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DEPARTMENT OF  
WATER RESOURCES

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, 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

Case No. CV-WA-2015-14500

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. GIFFE, FLOWERS BENCH  
LLC, ELIZABETH 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 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  
HEATHERLAND HOMEOWNERS  
ASSOCIATION, INC.,

Intervenors.

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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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### INTERVENOR'S BRIEF

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Appeal from the Director of the Idaho Department of Water Resources

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The Water District 37B Ground Water Association (the “Camas Group”),<sup>1</sup> through undersigned counsel of record, hereby files this brief in response to the Petitioner’s Brief filed by Sun Valley Company (“SVC”) in this appeal.<sup>2</sup> In short, the Camas Group generally supports the majority of the arguments adduced by SVC in its opening brief, but also files this brief in order to clarify a particular issue regarding the Director’s authorities to take actions regarding water districts in the course of a delivery call proceeding.

## I. STATEMENT OF THE CASE

### A. Nature of the Case

This is an appeal of a decision by the Director of the Idaho Department of Water Resources (“IDWR”) to deny SVC’s Motion to Dismiss an administrative delivery call proceeding, based upon the failure of the senior water right holders to file a petition compliant with IDWR’s Rules of Procedure and Conjunctive Management (“CM”) Rules.

### B. Course of Proceedings and Concise Statement of Facts

The Camas Group is a non-profit association formed by several ground water irrigators located within Idaho’s Camas Prairie and the State’s Water District 37B, for the purposes of defending against this delivery call. (*See R.*, Vol. I, p. 62 (notice of intent to participate), Vol. IV, pp. 722-24 (joinder in motion to dismiss).)<sup>3</sup> All of the members of the Camas Group received the initial March 20, 2015 letter from Director Spackman regarding the delivery call.

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<sup>1</sup> As reflected in the accompanying Notice of Substitution, the Water Dist. 37-B Groundwater Group has changed its name with the Idaho Secretary of State to the Water District 37B Ground Water Association.

<sup>2</sup> The Court’s September 29, 2015 Order approving intervention by the Camas Group and other parties did not specifically designate the intervening parties as intervenor-appellants or intervenor-respondents, as contemplated by Idaho Appellate Rule 7.1. Because the Camas Group files this brief, in part, to clarify an argument in Sun Valley Company’s opening brief regarding the Director’s water district authority in a delivery call, the Camas Group believes it is appropriate to file and consider this brief as an intervenor-response brief.

<sup>3</sup> Unless otherwise noted, citations to the record are to the record for the Big Wood River proceeding, CM-DC-2015-001.

(See generally R., Vol. I, pp. 12-20 (letter and mailing list).) The Camas Group itself filed a notice of intent to participate in the administrative delivery call proceeding on April 22, 2015. (R. Vol. I, p. 62.) Several members of the Camas Group filed individual notices of intent to participate at the early stages of the delivery call, (see, e.g., R., Vol. I, pp. 31, 51, 52, 61, 70, 71-72, 75, 80, 81, 82, 86, 153), but are now represented through the Camas Group. (See R., Vol. IV, pp. 706-21 (notice of appearance).)

SVC filed its Motion to Dismiss that is the subject of this appeal on June 25, 2015. (R., Vol. II, pp. 382-402.) In general, that motion sought to dismiss these delivery call proceedings based primarily on the argument that the initial delivery call letter submitted by counsel for the senior water users to Director Spackman did not satisfy, among other things, the requirements of IDWR's Procedural Rule 230. (See R., Vol. II, pp. 382-402 (motion to dismiss).) At the time SVC filed its motion, counsel for the Camas Group had not yet appeared as counsel of record, (R., Vol. IV, pp. 706-21 (notice of appearance)), and the Camas Group did not file a *pro se* response. However, the Camas Group filed its Notice of Appearance in this appeal on September 11, 2015, which the Court approved in its order of September 29, 2015. Therefore, the Camas Group is a proper party to this appeal. See IDA. R. OF CIV. PROC. 84(r) (incorporating Idaho Appellate Rules); IDA. APP. R. 7.1 (approved intervenor is party to the appeal).

## **II. ADDITIONAL ISSUES PRESENTED ON APPEAL**

In addition to the issues SVC has itself raised, SVC's opening brief appears to suggest that the delivery call could proceed only if ground water users in Water Districts 37 and 37B were incorporated into the same water district. The Camas Group will address this issue below, in Section IV.B.

### III. ATTORNEY FEES ON APPEAL

Idaho Code Section 12-117 provides a mandatory award of attorneys fees and other expenses to a prevailing party when a state agency acts “without a reasonable basis in fact or law.” Here, the dispute over the applicability of CM Rules 30 and 40 is a direct result of ambiguity in rules IDWR itself drafted and adopted. Therefore, the Camas Group requests an award of attorneys fees pursuant to Idaho Code Section 12-117.

### IV. LEGAL ARGUMENT

#### A. CM Rule 30 and Procedural Rule 230 Apply to This Delivery Call

The construction of CM Rules 30 and 40 is difficult because the title of those rules, the text of those rules, and CM Rule 20.07 all describe different circumstances for their application. The Camas Group agrees with SVC, however, that the overall structure of the rules demonstrates that Rule 30 applies to delivery call proceedings in which an area of common ground water supply has not yet been designated, and Rule 40 applies only after an area of common ground water supply has been designated.

Because an area of common ground water supply encompassing the junior ground water rights in this delivery call has not been established, CM Rule 30—and its incorporation of the requirements governing petitions in Procedural Rule 230—apply to the seniors’ initial delivery call letter. That letter does not satisfy Rule 230. (*Compare R., Vol. I, pp. 1-5 (delivery call letter) to Procedural Rule 230; see also* Petitioner’s Br., pp. 22-27.)

SVC has thoroughly analyzed this issue in its opening brief, and it is unnecessary to repeat those arguments here. Instead, the Camas Group would like to make two additional observations about the structure of the CM Rules, before addressing the Director’s water district authorities.

First, it is telling that, between Rule 30 and Rule 40, Rule 30 is the only rule that specifies that a conjunctive management delivery call is subject to the contested case procedures of the Procedural Rules. *Compare* CM Rule 30.02 to CM Rule 40. If Rule 40 applies in lieu of Rule 30, then what is the authority for the current contested case proceeding? The Director's more general statutory authorities to initiate a contested case do not answer the question, because if they did, it would not have been necessary to include the contested case authority within Rule 30. The fact that the contested case authority appears in Rule 30, but not in Rule 40, is significant.

Second, and similarly, CM Rule 31.05 states that the Director's findings in determining an area of common ground water supply shall be in an order issued under CM Rule 30. However, according to the Director, this is not a CM Rule 30 proceeding. If that is the case, then what is the authority to establish an area of common ground water supply in the course of the administrative delivery call proceeding? Again, the structure of Rules 30 and 40 demonstrates that the two rules are not necessarily mutually exclusive, and that Rule 30 applies in any conjunctive management delivery call for which the area of common ground water supply has not yet been established.

**B. The Director Lacks Authority to Combine Water Districts 37 and 37B Within the Delivery Call Proceeding**

While the Camas Group generally agrees with SVC regarding the applicability of CM Rule 30 and Procedural Rule 230, it does need to clarify an ancillary statement in SVC's opening brief. In discussing whether the Director's exercise of jurisdiction under Rule 40 was appropriate, SVC states:

The undefined and undesignated ACGWS has not been determined, either in a contested case proceeding or pursuant to rulemaking. Moreover, the same purported ACGWS appears to exist, if at all, in two separate water districts—

Water District 37 and Water District 37-B—*and has not been incorporated into a single water district.*

(SVC Petitioner’s Br., pp. 37-38 (emphasis added).)

The Camas Group’s concerns here relate to the highlighted language, which appears to suggest that the delivery call could proceed only if ground water users in Water Districts 37 and 37B were incorporated into the same water district. Because these are two pre-existing water districts, the only way this could be done would be to either combine Water Districts 37 and 37B, or simultaneously abolish Water District 37B and expand Water District 37.

To be clear, CM Rule 30 does not provide either such authority. When the senior surface water rights in a delivery call are within an organized water district, Rule 30.04 provides the Director with authority to treat the delivery call petition as a request to modify “*the* organized water district.” (Emphasis added). Rule 30.04’s consistent reference to the modification of a singular water district demonstrates that it does not provide the Director with authority to combine multiple water districts or to simultaneously abolish one water district and expand another. Similarly, Rule 30.05 provides the Director with authority to create a new water district, which of course does not apply when all of the water rights at issue are already within existing water districts.

Critical in this regard is the fact that Idaho Code Section 42-604 provides the Director with specific authority to “abolish” and “combine” water districts “if such action is required in order to properly administer uses of the water resource.” Accordingly, the Director has the authority to abolish or combine existing water districts *only* within the context of a proceeding initiated pursuant to Section 42-604, and *not* within the context of a CM Rule 30 delivery call. *See generally Nettleton v. Higginson*, 98 Idaho 87, 94, 558 P.2d 1048, 1055 (1977) (holding that “before such action can be taken creating one district [out of two existing water districts] the

Department of Water Resources must first hold a public hearing, upon reasonable notice, wherein all interested persons may testify before the Department regarding facts relevant to the combined water district”). Needless to say, the same rules regarding the strict construction of administrative authority described in SVC’s opening brief, (*see* Petitioner’s Br., pp. 16-21), apply here too.

While this may seem an ancillary issue to some, it is of critical importance to the Camas Group. In 2013, the Director proposed for Water District 37 to encompass the area that is now within Water District 37B. (R., Vol. III, p. 452 (Bromley aff.), pp. 464-80 (order).) Area water users testified in support of a separate Water District 37B, and some even hired counsel, who testified that thirty-nine out of forty-one ground water users on the Camas Prairie signed petitions in support of a separate water district. (R., Vol. III, pp. 468-69 (order).) The Director, “with some hesitation,” agreed to create a separate Water District 37B. (R., Vol. III, p. 473 (order).) Therefore, while this may be an ancillary issue to some, the Camas Group wants to ensure the Director’s water district authorities are accurately described in any orders generated from this appeal.

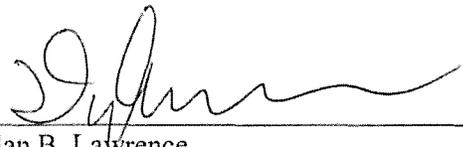
## V. CONCLUSION

For the foregoing reasons, the Camas Group believes the Court’s order in this matter should (1) confirm that CM Rule 30 and Procedural Rule 230 apply to this delivery call proceeding, (2) confirm that the senior water right owners’ delivery call letter does not satisfy those requirements, and (3) clarify that Rule 30 does not provide the Director with authority to abolish or combine existing water districts.

Dated this 3<sup>rd</sup> day of February, 2016.

Varin Wardwell LLC

BY: \_\_\_\_\_

  
Dylan B. Lawrence

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 3<sup>rd</sup> day of February, 2016, I caused to be served a true and correct copy of the foregoing **INTERVENOR'S BRIEF** by the method indicated below, and addressed to the following:

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