Skinner@idwr.idaho.gov](mailto:Corey.Skinner@idwr.idaho.gov)>, "Erickson, Nathan" <[Nathan.Erickson@idwr.idaho.gov](mailto:Nathan.Erickson@idwr.idaho.gov)>, [MDavis@house.idaho.gov](mailto:MDavis@house.idaho.gov), [SToone@house.idaho.gov](mailto:SToone@house.idaho.gov), Dick Fosbury <[dfosbury@co.blaine.id.us](mailto:dfosbury@co.blaine.id.us)>, "Carter, Meghan" <[Meghan.Carter@idwr.idaho.gov](mailto:Meghan.Carter@idwr.idaho.gov)>, "Baxter, Garrick" <[Garrick.Baxter@idwr.idaho.gov](mailto:Garrick.Baxter@idwr.idaho.gov)>, "Weaver, Mathew" <[Mathew.Weaver@idwr.idaho.gov](mailto:Mathew.Weaver@idwr.idaho.gov)>, "Spackman, Gary" <[Gary.Spackman@idwr.idaho.gov](mailto:Gary.Spackman@idwr.idaho.gov)>, "Whitney, Rob" <[Rob.Whitney@idwr.idaho.gov](mailto:Rob.Whitney@idwr.idaho.gov)>  
**Subject:** Notice of Basin 37 Administrative Proceeding

Dear BWRGWMA Advisory Committee Members,

On May 4, 2021, I sent you an email with a copy of *Notice of Basin 37 Administrative Proceeding, Pre-hearing Conference and Hearing* and cover letter issued by IDWR Director Spackman. My email stated that the notice was sent to over 1,100 water right holders in Water Districts 37 and 37B on May 4th.

The purpose of this email is to let you know that IDWR had a glitch in its mailing of the above referenced notice. Many of the notices sent had an error in the address and were not deliverable. Consequently, IDWR is resending the notice today to the correct and complete addresses for all 1,100 plus water right holders. All notices will be delivered to the US Postal Service today. An updated and complete service list showing all mailing recipients should be posted on IDWR's website by close of business on Monday, May 10, 2021.

We apologize for the delay in receipt of the notices and any inconvenience caused by the error. A copy of the notice, cover letter and updated Certificate of Service document is attached again for your reference. The only change between the notice attached and the one sent to you by email on May 4<sup>th</sup> is the updated Certificate of Service (last page of the notice).

Respectfully,

***Tim Luke***

***Idaho Department of Water Resources***

*Water Compliance Bureau Chief*

[tim.luke@idwr.idaho.gov](mailto:tim.luke@idwr.idaho.gov) | 208-287-4959

# Exhibit L



## **STATEMENT OF PURPOSE**

**RS28076 / H0043**

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 right 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).

## **FISCAL NOTE**

This legislation has no fiscal impact as its only purpose is to remove obsolete sections of Idaho Code.

### **Contact:**

Shelley Keen  
Department of Water Resources  
(208) 287-4947

**DISCLAIMER:** This statement of purpose and fiscal note are a mere attachment to this bill and prepared by a proponent of the bill. It is neither intended as an expression of legislative intent nor intended for any use outside of the legislative process, including judicial review (Joint Rule 18).

# Exhibit M

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

IN THE MATTER OF THE PETITION FOR  
ADMINISTRATION FILED BY THE BIG  
WOOD & LITTLE WOOD WATER USERS  
ASSOCIATION

Docket No. CM-DC-2017-001

**ORDER DISMISSING PETITION  
FOR ADMINISTRATION**

**BACKGROUND**

On March 6, 2017, the Big Wood & Little Wood Water Users Association (“Association”) filed a *Petition for Administration* (“Petition”) with the Idaho Department of Resources (“Department”). The Association petitions the Director (“Director”) of the Department for an order directing administration of its members surface water rights and hydrologically connected ground water rights in accordance with the prior appropriation doctrine and the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) (“CM Rules”). *Id.* at 1.

On March 24, 2017, Sun Valley Company (“SVC”) filed an *Answer to Petition for Administration*. On March 24, 2017, SVC also filed a *Motion for Leave to Conduct Discovery* requesting the Director issue an order authorizing discovery. On March 31, 2017, the Director issued a *Notice of Prehearing Conference; Order Authorizing Discovery* scheduling a prehearing conference in the matter for May 11, 2017, and authorizing the parties to engage in and conduct discovery.

On April 5, 2017, the Department received *Galena Ground Water District’s Petition to Intervene*. On April 18, 2017, the Department received *South Valley Ground Water District’s Petition to Intervene*. On April 27, 2017, the Director issued an order granting Galena Ground Water District’s and South Valley Ground Water District’s petitions to intervene.

On April 11, 2017, SVC filed *Sun Valley Company’s First Set of Discovery Requests to the Big Wood & Little Wood Water Users Association and Its Members*. On May 3, 2017, the Association filed *Petitioner’s Motion for Protective Order* (“Motion”). The Association asserts it has “standing” to file the Petition “seeking an order from the Director directing the administration of certain surface water rights and hydrologically connected ground water rights.” *Motion* at 2. The Association asserts it “is a party to” this contested case but that the “individual members of the Association are not parties . . . .” *Id.* The Association states that SVC’s “discovery requests are not only directed to the Association, but specifically propounded upon



the Association's members." *Id.* at 3. The Association also states that SVC's "discovery requests treat the [Association] and the non-party members of the Association interchangeably." *Id.* The Association asserts it "is unable to respond to the requests as propounded to non-party members, and to require them to do so would cause an undue burden and expense." *Id.* The Association requests the Director "issue an order protecting [the Association] from undue burden or expense and directing that [the Association] not be required to respond to" SVC's discovery requests. *Id.* at 1.

On May 8, 2017, South Valley Ground Water District filed a *Motion to Dismiss or in the Alternative Motion to Stay* asserting the Petition should be dismissed for the Association's failure to submit information required by CM Rule 30. Galena Ground Water District, the City of Bellevue, SVC, the City of Hailey, Dean R. Rogers Inc., the City of Ketchum, and James Speck on behalf of multiple Respondents separately filed joinders in South Valley Ground Water District's motion to dismiss or stay.

The Department held the prehearing conference on May 11, 2017.

On May 12, 2017, SVC filed a *Response to Petitioner's Motion for Protective Order/Motion to Dismiss* ("SVC's Motion to Dismiss"). SVC asserts the Petition "must be dismissed" because the Association does not hold any water rights and the Association does not have "standing to pursue a delivery call on behalf of its" members who the Association asserts "are not parties." *SVC's Motion to Dismiss* at 2-5. James Speck filed a joinder in support of SVC's Response on behalf of multiple Respondents.

On May 22, 2017, the Association filed *Petitioner's Response to South Valley Ground Water District's Motion to Dismiss or in the Alternative Motion to Stay*.<sup>1</sup> On May 30, 2017, the Department received *Petitioner's Response to Sun Valley Company's Motion to Dismiss* ("Association's Response").

## ANALYSIS

The various motions filed by the parties raise several issues, including the following:

1. Does the Association have standing to collectively call for the delivery of water authorized by senior priority water rights held individually by the members of the Association?
2. Was sufficient information submitted by the Association with its Petition to satisfy the pleading requirements of Rule 30 of the CM Rules?
3. If recognized as a party having standing, can the Association assert that it is the sole conduit through which all discovery requests will be served, insulating its members from direct service of discovery, and assuming sole responsibility for responding to any discovery requests related to its members and water rights held by its members?

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<sup>1</sup> On May 26, 2017, South Valley Ground Water District filed *South Valley Ground Water District's Reply in Support of its Motion to Dismiss or in the Alternative Motion to Stay* ("Reply"). On May 31, 2017, the Department received SVC's *Joinder in Reply in Support of Motion to Dismiss* joining the Reply. The Department's Rules of Procedure 270.02 and 565 authorize a party opposing a motion or prehearing motion respectively to file an answer within fourteen days of the filing of the motion. IDAPA 37.01.01.270.02 & 565. The Department's Rules of Procedure do not authorize the filing of replies or joinders in replies.



## Standing of the Association

Both the Association and SVC rely on *Beach Lateral Water Users Association v. Harrison*, 142 Idaho 600, 130 P3d 1138 (2006) to support their respective, but conflicting, positions about whether the Association has standing to call for delivery of its members' senior priority water rights. Quoting *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), the *Beach* decision established three tests for determining "associational standing":

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

The Association asserts, and SVC does not contest, that the water right holder members of the Association would have standing to sue in their own right (factor a). The Association also asserts, and SVC does not contest, that the interests the Association seeks to protect are germane to the organization's purpose (factor b).

SVC argues, however, that the claim, or claims, asserted by the Association in the Petition, require the participation of the individual members of the Association in the contested case (factor c). *SVC's Motion to Dismiss* at 3. In contrast, the Association argues its Petition seeks a form of prospective relief, and consequently, does not require the direct participation of its members because the "benefits will likely be shared by the association's members without any need for individualized findings of injury . . . ." *Association's Response* at 3 (quoting *Beach Lateral Water Users Ass'n*, 142 Idaho at 604, 130 P.3d at 1142).

Rule 30.01 of the CM Rules expressly states: "When a delivery call is made by **the holder of a surface or ground water right (petitioner)** alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) the petitioner is suffering material injury, **the petitioner shall file** with the Director a petition" for delivery call. IDAPA 37.03.11.030.01 (emphasis added).

Rule 30.01 of the CM Rules also states:

When a delivery call is made by the holder of a surface or ground water right (petitioner) alleging that by reason of diversion of water by the holders of one or more junior-priority ground water rights, the petitioner shall file with the Director a petition containing, at least, the following . . . :

- a. A description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water.
- b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such



information is known by the petitioner or can be reasonably determined by a search of public records.

c. All information, measurements, data or study results available to the petitioner to support the claim of material injury.

d. A description of the area having a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated.

IDAPA 37.03.11.030.01 (a-d).

Rule 42 of the CM Rules requires that the Director determine “whether the holders of water rights are suffering material injury and using water efficiently and without waste.” IDAPA 37.03.11.042.01. Rule 42 sets forth factors “the Director may consider” in reaching this determination, including “[t]he effort or expense of the holder of the water right to divert water from the source” and “[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” or “alternate reasonable means of diversion or alternate points of diversion.” IDAPA 37.03.11.042.01(b, g-h).

Accordingly, Rules 30 and 42 of the CM Rules require submittal of information unique to each petitioner, including the water rights alleged to be injured, the water diversion and delivery system conveying water to each petitioner, a description of the beneficial use by each petitioner, the expense to each petitioner to divert water, and whether the petitioner could meet its needs using existing facilities more efficiently or using alternate means of diversion or points of diversion.

Landowners who are members of the Association irrigate with water from one to several water sources. These various sources of water are uniquely diverted and delivered to each of the landowners. The Director must analyze each member’s combination of water sources, and each member’s unique delivery systems and water use operations to determine whether there is material injury to each senior priority water right.

The *Beach* Court also quoted *Bear Lake Educ. Assoc. v. Sch. Dist. 33*, 116 Idaho 443, 448 776 P.2d 452, 457 (1989):

[S]o long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the case, the association may be an appropriate representative of its members, entitled to invoke the court’s jurisdiction.

Again, CM Rule 30 expressly states the water right holder must file the petition for delivery call. IDAPA 37.03.11.030.01. The water right holder must submit information about the holder’s water rights, water sources, points of diversion, delivery systems, and beneficial use for the Director to determine whether the senior priority water rights have been materially injured. The claim and relief sought requires the individual participation of each party claiming material injury who is indispensable to proper resolution of the case.



Because the individual water right holders who are members of the Association are indispensable to proper resolution of this contested case, the holders of the individual senior priority water rights must petition for delivery of their water rights. The Association does not have standing to petition for delivery of its members' senior priority water rights and to seek a general remedy for all the senior priority water right holders.

The Petition filed by the Association should be dismissed. *See In re Jerome Cty. Bd. of Comm'rs*, 153 Idaho 298, 308, 281 P.3d 1076, 1086 (2012) (explaining that a person must have standing to invoke a court's jurisdiction).

### **Sufficiency of Information Submitted, Motion for Protective Order**

Dismissal of the Petition moots all other motions pending before the Director. The issue of the sufficiency of information submitted with the Petition raised by South Valley Ground Water District's *Motion to Dismiss or in the Alternative Motion to Stay* and the Association's motion for protective order from discovery will not be addressed.

### **ORDER**

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the *Petition for Administration*, filed by the Big Wood & Little Wood Water Users Association, is DISMISSED, without prejudice.

DATED this 7<sup>th</sup> day of June 2017.

  
\_\_\_\_\_  
GARY SPACKMAN  
Director

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7<sup>th</sup> day of June 2017, I served a true and correct copy of the foregoing document to all parties listed on the Big Wood & Little Wood 2017 Delivery Call Certificate of Service List posted on the Department's website at <https://idwr.idaho.gov/legal-actions/delivery-call-actions/BWLW.html> updated May 30, 2017, by U.S. mail, postage prepaid.



Kimi White

# Exhibit N



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

IN THE MATTER OF BASIN 37	)	<b>REQUEST FOR</b>
ADMINISTRATIVE HEARING	)	<b>STAFF MEMORANDUM</b>
_____	)	

On May 4, 2021, the Director of the Idaho Department of Water Resources (“IDWR”) issued a Notice of Administrative Proceeding for Basin 37, Wood River Basin. The Notice scheduled a hearing for June 7-11, 2021.

During the winter of 2020 – 2021 and the spring of 2021, IDWR staff participated in and presented technical information for a series of meetings of the Big Wood River Ground Water Management Area Advisory Committee. Facts and technical information presented should be included as evidence in the administrative proceeding hearing. Because IDWR initiated the contested case, the Director will also rely on IDWR staff expertise in deciding the contested case arising from the administrative proceeding. This Request for Staff Memoranda seeks information from IDWR staff pertinent to the issues to be addressed at the administrative proceeding hearing.

Staff preparing staff memoranda will testify at the hearing and be subject to cross-examination.

The Director requests Department staff prepare memoranda addressing the following subjects:

- 1. Describe the hydrology and hydrogeology of the Big Wood River, Little Wood River, Silver Creek, and Camas Creek Basins (“Wood River Basins”). Please cite to technical reports and materials that support the descriptions.**
- 2. Describe methods of predicting surface water supplies for the Wood River Basins. Based on IDWR expertise, recommend a method for predicting the water supply for the upcoming 2021 irrigation season.**
- 3. Describe the surface water deliveries in the Wood River Basins. The description should include:**
  - a) Irrigation delivery infrastructure and systems of importance. Examples are Magic Reservoir and the Milner Gooding Canal. This description should also explain operations that alter the normal supply of water. For example, operation of Magic Reservoir alters delivery of natural flow water rights.**

- b) **Surface water rights, including dates of priority, in the various drainages that were both historically delivered and curtailed in good water years, average water years, and water-short years. These descriptions should include sub-reaches of each river basin, describing both geographical variability in supply, reliability of supply, and impact of storage or delivery of water from out-of-basin sources or return flows from irrigation.**
- c) **Identify an analog year or analogous years prior to the advent of ground water irrigation well diversions that would be similar to the upcoming 2021 irrigation season.**

**4. Summarize the development and beneficial use of ground water in the Wood River Basins. The summary should include quantities developed and associated water right priority dates over the period of development.**

**5. Describe the development and operation of the Wood River Valley Groundwater Flow Model Version 1.1 (WRV1.1). The narrative should include a general description of the modeling platform, the anticipated accuracy of the model, the boundaries of the model, and the purposes for which the model was developed.**

**6. Simulate full curtailment of junior ground water rights within the WRV1.1 model boundary beginning on the following 2021 dates: May 1, June 1, July 1, and August 1. Identify areas within the WRV1.1 model boundary where curtailment of groundwater use has a minimal contribution to streamflow in Silver Creek and the Little Wood River. Remove these areas from the area of simulated curtailment, and simulate full curtailment of junior ground water rights within the reduced area, beginning on May 1, June 1, July 1, and August 1.**

**7. Evaluate the simulated curtailments to determine the total benefits of curtailment to the Big Wood River, including Magic Reservoir; Silver Creek, and the Little Wood River for the model simulations above.**

**8. The Snake River Basin Adjudication Court decreed some surface water rights authorizing diversion from the Big Wood River and the Little Wood River with a condition that states the delivery of water is subject to the water exchange provisions in contracts between the Bureau of Reclamation, American Falls Reservoir District No. 2, and the Big Wood Canal Company. Please explain the condition, and explain assumptions by IDWR in determining whether diminished Wood River flows from ground water flow would cause injury to water rights with this condition.**

**9. Explain IDWR analysis to identify lands irrigated by water from the Little Wood River and Silver Creek that could be injured by depletions caused by ground water pumping.**



**10. Explain methods of analysis for identifying possible injury. These methods might include:**

- a) Comparison of Little Wood River and Silver Creek water right priorities (a) that were deliverable in a water supply year analogous to 2021 prior to the advent of ground water pumping, and (b) that may be deliverable during 2021.**
- b) Comparison of evapotranspiration ("ET") values for water right places of use during years of adequate water supply and years of reduced water supply.**
- c) Analysis of watermaster records to determine water deliveries for water rights during water supply years analogous to 2021.**

The staff memoranda should be submitted to the Director on or before May 17, 2021. Department staff preparing memoranda will testify at the hearing and will be subject to cross examination.

Dated this 11<sup>th</sup> day of May, 2021.

A handwritten signature in blue ink, reading "Gary Spackman", written over a horizontal line.

Gary Spackman  
Director



# Exhibit O

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

IN THE MATTER OF BASIN 37  
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

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

**BACKGROUND**

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

On May 13, 2021, South Valley Ground Water District (“South Valley”) filed *South Valley Ground Water District’s Motion to Dismiss/Supporting Points & Authorities/Motion to Shorten Time for Response/Request for Oral Argument* (“SVGWD MTD”) and *South Valley Ground Water District’s Motion for Continuance of Hearing* (“SVGWD MFC”). On the next day, Sun Valley Company (“Sun Valley”) filed a *Motion to Dismiss* (“SVC MTD”) and the City of Bellevue (“Bellevue”) filed a *Motion for More Definite Statement, Motion for Clarification, and Motion to Postpone Hearing* (“Bellevue Motion”). On May 19, 2021, attorney James P. Speck filed a *Joinder in and Support of Motions* on behalf of numerous clients<sup>1</sup> that joined in and

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

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

## ANALYSIS

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

### I. MOTIONS TO DISMISS

The motions to dismiss filed by South Valley and Sun Valley argue that Idaho Code § 42-237a.g. does not create authority for the Director to initiate this proceeding, and the Director has used an improper procedure to address the question of whether ground water rights diverting in the Bellevue Triangle should be curtailed during 2021 in favor of senior water rights diverting from Silver Creek and its tributaries. *SVGWD MTD* at 1-2, 9-20; *SVC MTD* at 2-12. South Valley and Sun Valley argue that the Ground Water Act<sup>3</sup> does not authorize this proceeding, and that, in the absence of the filing of a delivery call under the *Rules for Conjunctive Management of Surface and Ground Water Resources* ("CM Rules"),<sup>4</sup> the Director lacks authority to regulate or curtail diversions by holders of junior-priority ground water rights to protect diversions by holders of senior-priority surface water rights. *Id.* South Valley and Sun Valley further argue that the Notice and the administrative proceeding it initiated violate due process requirements.

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

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

<sup>3</sup> Idaho Code §§ 42-226—42-239.

<sup>4</sup> IDAPA 37.03.11.000—050.



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

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

The Director has the authority to initiate this administrative proceeding under the plain language of Idaho Code § 42-237a.g. Section 42-237a.g. authorizes the Director “[t]o ‘supervise and control the exercise and administration of all rights to the use of ground water.’” Idaho Code § 42-237a.g. This code section states that “in the exercise of this discretionary power,” the Director “may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well” during any period the Director determines “that water to fill any water right in said well is not there available.” *Id.* “Water in a well shall not be deemed available to fill a water right therein,” in turn, “if withdrawal of the amount called for by such right” would affect, contrary to the policy of the Ground Water Act, “the present or future use of any prior surface or ground water right . . . .” *Id.* (underlining added). Nothing in Idaho Code § 42-237a.g. requires the filing of a delivery call or request for administration of ground water rights prior to the Director initiating an administrative proceeding. Idaho Code § 42-237a.g. expressly authorized the Director to initiate this proceeding even in the absence of a delivery call or a request for administration. Further, Idaho Code § 42-237a.g. expressly commits the determination of whether to initiate this proceeding to the Director’s discretion.<sup>5</sup>

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

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<sup>5</sup> The Director’s exercise of this discretionary authority is subject to judicial review under applicable legal standards. *See, e.g., Rangen, Inc. v. IDWR*, 160 Idaho 251, 255, 371 P.3d 305, 309 (2016) (discussing the standards for reviewing “[d]iscretionary determinations of an agency”).

Sun Valley further argues that a different section of the Ground Water Act—Idaho Code § 42-237b<sup>6</sup>—requires the filing of a delivery call. Sun Valley argues Section 42-237b “requires an ‘adverse claim’ – or put another way a ‘call’ – to initiate the proceeding.” *SVC MTD* at 7, 9. This argument is incorrect because this proceeding was not initiated under Idaho Code § 42-237b, but rather under Idaho Code § 42-237a.g. Section 42-237a.g. expressly authorizes the Director to initiate this administrative proceeding even in the absence of a delivery call or “adverse claim.” Nothing in Idaho Code § 42-237b or in Idaho Code § 42-237a.g. mandates that an “adverse claim” be filed prior to initiation of an administrative proceeding pursuant to Idaho Code § 42-237a.g.

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

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

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

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

24; *SVC MTD* at 3, 5, 11.<sup>7</sup> Under the plain language of Idaho Code § 42-237a.g., however, the Director is allowed, not required, to make these determinations when exercising “discretionary power” to initiate and conduct administrative proceedings regarding supervision and control of ground water withdrawals. See Idaho Code § 42-237a.g. (“in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him . . .”). The Director is also specifically authorized to allow ground water withdrawals “at a rate exceeding the reasonably anticipated rate of future natural recharge . . .” *Id.* The language of Idaho Code § 42-237a.g. expressly states that these determinations are not preconditions to the Director’s exercise of the “discretionary power” to initiate administrative proceedings under Idaho Code § 42-237a.g., but rather are permissible exercises of the Director’s authority to “supervise and control the exercise and administration” of ground water rights. *Id.*

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

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

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

The CM Rules provide procedures for responding to delivery calls. As CM Rule 1 states: “The rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right . . .” IDAPA 37.03.11.001. In contrast, this administrative proceeding is not a response to a delivery call. Rather, as South Valley and Sun Valley admit, this administrative proceeding was initiated in the absence of a delivery call. See, e.g., *SVGWD MTD* at 8 (“the Association

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

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



members did not file a delivery call that satisfied the requirements of CM Rule 30”);<sup>9</sup> *SVC MTD* at 1-2 (“in the absence of a call for delivery of water”). The plain language of the CM Rules contradicts assertions that the CM Rules govern this administrative proceeding. *See also Memorandum Decision and Order, Basin 33 Water Users, et al., v. IDWR*, Ada County Case No. CV01-20-8069, at 8-9 (Nov. 6, 2020) (“the CM Rules are limited in scope to prescribing the basis and procedure for responding to delivery calls . . . . No such delivery call has been made in this case.”).

The plain language of the CM Rules also contradicts assertions that the CM Rules provide the sole and exclusive procedure for dealing with questions of administration between surface water rights and ground water rights. This case is an example. As previously discussed, Idaho Code § 42-237a.g. explicitly recognizes the Director’s broad “discretionary power” to initiate administrative proceedings to address the question of whether to prohibit or limit diversions under junior ground water rights that are affecting senior surface water rights, even in the absence of a delivery call or “adverse claim.” *See also Memorandum Decision and Order, Basin 33 Water Users, et al., v. IDWR*, supra, at 8-12 (rejecting the argument that “the CM Rules preclude the Director from exercising his authority under the [Ground Water] Act”).

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

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

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

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

c. THIS ADMINISTRATIVE PROCEEDING SATISFIES DUE PROCESS REQUIREMENTS.

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

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

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

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

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

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

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



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

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

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

## **II. MOTION FOR CLARIFICATION OR MORE DEFINITE STATEMENT**

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

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

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

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

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

### **III. MOTIONS FOR POSTPONEMENT OR CONTINUANCE.**

Bellevue requests postponement of the hearing scheduled for June 7-11, 2021, *Bellevue Motion* at 3-6, and South Valley requests that the hearing be continued. *SVGWD MFC* at 1-4.<sup>12</sup>

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

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

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

DATED this 22<sup>nd</sup> day of May, 2021.

  
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GARY SPACKMAN  
Director



### CERTIFICATE OF SERVICE

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

James R. Laski Heather E. O'Leary Lawson Laski Clark, PLLC 675 Sun Valley Rd., Ste. A P.O. Box 3310 <a href="mailto:jrl@lawsonlaski.com">jrl@lawsonlaski.com</a> <a href="mailto:heo@lawsonlaski.com">heo@lawsonlaski.com</a> <a href="mailto:efiling@lawsonlaski.com">efiling@lawsonlaski.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Matthew A. Johnson Brian T. O'Bannon White, Peterson, Gigray & Nichols, P.A. 5700 East Franklin Road, Suite 200 Nampa, Idaho 83687-7901 <a href="mailto:mjohnson@whitepeterson.com">mjohnson@whitepeterson.com</a> <a href="mailto:bobannon@whitepeterson.com">bobannon@whitepeterson.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Laird B. Stone Stephan, Kvanvig, Stone, & Trainor P.O. Box 83 Twin Falls, Idaho 83303-0083 <a href="mailto:sks&amp;t@idaho-law.com">sks&amp;t@idaho-law.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Jerry R. Rigby Rigby, Andrus & Rigby, Chartered 25 North Second East Rexburg, ID 83440 <a href="mailto:irigbv@rex-law.com">irigbv@rex-law.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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REBECCA WILLS



# Exhibit P

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

IN THE MATTER OF BASIN 37  
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**ORDER DENYING MOTION TO  
APPOINT INDEPENDENT HEARING  
OFFICER**

**BACKGROUND**

On May 4, 2021, the Director of the Idaho Department of Water Resources (“Department”) issued a *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* (“Notice”). The Director commenced the administrative proceeding in response to predicted drought in Basin 37 for the 2021 irrigation season and in response to ground water modeling showing that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for certain holders of senior surface water rights. *Notice* at 1. The purpose of the hearing is for the Director to decide whether “the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season.” *Id.* at 1. The Director, acting as presiding officer, set a prehearing conference for May 24, 2021, and set the hearing for June 7-11, 2021. *Id.* at 1-2.

On May 13, 2021, South Valley Ground Water District (“South Valley”) filed *South Valley Ground Water District’s Motion to Appoint Independent Hearing Officer* (“Motion”). In its Motion, South Valley asks the Director to appoint an independent hearing officer pursuant to Idaho Code § 42-1701A(2) and IDAPA 37.01.01.410. *Motion* at 2. South Valley argues the Director should appoint an independent hearing officer because of “the Director’s role in various aspects of prior negotiations and meetings of the Big Wood River Ground Water Management Area Advisory Committee, as well as the overarching issues of the Director’s authority and scope to initiate these proceedings.” *Id.* at 4.

On May 19, 2021, Attorney James Speck filed a *Joinder In and Support of Motions* (“Speck Joinder”) on behalf of numerous clients. The Speck Joinder states that his clients “join in and fully support” South Valley’s Motion. *Speck Joinder* at 1. On the same day, Galena Ground Water District (“Galena GWD”) filed *Galena Ground Water District’s Joinder In and Support of South Valley Ground Water District’s Motions* (“Galena GWD Joinder”) stating Galena GWD “joins in and fully supports” South Valley’s Motion. *Galena GWD Joinder* at 1. On May 20, 2021, Dean Rogers, III and Dean R. Rogers, Inc., Sun Valley Water and Sewer District, and the City of Pocatello also joined in the Motion filed by South Valley.

## APPLICABLE LEGAL STANDARD

Idaho Code § 42-1701A(2) states in relevant part: “The director, *in his discretion*, may direct that a hearing be conducted by a hearing officer appointed by the director.” (emphasis added).

Rule 410 of the *Rules of Procedure of the Idaho Department of Water Resources* states:

A hearing officer is a person other than the agency head appointed to hear contested cases on behalf of the agency. Unless otherwise provided by statute or rule, hearing officers may be employees of the agency or independent contractors. Hearing officers may be (but need not be) attorneys. Hearing officers who are not attorneys should ordinarily be persons with technical expertise or experience in issues before the agency. The appointment of a hearing officer is a public record available for inspection, examination and copying.

IDAPA 37.01.01.410.

## ANALYSIS

South Valley asks the Director to exercise his discretion pursuant to Idaho Code § 42-1701A(2) to appoint an independent hearing officer. The Director denies South Valley’s request for a number of reasons.

First, time is of the essence in this administrative proceeding. As explained in the Notice, a drought is predicted for the 2021 irrigation season and the water supply in Silver Creek and its tributaries may be inadequate to meet the needs of surface water users. The urgency for water administration requires that issuance of a decision not be delayed. The Director can expeditiously hear the contested case and issue a final order, avoiding delays in identifying and appointing a hearing officer and shortening the time periods for issuance of recommended or preliminary orders, motions for reconsideration, and ultimate issuance of a final order by the Director. Appointing someone else to hear the matter would unreasonably delay the proceeding.

Second, the Director is statutorily mandated to distribute water in Idaho. “The director’s duty pursuant to I.C. § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director’s discretion, the director has the duty to distribute water.” *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994); *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973); *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977). This is the first time the Director has sought to invoke Idaho Code § 42-237a.g. for water right administration. The Director takes this duty seriously and believes that he should hear this matter especially given the important issues to be addressed in this proceeding.

South Valley suggests that because resolution of the surface and ground water disputes were a key topic of discussion at the Big Wood River Ground Water Management Area (“BWRGWMA”) meetings and because the Director made statements about commencing this administrative proceeding and the possibility of curtailment, the Director should appoint



someone else to hear the matter. *Motion* at 3. The Director's participation in the BWRGWMA advisory committee meetings is not improper and does not justify appointing someone else to hear the matter. The Director's participation in discussions involving the BWRGWMA is only natural given he is statutorily charged with creating and overseeing ground water management areas and that he is charged with distributing water in the basin. The Director is required to (and is committed to) being an impartial and disinterested tribunal in this contested case. *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist.* 170, 148 Idaho 200, 208, 220 P.3d 318, 326 (2009). An impartial and disinterested tribunal is one which "assures equal application of the law." *Republican Party of Minn. v. White*, 536 U.S. 765, 775-776 (2002). An impartial and disinterested tribunal is one that "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *Id.* at 776. The Director is committed to applying the law evenly to all parties to this proceeding.

Finally, South Valley suggests that someone other than the Director should hear the matter because South Valley is challenging the Director's authority to initiate this proceeding. *Motion* at 3. South Valley argues that "given these foundational disagreements as to the authority of the Director and the procedure chosen, adjudication of these issues should be left to a party without interest in their resolution; i.e. the Director should not be put in a position where he is asked to determine the scope of his own authority to act." *Id.* It is important that quasi-judicial administrative bodies be provided the opportunity to mitigate or cure alleged errors. *See Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 872, 154 P.3d 433, 443 (2007). In a separate motion filed by South Valley with the Department, South Valley alleges that the Director lacks the authority to commence the action. *South Valley Ground Water District's Motion to Dismiss* at 10-15. The filing of the motion to dismiss is the proper way to raise the issue. There is nothing wrong or improper with the Director being in a position where he has to evaluate the scope of his own authority.

### ORDER

Based on the forgoing discussion, IT IS HEREBY ORDERED that *South Valley Ground Water District's Motion to Appoint Independent Hearing Officer* is DENIED.

DATED this 21<sup>st</sup> day of May, 2021.

  
Gary Spackman  
Director

# **AMENDED CERTIFICATE OF SERVICE**

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

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[name] Rebecca Wills

# Exhibit Q

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

IN THE MATTER OF BASIN 37  
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**ORDER AUTHORIZING  
DISCOVERY**

On May 4, 2021, the Director of the Idaho Department of Water Resources (“Department”) issued a *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* (“Notice”). The Director commenced the administrative proceeding in response to predicted drought in Basin 37 for the 2021 irrigation season and in response to ground water modeling showing that curtailment of ground water rights during the 2021 irrigation season would result in increased surface water flows for certain holders of senior surface water rights. *Notice* at 1. The purpose of the hearing was for the Director to decide whether “the withdrawal of water from ground water wells in the Wood River Valley south of Bellevue (commonly referred to as the Bellevue Triangle) would affect the use of senior surface water rights on Silver Creek and its tributaries during the 2021 irrigation season.” *Id.* at 1. The Director set a pre-hearing conference for May 24, 2021, and set the hearing for June 7-11, 2021. *Id.* at 1-2.

On May 13, 2021, South Valley Ground Water District (“South Valley”) filed *South Valley Ground Water District’s Motion for Order Authorizing Discovery* (“Motion”) asking the Director to authorize discovery in this matter pursuant to IDAPA 37.01.01.260, IDAPA 37.01.01.520, and IDAPA 37.01.01.521. South Valley requests authorization to “conduct discovery in all forms listed in rule 520.01a-d and seeks leave to conduct discovery against all parties or other knowledgeable persons or entities.” *Motion* at 1. South Valley states “[e]valuation of the factual issues that the Director has addressed in his *Notice* will be complex and extensive,” therefore discovery is essential. *Id.* at 2.

Rule 521 of the Department’s Rules of Procedure require an order authorizing discovery prior to any party conducting discovery. IDAPA 37.01.01.521. Rule 520.02 specifies the scope of discovery is governed by the Idaho Rules of Civil Procedure, unless otherwise provided by an order. The Director agrees that discovery is appropriate in this matter. Discovery is only authorized for depositions, production requests (not interrogatories), and subpoenas, as discussed in Rule 520.01a, 520.01b and 520.01d. Deadlines will be discussed at the pre-hearing conference.

**ORDER**

Based upon the foregoing, IT IS HEREBY ORDERED South Valley’s *Motion* is GRANTED.

IT IS FURTHER ORDERED that discovery is limited to depositions, production requests, and subpoenas.



DATED this 21<sup>st</sup> day of May, 2021.

  
GARY SPACKMAN  
Director

# **AMENDED CERTIFICATE OF SERVICE**

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

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[name] Rebecca Wills

# Exhibit R



IN THE MATTER OF DESIGNATING)  
THE BIG WOOD RIVER GROUND )  
WATER MANAGEMENT AREA )  
)

This matter having come before the Director of the Idaho Department of Water Resources as a result of concern over the relationship between ground water pumping and the flow of surface streams in the Big Wood River drainage, the Director Finds, Concludes and Orders as follows:

1. The Director of the Department of Water Resources has the responsibility to administer the use of ground water in the state of Idaho to protect prior rights and yet allow full economic development of the resource.

3. There are a number of Applications for Permit to Appropriate Water pending before the department which propose additional consumptive uses of ground water within the Big Wood River drainage.

1. Section 42-226, Idaho Code, declares all ground waters to be the property of the state, whose duty it is to supervise the appropriation and allotment of the same. One of the goals is to assure that early appropriations of ground water are protected in the maintenance of reasonable ground water pumping levels.

2. In order to determine whether withdrawals from the existing and proposed wells will have an adverse impact on prior water rights diverted from surface water and/or ground water, the

construction and use of additional wells in the area must be monitored and controlled.

3. Section 42-233b, Idaho Code, authorizes the Director of the Idaho Department of Water Resources to designate "ground water management areas" to allow increased management of the ground water resources.

4. The director of the department of water resources should designate a ground water management area for a portion of the Big Wood River basin upstream from Magic Reservoir and from which ground water pumping can have an effect on flows of streams and rivers in the basin.

ORDER

NOW, THEREFORE IT IS HEREBY ORDERED that the following described area be included within and designated as the "Big Wood River Ground Water Management Area" pursuant to the provisions of Section 42-233b, Idaho Code:

Beginning at Magic Dam on Big Wood River and continuing eastward approximately one mile to the drainage divide at Rattlesnake Butte, which separates tributaries of the Big Wood River above Magic Dam from those below the dam, thence northward approximately three miles and eastward approximately fourteen miles along the divide to a point where the divide crosses the north-south section line common to sections 28, 29, 32 and 33, T1S, R20E, BM, which is near the NE corner of Section 32, T1S, R20E, BM., thence east approximately five miles to the divide separating Silver Creek tributaries from the upper Little Wood River basin, thence continuing in a counterclockwise direction along the entire topographic boundary of the upper Silver Creek and Big Wood River basins, including Camas Creek returning to the point of beginning at Magic Dam.

Attached to this order is a map identified as Attachment 1. which graphically shows the boundaries of the management area.

DATED this 28<sup>TH</sup> day of JUNE, 1991.

  
R. KEITH HIGGINSON  
Director



MANAGEMENT POLICY  
FOR  
THE BIG WOOD RIVER GROUND WATER MANAGEMENT AREA

I. GENERAL

A. Introduction

The Big Wood River drainage basin is located in southcentral Idaho within Blaine, Camas, Lincoln and Gooding Counties. In the approximate center of this basin is Magic Reservoir with a water storage capacity of 191,000 acre feet. This reservoir generally divides the basin into two distinct areas. The area upstream from the reservoir is herein referred to as the upper Big Wood River Basin.

The headwaters of Silver Creek are located east of the Big Wood River in the Bellevue Triangle. Silver Creek provides water to users who divert from the creek and from the Little Wood River to which it is tributary.

The upper Big Wood River Basin (including Silver Creek), particularly in Blaine County, is an area of continued economic growth and development. Water resource development to support some of this growth has occurred through transfers of existing water rights and new water appropriations.

B. Geohydrologic Characteristics of the Big Wood River Basin

The surface and ground water system in the upper Big Wood River Basin is interconnected. Diversion and use of water from a tributary stream or well will impact the total water supply available in the system. Downstream from Magic Reservoir, the river and ground water system are not as directly connected and there are other sources of water supply including canals bringing water from the Snake River and the Snake Plain ground water system. Magic Reservoir collects much of the water which moves through the upper Big Wood River Basin and which is not diverted and used upstream from that point. Except during periods of high runoff when Magic Reservoir fills and spills, the available water supply, both surface and ground water, upstream from Magic Reservoir is fully appropriated. Camas Creek and the Big Wood River are the major surface water tributaries upstream from Magic Reservoir.

Silver Creek is fed by numerous springs whose flows depend partly on percolating seepage resulting from Big Wood River irrigation diversion and use upstream in the Bellevue area. Ground water inflow contributes to the surface flow of Silver Creek and its tributaries from the headwaters to



a point approximately two miles upstream of Picabo, where Silver Creek ceases to be a gaining stream.

Diversions of ground water in the Bellevue Triangle, and generally in locations hydrologically upstream from Picabo, will deplete the surface flow of Silver Creek. Prior water right holders who divert from the Little Wood River also depend on surface water flow from Silver Creek. Depletion of Silver Creek flow will injure these earlier-in-time right holders. Many of the Little Wood River right holders also receive storage water from Magic Reservoir.

#### C. Present and Proposed Uses

Approximately 73 applications for permit to appropriate ground water upstream from Magic Reservoir and in the upper Silver Creek area are pending before the Department of Water Resources. Protests have been filed with the department against some of these applications. Complaints have also been lodged that continued granting of permits to develop new ground water uses in the upper Big Wood River Basin is interfering with prior surface water rights.

#### D. Recent Declines

The water years 1987 to the present have been below average within the basin. As a result, Magic Reservoir has not filled to its capacity within that time period. It has been suggested that this has been caused, in part, by the diversion of water within the basin under water rights with priority dates later in time than the Magic Reservoir rights.

Many natural flow rights have been cut off because of insufficient surface water flows. Since the water supply of the basin is finite, any withdrawal and consumption of water which would otherwise contribute water to a surface water source, when the source is fully appropriated, will injure another water user.

Various estimates have been made of the quantity of water within the basin. The studies have not all agreed on the total quantity of water but all have generally agreed that the surface and ground waters of the area are interconnected and that withdrawal and use of water from either source will impact the total supply.

#### E. Past Department Designation

In 1980, the Director of the Department of Water Resources issued a policy memorandum by which he declared that the surface water of the Big Wood River upstream from Magic Reservoir was fully appropriated. Since that date, no new permits for consumptive purposes have been issued for the use of the river or any of its tributaries. The department has continued, however, to issue permits for the use of ground water within the watershed. It now appears



that this policy must be changed with respect to new consumptive uses of ground water.

## II. STATUTORY REQUIREMENTS AND AUTHORITIES

- A. Section 42-226, Idaho Code, declares all ground water to be the property of the state, and charges the state with supervising the appropriation and allotment of the same. One of the purposes of this is to assure that early appropriators of ground water are protected in the maintenance of reasonable ground water pumping levels.
- B. Section 42-233b., Idaho Code, authorizes the Director of the Department of Water Resources to designate a "Ground water Management Area" when the water supply in the area may be approaching conditions which could lead to designation as a critical ground water area.
- C. Section 42-237 a.g., Idaho Code, empowers the Director to prohibit or limit the withdrawal of water from any well during the period that he determines that water to fill any water right is not available.
- D. Policy 1F of the State Water Plan adopted by the Idaho Water Resource Board provides that "It is the policy of Idaho that where evidence of hydrologic connection exists between ground and surface water, they be managed as a single resource."

## III. MANAGEMENT POLICY

Management policies which could be used in connection with future use of water in the upper Big Wood River Basin include the designation of all or a portion of the drainage as a groundwater management area, a critical ground water area or to issue a moratorium on additional permits for development.

The designation of a ground water management area for the upper Big Wood River Basin is the preferred management policy. Under this policy, additional approvals of ground water for consumptive uses can be granted upon a showing by an applicant and a determination by the department that the water supply is adequate and other water rights will not be injured. After the water rights of the basin are determined in the Snake River Basin Adjudication, and a method for the co-regulation of surface and ground water rights has been determined, the Director may require record keeping and reporting and may also issue orders if needed to reduce or stop ground water diversions.

This management policy allows the processing of all pending filings. Most consumptive use applications will be denied unless the applicants can demonstrate there will be no injury or can provide acceptable mitigation to prior rights.



The department will continue to consider the approval of applications for permit which propose non-consumptive uses, municipal uses, stockwater and domestic uses as defined in Section 42-111, Idaho Code. Domestic uses meeting the definition of Section 42-111, Idaho Code, are not subject to the application for permit filing requirements of Section 42-229, Idaho Code.

Section 42-111, Idaho Code, defines "domestic uses" as

- A. The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or
- B. Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

For purposes of this management policy, applications for ground water permits seeking water for multiple ownership subdivisions or mobile home parks will be considered provided each unit satisfies the definition for the exception of need to file an application for permit as described above.

While an incorporated city has wide latitude under state law to beneficially use its water rights for municipal purposes, any new large consumptive use within the municipal limits, such as irrigation of lands not associated with a dwelling, or irrigation of more than one-half acre associated with a dwelling, must be mitigated by the municipality.

The department will continue to accept and process new applications for permit and applications seeking amendment or transfer of existing water rights. Applications for amendment or applications for transfer which propose a change in the point of diversion from outside the ground water management area to within the area which would directly or indirectly result in the irrigation of new land will be treated as a proposed new appropriation of water.

Dated this 28<sup>TH</sup> day of JUNE, 1991.

  
R. KEITH HIGGINSON  
Director



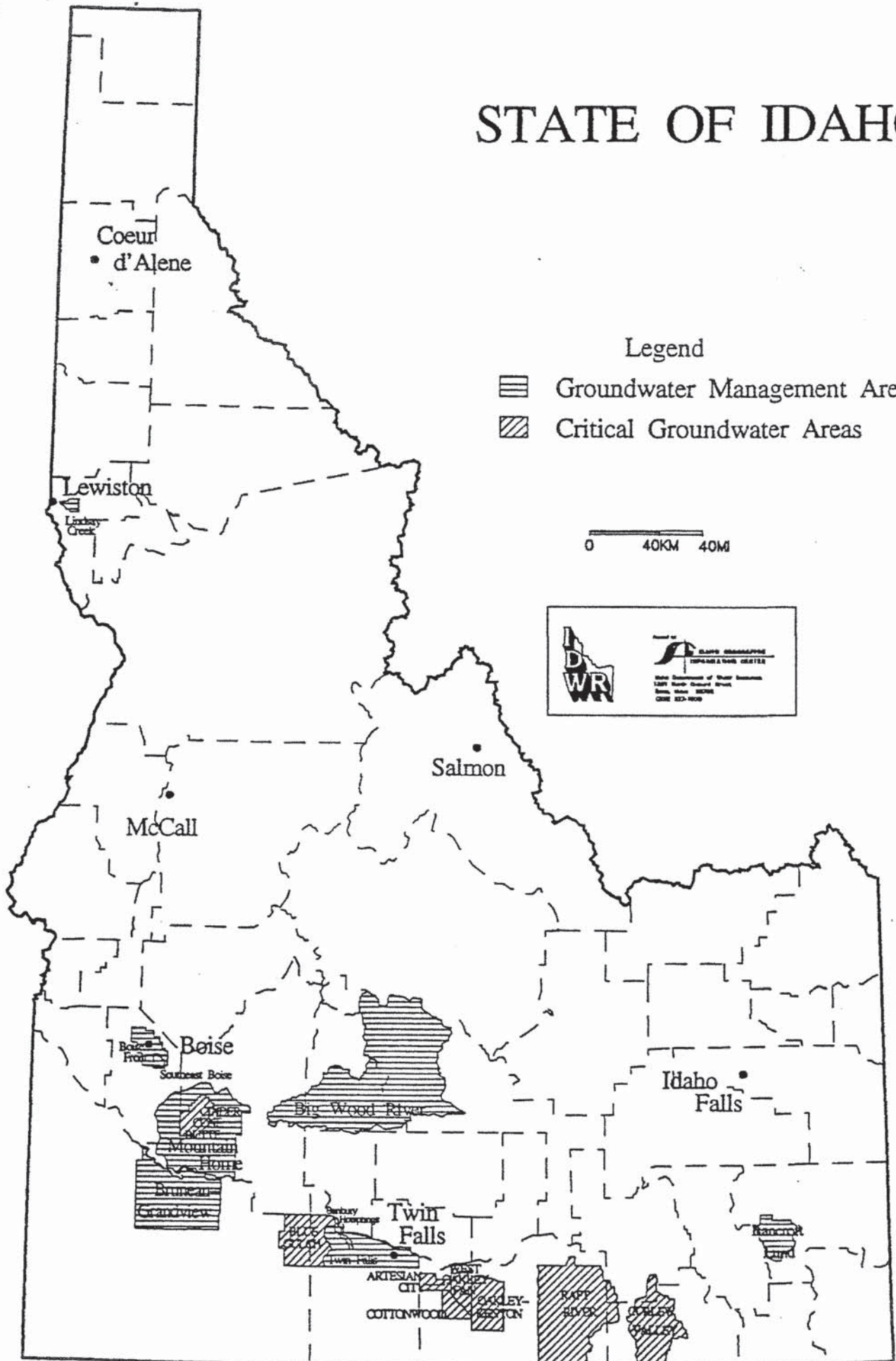
ATTACHMENT 1

BIG WOOD RIVER GROUND WATER MANAGEMENT AREA

BIG WOOD RIVER GROUND  
WATER MANAGEMENT AREA



# STATE OF IDAHO





00-5816  
WR5816NP  
SELECTION FILE: JIMGW

IDAHO DEPARTMENT OF WATER RESOURCES  
SOURCE SUMMARY REPORT  
BY WATER SOURCE/PRIORITY DATE

DATE: 09/12/95  
TIME: 17:06:02  
PAGE: 1

WATER RIGHT NUMBER	OWNER NAME	O C	PRIORITY DATE	STG	POINT OF DIVERSION	FLAG	TOTAL DIVERSION	POO	ACRES	WATER USES
WATER SOURCE: GROUNDWATER										
37-08195	CITY OF KETCHUM	C	10/05/1984	A	04N 17E 1	SWS	2.750	CFS	40.0	81,40,43
37-08204	SUN VALLEY LAND AND MINERAL INC.	C	03/12/1985	A	03N 17E 27	SWS	4.380	CFS	38.0	01,04,10,43,46
37-08268	RINKER CO.	C	03/24/1986	A	03N 18E 18	SESE	2.620	CFS	131.0	01
37-08294	GARDNER, ROBERT E.	C	05/01/1987	A	01N 19E 18	SESE	6.000	CFS	300.0	01
37-08354	ALMA, H. WILLEM	C	07/07/1988	A	02N 19E 31	SWS	0.175	CFS	6.0	01
37-08459	MC MAHAN, KATHRYN	C	09/22/1988	A	01N 18E 1	SWS	0.100	CFS	5.1	43,01
37-08439	STARWEATHER SUBDIVISION PROPERTY	C	10/25/1988	A	03N 18E 20	NWS	0.960	CFS	30.0	43,01,49
37-08552	REESE, JANET S.	C	09/11/1989	A	02N 18E 30	SWS	0.200	CFS	3.0	01,43,52
37-08580	FARNES, DORLA	C	10/26/1989	A	02S 17E 11	NWS	0.200	CFS	1.0	10,01,43
37-08598	HERMANN, RANDALL	C	03/01/1990	A	05N 17E 10	SESE	0.120	CFS	4.0	01
37-08656	JOHN BROWN INC.	C	06/04/1990	A	01N 18E 14	SWS	4.000	CFS	349.0	01
37-08645	BALDWIN, PHYLLIS	C	07/11/1990	A	01S 19E 11	NWS	1.240	CFS	60.0	01,43
37-08672	RAMM, PAUL C.	C	08/16/1990	A	01N 19E 18	SWS	0.060	CFS	3.0	01
37-08671	RAMM, PAUL C.	C	08/16/1990	A	01N 19E 18	SWS	0.100	CFS	5.0	01
37-08674	NEW DEER CREEK RANCH INC.	C	09/07/1990	A	03N 18E 30	SESE	0.090	CFS	3.0	01
37-08681	PUCHNER, PHILIP F.	C	09/14/1990	A	01N 18E 28	NWS	0.130	CFS	3.0	43,01
37-08680	PUCHNER, PHILIP F.	C	09/14/1990	A	01N 18E 28	SWS	0.130	CFS	3.0	43,01,04
37-08682	PUCHNER, PHILIP F.	C	09/14/1990	A	01N 18E 28	SWS	1.200	CFS	60.0	01
37-08686	HEATHERLANDS HOMEOWNERS ASSN INC	C	09/28/1990	A	03N 18E 17	NESE	0.860	CFS	6.5	49,43,01
37-08698	HARRIS, TIMOTHY H.	C	10/16/1990	A	04N 17E 1	SWS	0.130	CFS	3.0	01,43,50,55
37-08708	MC STAY, G.M.	C	02/13/1991	A	02N 18E 10	SESE	0.130	CFS	3.0	43,01
37-08737	REMBER, CRAIG	C	02/19/1991	A	01N 18E 23	NWS	1.600	CFS	80.0	01
37-08711	HOBBS, JIM	C	02/19/1991	A	03N 18E 33	NESE	0.070	CFS	1.0	43,01
37-08738	IRELAND, IAN DAVID	C	02/26/1991	A	01S 14E 11	SWS	0.090	CFS	3.0	01
37-08714	CROPPER, LINDA C.	C	02/27/1991	A	02N 19E 31	SEWS	0.130	CFS	3.0	01,43
37-08725	MC ATEE, KENT	C	03/08/1991	A	02N 17E 35	NWS	2.000	CFS	222.0	01
37-08709	GARDNER, ROBERT	C	03/08/1991	A	01S 19E 13	SENE	10.200	CFS	511.0	01
37-08723	GMK-B	C	05/06/1991	A	01S 19E 10	NWS	0.240	CFS	1.8	01,43
37-08727	ROSE, DONNA	C	05/16/1991	A	04N 18E 25	SESE	0.060	CFS	2.0	01,50
37-08728	KENDALL, CHUCK	C	05/21/1991	A	04N 18E 19	SESE	0.130	CFS	3.0	01,43
37-08731	WOOD, SYLVIA	C	06/14/1991	A	01N 18E 36	SENE	0.090	CFS	3.0	01
37-08762	NORTH STAR FUNDING INC	C	06/21/1991	A	01N 18E 1	SESE	0.500	CFS	25.0	01
37-08763	RYAN, RONALD D	C	07/12/1991	A	05N 17E 26	SENE	0.130	CFS	3.0	01,43
37-08749	HEAD, JOSEPHINE	C	07/12/1991	A	02N 18E 36	SENE	0.360	CFS	18.0	01
37-08765	WOODS, JR, WARD W	C	08/28/1991	A	03N 18E 32	SESE	0.180	CFS	4.0	01,43
37-08761	BASABE, SUSAN A	C	09/24/1991	A	01S 11E 35	SESE	4.760	CFS	238.0	01
37-08768	LIMES, JAMES L	C	11/29/1991	A	01N 19E 18	SWS	0.090	CFS	10.0	01
37-08817	NEILL, STEVEN	C	08/02/1993	A	02N 19E 31	NWS	0.060	CFS	3.5	01
37-08848	CITY OF BELLEVUE	C	06/06/1995	A	02N 18E 25	SWS	3.350	CFS	40	
WATER SOURCE: SPRING										
37-08552	REESE, JANET S.	C	09/11/1989	A	02N 18E 30	SWS	0.200	CFS	3.0	01,43,52

# Exhibit S

RECEIVED

MAY 13 2021

DEPARTMENT OF  
WATER RESOURCES

Albert P. Barker [ISB No. 2867]  
Travis L. Thompson [ISB No. 6168]  
Michael A. Short [ISB No. 10554]  
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*Attorneys for South Valley Ground Water District*

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

IN THE MATTER OF BASIN 37  
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001


**SOUTH VALLEY GROUND  
WATER DISTRICT'S  
REQUEST FOR PRODUCTION**

COMES NOW, the SOUTH VALLEY GROUND WATER DISTRICT ("SVGWD"), by and through its attorneys of record, BARKER ROSHOLT & SIMPSON LLP, and hereby requests the the Department of Water Resources respond to this request for production of information. SVGWD requests production of this information related to the *Notice of Administrative Proceeding, Pre-Hearing Conference, and Hearing* ("Notice") issued by the Director of the Idaho Water Resources Board on May 4, 2021, and conjunctive management of certain groundwater rights in a portion of Basin 37. This information is relevant to the hydrology and water rights that are subject to the Director's *Notice* of potential curtailment and critical for SVGWD and its members to prepare for the hearing.

To wit, SVGWD makes specific requests for production of records and information as more fully described in **Exhibit A**. This request is in addition to the information that the Director's May 11, 2021 *Request for Staff Memorandum*, required to be produced. To the extent that the information contained in answering these requests is included in the information provided in IDWR's response to the Director's May 11, 2021 *Request for Staff Memorandum*, SVGWD requests that the Department identify where the response to the request can be found in the forthcoming Staff Memorandum, and if not in the Staff Memorandum, responses should be answered in full.

Dated this 13<sup>th</sup> day of May, 2021.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in blue ink, appearing to read 'Albert P. Barker', is written over a horizontal line.

Albert P. Barker

*Attorney for South Valley Ground Water District*



# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13<sup>th</sup> day of May, 2021, the foregoing was filed, served, and copied as shown below.

**IDAHO DEPARTMENT OF WATER RESOURCES**  
P.O. Box 83720  
Boise, ID 83720-0098  
Hand delivery or overnight mail:  
322 East Front Street  
Boise, ID 83702

☐ U. S. Mail  
☒ Hand Delivered  
☐ Overnight Mail  
☐ Fax  
☐ E-mail

**Gary L. Spackman**  
Director  
IDAHO DEPARTMENT OF WATER RESOURCES  
PO Box 83720  
Boise, ID 83720-0098

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☒ Hand Delivered  
☐ Overnight Mail  
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**Candice McHugh**  
**Chris Bromley**  
MCHUGH BROMLEY, PLLC  
Attorneys at Law  
380 S. 4th St., Ste. 103  
Boise, ID 83702

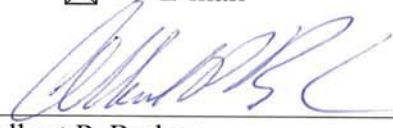
☐ U. S. Mail  
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Albert P. Barker

1. All Orders issued under IC 42-237a.g involving curtailment of groundwater to prevent injury to surface water rights.
2. All IDWR guidance concerning the authority of the Director or IDWR under 42-237a.g.
3. The basis for the decision to direct the proposed administration at those groundwater rights within the boundary of the map, including the basis for selecting the boundary as shown on the inset map to the Notice.
4. The Director stated at an Advisory Committee meeting in April that he had enough information to make an injury determination. Produce the information that the Director relied upon or was available to the Director in making that statement.
5. Any additional information relevant to injury analysis generated since the Director's statement.
  - a. Including water rights that may be injured, and for each water right the factors listed in Rule 42 of the Conjunctive Management Rules
  - b. If the spreadsheet analysis dated April 14 &/or April 15, 2021 from Watermaster Kevin Lakey is relied upon, provide a full explanation of the spreadsheets and all backup data and calculations used to prepare the spreadsheets.
  - c. Provide all additional information and injury analysis prepared by or obtained from the Watermaster Kevin Lakey or the watermaster's office.
6. Identify all water rights the Department considers may be injured and the basis for that conclusion
7. Provide the methodology used to quantify the surface water supply for the Little Wood River downstream of Silver Creek in 2021.
8. Describe the impact of Condition 161 on water deliveries in the Little Wood in the 2021 water year, including identification of those rights with that condition.
9. All communications concerning water supply and injury analysis with any water right holder and their representatives, including Eric Miller and counsel, whose rights the Department considers may be injured concerning injury analysis
10. All injury analysis conducted by IDWR for this proceeding
11. All communication with the Basin 37 Water Master regarding injury analysis and water supply
12. All analysis of curtailment necessary to avoid injury
  - a. All analysis using the WRV 1.1 Ground Water Model including model runs, supporting data and documentation utilized to determine the administrative area identified on Attachment A to the Basin 37 Administrative Proceeding Order.
  - b. All analysis using the WRV 1.1 Ground Water Model including model runs, supporting data and documentation utilized to identify ground water rights to be reduced or curtailed in 2021.
  - c. All analysis including model runs, supporting data and documentation using the WRV 1.1 Ground Water Model to quantify the benefit to the Little Wood River water users from proposed reductions in ground water withdrawals in 2021.

13. 2021 communications (including phone logs, texts, emails and other written documents) with members of the Idaho legislature and Idaho Water Resource Board concerning about water supply, injury, curtailment and this administrative proceeding.
14. Quantify the impact of the channel condition of Silver Creek upstream of Highway 93. Explain how the channel condition impacts the water supply for the downstream Little Wood River water users. Produce all analysis of water losses to Silver Creek at the Highway 93 crossing.
15. Produce all documentation of the deterioration of the stream conditions in Silver Creek at Highway 93 and increases in stream losses at this location.
16. Provide documentation to support any determination concerning the responsibility for maintaining the stream channel in Silver Creek at Highway 93.
17. Provide all communication to the Department requesting administration of ground water in the Big Wood Ground Water Management Area since 2014.

# Exhibit T



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

IN THE MATTER OF BASIN 37  
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**ORDER DENYING SOUTH VALLEY  
GROUND WATER DISTRICT'S  
MOTION TO DESIGNATE ORDER  
DENYING MOTION TO DISMISS AS  
FINAL ORDER**

**BACKGROUND**

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

On May 13, 2021, South Valley Ground Water District (“South Valley”) filed *South Valley Ground Water District’s Motion to Dismiss/Supporting Points & Authorities/Motion to Shorten Time for Response/Request for Oral Argument* (“SVGWD MTD”). On the next day, Sun Valley Company (“Sun Valley”) filed a *Motion to Dismiss* (“SVC MTD”) and the City of Bellevue (“Bellevue”) filed a *Motion for More Definite Statement, Motion for Clarification, and Motion to Postpone Hearing* (“Bellevue Motion”). On May 19, 2021, attorney James P. Speck filed a *Joinder in and Support of Motions* on behalf of numerous clients that joined in and supported the motions filed by South Valley, Sun Valley, and Bellevue. On the same day, Galena Ground Water District filed *Galena Ground Water District’s Joinder in and Support of South Valley Ground Water District’s Motions*. On May 20, 2021, three joinder filings were made. Dean R. Rogers, III and Dean R. Rogers, Inc., filed a *Joinder in and Support of Motions* that joined and supported South Valley and Bellevue’s motions; Sun Valley Water and Sewer District joined in the same motions in its *Joinder in, and Support of, Previously Filed Motions*; and the City of Pocatello filed *City of Pocatello’s Joinder in and Support of Motions* joining in the motions filed by South Valley, Sun Valley and Bellevue. On May 21, 2021, the City of Hailey filed *City of*

*Hailey's Joinder in and Support of Motions* joining in the motions filed by South Valley, Sun Valley, and Bellevue. In addition, on May 21, 2021, the Big Wood and Little Wood Water Users Association and the Big Wood Canal Company filed *Joint Response to Motions*.

On May 22, 2021, the Director issued the *Order Denying Motions to Dismiss, for Continuance or Postponement, and for Clarification or More Definite Statement* ("Order"). The Order does not contain language indicating it is a recommended order, preliminary order, or final order, and also was not accompanied by a document containing such language. Later the same day, South Valley filed *South Valley Ground Water District's Motion to Designate Order Denying Motion to Dismiss as Final Order* ("Motion"), in order to allow South Valley to seek judicial review of the Order pursuant to the Idaho Code § 67-5270. *Motion* at 1-3. South Valley requests oral argument and expedited consideration of the Motion, with Monday, May 24, 2021, set as the date for responses, oral argument, and an order resolving the Motion.<sup>1</sup> *Motion* at 3. The Director denies the Motion for reasons discussed below.<sup>2</sup>

### ANALYSIS

As explained above, the Order does not contain language indicating it is a recommended order, preliminary order, or final order, and also was not accompanied by a document containing such language. Thus, under the Department's Rule of Procedure 710, the Order is an interlocutory order that is not subject to judicial review under the under the Idaho Administrative Procedure Act. IDAPA 37.0101.710; *see also Williams v. State, Bd. of Real Estate Appraisers*, 149 Idaho 675, 678, 239 P.3d 780, 783 (2010) (holding that an agency's denial of a motion to dismiss was an interlocutory order rather than a final agency action for purposes of judicial review).

Rule 750 of the Department's Rules of Procedure, however, authorizes the Director to designate an interlocutory order as a "final" order:

If an order does not designate itself as recommended, preliminary or final at its release, but is designated as recommended, preliminary or final after its release, its effective date for purposes of reconsideration or appeal is the date of the order of designation. If a party believes that an order not designated as a recommended order, preliminary order or final order according to the terms of these rules should be designated as a recommended order, preliminary order or final order, the party may move to designate the order as recommended, preliminary or final, as appropriate.

IDAPA 37.01.01.750. The determination of whether to grant a motion to designate an interlocutory order as final for purposes of reconsideration or appeal is committed to the Director's discretion. *See Brinkmeyer v. Brinkmeyer*, 135 Idaho 596, 599, 21 P.3d 918, 921

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<sup>1</sup> This is the date set for the prehearing conference in this matter. *Notice* at 1.

<sup>2</sup> The Director grants the request for expedited consideration and denies the request for oral argument.

(2001) (“The decision to grant or deny a 54(b) certificate rests in the sound discretion of the trial judge who is best able to evaluate the situation.”).<sup>3</sup>

South Valley argues the Motion should be granted because “IDWR has followed a similar procedure before,” in the proceedings involving delivery calls filed by the Big & Little Wood Water Users Association (IDWR Docket no. CM-DC-2015-001 & 002). *Motion* at 2. South Valley asserts that designating the Order as final would serve the interests of administrative and judicial economy and “would be consistent with the prior handling of a similar conjunctive administration matter.” *Motion* at 2-3. The Director disagrees.

In the proceedings involving the Wood River Water Users’ delivery calls, the motion to designate certain interlocutory orders as final was the product of a stipulation among number of parties, and no party objected to the stipulation or designation of the interlocutory orders as final. *Order Designating ACGWS Order and Sun Valley Order as Final Order* at 2 (Oct. 15, 2015). There is no similar stipulation in this case, and the absence of such a stipulation weighs against granting the Motion.

As discussed in the Order, this case involves a question of administration during the current 2021 irrigation season, and time is of the essence. Drought conditions are predicted, and the information available to the Director suggests that ground water pumping in the Bellevue Triangle during the 2021 irrigation season will have an immediate, measurable impact on surface flows in Silver Creek and its tributaries, and may injure senior surface water rights diverting from those sources. *Order* at 8. Under these circumstances, designating the Order as a final order would likely preclude administration during some or all of the rest of the irrigation season because of the time that would be consumed by the judicial review proceedings.<sup>4</sup> Under the circumstances of this case, therefore, designating the Order as a final order would effectively rule out any possibility of protecting senior surface water rights diverting from Silver Creek and its tributaries from junior ground water uses in the Bellevue Triangle during the upcoming irrigation season. As discussed in the Order, this result would be contrary to the prior appropriation doctrine as established by Idaho law. *Order* at 8, 11.

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<sup>3</sup> In *Williams*, the Idaho Supreme Court held that an agency’s denial of a motion to dismiss was not a final order even though the agency had expressly designated it as a final order. *Williams*, 149 Idaho at 677, 239 P.3d at 782. That case, however, involved an administrative complaint alleging multiple counts of wrongful conduct against a state-certified real estate appraiser, and the motion to dismiss did not challenge the agency’s authority to file such a complaint or initiate such a proceeding. *Id.* at 676-77, 239 P.3d at 781-82. This case does not involve an administrative complaint, and the Motion seeks judicial review of the Order’s determinations that the Director had authority to initiate this proceeding under Idaho Code § 42-237a.g., and was not required to proceed under the *Rules for Conjunctive Management of Surface and Ground Water Resources*. The Director, therefore, does not view *Williams* as eliminating the Director’s discretion to designate the Order as a final order.

<sup>4</sup> The judicial review proceedings in the Wood River Water Users’ matter were initiated in August 2015 and concluded in April 2016.

## CONCLUSION

The Motion to designate the Order as a “final order” is denied. The Director retains discretion to reconsider this determination if the parties enter into a stipulation regarding designation of the Order as a “final order.”

DATED this 24<sup>th</sup> day of May, 2021.

  
\_\_\_\_\_  
GARY SPACKMAN  
Director



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of May, 2021, the above and foregoing was served on the following by the method(s) indicated below:

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


Rusty Kramer, Secretary PO Box 507 Fairfield, ID 83327 <a href="mailto:waterdistrict37b@outlook.com">waterdistrict37b@outlook.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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Alton Huyser 72 North, Hwy 75 Shoshone, ID 83352 <a href="mailto:bigwoodfarmllc@gmail.com">bigwoodfarmllc@gmail.com</a> <a href="mailto:cooper.brossy@gmail.com">cooper.brossy@gmail.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Richard T. Roats Lincoln County Prosecuting Attorney P.O. Box 860 Shoshone, ID 83352 <a href="mailto:rtr@roatslaw.com">rtr@roatslaw.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Paul Bennett 114 Calypso Lane Bellevue, ID 83313 <a href="mailto:info@swiftsureranch.org">info@swiftsureranch.org</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Carl Legg 1430 Poplar Avenue Twin Falls, ID 83301	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
J. Evan Robertson Robertson & Slette, PLLC P.O. Box 1906 Twin Falls, Idaho 83303-1906 <a href="mailto:erobertson@rsidaholaw.com">erobertson@rsidaholaw.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

Ann Y. Vonde P.O. Box 83720 Boise, ID 83720-0010 <a href="mailto:ann.vonde@ag.idaho.gov">ann.vonde@ag.idaho.gov</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
James P. Speck Speck & Aanestad P.O. Box 987 Ketchum, ID 83340 <a href="mailto:jim@speckandaanestad.com">jim@speckandaanestad.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
John K. Simpson Barker Rosholt & Simpson LLP 1010 Jefferson St., Ste. 102 P.O. Box 2139 Boise Idaho 83701-2139 <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Rod and Kaysi Hubsmith 208-316-7087 <a href="mailto:Kaysi10@live.com">Kaysi10@live.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Lawrence Schoen Napuisunaih 18351 U.S. Highway 20 Bellevue, ID 83313 <a href="mailto:lschoen@naramail.net">lschoen@naramail.net</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
Barbara Farms LLC Fred Brossy P.O. Box 424 Shoshone, ID 83352	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
Sabala Farms, Inc. Mark Sabala 1819 E. 1550 S. Gooding, ID 83330	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email

Idaho Ranch Hands Property Management 218 Meadowbrook Hailey, ID 83333 <a href="mailto:idahoranchhands@gmail.com">idahoranchhands@gmail.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
David & Nicole Hults 1572 E. 1700 S. Gooding, ID 83330	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
Bill & Karen Arkoosh 2005 US Hwy 26 Gooding, ID 83330	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
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Nick & Jennifer Westendorf 439 N. 700 W. Shoshone, ID 83352	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
Southern Comfort Homeowner's Association P.O. Box 2739 Ketchum, ID 83340	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
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Rebecca Wills  
Legal Assistant/IDWR

# Exhibit U



IDWR offices are open to the public and following the CDC guidelines for wearing masks and observing social distancing. For in-person visits, we encourage you to [call ahead for an appointment](#). ✕

[Home](#) / [Legal Actions](#) / [Administrative Actions](#) / Basin 37

 [External link](#)

## Basin 37 Administrative Proceeding

[Administrative Documents](#) [Maps](#)

### DOCKET #AA-WRA-2021-001



[BWLWWU Notice of Intent to Participate](#) - May 20, 2021



[City of Gooding Notice of Intent to Participate](#) - May 20, 2021



[Charles E. Newell Notice of Intent to Participate](#) - May 20, 2021



[Joe Matheney Notice of Intent to Participate](#) - May 20, 2021



[Bill Arkoosh Notice of Intent to Participate](#) - May 20, 2021



[John Arkoosh Notice of Intent to Participate](#) - May 20, 2021



[Nick Westendorf Notice of Intent to Participate](#) - May 20, 2021



[Southern Comfort Homeowners Association Notice of Intent to Participate](#) - May 20, 2021



[Dean R. Rogers Joinder in and Support of Motions](#) - May 20, 2021



[Galena GWD Joinder in and Support of South Valley GWD Motions](#) - May 19, 2021



[Mark Sabala Notice of Intent to Participate](#) - May 19, 2021





Kaysi and Rodney Hubsmith Notice of Intent to Participate - May 19, 2021



Joinder in and Support of Motions - May 19, 2021



James P. Speck Intent to Participate for Persons and Entities Listed - May 19, 2021



Idaho Power Company Notice of Intent to Participate - May 19, 2021



Idaho Dept. of Fish and Game Intent to Participate - May 19, 2021



Fred Brossy Notice of Intent to Participate - May 19, 2021



Big Wood Farms Notice of Intent to Participate - May 19, 2021



City of Hailey Notice of Intent to Participate - May 18, 2021



Sun Valley Water and Sewar District Notice of Intent to Participate - May 18, 2021



Declaration of Candice M. McHugh in Support of Motion for More Definite Statement - May 18, 2021



Corrected Declaration of Travis L. Thompson in Support of Motion for Continuance - May 18, 2021



Tim Luke Response to Request for Staff Memo - Basin 37 Admin Hearing - May 17, 2021



Sean Vincent Response to Request for Staff Memo - Basin 37 Admin Hearing - May 17, 2021



Jennifer Sukow Response to Request for Staff Memo - Basin 37 Admin Hearing - May 17, 2021



Jennifer Sukow Supporting Files - May 17, 2021



Phil Blankenau Response to Request for Staff Memo - Basin 37 Admin Hearing - May 17, 2021



Idaho Water Users Association Intent to Participate as Observer - May 17, 2021



City of Idaho Falls Notice of Intent to Participate - May 17, 2021



Big Wood Water Users Association Notice of Intent to Participate - May 17, 2021



WD 37B Groundwater Association Notice of Intent to Participate - May 17, 2021



Swiftsure Ranch Notice to Participate - May 14, 2021



[Simplot Notice of Informal Participation](#) - May 14, 2021



[Sun Valley Company Motion to Dismiss](#) - May 14, 2021



[City of Bellevue Motion for More Definite Statement Clarification](#) - May 14, 2021



[Dean Rogers Notice of Intent to Participate](#) - May 14, 2021



[Lawrence Schoen Notice of Intent to Participate](#) - May 13, 2021



[Galena GWD Notice of Intent to Participate](#) - May 13, 2021



[City of Ketchum Notice of Intent to Participate](#) - May 13, 2021



[South Valley GWD Motion to Dismiss](#) - May 13, 2021



[South Valley GWD Request for Production](#) - May 13, 2021



[South Valley GWD Motion for Order Authorizing Discovery](#) - May 13, 2021



[South Valley GWD Motion for Continuance - Declaration of David Shaw](#) - May 13, 2021



[South Valley GWD Motion for Continuance of Hearing](#) - May 13, 2021



[South Valley GWD Motion to Appoint Independent Hearing Officer](#) - May 13, 2021



[Sun Valley Company Notice of Intent to Participate Amended Certificate of Service](#) - May 12, 2021



[City of Bellevue Notice of Intent to Participate Amended Certificate of Service](#) - May 12, 2021



[IGWA Notice of Intent to Participate](#) - May 12, 2021



[Eagle Creek Irrigation Company Notice of Intent to Participate](#) - May 12, 2021



[City of Pocatello Notice of Intent to Participate](#) - May 12, 2021



[Request for Staff Memorandum](#) - May 11, 2021



[Sun Valley Company Notice of Intent to Participate](#) - May 11, 2021



[City of Bellevue Notice of Intent to Participate](#) - May 11, 2021



South Valley GWD Notice of Intent to Participate - May 10, 2021



Big Wood Canal Company Notice of Intent to Participate - May 10, 2021



Revised Complete Certificate of Service with list of addressees - May 7, 2021



Published Notice of Administrative Proceeding - May 4, 2021



Notice of Administrative Proceeding Cover Letter - May 4, 2021



Notice of Administrative Proceeding, Certificate of Service, Map (Attachment A) - May 4, 2021



# Exhibit V



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*Attorney for Big Wood Canal  
Company*

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

IN THE MATTER OF BASIN 37  
ADMINISTRATIVE PROCEEDING

Docket No. AA-WRA-2021-001

**DECLARATION OF FRED BROSSY IN  
SUPPORT OF BWLWWUA RESPONSE  
TO MOTIONS**

I Fred Brossy hereby state and declare as follows:

1. I am one of the managing members of Barbara Farms, LLC, a participant and owner of the land

and water rights in the above-entitled matter and a member of Big Wood & Little Wood Water Users Association.

2. I am an active participant in the farming operation on the land owned by Barbara Farms, LLC (hereinafter "Barbara") and leased to Ernie's Organics, LLC. I am very familiar with the historical use of water and its availability to fulfill the water rights owned by Barbara having operated this farm since 1983.

3. Attached to this declaration is a table which depicts the water rights owned by Barbara with their priority dates. Barbara owns 300 acres of irrigable farmland to which 300 inches of water have been adjudicated. Barbara is party to a contract with Big Wood Canal Co. (hereinafter, "BWCC") for delivery of 314 acre-feet of water additional water to be delivered on-demand when BWCC is delivering to its shareholders.

4. The attached table also describes the acres of different crops being grown by Ernie's Organics in 2021, as well as the last irrigation dates required to complete the irrigation of the crops as compared with the currently projected cutoff date given by the Water District 37 watermaster.

5. Additionally, the attached table also depicts the projected loss in revenue (for the years 2021 and 2022) to be realized by Ernie's Organics, LLC as a result of the crop losses due to lack of adequate irrigation.

6. Due to the drought which is occurring in Basin 37 this year, Barbara's water rights are an example of so many other senior water rights that will be dramatically impacted and are projected by the Water District 37 watermaster to be cut off earlier than the historical average cutoff date.

7. Historically, water rights with an 1884 priority date, or senior right, commonly were filled and diverted for a full irrigation season prior to widespread groundwater withdrawals upstream.

8. This is substantiated by the IDWR Technical Memo from Tim Luke to Gary Spackman of May 17, 2021, which explains that Water District 37 delivery records demonstrate water rights with priority dates 04-01-1884 and senior were in priority for the full irrigation season, even in dry years, prior to widespread groundwater withdrawals.

9. Traditionally, Barbara's 300 inches of Little Wood River Decreed Water Rights and 314 acre-feet of Contract water from BWCC have been adequate to grow the mix of crops listed in the attached table. When Barbara's decrees are cut prematurely due to ground water pumping in the Lower Wood River Valley, and BWCC ceases delivery, we have had to supplement our water needs with rentals from District 1 in the Upper Snake. After a concerted effort and certainly due in part to the drought, we have been unsuccessful thus far in obtaining any emergency supplemental water for 2021 from any entities in the upper Snake River.

10. We have been able to rent 100 shares of AFRD2 water from the City of Shoshone for the 2021 irrigation season at a cost of \$3,300. An AFRD2 share is 5/8 of an inch, so this equates to 66" of water, and is not nearly adequate to replace our 300" of Little Wood Decrees, projected by Watermaster Kevin Lakey to be cut off by 6/15/2021. Additionally, when Magic Reservoir is off, most likely by 6/1/2021, our 314 ac/ft of contract water will be undeliverable as well. The 66" of AFRD2 water will only be sufficient to irrigate 21 acres of processing potatoes and approximately 45 of the planned 66 acres of garden bean seed crops. The 66" is not nearly adequate to finish currently growing crops (alfalfa—71 acres, barley—60.5 acres, wheat—12 acres) and achieve yield targets, and furthermore jeopardizes our ability to plant previously planned crops (36 acres of pinto beans and 78.5 acres of new seeding alfalfa).

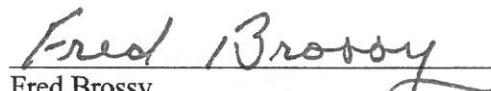
11. Due to the unprecedented early projected shutoff dates of our decree water, and unavailability of our BWCC contract water, we anticipate getting just two cuttings of green-chopped dairy alfalfa instead of the usual four. Additionally, planned establishment of new-seeding alfalfa following malt barley and wheat in late summer 2021 will not be possible, resulting in revenue loss of two cuttings in 2022 during the spring establishment period.

12. At the present time, we consider injury to consist of the sum of loss in revenue and cost of renting emergency supplemental water. The attached table shows combined projected injury in 2021 and 2022 of \$261,635 due to insufficient supply of irrigation water in 2021. We reserve the right to identify and characterize additional injuries in the future.

13. I have personal knowledge that when Silver Creek is running at low flows and groundwater pumps in Basin 37 are shut off, we senior water right holders see a significant increase in stream flows available to fill our senior water rights within a matter of less than one week. Therefore, I believe that a curtailment of junior ground water rights would significantly benefit not only Barbara's senior water rights but also similarly decreed water rights within the drainage area.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct to the best of my knowledge.

Dated this 23<sup>rd</sup> day of May, 2021

  
Fred Brossy  
Managing Member of Barbara Farms, LLC.



**Table of Projected Injury\***

Owner	Water Right	Priority Date	Water Right Volume	Crop	Crop Acres	Needed last day of irrigation	Projected Cutoff Date <sup>s</sup>	Days of Supply Shortfall	Yield Target	Projected 2021 Yield Loss	Projected Revenue Loss in 2021	Projected Revenue Loss in 2022
<b>Decreed Water</b>												
BARBARA FARMS	37-344A	04/06/1883	200 inches	Organic garden seed beans	21	30-Aug	15-Jun	76	1000 lbs/ac	1000 lbs/ac	\$84,000	\$0
BARBARA FARMS	37-344A	04/06/1883	200 inches	Organic edible pinto beans	20	25-Aug	15-Jun	71	2200 lbs/ac	2200 lbs/ac	\$40,480	\$0
BARBARA FARMS	37-344A	04/06/1883	200 inches	Organic purple barley	11	15-Jul	15-Jun	30	3100 lbs/ac	1550 lbs/ac	\$10,230	\$0
BARBARA FARMS	37-344A	04/06/1883	200 inches	Organic malt barley/new seeding alfalfa	49.5	15-Jul	15-Jun	30	100 bu/ac	50 bu/ac	\$23,513	\$24,948
BARBARA FARMS	37-344A	04/06/1883	200 inches	Organic winter wheat/new seeding alfalfa	12	15-Jul	15-Jun	30	80 bu/ac	40 bu/ac	\$5,760	\$6,048
BARBARA FARMS	37-344A	04/06/1883	200 inches	Organic no-till edible pinto beans	16	25-Aug	15-Jun	71	1000 lbs/ac	1000 lbs/ac	\$14,720	\$0
BARBARA FARMS	37-973	04/01/1884	100 inches	Organic alfalfa green chop	71	30-Aug	5-Jun	76	16.8 tons/ac	8.4 tons/ac	\$35,784	\$0
BARBARA FARMS	37-973	04/01/1884	100 inches	Organic rye green chop/new seeding alfalfa <sup>#</sup>	17	15-Sep	5-Jun	102	7.2 tons/ac	4.2 tons/ac	\$4,284	\$8,568.00
<b>Supplemental Water</b>												
BARBARA FARMS	BWCC Contract	n/a	314 acf	Applied as needed per crop, if BWCC is delivering	300	15-Sep	1-Jun	107	n/a	n/a	n/a	n/a
CITY OF SHOSHONE*	AFRD2	n/a	66 inches	Organic processing potatoes	21	15-Sep	End of season	none	400 cwt/ac	none	none	none
CITY OF SHOSHONE*	AFRD2	n/a	66 inches	Organic garden seed beans	45	30-Aug	End of season	none	1000 lbs/ac	none	none	none
Sum of revenue loss by year:											\$218,771	\$39,564
Cost of emergency rental of 66 inches of supplemental AFRD2 water for 2021 season:											\$3,300	
											\$222,071	\$39,564
Total Projected Injury:											\$261,635	

**Notes:**

- <sup>#</sup>This table considers the sum of loss of revenue and cost of renting emergency supplemental water to be an injury. We reserve the right to identify and characterize additional injuries in the future.
- <sup>s</sup>Projected cutoff dates as of 05/21/21 are based on professional judgement of WD37 Watermaster utilizing WD37 historical records. Projected dates are not static; they will change as more current data become available.
- \*City of Shoshone water is an emergency rental for 2021 season only.
- <sup>#</sup>New seeding alfalfa revenue loss in 2022 is based on yield loss of 4.2 tons/ac per cutting and loss of two cuttings during establishment.

## **CERTIFICATE OF MAILING**

I HEREBY CERTIFY That on this 22<sup>nd</sup> day of May, 2021, a true and accurate copy of the foregoing was sent by U.S. Mail, postage prepaid or email to the following:

Gary Spackman, Director  
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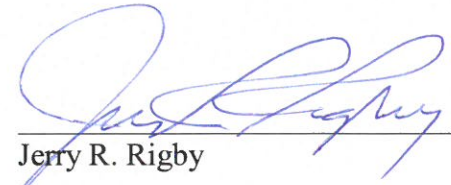
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