

**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

**ORDER DENYING JOINT MOTION TO
REVISE INTERLOCUTORY ORDER**

BACKGROUND

On February 24, 2015, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) received two conjunctive management water delivery call letters from counsel for members of the Big Wood & Little Wood Water Users Association (“Petitioners”). The letters allege senior surface water users on the Big Wood and Little Wood Rivers are being injured by water users diverting ground water hydraulically connected to the Big Wood and Little Wood Rivers. The letters request the Director regulate junior ground water users consistent with the prior appropriation doctrine.

The Director treated the letters as delivery calls pursuant to the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”), initiated new contested case proceedings, and assigned each delivery call letter its own docket number. The Big Wood Delivery Call was assigned docket no. CM-DC-2015-001. The Little Wood Delivery Call was assigned docket no. CM-DC-2015-002.

On June 26, 2015, the City of Hailey and the City of Bellevue (“Hailey and Bellevue”) filed a *Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* (“Motion to Dismiss”) and *Memorandum in Support of Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* (“Memorandum”). Hailey and Bellevue argued the Director must “initiate rulemaking in accordance with the Idaho Administrative Procedure Act, I.C. § 67-5201” to designate an area of common ground water supply (“ACGWS”) before proceeding with the Big and Little Wood Delivery Calls pursuant to CM Rule 40. *Memorandum* at 1.

On July 22, 2015, the Director issued an *Order Denying Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* (“Order”). The Director determined “CM Rule 40 does not require the Director establish an ACGWS by rulemaking before the Director can move forward with the Big and Little Wood Delivery Calls.” *Order* at 2. The Director stated: “While the Director has authority to establish an ACGWS by rule (and in fact did for the Eastern Snake Plain Aquifer (“ESPA”)), the CM Rules do not mandate that the Director go through the rulemaking process to establish an ACGWS.” *Id.* The Director concluded “[t]he ACGWS for the Big and Little Wood Delivery Calls is a factual question that can be established based upon information presented at hearing applying the definition set forth in CM Rule 10.01.” *Id.* at 3.

On August 18, 2015, Hailey and Bellevue filed a *Joint Motion for Review of Interlocutory Order* requesting the Director revise the Order to grant the Motion to Dismiss (“Motion to Revise”).¹

ANALYSIS

Hailey and Bellevue argue the Director’s determination that the ACGWS can be determined based upon the definition set forth in CM Rule 10.01 is “contrary to the plain language of the CM Rules.” *Motion to Revise* at 2. Specifically, Hailey and Bellevue cite to statements in CM Rules 1, 20, and 40 and assert these statements mandate the Director must “first define the [ACGWS] by rule under the Idaho Administrative Procedure Act, I.C. § 67-5201 *et. seq*” before proceeding with the Big and Little Wood Delivery Calls. *Id.* at 2-4.

Nothing in CM Rules 1, 20, and 40 mandates the Director establish an ACGWS by rule before proceeding with the Big and Little Wood Delivery Calls. CM Rule 1 states the CM 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.” IDAPA 37.03.11.001. CM Rule 20.01 states the CM Rules “govern the distribution of water from ground water sources and areas having a common ground water supply.” IDAPA 37.03.11.020.01. CM Rule 20.06 states: “These rules provide the basis for the designation of areas of the state that have a common ground water supply. . . .” IDAPA 37.03.11.020.07. CM Rule 40 states the rule governs “responses to call for water delivery made by the holders of senior-priority surface or ground water rights 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. These statements do not require the Director establish an ACGWS by rule prior to moving forward with the Big and Little Wood Delivery Calls. As the Director stated in the Order, “[w]hile the Director has authority to establish an ACGWS by rule (and in fact did for the [ESPA]), the CM Rules do not mandate that the Director go through the rulemaking process to establish an ACGWS.” *Order* at 2. The Director’s determination that the ACGWS can be established using the framework of CM Rule 40 based on information presented at hearing and applying the definition set forth in CM Rule 10.01 is consistent with the CM Rules.

¹ On August 20, 2015, James P. Speck, attorney for multiple respondents in the Big and Little Wood Delivery Calls, filed a *Joinder in and Support of Joint Motion for Review of Interlocutory Order*.

Hailey and Bellevue also argue the “the plain reading” of CM Rule 20.06 requires that, after the Director designates an ACGWS, “the next step is the incorporation of the ground water rights within that defined area into a water district.” *Motion to Revise* at 3.

Hailey and Bellevue’s suggestion that CM Rule 20.06 prescribes a fixed two-step process in delivery calls where water rights are put into water districts only after an area of common ground water is designated is not tenable. Throughout much of Idaho, water districts have been created and water rights incorporated into the districts. CM Rule 20.06 simply explains the CM Rules provide “the procedures that will be followed in incorporating the water rights within [areas of the state that have a common ground water supply] into existing water districts” when such water rights are not already within water districts. Here, current information demonstrates the water rights at issue in the Big and Little Wood Delivery Calls are already in water districts. Specifically, the junior-priority ground water right diversions that impact flow in water sources for the Petitioners’ senior surface water rights are diverted from the Wood River Valley aquifer system and the Camas Prairie aquifer system. *IDWR Staff Memo Re: Hydrology, Hydrogeology, and Hydrologic Data* at 1, 6-14 (Aug. 28, 2015).² The ground water rights in the Wood River Valley aquifer system are in Water District 37. *See Preliminary Order* at 13, *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* (Sept. 17, 2013) (“Preliminary Order”). The ground water rights in the Camas Prairie aquifer system are in Water District 37B. *Id.* The senior surface water rights Petitioners allege are being injured are in Water District 37. *IDWR Staff Memo Re: Surface Water Delivery Systems* at Attachments 1 and 2 (Aug. 31, 2015). Water Districts 37 and 37B are authorized to administer both surface and ground water rights. *Preliminary Order* at 13-14. Therefore, current information establishes the Director will not need to incorporate water rights at issue in the Big and Little Wood Delivery Calls into water districts.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that Hailey and Bellevue’s Motion to Revise is DENIED.

DATED this 16th day of October 2015.



GARY SPACKMAN
Director

² Ground water use in the upper Little Wood River valley above Silver Creek does not appear to affect the calling surface water rights. *IDWR Staff Memo Re: Hydrology, Hydrogeology, and Hydrologic Data* at 14 (Aug. 28, 2015).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 16th day of October 2015, I served a true and correct copy of the foregoing document to all parties listed on the Combined Certificate of Service List posted on the Department's website at <http://idwr.idaho.gov/legal-actions/delivery-call-actions/big-wood-river.html> and <http://idwr.idaho.gov/legal-actions/delivery-call-actions/little-wood-river.html> updated the 14th day of October 2015, by the following method:

- ☐ Placing a copy of the document in the United States mail, postage prepaid and properly addressed.
- ☒ Email only to parties who have consented to service by email as indicated on the above-described Certificate of Service List; placing a copy of the document in the United States mail, postage prepaid and properly addressed, to parties who have not consented to service by email; and email to parties who provided e-mail addresses to the Department but have not consented to service by email.



Person serving document