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The City of Ketchum and City of Fairfield, (hereinafter referred to as “Ketchum” and “Fairfield”) by and through their attorney of record, Susan E. Buxton, of the law firm of MOORE SMITH BUXTON & TURCKE, CHTD., pursuant to Idaho Rules of Civil Procedure 18(a), hereby join in and fully support the Petitioners’ Opening Brief filed herein by the City of Hailey and the City of Bellevue on January 7, 2016 (“Petitioners’ Opening Brief”). “Petitioners” as referred to herein are collectively the cities of Bellevue and Hailey.

I. STATEMENT OF THE CASE

Ketchum and Fairfield join the statement of the case as presented in Petitioners’ Opening Brief.

II. FACTUAL BACKGROUND

Ketchum and Fairfield join the factual background as presented in Petitioners’ Opening Brief and offer additional factual information herein.

On March 6, 2015, the Idaho Department of Water Resources (“Department”) Director sent a letter to the Big and Little Wood Water Users Association (“WUA”) and consolidating the water delivery calls under CM Rules. The Department commenced two contested case proceedings identified as Contested Case No. CV-DC-2015-001 and Case No. CM-DC-2015-002 (“Contested Cases”). BW-R, Vol. 1, p. 6; LW-R, Vol. I, p. 22. On March 20, 2015, the Department sent letters to junior-priority ground water rights holders, including Ketchum and Fairfield, who the Department determined “may be affected” by the Contested Cases. R. Vol. I, p. 12.

On April 23, 2015, Ketchum submitted a Notice of Intent to Participate. BW-R, Vol. I, pp. 67-69; LW-R, Vol. I, pp. 67-69.

On May 26, 2015, Fairfield submitted a Notice of Intent to Participate. BW-R, Vol. I, pp. 261-263; LW-R, Vol. II, pp. 261-263.

Neither Fairfield nor Ketchum's water rights are located within the ESPA area of common ground water supply. See FN 5; Appendix A to Petitioners' Opening Brief; R. Vol. I., p. 126.

III. ISSUES PRESENTED ON JUDICIAL REVIEW

Ketchum and Fairfield join the issues presented on judicial review as presented in Petitioners' Opening Brief.

IV. ARGUMENT

A. Ketchum and Fairfield Join Hailey and Bellevue's Arguments.

Ketchum and Fairfield join the arguments presented in Petitioners' Opening Brief, and offer the following additional argument.

As set forth in Petitioners' Opening Brief, the Department has failed to provide due process and follow its own laws and rules initiating the underlying administrative proceeding commenced based upon the WUA's February 23, 2015, letters claiming that their surface water rights "have suffered from premature curtailment...." before establishing an area of common groundwater supply. R. Vol. I, p. 3.

B. The Department Did Not Follow the Legislative Mandates and Administrative Rules and Acted Without Authority.

The Department is only entitled to the authority granted to it by the legislature. As a condition precedent, the Department is required to find that a delivery call petition satisfied both Idaho Code and the IDAPA Rules before the Department has any authority to exercise the agency's powers. The members of WUA have burdens and obligations, imposed upon them by Idaho law and the Department's rules that they must satisfy before they are entitled to the benefit

of the Department Director's regulatory powers. *A&B Irrigation Dist. v. Spackman*, 155 Idaho 640, 652-53, 315 P.3d 828, 840-41 (2013).

Ketchum and Fairfield hold significant water rights that are very valuable and necessary for the overall health, safety and welfare of their collective residents and taxpayers. The Department's action to conclude that Ketchum and Fairfield are part of the Contested Cases detrimentally affects their interests and has caused them to expend significant taxpayer monies unfairly in a premature process prior to establishing an area of common ground water supply where one has not been established in Basins 37 and 37B. Idaho Code § 42-237a(g); IDAPA 37.03.11.020.07. (See Department Delivery Call Letters to Junior-Priority Ground Water Right or Rights Holders and Mailing List which lists Ketchum and Fairfield's affected water rights, R. Vol. I, p. 12 and 14). The threat of curtailment, or other potential abridgement of Ketchum and Fairfield's water rights, requires the Department to provide proper due process of law. See *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651, 150 P.3d 336, 339 (1915).

The Rules of Conjunctive Management of Surface and Ground Water Resources ("CM Rules") were promulgated by the Department and approved by the Idaho Legislature in 1994. IDAPA 37.03.11 *et. seq.* The CM Rules have not been amended. Petitioners' Opening Brief at p. 12, FN 7. As well described by Petitioners (Hailey and Bellevue), the Department has attempted to amend the CM Rules but such efforts were rejected by the Idaho Legislature. *Id.* at pp. 12-14.

In support of Petitioners' arguments, "it is a familiar rule of administrative law that an agency must abide by its own regulations." *Fort Steward Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 654 (1990); *Watkins v. United States Bureau of Customs and Border*

Protection, 643 F.3d 1189 (9th Cir. 2011). Agencies that circumvent their own rules without waiving, suspending or amending them is arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law. *See Align Tech., Inc. v. ITC*, 771 F.3d 1317, 1322 (Fed. Cir. 2014).

The Department cannot now circumvent the CM Rules that address procedures for delivery call petitions. The Petitioners' have not provided nor proven facts required under the CM Rule 30 or CM Rule 40. The Department cannot shift the burden to the junior waters users to prove a negative to facts that have not even been proven by the Petitioners in the first place. *See generally* June 3, 2015 Transcript pp. 30-32.

C. The Director's Actions Are Not Harmless and Have a Direct Effect on Ketchum and Fairfield's Property Rights Without Any Due Process Provided.

Neither Ketchum nor Fairfield are disregarding the agency's ability to act with broad discretion. Nonetheless, this discretion is not unfettered. The Department is required to comply with the rules. *See Rangen, Inc. v. Idaho Dep't of Water Res.*, Twin Falls Case No. CV 2014-2446, Memorandum Decision and Order on Petition for Judicial Review at 7 (Dec. 3, 2014) (finding that while the Director has discretion to approve a mitigation plan, he must also follow clearly expressed mandates related thereto as set forth in the CM Rules). And any deviation from the agency's prior interpretations or actions must be justified and not arbitrary or capricious. *See Washington Water Power Co.* 101 Idaho 567, 579, 617 P.2d 1242, 1254 (1980) (there may be times when an agency can change course from past decisions, but there must be "sufficient findings to show that its action is not arbitrary and capricious.").

In this particular delivery call, the Director has determined that the agency will conduct its own investigation and make factual findings and, only after those determinations are made, will the junior holders be able to challenge the Department's decisions. This process is arguably

a 180 degree change from the Department's process in the *Rangen* call which required thorough discovery and expert consultation prior to making any findings. *See generally* Transcript Vol. I, p. 31, ll. 21-23 and p. 38, ll. 9-18. These determinations and findings directly impact Ketchum and Fairfield's property rights, which are perhaps, the cities' most valuable property rights. "When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law. . . ." *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). Procedural due process is afforded to all parties subject to the Department's jurisdiction by virtue of compliance with Title 42 of Idaho Code and the Act. *See Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977), *supra*.

By accepting the Petitioners' February 23, 2015 letter as a valid delivery call under CM Rule 30 (or CM 40) and Title 42 of the Idaho Code, the Department failed to require WUA to provide the pertinent and crucial information regarding identifying those junior users (including Ketchum and Fairfield) what WUA alleged injured their senior rights. In failing to do so, every water right holder in Basin 37 and 37B (except some exempt users) were considered by the Director as a potential respondent. R. Vol. I, p. 12. This is wholly unjust and an unfair burden to allow a senior water right holder to hold hostage junior water rights within Basins 37 and 37B by merely writing letters to the Director. The Director's acceptance of WUA's letter as a valid delivery call, and establishing Contested Cases, was arbitrary and capricious and should be dismissed.

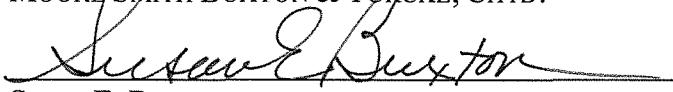
V. CONCLUSION

At the very least, the Director's decision to deny Bellevue and Hailey's motion should be overturned and the area of common ground water supply should be determined before any

further action on WUA's claims are addressed. Further, WUA's Contested Cases should be dismissed or stayed pending such establishment of the area of common ground water supply and any information in the record obtained in violation of the Department rules and regulations should be expunged.

DATED this 7th day of January, 2016.

MOORE SMITH BUXTON & TURCKE, CHTD.



Susan E. Buxton

Attorneys for City of Ketchum & City of Fairfield

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 7th day of January, 2016, I served a true and correct copy of the above and foregoing document by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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