

**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 37B GROUND WATER
ASSOCIATION, 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 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,

Case No. CV-WA-2015-14500

**SUPPLEMENTAL RESPONDENTS'
BRIEF**

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 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

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

ATTORNEYS FOR RESPONDENTS

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

GARRICK L. BAXTER, ISB #6301
EMMI L. BLADES, ISB #8682
Deputy Attorneys General
P.O. Box 83720
Boise, ID 83720-0098
Telephone: (208) 287-4800
garrick.baxter@idwr.idaho.gov
emmi.blades@idwr.idaho.gov

*Deputy Attorneys General for Idaho
Department of Water Resources and Gary
Spackman, Director of the Idaho
Department of Water Resources*

ATTORNEYS FOR INTEVENORS

Albert P. Barker, Barker Rosholt & Simpson, LLP, P.O. Box 2139, Boise, Idaho
Representing South Valley Ground Water District

Susan E. Buxton, Chereese D. McLain, Moore Smith Buxton & Turcke, Chtd., 950 W.
Bannock Street, Ste. 520, Boise, Idaho 83702
Representing the City of Ketchum and City of Fairfield

Dylan B. Lawrence, J. Will Varin, Varin Wardwell, LLC, 242 N. 8th Street, Ste. 220, P.O.
Box 1676, Boise, Idaho 83701-1676
Representing Water District 37B Ground Water Association

James P. Speck, Speck & Aanestad, 120 East Avenue North, P.O. Box 987, Ketchum, Idaho
83340
*Representing Airport West Business Park Owners Association, 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. Champion, 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, M.D. 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.*

ATTORNEYS FOR PETITIONER

Scott L. Campbell
Norman M. Semanko
Matthew J. McGee
MOFFATT, THOMAS, BARRETT,
ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, Idaho 83701
Telephone: (208) 345-2000
Facsimile: (208) 385-5384
slc@moffatt.com
nms@moffatt.com
mjm@moffatt.com

Attorneys for Sun Valley Company

and Griffin Ranch PUD Subdivision Homeowners Assn., Inc., Gluch 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 McMahan 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, Vernoy Irrevocable Trust, Charles and 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., Heatherlands Homeowners Association, Inc.

Joseph F. James, Brown & James, 130 Fourth Avenue West, Gooding, Idaho 83330
Representing Big Wood and Little Wood Water Users Association

James R. Laski, Heather E. O'Leary, Lawson Laski Clark & Pogue, PLLC, 675 Sun Valley Road, Ste. A, P.O. Box 3310, Ketchum, Idaho 83340
Representing 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.

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I. INTRODUCTION

On January 7, 2016, Sun Valley Company (“SVC”) filed its *Petitioner’s Brief* in the above-captioned matter. The issues raised by SVC 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”).¹ SVC primarily challenges the Director’s determination in the *Order Denying Sun Valley Company’s Motion to Dismiss*, and subsequent *Order Denying Motion to Revise Interlocutory Order*, that CM Rule 40 is applicable to the Big and Little Wood Delivery Calls, not CM Rule 30.

On February 4, 2016, the day the *Respondents’ Brief* was due and filed with the Court, the Water District 37B Ground Water Association (“Camas Group”) filed an *Intervenor’s Brief*. The Camas Group asks the Court to “confirm that CM Rule 30 and Procedural Rule 230 apply” to the Big and Little Wood Delivery Calls, to “clarify that [CM] Rule 30 does not provide the Director with authority to abolish or combine existing water districts,” and requests attorney fees on appeal. *Id.* at 3, 6.

¹ 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.

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 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.” *Intervenor's Brief* at 1 n.2. However, because the Camas Group’s arguments are either in support of SVC’s position on appeal, directed at what action the Director must take in response to the underlying delivery calls, or against the Respondents, 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 CAMAS GROUP’S INTERPRETATION OF THE CM RULES SHOULD BE REJECTED.**

In its *Petitioner's Brief*, SVC raised several arguments in support of its position that CM Rule 30 applies to the Big and Little Wood Delivery Calls. See *Petitioner's Brief* at 28-42. SVC also argued that the Association’s delivery call letters failed to comply with the requirements of the Department’s Rule of Procedure 230. *Id.* at 21, 23, 39. In the *Intervenor's Brief*, the Camas Group supports SVC’s arguments, stating that, “[b]ecause an area of common ground water

supply encompassing the junior ground water rights in [the Big and Little Wood Delivery Calls] has not been established, CM Rule 30—and its incorporation of the requirements governing petitions in Procedural Rule 230—apply to the seniors’ [delivery call letters].” *Intervenor’s Brief* at 3. The Camas Group asserts “SVC has thoroughly analyzed this issue in its opening brief, and it is unnecessary to repeat those arguments here.” *Id.* However, the Camas Group makes “two additional observations about the structure of the CM Rules” to support the argument that CM Rule 30 applies to the Big and Little Wood Delivery Calls, not CM Rule 40. *Id.* at 3-4. The Camas Group’s “observations” ask the Court to interpret the language of the CM Rules.

- i. **CM Rule 30.02’s reference to “contested case” is irrelevant to the Director’s authority to proceed with the Big and Little Wood Delivery Calls pursuant to CM Rule 40.**

As its first “observation,” the Camas Group cites to CM Rule 30.02 and asserts “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.” *Intervenor’s Brief* at 4. Based upon this “observation,” the Camas Group concludes the Director has no “authority to initiate” the Big and Little Wood Delivery Call contested case proceedings pursuant to CM Rule 40. *Id.*

The Camas Group’s interpretation that CM Rule 30.02’s reference to “contested case” precludes initiation of the Big and Little Wood Delivery Call contested cases pursuant to CM Rule 40 is not reasonable. CM Rule 30.02 states that the Department will consider a delivery call under CM Rule 30 “as a petition for contested case under the Department’s Rules of Procedure.” IDAPA 37.03.11.030.02. This statement is not what authorizes initiation of a contested case proceeding under CM Rule 30. Instead, a contested case is initiated under *both*

CM Rule 30 and CM Rule 40 when a water right holder files a “delivery call” requesting the Director administer “water rights under the prior appropriation doctrine.” IDAPA 37.03.11.010.04. Specifically, Rule of Procedure 5.07 defines “contested case” as “[a] proceeding which results in the issuance of an order.” IDAPA 37.01.01.005.07. Rule of Procedure 5.15 defines “order” as “[a]n agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.” IDAPA 37.01.01.005.15; *accord* Idaho Code § 67-5201(12); *accord Laughy v. Idaho Dep’t of Transp.*, 149 Idaho 867, 870, 243 P.3d 1055, 1058 (2010). Thus, when a water right holder files a delivery call under either CM Rule 30 or CM Rule 40 asking the Director to administer water under the prior appropriation doctrine, the water right holder asks the Director to determine legal rights of water users and, therefore, initiates a contested case. *See* IDAPA 37.03.11.030.01 & .07 (explaining that, when a petitioner makes a delivery call under CM Rule 30 alleging “the petitioner is suffering material injury,” the Director may take several actions including denial or granting of the petition); *see* IDAPA 37.03.11.040 (explaining that, when a petitioner makes a delivery call under CM Rule 40 alleging “the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring,” the Director shall administer water in accordance with the prior appropriation doctrine.). The statement in CM Rule 30.02 explaining the Department will consider a delivery call under CM Rule 30 “as a petition for contested case under the Department’s Rules of Procedure” is irrelevant to the initiation of contested case proceedings under the CM Rules. The Court should reject the Camas Group’s interpretation that the language of CM Rule 30.02 precludes initiation of the Big and Little Wood Delivery Call contested cases pursuant to CM Rule 40. *See In re Idaho Dep’t of Water Res. Amended Final Order Creating Water Dist. No.*

170, 148 Idaho 200, 210, 220 P.3d 318, 328 (2009) (explaining that, in reviewing administrative rules, the Court should examine not only the literal words of the rules but also the “reasonableness of proposed constructions.”).

As discussed in detail in the *Respondents’ Brief*, the language of the CM Rules confirms that CM Rule 40 applies to the Big and Little Wood Delivery Calls, not CM Rule 30. See *Respondents’ Brief* at 13-20. The Director’s interpretation that the test for deciding whether CM Rule 30 or 40 applies to the Big and Little Wood Delivery Calls is whether the delivery calls are against junior ground water rights within water districts is entitled to deference. *Id.* at 19-20. Because current information demonstrates the Big and Little Wood Delivery Calls are against junior ground water rights within water districts, the Director has authority to proceed with the delivery calls pursuant to CM Rule 40. *Supp AR Lodged w-DC* at 85; see *BW CM-DC-2015-001* at 1; see *LW CM-DC-2015-002* at 1; see *BW CM-DC-2015-001* at 477, 479.

- ii. **CM Rule 31’s reference to an order including findings of the Director does not preclude the Director from designating an ACGWS within a CM Rule 40 delivery call proceeding.**

The Camas Group argues that, because CM Rule 31.05 “states that the Director’s findings in determining an [ACGWS] shall be in an order issued under CM Rule 30,” the Director has no “authority to establish” an ACGWS in the Big and Little Wood Delivery Calls pursuant to CM Rule 40. *Intervenor’s Brief* at 4. The Camas Group asks, if CM Rule 30 does not apply, “what is the authority to establish an [ACGWS] in the course” of the Big and Little Wood Delivery Calls? *Id.*

CM Rule 31.05’s requirement that the Director issue an order pursuant to CM rule 30.07 is specific to ACGWS determinations in CM Rule 30 delivery call proceedings against junior ground water rights “*not in organized water districts.*” IDAPA 37.03.11.030. In other words,

the process for determining an ACGWS in a CM Rule 30 delivery call proceeding does not preclude the Director from establishing an ACGWS within a CM Rule 40 delivery call proceeding against junior ground water rights *within* organized water districts. Instead, consistent with the CM Rules, “[t]he [ACGWS] for the Big and Little Wood Delivery Calls is a factual question that can be answered using the framework of CM Rule 40 based upon information presented at hearing and applying the definition set forth in CM Rule 10.01.” *Supp AR Lodged w-DC* at 85. Further, as explained in the *Respondents’ Brief*, a construction of the CM Rules that would require the Director designate an ACGWS pursuant to CM Rule 30 before proceeding with the Big and Little Wood Delivery Calls pursuant to CM Rule 40 is contrary to the plain language of the CM Rules, leads to an absurd result, and would run afoul of the Director’s duty to timely distribute water in water districts in accordance with the prior appropriation doctrine. *See Respondents’ Brief* at 16-18. Thus, the Court should reject the Camas Group’s argument that CM Rule 31’s reference to issuance of an order regarding an ACGWS determination in a CM Rule 30 delivery call proceeding precludes the Director from proceeding with the Big and Little Wood Delivery Calls pursuant to CM Rule 40.

C. THE COURT SHOULD DENY THE CAMAS GROUP’S REQUEST TO CONSIDER THE SCOPE OF THE DIRECTOR’S AUTHORITY TO COMBINE WATER DISTRICTS.

SVC states in its *Petitioner’s Brief* that the “undefined and undesignated ACGWS” relevant to the Big and Little Wood Delivery Calls “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.” *Petitioner’s Brief* at 37-38. The Camas Group asserts that, by making this statement, SVC argues the Big and Little Wood Delivery Calls “could proceed only if ground water users in Water Districts 37 and 37B were incorporated into the same water district.”

Intervenor's Brief at 5. The Camas Group asks the Court to “clarify that [CM] Rule 30 does not provide the Director with authority to abolish or combine existing water districts.” *Id.*

SVC's statement does suggest that, in order to proceed with the Big and Little Wood Delivery Calls, the Director must combine Water Districts 37 and 37B into a single water district pursuant to CM Rule 30. But SVC cites no authority to support this suggestion. *See Petitioner's Brief* at 37-38. Thus, the Court should not consider the issue. *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 784, 890 P.2d 732, 735 (1995). That aside, the Court should also reject the Camas Group's request “clarify that [CM] Rule 30 does not provide the Director with authority to abolish or combine existing water districts.” The rules cited by the Camas Group to support its argument are not applicable to the circumstances at issue in the Big and Little Wood Delivery Calls. Specifically, CM Rule 30.04 addresses the circumstance of a petition proposing regulation of junior ground water rights not in organized water districts “conjunctively with surface water rights in an organized water district.” IDAPA 37.03.11.030 & .030.04. CM Rule 30.05 addresses the circumstance of a petition proposing creation of a new water district where all the water rights at issue are not in water districts. IDAPA 37.03.11.030.05. Neither CM Rule 30.04 or CM Rule 30.05 apply to the Big and Little Wood Delivery Calls where the Association seeks regulation of junior ground water rights that are *already in* organized water districts. *See BW CM-DC-2015-001* at 1; *LW CM-DC-2015-002* at 1; *BW CM-DC-2015-001* at 477, 479; *Supp AR Lodged w-DC* at 85. Because the CM Rules cited by the Camas Group do not address the question of whether the Director must combine Water District 37 and 37B in response to the Big and Little Wood Delivery Calls, the Court should decline to address that question on appeal.

In addition, the scope of the Director's authority to combine water districts in the Big and Little Wood Delivery Call proceedings is not an issue that was raised to the Director. Thus, the

Court should not consider the issue in this appeal. *Elias-Cruz v. Idaho Dep't of Transp.*, 153 Idaho 200, 206, 280 P.3d 703, 709 (2012) (“We will not consider on appeal issues that the administrative tribunal had the authority to decide but were not raised before it. (internal citation omitted)).

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 Camas Group's interpretation that the language of CM Rule 30.02 precludes the Director from proceeding with the Big and Little Wood Delivery Calls pursuant to CM Rule 40 should be rejected because the language is irrelevant to the initiation of contested case proceedings under the CM Rules. The Camas Group's construction of the CM Rules that would require the Director designate an ACGWS pursuant to CM Rule 30 before proceeding with the Big and Little Wood Delivery Calls pursuant to CM Rule 40 is contrary to the plain language of the CM Rules, leads to an absurd result, and would run afoul of the Director's mandatory duty to timely distribute water in water districts in accordance with the prior appropriation doctrine. The Court should deny the Camas Group's request to address the scope of the Director's authority to combine water districts. The Camas Group is not entitled to attorney fees.

RESPECTFULLY SUBMITTED this 25th day of February 2016.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
CHIEF, NATURAL RESOURCES DIVISION


GARRICK L. BAXTER
EMMI L. BLADES
Deputy Attorneys General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of February 2016, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

Original to:
SRBA DISTRICT COURT
253 3RD AVE NORTH
PO BOX 2707
TWIN FALLS ID 83303-2707
Facsimile: (208) 736-2121

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

SCOTT L CAMPBELL
NORMAN M SEMANKO
MATTHEW J MCGEE
MOFFATT THOMAS
PO BOX 829
BOISE IDAHO 83701
slc@moffatt.com
nms@moffatt.com
mjm@moffatt.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

ALBERT P BARKER
BARKER ROSHOLT & SIMPSON
PO BOX 2139
BOISE ID 83701-2139
apb@idahowaters.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

DYLAN B LAWRENCE
VARIN WARDWELL LLC
PO BOX 1676
BOISE ID 83701-1676
dylanlawrence@varinwardwell.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

JAMES P SPECK
SPECK & AANESTAD
PO BOX 987
KETCHUM ID 83340-0987
jim@speckandaanestad.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

JAMES R LASKI
HEATHER O LEARY
LAWSON LASKI CLARK POGUE PLLC
PO BOX 3310
KETCHUM ID 83340
jrl@lawsonlaski.com
heo@lawsonlaski.com

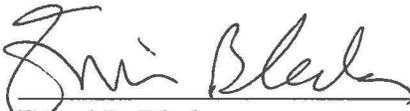
U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

JOSEPH F JAMES
BROWN & JAMES
130 4TH AVENUE W
GOODING ID 83330
joe@brownjameslaw.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail

SUSAN E BUXTON
MOORE SMITH BUXTON & TURCKE
950 W BANNOCK ST STE 520
BOISE ID 83702
seb@msbtlaw.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Facsimile
 E-mail



Emmi L. Blades
Deputy Attorney General