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

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
RIVER

Docket No. CM-DC-2015-001

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 LITTLE WOOD
RIVER

Docket No. CM-DC-2015-002

**MOTION FOR REVIEW OF
INTERLOCUTORY ORDER**

Sun Valley Company, through its counsel of record, petitions the Director to
review the Order Denying Sun Valley Company's Motion to Dismiss, dated July 22, 2015

ORIGINAL

(Order). This motion is filed pursuant to Idaho Department of Water Resources Procedural Rules, IDAPA 37.01.01.260 and 711.

Argument

The Order should be reviewed and revised. The Order ignores the plain language of the Department's Conjunctive Rules and prejudices fundamental substantive issues. In so doing, the Order violates Sun Valley's constitutional and statutory rights, thereby prejudicing its substantial rights.

I. The Order Incorrectly Determined The Department Has Jurisdiction To Proceed Under CM Rule 40

Sun Valley previously argued that CM Rule 30 applied in these proceedings, but because Petitioners failed to satisfy the Department's minimum pleading requirements under CM Rule 30, the Department has no jurisdiction in these proceedings. (*See Motion to Dismiss.*)

Rejecting Sun Valley's argument, the Order determined:

However, CM Rule 30 applies only where a delivery call is filed by the holders of senior-priority surface or ground water rights against "holders of junior priority ground water rights within areas of the state *not in organized water districts.*" IDAPA 37.03.11.030 (emphasis added). The Big and Little Wood Delivery Calls are against junior-priority ground water rights *in organized water districts.* Therefore, the applicable rule is CM Rule 40 that addresses delivery calls against junior-priority ground water users "in an organized water district." IDAPA 37.03.11.040.01. SVC's arguments regarding the failure of Petitioners' letters to comply with requirements in CM Rule 30 are therefore irrelevant in these proceedings and not a basis to dismiss the Big and Little Wood Delivery Calls.

Order, p. 3 (emphasis added; italics in original).

Based upon this determination, the Order then concludes that the pleading requirements of "Rule 230 of the Department's Rules of Procedure" do not apply. Again, relying upon CM Rule 40, the Order states:

The more specific requirement for initiating a delivery call under CM Rule 40 is that the holder of a senior-priority water right must allege “that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury. . . .” IDAPA 37.03.11.040.01. It is well recognized that a specific rule controls over a more general rule when there is conflict between the two. See *Ausman v. State*, 124 Idaho 839, 842, 864 P.2d 1126, 1129 (1993). Accordingly, Petitioners’ letters must only meet the specific pleading requirement set forth in CM Rule 40 to properly initiate the Big and Little Wood Delivery Calls.

Order, pp. 3-4 (emphasis added).

The Order then recites portions of the Petitioners’ Big Wood and Little Wood delivery call letters and concludes:

The above-quoted statements meet the specific requirement for initiating the Big and Little Wood Delivery Calls under CM Rule 40 that the calling party must allege “that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury. . . .” IDAPA 37.03.11.040.01.

Order, p. 4 (emphasis added).

Next, the Order dismisses Sun Valley’s argument regarding Petitioners’ failure to satisfy the Procedural Rule 230 requirement that a petition “[s]tate the name of the person petitioned against (the respondent), if any.” The Order rejects Sun Valley’s argument that the Petitioners’ procedural failure “shifted to the Department the burden of identifying and providing notice to Respondents, effectively asking the Department to draw prejudicial conclusions about potential causation and hydrological connection.” Order, pp. 4-5.

Finally, the Order uses Procedural Rule 52 to justify reliance upon the minimal pleading requirements of CM Rule 40, instead of the more specific standards of Procedural

Rule 230. Relying upon the “unnecessary” exception in Procedural Rule 52, the Order determines that CM Rule 40 means,

It is unnecessary to require petitioners filing CM Rule 40 delivery calls to identify each person petitioned against. Again, CM Rule 40 delivery calls are against junior-priority ground water rights “in an organized water district.” IDAPA 37.03.11.040.01. . . . In addition, the Department has not drawn any conclusions “about potential causation and hydrological connection” in these delivery call proceedings as SVC asserts. Those determinations are for the Director upon a fully developed record and evidence admitted at hearing.

Order, p. 5 (emphasis added).¹

All of these determinations incorrectly conclude the Department has jurisdiction to conduct these contested case proceedings under CM Rule 40. The Order is fatally flawed in this conclusion. Because CM Rule 40 does not confer jurisdiction upon the Department, these proceedings must be dismissed.

II. CM Rule 40 Does Not Confer Jurisdiction Because No Finding Exists Of An Area Of Common Ground Water Supply

Fundamentally, the Department cannot conduct these contested case proceedings under CM Rule 40, because no finding exists determining that an area of common ground water supply provides the junior ground water users’ water source from which they divert.

CM Rule 40.01 provides, as recognized in the Order:

When a delivery call is made by the holder of a senior-priority 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) from an area having a common ground water supply in an organized water district 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, through the watermaster, shall:

¹ The quoted language omits the key phrase “from an area having a common ground water supply,” in its citation to CM Rule 40.01. This omission is significant.

* * *

(Emphasis added.)

The Order apparently assumes that water diversion by respondents is “from an area having a common ground water supply” in Water Districts 37 and 37A. However, no evidentiary hearing has yet been conducted, nor have any findings yet been made by the Director to establish this designation.

In response to Sun Valley’s concerns on this issue, the Order apparently agrees, stating:

In addition, the Department has not drawn any conclusions “about potential causation and hydrological connection” in these delivery call proceedings as SVC asserts. Those determinations are for the Director upon a fully developed record and evidence admitted at hearing.

Order, p. 5.

Yet, the Department’s CM Rule 40 jurisdiction does not exist unless “the holder of a senior-priority water right (petitioner)” alleges “that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury” (Emphasis added.)

The Order states the cited portions of Petitioners’ letters of February 24, 2015:

meet the specific requirement for initiating the Big Wood and Little Wood Delivery Calls under CM Rule 40 that the calling party must allege “that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury. . . .” IDAPA 37.03.11.040.01.

Order, p. 4.

However, CM Rule 40 contains no mechanism for reaching the requisite finding by the Director of the existence of “an area of common ground water supply in an organized water district.” And, the Order emphatically rejected Sun Valley’s CM Rule 30 arguments. The Order states:

SVC’s arguments regarding the failure of Petitioner’s letters to comply with requirements in CM Rule 30 are therefore irrelevant in these proceedings and not a basis to dismiss the Big and Little Wood Delivery Calls.

Order, p. 3.

However, if CM Rule 30 does not apply, the Department has no vehicle to make a determination of “an area of common ground water supply.” Consequently, the Department should dismiss these proceedings.

III. The Director Must Determine “An Area Having A Common Ground Water Supply” Before CM Rule 40 Confers Jurisdiction

The Department’s authority in these proceedings is circumscribed by its Procedural Rules and Conjunctive Management Rules, in addition to Idaho law and the U.S. Constitution. *See* Motion to Dismiss, at 3, 4, 11-14.

CM Rule 1 articulates the title and scope of the Conjunctive Management Rules.

It states:

001. TITLE AND SCOPE (RULE 1).

These rules may be cited as “Rules for Conjunctive Management of Surface and Ground Water Resources.” 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 in an area having a common ground water supply. It is intended that these rules be incorporated into general rules governing water distribution in Idaho when such rules are adopted subsequently. (10-7-94)

(Emphasis added.)

Consequently, existence of “an area having a common ground water supply” where junior-priority ground water users divert is critical to applicability of the Rules, and the resulting jurisdiction of the Department.

Apart from this clear delineation of scope, CM Rule 20 confirms and refines the extent of jurisdictional power of the Department. It states:

01. Distribution of Water Among the Holders of Senior and Junior-Priority Rights. These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply.

* * *

06. Areas Having a Common Ground Water Supply. These rules provide the basis for the designation of areas of the state that have a common ground water supply and the procedures that will be followed in incorporating the water rights within such areas into existing water districts or creating new districts as provided in Section 42-237a.g., and Section 42-604, Idaho Code, or designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code.

(Emphasis added.)

Significantly, CM Rules 20.06 and 20.07 describe the concept of designation of areas of the state that have a common ground water supply and the procedures that will be followed in incorporating the water rights within such areas into existing water districts

CM Rule 20.06.

CM Rule 20.07 specifically describes the applicability of CM Rule 30 for implementation of this concept:

Rule 30 provides procedures for responding to delivery calls within areas having a common ground water supply that have not

been incorporated into an existing water district or designated a ground water management area.

(Emphasis added.)

In these proceedings, no “area of common ground water supply” has yet been designated. And, because no designation has been made, no action has been taken to “incorporat(e) such water rights into existing water districts,” as specified in CM Rule 20.06:

These rules provide the basis for designation of areas of the state that have a common ground water supply and the procedures that will be followed in incorporating the water rights within such areas into existing water districts as provided in Section 42-237a.g. and Section 42-604, Idaho Code, or designating such areas as ground water management areas as provided in Section 42-233(b), Idaho Code.

Consequently, on this record in these contested cases, CM Rule 40 cannot confer jurisdiction upon the Department for two reasons. First, the Upper Big Wood and Little Wood River Basin have not been designated “an area of common ground water supply.” Second, the water rights within this non-existent, undesignated “area of common ground water supply” have not been “incorporated into an existing or new water district.” These CM Rules describe a two-step, sequential process. After completion of these steps, and the process set forth in the provisions of CM Rule 30.01 through 30.09, then CM Rule 40 would apply, but not before then.

IV. Apart From CM Rule 50, CM Rule 30.01 Through 30.09 Establish The Exclusive Administrative Process To Determine “An Area Of Common Ground Water Supply”

Although deemed “irrelevant” by the Director’s Order,² CM Rule 30.01 through 30.09 contain the only administrative process to determine “an area of common ground water supply.”³

² Order, p. 3.

³ CM Rule 50 designated the ESPA as an area of common ground water supply.

As previously argued by Sun Valley in its Motion to Dismiss, CM Rule 30.01 delineates specific pleading requirements for delivery call petitions under the present factual circumstances. Particularly germane in this regard, CM Rule 30.04 specifies:

Petition for Modification of an Existing Water District.
In the event the petition proposes regulation of ground water rights conjunctively with surface water rights in an organized water district, and the water rights have been adjudicated, the Department may consider such to be a petition for modification of the organized water district and notice of proposed modification of the water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter addressed by the petition under the Department's Rules of Procedure. (10-7-94)

(Emphasis added.)

Clearly, the February 2015 letters sent to the Department by the Petitioners “propose(s) regulation of ground water rights conjunctively with surface water rights in an organized water district. . . .” And, the Department could “consider such to be a petition for modification of the organized water district. . . . [and] proceed to consider the matter addressed by the petition under the Department's Rules of Procedure and CM Rule 30.01 through 30.09.” The Department declined to do so.

CM Rule 30.07 specifies:

Following consideration of the contested case under the Department's Rules of Procedure, the Director may, by order, take any or all of the following actions:

- a. . . .
- b. . . .
- c. Determine an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district;
- d. Incorporate an area having a common ground water supply into an organized water district following the

procedures of Section 42-604, Idaho Code, provided that the ground water rights that would be incorporated into the water district have been adjudicated relative to the rights already encompassed within the district;

(Emphasis added.)

This language sets forth the only grant of authority to the Director to render the necessary determinations applicable in the initial phases of these contested cases: 1) determine an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district, and 2) incorporate an area having a common ground water supply into an organized water district.

Additionally, CM Rule 30.09 supports this reasoning, indicating clear conditions precedent to use of CM Rule 40 in the factual circumstances in these contested cases.

09. Administration Pursuant to Rule 40. Upon 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. (10-7-94)

(Emphasis added.)

Again, under the administrative record in these contested cases there has been no “finding of an area of common ground water supply” and “such area” has not been incorporated “into an organized water district.”

After completion of these two sequential steps, “the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40,” not before.

Following the specific procedures of CM Rule 30.01 through 30.09, in logical sequence, CM Rule 31 sets forth the parameters for the Director to consider “in making a finding

of an area of common ground water supply.” But, CM Rule 31 grants no independent authority to the Director to render “a finding of an area of common ground water supply,” in contrast to the specific procedures of CM Rule 30.01 through 30.09. It merely describes the factors the Director should consider. Consequently, the Order’s conclusion that CM Rule 40 applies in these contested cases is erroneous. And, CM Rule 31.05 confirms this result. It states:

The findings of the Director shall be included in the Order issued pursuant to Rule Subsection 030.07.

This mandatory language leaves no doubt. If the Director rejects CM Rule 30.01 through 30.09 as “irrelevant” and proceeds under CM Rule 40, any attempt to make “a finding of an area of common ground water supply” under CM Rule 31 would violate this clear mandate.

Under the factual and legal record in these contested cases, the Department has no jurisdiction to proceed under CM Rule 40. Consequently, Sun Valley’s Motion to Dismiss should be granted, because the Petitioners failed to satisfy the minimum pleading requirement of the Procedural Rules and the Conjunctive Management Rules.

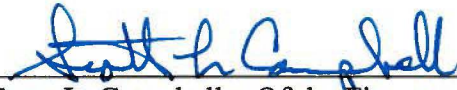
Conclusion

The Order should be reviewed, with careful consideration of the limitations of Department authority. The Department’s Procedural Rules and Conjunctive Management Rules must be construed in context and with proper meaning attributed to each word and phrase. The Department has no authority under the law to use a few rules, ignore others, and cobble bits and

pieces together to produce interpretations that fit a preconceived plan of action. The Order does just that. Idaho law and the U.S. Constitution require more.

DATED this 6th day of August, 2015.

MOFFATT, THOMAS, BARRETT, ROCK &
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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of August, 2015, I caused a true and correct copy of the foregoing **MOTION FOR REVIEW OF INTERLOCUTORY ORDER** to be served by U.S. Mail and addressed to the following:

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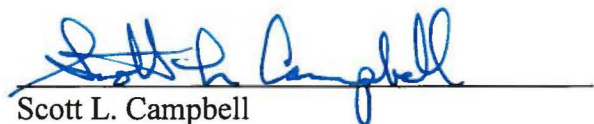
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