IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CITY OF HAILEY, an Idaho municipal corporation, and CITY OF BELLEVUE, an Idaho municipal corporation, Petitioners, 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, et al., Intervenors.	**Case No. CV-WA-2015-14419**
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	

PETITIONERS' REPLY BRIEF

Appeal of final agency action by the Idaho Department of Water Resources,

Honorable Eric J. Wildman, Presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

At the outset, it is worth repeating that this appeal involves a question of law. *Petitioners' Opening Brief* ("*Cities' Opening Brief*") at 15 (filed Jan. 7, 2016). The scope of the issues before the Court in this proceeding are set out in the Cities' *Amended Joint Petition for Judicial Review of Agency Action* and the *Cities' Opening Brief.* Succinctly, the Cities ask this Court to determine whether, under the current Conjunctive Management Rules ("CM Rules"), IDAPA 37.03.11, the Director has authority to determine an area of common ground water supply within the context of delivery calls being conducted pursuant to CM Rule 40,[1] or whether he must first conduct a rulemaking to amend the CM Rules to designate the relevant area of common ground water supply. The Cities contend that rulemaking is required as a matter of law.

The Department, on the other hand, contends that the area of common ground water supply "is a factual question that can be established [by the Director] based upon information presented at hearing." *IDWR Brief* at 17. But the Department does not rest this position on legal argument alone. The Department also cites unproven facts in the record as after-the-fact justification for determinations it made earlier in the proceedings, and apparently to influence the Court's perception of factual matters not at issue in this proceeding.

[1] The Cities and the Department do not dispute that the delivery calls ("Delivery Calls") initiated by the Big Wood & Little Wood Water Users Association ("WUA") are governed by CM Rule 40. *See, e.g., [IDWR's] Respondent's Brief* ("*IDWR Brief*") at 9 ("In the ACGWS Order, the Director determined that CM Rule 40 governs the Director's response to the Big and Little Wood Delivery Calls . . . ."). *See also [IDWR's] Respondent's Brief* in *Sun Valley Company v. IDWR*, et al. ("*IDWR SVC Brief*"), Case No. CV-WA-2015-14500, pp. 12-20 (Feb. 4, 2016) (stating the Department's position that Rule 40, and not Rule 30, applies to these Delivery Calls). Pursuant to Idaho Rule of Evidence 201, the Cities request the Court take judicial notice of the *IDWR SVC Brief.*

The bottom line is that, regardless of whatever alleged facts the Department cites, the CM Rules require the Department to undertake rulemaking to determine an area of common ground water supply applicable to the Rule 40 proceedings. The Cities respectfully ask the Court to reach that conclusion, to remand the case back to the Department with instructions to conduct the appropriate rulemaking, and to stay the Delivery Calls until an appropriate area of common ground water supply is determined.

I. THE DIRECTOR CANNOT PROCEED WITH THE WUA'S DELIVERY CALLS THAT SEEK TO CURTAIL JUNIOR-PRIORITY GROUND WATER RIGHTS NOT LOCATED WITHIN A DESIGNATED AREA OF COMMON GROUND WATER SUPPLY.

It is undisputed that the junior ground water rights implicated by the Department in these Delivery Calls are not located within the Eastern Snake Plain Aquifer area of common ground water supply ("ESPA ACGWS") defined in CM Rule 50, or in any other area of common ground water supply. *See* R. Vol. I, p. 126 (IDWR map).[2] It also is undisputed that in the history of conjunctive administration—and despite repeated attempts to be persuaded to do so—the Director has never allowed a senior water right holder to assert their delivery call against a junior-priority ground water right located outside the ESPA ACGWS—the only area of common ground water supply currently designated by the CM Rules. *See Cities' Opening Brief* at Section II.B. In every instance on judicial review, this Court has agreed with that position. *See id.*

Because the Department cannot reconcile its current position with its past decisions, or point to an intervening change in the law, it simply responds by stating that "the ESPA ACGWS

[2] All citations to the record in this brief and in the *Cities' Opening Brief* are to the Big Wood Delivery Call record, BW CM-DC-2015-001.

is not relevant to the Big and Little Wood Delivery Calls." *IDWR Brief* at 14 (emphasis added). However, the Department fails to demonstrate why the same CM Rules and precedent that IDWR and the Courts have applied to the numerous, long-running ESPA delivery calls would not be relevant to the instant Delivery Calls. The CM Rules apply statewide, CM Rule 20.01 ("These rules apply to all situations in the state . . ."), not just in the ESPA ACGWS. As structured, they apply to water rights throughout the state that are in water districts and those that are not. *Compare* CM Rule 30 (applying to delivery calls within areas of the state not in organized water districts) *and* CM Rule 40 (applying to delivery calls within areas of the state having a common ground water supply in organized water districts). *See also IDWR SVC Brief* at 12 (describing CM Rules 30 and 40 as "two avenues for responding to delivery calls" depending on whether the subject water rights are "in an organized water district.")

But as to all delivery calls between senior surface or ground water rights and junior ground water rights, the CM Rules require that there must be an area of common ground water supply, and these rules provide a specific subsection (i.e., CM Rule 50) for such areas to be listed in contemplation of delivery calls that may occur in various regions of the state. As such, the precedential decisions of IDWR and the Courts concerning application of the CM Rules and those ground water rights which may properly be implicated by a delivery call are directly relevant to their application in all areas of the state, including the Big Wood and Little Wood river basins.

Now, if the Department is successful in arguing to this Court that in a CM Rule 40 delivery call seniors may curtail junior-priority ground water rights that are not in any designated

area of common ground water supply, it effectively would amount to a judicial repeal of the CM Rules governing administration of ground water rights only in areas of common ground water supply. That would allow other active CM Rule 40 delivery calls by seniors within the ESPA ACGWS—such as the Surface Water Coalition and Rangen, Inc.—to extend their calls to areas outside the ESPA ACGWS. And that would be entirely inconsistent with this Court's prior rulings and the 2015 Legislature's intent.

In support of its argument that the ESPA ACGWS is "not relevant," the Department contends that "[t]he source *of the junior ground water rights* is the focus of an ACGWS determination, not the location of the calling senior surface water rights." *IDWR Brief* at 12 (emphasis added). This ignores the plain language of the CM Rules and common sense, both of which require that potentially-curtailed juniors be located within a designated area of common ground water supply that affects the flow of water in the calling senior's surface water source. For that matter, it is hard to contemplate how the calling seniors (whose surface water source is "affected") would not also have to be within the same designated area of *common* ground water supply as the juniors.

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." CM Rule 1. This rule dictates that a potentially-curtailed junior will be in "an area of common ground water supply." Similarly, the definition of "area of common ground water supply" contemplates that such areas include ground water sources that are hydraulically connected to surface water sources. CM

Rule 10.01 (defining "area of common ground water supply" as "[a] ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source.").

The plain language of CM Rules 30 and 40 require the Director to administer water within a single "area having a common ground water supply." *See* CM Rule 30.d, 30.07.c, 30.07.d, 30.09, and 40.01. Administration between different areas of common ground water supply, or outside an area of common ground water supply, is not authorized in, or contemplated by, any of the CM Rules' delivery call procedures (nor would it make any logical sense).

CM Rule 42 is clear that, in determining material injury, the Director must look at junior ground water rights diverting within an area of common ground water supply that is hydraulically connected to the calling senior surface water source. *See* CM Rule 42.01.c ("[w]hether the exercise of junior-priority ground water rights . . . affects the quantity and timing of when water is available to . . . a senior-priority surface or ground water right. This may include . . . all ground water withdrawals from the area having a common ground water supply."). *See also* CM Rule 42.01.h (the Director may consider whether a calling senior-priority surface water right "could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority." (emphasis added)).

All of this, of course, is for good reason. It would make no sense for the CM Rules to allow senior calling rights to curtail junior ground water rights not in an area of common ground water supply that is hydraulically connected to the surface water source.

II. BECAUSE THIS IS A CM RULE 40 DELIVERY CALL, RULEMAKING IS REQUIRED TO DESIGNATE THE AREA OF COMMON GROUND WATER SUPPLY.

A. The CM Rules' plain language does not authorize the Director to determine an area of common ground water supply in a Rule 40 delivery call.

The Department argues that the area of common ground water supply in this CM Rule 40 delivery call need not be promulgated through rulemaking, but instead can simply be determined in the course of the contested case. *IDWR Brief* at 10-12. This argument is contrary to the CM Rules' plain language, which expressly authorizes the Director to determine an area of common ground water supply in a Rule 30 proceeding, and clearly provides no such authority in a Rule 40 proceeding.

"Analysis of a statute or regulation always begins with the literal language of the enactment." *Stafford v. Idaho Dep't of Health & Welfare*, 145 Idaho 530, 538, 181 P.3d 456, 464 (2008). Furthermore, Courts

> will not look to the legislative intent of a regulation where the express written language of the regulation is unambiguous. Where the language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to construe the language. If the language is clear and unambiguous, then a court may not interpret the language to include an unwritten legislative intent.

Id. at 538-39, 181 Idaho P.3d at 464-65 (internal citations and quotation marks omitted).

No language in the CM Rules authorizes the Director to determine an area of common ground water supply within a Rule 40 proceeding. The plain text of CM Rule 40's title says that Rule's provisions govern responses to delivery calls "from areas having a common ground water supply in an organized water district."[3] This language does not state that Rule 40 governs delivery calls where no area of common ground water supply has been determined, or that the Director may determine the area of common ground water supply in the Rule 40 proceeding. Rather, the language contemplates that such a designated area already exists and is a pre-requisite to proceeding under Rule 40.

So does Rule 40's main text. The first subsection states that the Director may respond "[w]hen a delivery call is made by the holder of a senior-priority water right (petitioner) alleging[4] 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 . . . ." CM Rule 40.01 (emphasis added). This text does not authorize the Director to determine an area of common ground water

[3] "[T]he headings of the rules may be consulted to ascertain the intent of the rules." *IDWR SVC Brief* at 18 (citing *Walker v. Nationwide Fin. Corp. of Idaho*, 102 Idaho 266, 268, 629 P.2d 662, 664 (1981)).

[4] The WUA did not allege any area of common ground water supply in its letters to the Director, at least not by name. Although the WUA alleged that all of its members' water rights "are hydrologically connected to ground water rights in the Wood River Valley aquifer system," R. Vol. I, p. 1, they did not allege that these existed within a designated area of common ground water supply. Indeed, their closing demand for administration simply refers to administration within the water district, and completely ignores Rule 40's area of common ground water supply requirement. *See* R. Vol. I, p. 3 ("Accordingly, Petitioners hereby demand that you direct the Watermaster for Water District No. 37 to administer Petitioners' surface water rights, and hydrologically connected to [sic] ground water rights within the district in accordance with the prior appropriation doctrine.")

supply in a Rule 40 proceeding, but rather it contemplates that one already exists. Moreover, this language authorizes the Director to find that material injury is occurring, but that is all.[5]

No other provision of the CM Rules contains text supporting the Department's position. CM Rule 30 expressly states that "[f]ollowing consideration of the contested case under the Department's Rules of Procedure [in a Rule 30 proceeding], the Director may, by order, . . . [d]etermine an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district." CM Rule 30.07.c (emphasis added). The fact that this procedure is provided for in Rule 30 but not Rule 40 indicates it is not intended to be used under Rule 40. *Dev., LLC v. City of Ketchum*, 149 Idaho 524, 528, 236 P.3d 1284, 1288 (2010) ("It is a universally recognized rule of construction that, where a constitution or statute specifies certain things, the designation of such things excludes all others, a maxim commonly known as *expressio unius est exclusio alterius*."). The Department's position would add these words from Rule 30 into Rule 40 which, as the Department points out, is not permissible. *See IDWR Brief* at 10 (citing *City of Huetter v. Keene,* 150 Idaho 13, 15, 244 P.3d 157, 159 (2010) for the rule that the Court "cannot add by judicial interpretation words that are not found in the statute as written.").

The plain text of CM Rule 31 (entitled "Determining Areas Having a Common Ground Water Supply") also does not support the Department's position. This Rule describes the kinds of information the Director must consider and the criteria for finding an area of common ground

[5] As discussed below, Rule 42's plain text does not give the Director authority to determine an area of common ground water supply, it simply outlines factors to determine material injury.

water supply under CM Rule 30 only—its plain language unambiguously states that "[t]he findings of the Director shall be included in the Order issued pursuant to Rule Subsection 030.07." CM Rule 31.05. There simply is no language providing a similar process in a Rule 40 delivery call.

The plain language of CM Rule 42 (which is referenced in Rule 40) also does not give this authority. Rule 42 sets out the factors the Director may consider in determining material injury to senior water rights. None of the factors include determining an area of common ground water supply. Indeed, Rule 42's text assumes the area of common ground water supply has been determined. *See* CM Rule 42.01.c ("Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply." (emphasis added)).

In short, the CM Rules' literal language does not authorize the Director to determine an area of common ground water supply in these Rule 40 Delivery Calls. It therefore is not surprising that none has ever been determined that way in any of the Rule 40 delivery call cases to date.

B. The Department's interpretation is not entitled to deference.

To the extent that CM Rules' language might be deemed to contain ambiguity requiring interpretation to determine their intended meaning, the Department's interpretation is not reasonable and is not entitled to deference.

"An agency interpretation of a rule or statute is unreasonable when it is so obscure or doubtful that it is entitled to no weight or consideration." *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 4, 232 P.3d 322, 325 (2010) (internal quotation marks omitted). Agency interpretations are not reasonable if the agency relied on erroneous facts or law in its determination. *Id.*

The Department's interpretation here relies on its erroneous view of the law—that the Director may amend (or ignore) Rule 50 in a Rule 40 proceeding, or may graft provisions from other Rules onto Rule 40. As already discussed, the CM Rules' literal language expressly treats the matter at issue by allowing the Director to determine an area of common ground water supply in a Rule 30 contested case proceeding, but not in a Rule 40 proceeding. The only other avenue for determining an area of common ground water supply under the CM Rules is via designation in Rule 50, which has thus far been done only with respect to the ESPA ACGWS. The Department's interpretation is not required to implement the rules in a practical or timely way.

No rationale supports deference to the Department's interpretation of the CM Rules. *See Duncan*, 149 Idaho at 4, 232 P.3d at 325 (listing five rationales underlying the rule of deference: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation). The practical and reasonable interpretation of the CM Rules—which requires rulemaking to determine an area of common ground water supply before proceeding with a Rule 40 delivery call—is contrary to the Department's interpretation. Nor has the Legislature acquiesced in the Department's

interpretation—rather, it has considered and rejected it. The question of which legal process is required to determine an area of common ground water supply does not require the agency's expertise, or scientific or technical knowledge. There is no reason to believe that water users have come to rely on the Department's current position, since it has only recently been announced. On the contrary, it is more likely that water users have relied on the Department's (and this Court's) interpretations over the past decade, which consistently held that, in a Rule 40 delivery call, senior calling rights cannot curtail junior rights that are not within an area of common ground water supply designated in CM Rule 50.

The Department contends that if rulemaking is required in a Rule 40 proceeding involving seniors and juniors not already within a designated area of common ground water supply, then "the Director's ability to determine an ACGWS within the context of a CM Rule 30 delivery proceeding would be read out of the CM Rules." *IDWR Brief* at 12. This ignores the fact that CM Rule 30 contains express language to do just that, which is different from the procedures of CM Rule 40 .

The CM Rules contemplate two ways of determining an area of common ground water supply: (1) based on the record created in a Rule 30 contested case proceeding (CM Rule 30.07.c); or (2) in non-Rule 30 proceedings, by amending CM Rule 50 (entitled "Areas Determined to Have A Common Ground Water Supply) through rulemaking. The first method for designating an area of common ground water supply is not available because Rule 30 does not apply to these Rule 40 Delivery Calls. *IDWR Brief* at 9 ("CM Rule 40 governs the Director's response to the Big and Little Wood Delivery Calls."). Accordingly, the second method applies,

which means that Rule 50 must be amended before the Delivery Calls can proceed. The Department's position would read Rule 50 out of the CM Rules and would rewrite Rule 40 by deleting "from areas having a common ground water supply" from the rule entirely.

The Department also contends that designating an area of common ground water supply through rulemaking before responding to a CM Rule 40 delivery call "would result in lengthy delay . . . ." *IDWR Brief* at 15. But complying with rulemaking is not an obstacle to timely administration. It is a legal requirement that gives effect to our government's separation of powers and system of checks and balances. And it can be done with relative swiftness.

Since the CM Rules were promulgated in 1994, conjunctive administration has been possible in all corners of the State. As early as February 2013, the Department sought and obtained an order of this Court authorizing interim administration of ground and surface water rights in SRBA Basin 37. *See In Re SRBA Case No. 39576, Subcase No. 00-92021-37.* At about the same time, the Department, in cooperation with the U.S. Geological Survey began development of a ground water model for the Big Wood River aquifer system and established a ground water measurement district. R. Vol. I, p. 174. Thereafter, the Department took the necessary steps to formally incorporate ground water rights into Water Districts 37 and 37B for administration, at the same time acknowledging that conjunctive administration was likely in the Big Wood and Little Wood river basins. R. Vol. III, p. 473 ¶ 12 ("The Department also agrees with testimony that conjunctive administration of surface and ground water rights in the Wood

River basin is likely imminent.").[6] The Department offers no reason why, with the full anticipation of these delivery calls as early as 2013, it could not have initiated rulemaking at some point in the ensuing two years to designate an area of common ground water supply. Indeed, a rulemaking proceeding to amend CM Rule 50 was pending *at the time* the Department addressed the Water Districts. R. Vol. III, pp. 571 (describing Clear Springs Foods' rulemaking petition). There has been ample time for rulemaking to have occurred well in advance of the Delivery Calls.

In fact, there has been ample time after the Delivery Calls were initiated in February 2015 to conduct the necessary investigation and rulemaking proceedings. Had the Department done so, any new area of common ground water supply designated in CM Rule 50 could be in front of the 2016 Legislature now. In light of the delay created by the Department's rejection of the Cities' request to undertake rulemaking (which resulted in this judicial review proceeding), the Court should pay no heed to any claim by the Department that the rulemaking process would have resulted in untimely administration.

The Department bemoans the Legislature's authority to influence the rulemaking process. *IDWR Brief* at 15-16 ("the Idaho Legislature has the authority to reject any agency rule, I.C. § 67-5291, a requirement to promulgate a rule may altogether prevent the Director from complying with [his] mandatory duty [to distribute water]."). But, rather than unduly hindering executive functions, the rulemaking process—which requires the Legislature's review and approval of new

[6] It is common knowledge that senior surface water users have been pressing for conjunctive administration of junior ground water rights much earlier than 2013.

or modified agency rules—provides a necessary check and balance against executive power. The Legislature understood this role when it rejected the Director's attempted repeal of CM Rule 50. The Director is bound by the authority vested in him by the Legislature, which, in these Delivery Calls, requires that an area of common ground water supply be established through a rulemaking process that requires Legislative oversight.

The Department cannot credibly claim it did not know rulemaking was required to designate an area of common ground water supply before responding to these CM Rule 40 Delivery Calls. The Department's efforts and positions taken throughout the entire episode triggered by Clear Springs Foods' petition for rulemaking demonstrate the Department's understanding that the only way to achieve conjunctive administration in a Rule 40 delivery call is to designate the relevant area of common ground water supply through rulemaking. The Court should reject the Department's arguments that this history, including the Director's 2015 testimony to the Legislature regarding his proposed Rule 50 repeal, is "not relevant." *IDWR Brief* at 19.

In sum, there is no basis to afford deference to the Department's interpretation of CM Rules, which is contrary to the Rules' literal language and past interpretations of the Rules by the Department and this Court.

III. THE COURT SHOULD REJECT THE DEPARTMENT'S ASSERTION OF UNPROVEN FACTS IN SUPPORT OF ITS POSITION.

Citing "current information," the Department argues that the ESPA ACGWS is "not relevant" to the Delivery Calls because the WUA's surface water sources are not within the

ESPA ACGWS. *IDWR Brief* at 14, 19. However, there is no reason for this Court to consider that unproven factual contention because this judicial review is focused solely on questions of law: namely, whether the Director has authority to determine an area of common ground water supply within the context of Rule 40 delivery calls, or whether he must first conduct a rulemaking to amend the CM Rules to define a relevant area of common ground water supply.

The source of the Department's "current information" is an August 28, 2015 staff memorandum on Hydrology, Hydrogeology, and Hydrologic Data, Big Wood & Little Wood Water Users Association delivery calls (the "Hydro Memo"). *IDWR Brief* at 14, 17 (citing BW CM-DC-2015-001 at 1086 and 1093). But the Hydro Memo was issued more than a month after the agency action challenged here (IDWR's July 22, 2015 *Order Denying Joint Motion To Designate ACGWS by Rulemaking and to Dismiss Delivery Calls ("ACGWS Order")*). In other words, the Hydro Memo could not have informed the Department's decision in *ACGWS Order*, and even if certain alleged facts were necessary to determine the legal question presented here, any contained in the Hydro Memo cannot be relevant.

For these reasons, the Cities have consistently objected to the Department shoehorning the Hydro Memo and another staff memorandum (the "Delivery Memo") into the agency record.[7] *See* R. Vol. VII, p. 1383 (Cities' objection to Agency Record); *Stipulated Motion to Augment the Record*, p. 4 (Oct. 27, 2015) (reiterating Cities' objections to the staff memoranda). In the administrative proceeding, the Cities requested that the Director modify his request for

[7] The "Delivery Memo" is the August 31, 2015 memorandum on Surface Water Delivery Systems, which is in the record at R. Vols. VI and VII at 1105-1342.

staff memoranda, including his request for what later became the Hydro Memo and the Delivery Memo. R. Vol. III, pp. 435-51. The Cities' concerns included that "the Director's request for hydrologic and hydrogeologic information, including his request for '[a] conceptual description of the interaction between ground water and surface water,' are the type of information that the Director may use to develop an area of common ground water supply ('ACGWS'), and that determination must be made through rulemaking rather than in these contested cases." R. Vol. III, p. 438 n.2. *See also id.* pp. 442-43.

Nevertheless, the Department did not alter the request for memoranda, and later included the memoranda in the agency record. As the Cities' feared would happen, the Department now cites to them as fact to support its arguments in this judicial review proceeding. The Department takes this approach despite its earlier statements about the memoranda's limited purpose.

At a November 12, 2015 hearing before this Court,[8] the Department stated that these staff memoranda were appropriately included in the agency record because the Director cited to them in his October 16, 2015 *Order Denying Joint Motion to Revise Interlocutory Order* (the so-called "*Rule 711 Order*" that is not the subject of this judicial review). The Department also stated that the memoranda were referenced in the *Rule 711 Order* only to demonstrate that the WUA's senior surface water rights and the targeted junior ground water rights at issue in the Delivery

[8] The November 12 hearing concerned Sun Valley Company's ("SVC") *Joint Response to Stipulated Motion to Augment the Record*. At that hearing, the Cities reiterated their objections to the Hydro Memo and Delivery Memo.

Calls are already in water districts.[9] Of course, the *WD 37 Order* (which was in the record when the Director issued the *ACGWS Order*) would have sufficed for this purpose. R. Vol. III, pp. 464-80. It now seems apparent that the Department's citation to the staff memoranda in the *Rule 711 Order* was simply a way to justify including them in the record to support arguments now.

In fact, it is apparent that the Department has already made up its mind about the nature and extent of an area of common ground water supply applicable to these Delivery Calls. When it received the WUA's letters initiating the Delivery Calls, the Department identified certain junior ground water right holders as potentially affected by the Delivery Calls without any notice to the junior ground water right holders, let alone any opportunity to present evidence to the contrary.

The extent to which the surface water sources for the WUA's senior water rights are or are not hydraulically connected to the ESPA ACGWS or connected to the targeted junior ground water rights has not been determined, and is not the subject of this judicial review. This judicial review is about whether, as a matter of law, the agency must undertake rulemaking to determine an area of common ground water supply if one does not already exist prior to proceeding under a contested case CM Rule 40 delivery call. The Court should ignore the Department's attempt to

[9] The Department repeated these statements in the *IDWR SVC Brief* at 37 ("The Director only cited the staff memoranda for one purpose: to explain why the process advocated by SVC in the Rule 711 Motion makes no practical sense because 'current information demonstrates the water rights at issue in the Big and Little Wood Delivery Calls are already in water districts." *and* "The Director only cited the Hydro Memo to show that current information demonstrates the junior ground water rights at issue in the Big and Little Wood Delivery Calls are diverted from the Wood River Valley aquifer system and the Camas Prairie aquifer system and, therefore, in Water Districts 37 and 37B."). The *IDWR SVC Brief* addresses text and citations in IDWR's *Order Denying [SVC's] Motion to Revise Interlocutory Order* which are exactly the same as the text and citations to staff memoranda in IDWR's *Rule 711 Order* concerning the Cities.

have the Court decide the merits of a question (or assume that it has already been properly determined) that must be determined through rulemaking and approved by the Legislature.

IV. THE COURT SHOULD NOT CONSIDER THE INTERVENOR'S BRIEF AND THE SUPPLEMENTAL RESPONDENTS' BRIEF.

The Cities object to *Intervenor's Brief* filed by the Water District 37B Ground Water Association (the "Camas Group") and the Department's *Supplemental Respondents' Brief* responding to the issues raised by the Camas Group. The Court should reject both of these briefs and all matters they raise because they are outside the scope of this judicial review proceeding and are untimely in any event.

The issue of whether CM Rule 30 applies to the Delivery Calls is not properly raised in this proceeding. The Cities did not raise it, and no party (including the Department or the Camas Group) properly raised it by filing a cross-petition or otherwise. The Department and Camas Group can argue about that issue in SVC's judicial review proceeding, Case No. CV-WA-2015-14500, where it has been raised and briefed by the parties, which include the Department and Camas Group.

In any event, both the Camas Group's *Intervenor's Brief* and the Department's *Supplemental Respondents' Brief* are untimely. The Camas Group is an intervenor adverse to the Department (i.e. the respondent) and therefore should have filed its briefing on the Cities' issues by the deadline for filing petitioners' briefs so the Department could timely respond. But the Camas Group instead filed its briefing on or around the deadline for filing respondent's briefing. Without asking the Court for permission to file additional briefing or obtaining a stipulation from

the Cities to do so, the Department has at the 11th hour filed supplemental briefing in response to the inappropriately raised issues in the Camas Group's untimely brief.

The Cities purposely limited the scope of their judicial review proceeding to the discrete question of law presented: whether the Director may determine an area of common ground water supply within the context of delivery calls being conducted pursuant to CM Rule 40, or whether he must first conduct a rulemaking to amend the CM Rules to designate the relevant area of common ground water supply. It is not proper for the Camas Group or the Department to inject their separate issues. Accordingly, the Cities respectfully request the Court disregard the Camas Group's *Intervenor's Brief* and the Departments *Supplemental Respondents' Brief*, and all matters raised therein.[10]

CONCLUSION

The CM Rules preclude the Director from curtailing junior ground water rights outside a defined area of common ground water supply in response to a CM Rule 40 delivery call. The *ACGWS Order* contains no lawful rationale explaining why the Department is justified in ignoring the plain language of the CM Rules and prior rulings of the agency and this Court. Therefore, the Department's action is contrary to Idaho law and must be vacated. The *ACGWS Order* should be set aside, and the Delivery Call proceedings before the Department should be dismissed.

[10] If the Court considers anything in the Camas Group's or the Department's improper briefing, it should be the Department's admission that it already has determined the area of common ground water supply relevant to the Delivery Calls. *Supplemental Respondents' Brief* at 6 ("because the Camas Group's junior ground water rights are diverted from an ACGWS that appears to be relevant to the Big and Little Wood Delivery Calls, the Camas Group is a proper respondent in the delivery call proceedings.").

Respectfully submitted on February 26, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th 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:

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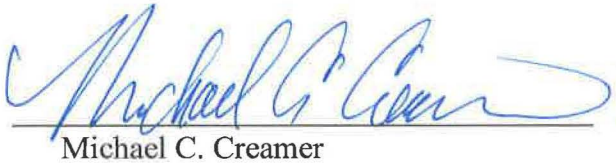

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