

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CITY OF HAILEY, an Idaho municipal corporation, and CITY OF BELLEVUE, an Idaho municipal corporation,

Petitioners,

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,

CITY OF KETCHUM, CITY OF FAIRFIELD, WATER DISTRICT 37B GROUND WATER ASSOCIATION, BIG WOOD & LITTLE WOOD WATER USERS ASSOCIATION, SUN VALLEY COMPANY, 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 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

Case No. CV-WA-2015-14419

**SUPPLEMENTAL RESPONDENTS'  
BRIEF**

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 LLC, 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

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**SUPPLEMENTAL RESPONDENTS' BRIEF**  
Judicial Review from the Idaho Department of Water Resources  
Honorable Eric J. Wildman, District Judge, Presiding

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## I. INTRODUCTION

On January 7, 2016, the City of Hailey and City of Bellevue (“Cities”) filed the *Petitioners’ Opening Brief* in the above-captioned matter. The issues raised by the Cities stem from two delivery calls (referred to herein as “the Big and Little Wood Delivery Calls”) initiated by the Big Wood and Little Wood Water Users Association (“Association”) pursuant to the Idaho Department of Water Resources’ *Rules for Conjunctive Management of Surface and Ground Water Resources* (“CM Rules”).<sup>1</sup> The Cities challenge the decision of the Director of the Department (“Director”) in the *Order Denying Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* (“ACGWS Order”) that the CM Rules do not require promulgation of a rule designating an area of common ground water supply (“ACGWS”) before the Director can proceed with the Big and Little Wood Delivery Calls pursuant to CM Rule 40. *Petitioners’ Opening Brief* at 8, 15.

On the day the *Respondents’ Brief* was due,<sup>2</sup> the Water District 37B Ground Water Association (“Camas Group”) filed an *Intervenor’s Brief*. The Camas Group asserts the CM Rules dictate “that CM Rules 30 and 31 apply to delivery call proceedings in which an [ACGWS] has not yet been designated, and that Rule 40 applies only after an [ACGWS] has been designated.” *Intervenor’s Brief* at 4. The Camas Group also suggests it is not a proper respondent in the underlying delivery call matters and requests attorney fees. *Id.* at 2-4.

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<sup>1</sup> The CD containing the record on appeal includes filings in the Big Wood Delivery Call matter in a folder labeled BW CM-DC-2015-001, filings in the Little Wood Delivery Call matter in a folder labeled LW CM-DC-2015-002, and documents as a result of the Court’s November 16, 2015, *Order Granting Motion to Augment* in a folder labeled Supp AR Lodged w-DC. Citations to the record herein are consistent with these labels.

<sup>2</sup> On February 2, 2016, the Respondents filed a *Motion for Extension of Time for Filing Respondents’ Brief* and *Affidavit of Emmi L. Blades in Support of Motion for Extension of Time for Filing Respondents’ Brief* requesting the Court move the due date for filing the *Respondent’s Brief* from February 4, 2016, to February 8, 2016. The Court granted the motion and the *Respondents’ Brief* was filed on February 8, 2016.

## II. ARGUMENT

### A. **THE RESPONDENTS ARE ENTITLED TO RESPOND TO CONTENTIONS OF THE CAMAS GROUP.**

The Respondents are entitled to address new arguments raised by the Camas Group in the *Intervenor's Brief* to which the Respondents did not have an opportunity to respond in the *Respondents' Brief*. See, e.g., *Bell v. Idaho Dep't of Labor*, 157 Idaho 744, 749, 339 P.3d 1148, 1153 (2014). The Camas Group asserts that, “[b]ecause the Camas Group does not necessarily agree with all the Cities’ arguments, it is appropriate to file and consider this brief as an intervenor-response brief.” *Intervenor's Brief* at 1 n.2. The Camas Group also asserts it “is not raising additional issues in this appeal.” *Id.* at 2. However, as discussed below, the Camas Group raises additional issues outside the scope of issues raised by the Cities and against the Respondents that the Respondents did not have an opportunity to respond to in the *Respondents' Brief*. Thus, the Camas Group should have filed its brief as an intervenor-appellant. By filing the *Intervenor's Brief* as an intervenor-response brief, the Camas Group deprived the Respondents of the right to respond to arguments to which they are entitled to respond on appeal. Thus, the Court should consider arguments set forth herein in rebuttal to contentions of the Camas Group.

### B. **THE COURT SHOULD NOT CONSIDER THE CAMAS GROUP'S CLAIM THAT THE DIRECTOR MUST DESIGNATE AN ACGWS PURSUANT TO CM RULE 30.**

As explained above, the Cities challenge the Director’s determination that the CM Rules do not require the Director to promulgate a rule designating an ACGWS before responding to the Big and Little Wood Delivery Calls pursuant to CM Rule 40. *Petitioners' Opening Brief* at 8, 15. The Camas Group raises a new claim that the CM Rules dictate “that CM Rule 30” applies

to the Big and Little Wood Delivery Calls because no ACGWS has “yet been designated” and that CM Rule 40 “only applies after an [ACGWS] has been designated.” *Intervenor’s Brief* at 4. The Camas group states that, because it “believes that CM Rule 30 applies in any delivery call for which an [ACGWS] has not already been established, it cannot go so far as to conclude, as the Cities do, that a rulemaking is the only procedural mechanism for establishing the [ACGWS].” *Id.* at 5.

The Court should not consider the Camas Group’s contention that CM Rule 30 applies to the Big and Little Wood Delivery Calls because it is a new claim outside the scope of issues raised by the Cities. *Anderson v. Ferguson*, 56 Idaho 554, 57 P.2d 325, 328 (1936) (“Intervener takes the case as he finds it.”); *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 908, 684 P.2d 307, 310 (Ct. App. 1984) (“An intervenor takes a case as he finds it. He is not entitled to raise new claims outside the scope of the original parties’ pleadings.”). In addition, the claim that CM Rule 30 applies to the Big and Little Wood Delivery Calls is a claim made by Sun Valley Company (“SVC”) in Case No. CV-WA-2015-14500 that is currently pending before the Court. The Camas Group filed an *Intervenor’s Brief* in that case on February 4, 2016, supporting SVC’s claim. *See Intervenor’s Brief* filed in Case No. CV-WA-2015-14500 at 3-4. Thus, the Court should not consider arguments regarding whether CM Rule 30 applies to the Big and Little Wood Delivery Calls in this appeal but should instead decide that issue in Case No. CV-WA-2015-14500 because the issue falls outside the scope of issues raised by the Cities here.<sup>3</sup>

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<sup>3</sup> In the event the Court considers the issue of whether CM Rule 30 applies to the Big and Little Wood Delivery Calls in this appeal, the Respondents hereby incorporate into this brief all arguments set forth in the *Respondents’ Brief* filed in Case No. CV-WA-2015-14500 responding to SVC’s argument that CM Rule 30 applies, as well as all arguments set forth in the *Supplemental Respondents’ Brief* filed in that case on February 25, 2016, responding to the Camas Group’s argument that CM Rule 30 applies.

**C. THE CAMAS GROUP IS A PROPER RESPONDENT IN THE BIG AND LITTLE WOOD DELIVERY CALLS.**

The Camas Group contends that the Director must designate an ACGWS “before proceeding with the remainder of” the Big and Little Wood Delivery Calls because “it makes little sense, and is potentially wasteful of their resources, to participate in all aspects of a full-blown delivery call action, without yet knowing whether they are proper respondents in the first place—particularly when they were not identified as respondents in the initial delivery call petition.” *Intervenor’s Brief* at 4. In support of this argument, the Camas Group asserts that the Association members’ delivery call letters did not specifically “request administration of ground water rights on the Camas Prairie.” *Id.* at 3. The Camas Group also asserts that, because “the Camas Prairie is not within the current USGS modeling effort” and “there are not sufficient data available to calibrate a model to predict the timing of impacts [of ground water use from the Camas Prairie on aquifer discharge].” *Id.* at 4.

All information currently available to the Department suggests that the Camas Group is a proper respondent in the Big and Little Wood Delivery Calls. Specifically, CM Rule 10.01 defines the ACGWS, in relevant 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 (emphasis added). Current information demonstrates the ground water sources that appear to affect the flow of water to the Big and Little Wood Rivers are the Wood River Valley aquifer system and the Camas Prairie aquifer system. *See BW CM-DC-2015-001* at 1085-93. Thus, because the Camas Group’s junior ground water rights are diverted from an ACGWS that appears to be relevant to the Big and Little Wood Delivery Calls, the Camas Group is a proper respondent in the delivery call proceedings. IDAPA 37.03.11.010.20 (defining the term “Respondent” as “[p]ersons against whom complaints or

petitions are filed or about whom investigations are initiated.”). There is no need for the Director to formally designate an ACGWS prior to proceeding with the Big and Little Wood Delivery Calls pursuant to CM Rule 40 in order to identify the Camas Group as a proper respondent in the delivery call proceedings.

The fact that the Association members’ delivery call letters did not specifically request administration of ground water rights on the Camas Prairie does not mean the Camas Group can avoid a delivery call proceeding that implicates their junior ground water rights. The Idaho Legislature has given the Director “broad powers to direct and control distribution of water from all natural water sources within water districts.” *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014); *see* Idaho Code § 42-602. If the Director allowed the senior calling party in a delivery call proceeding to pick and choose which junior ground water rights to seek administration of, the Director would violate his mandatory duty to distribute water in water districts in accordance with the prior appropriation doctrine. Idaho Code § 42-602; *see In re SRBA*, 157 Idaho 385 at 336 P.3d at 800; *see also Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, 143 Idaho 862, 874, 154 P.3d 433, 445 (2007). The Camas Group cannot avoid administration under the prior appropriation simply because the Association members’ delivery call letters did not specifically request administration of junior ground water rights on the Camas Prairie.

In addition, while there may not be “sufficient data available to calibrate a numerical model to predict the timing of impacts [of ground water use from the Camas Prairie on aquifer discharge],” such “modeling is not needed to quantify the impacts of consumptive groundwater use at steady state” and “[a]nalytical methods could be employed to estimate the seasonal timing of the impacts.” *BW CM-DC-2015-001* at 1098. As the Director stated in the ACGWS Order, a

lack of technical information cannot interfere with his “mandatory legal duty to distribute water in water districts in accordance with the prior appropriation doctrine . . . and [u]ncertainty cannot operate in favor of junior ground water right holders.” *Id.* at 861 n.2.

**D. THE CAMAS GROUP IS NOT ENTITLED TO ATTORNEY FEES.**

The Camas Group states: “the dispute over the applicability of CM Rules 30 and 40 is a direct result of ambiguity in rules [the Department] itself drafted and adopted. Therefore, the Camas Group requests an award of attorneys fees pursuant to Idaho Code Section 12-117.” *Intervenor’s Brief* at 3.

Idaho Code § 12-117(1) provides that “the court shall award the prevailing party reasonably attorney’s fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.” The Camas Group’s request for attorney fees suggests that, because the Department drafted and adopted the CM Rules, and there is “ambiguity” in those Rules, the Department has acted without a reasonable basis in fact or law. The very statement of the Camas Group that there is “ambiguity” in the CM Rules demonstrates there is a reasonable basis in law or fact to debate the meaning and interpretation of the Rules. That the CM Rules may contain ambiguity is not a reason to conclude the Department acted without a reasonable basis in law or fact in drafting and adopting the Rules. Further, the Director’s interpretation of the CM Rules at issue, which have not been previously construed by the courts, is reasonable. *See City of Osburn v. Randel*, 152 Idaho 906, 909, 277 P.3d 353, 356 (2012) (explaining that “a governmental agency does not act without a reasonable basis in fact or law when its interpretation of a statute that has not been previously construed by the courts” is not unreasonable.). The Camas Group is not entitled to attorney fees on appeal.

### III. CONCLUSION

The Respondents are entitled to address new arguments raised by the Camas Group in the *Intervenor's Brief* to which the Respondents did not have an opportunity to respond in the *Respondents' Brief*. Thus, the Court should consider arguments set forth herein. The Court should not consider the Camas Group's arguments regarding whether CM Rule 30 applies to the Big and Little Wood Delivery Calls in this appeal because the issue falls outside the scope of issues raised by the Cities. There is no need for the Director to formally designate an ACGWS prior to proceeding with the Big and Little Wood Delivery Calls pursuant to CM Rule 40 in order to identify the Camas Group as a proper respondent in the delivery call proceedings. The Camas Group is not entitled to attorney fees on appeal.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of February 2016.

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