

**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,

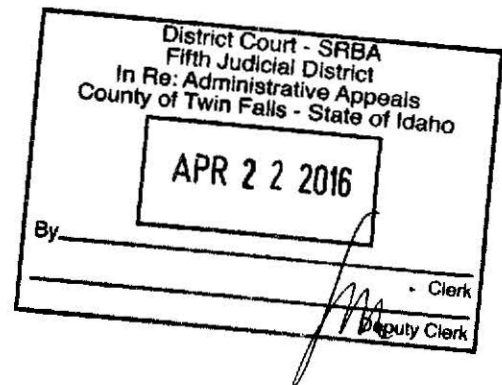
Respondents,

and

CITY OF KETCHUM, CITY OF FAIRFIELD,
WATER DISTRICT 37-B GROUNDWATER
GROUP, BIG WOOD & LITTLE WOOD WATER
USERS ASSOCIATION, SUN VALLEY
COMPANY, 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

Case No. CV-WA-2015-
14419

**MEMORANDUM
DECISION AND ORDER**



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,)
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 LCC, 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)

I.
STATEMENT OF THE CASE

A. Nature of the case.

This case originated when the City of Hailey and the City of Bellevue (collectively, “Cities”) filed a *Petition* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources (“IDWR” or “Department”). Under review is the Director’s *Order Denying Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* issued on July 22, 2015 (“*Final Order*”). The *Final Order* denies the Cities request to dismiss two requests for administration submitted by members of the Big Wood and Little Wood Water Users Association (“Association”) and to initiate rulemaking. The Cities asserts that the *Final Order* is contrary to law and requests that the Court set it aside and remand with instructions to dismiss the requests for administration.

B. Course of proceedings and statement of facts.

This case involves a demand for the priority administration of water. The seniors are Association members located in water district 37. R., pp.1-5; LW R., pp.1-5.¹ They hold approximately 80 senior water rights that divert from the Big Wood and Little Wood Rivers. *Id.* In two letters to the Director dated February 23, 2015, the seniors assert they are short water due to junior use. *Id.* They demand priority administration of their surface water rights and hydrologically connected ground water rights within Water District 37. *Id.* The Director informed the seniors he would treat the requests for administration as delivery calls under the CM Rules, and proceeded to initiate two contested case proceedings.² R., p.6; LW R., p.6. The first, designated IDWR docket number CM-DC-2015-001, involves those seniors that divert from the Big Wood River. *Id.* The second, designated IDWR docket number CM-DC-2015-002, involves those diverting from the Little Wood River. *Id.*

¹ Two agency records make the record in this matter. The first arises out of IDWR Docket No. CM-DC-2015-001, relating to the requests for priority administration of water rights diverting from the Big Wood River. The citation “R., p. __” refers to that agency record. The second arises out of IDWR Docket No. CM-DC-2015-002, relating to the requests for priority administration of water rights diverting from the Little Wood River. The citation “LW R., p. __” refers to that agency record.

² The term “CM Rules” refers to Idaho’s *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

The Director identified junior water users he determined may be affected by one or both of the calls. R., p.12. He proceeded to serve notice of the filing of the calls on those juniors. *Id.* The notice invited the juniors to participate in contested case proceedings, and warned that if they did not they “may still be legally bound by the results of the contested case proceedings.” *Id.*

On June 25, 2015, the Cities moved the Director to dismiss the calls and initiate rulemaking to determine an area of the state having a common ground water supply relative to the Big Wood and Little Wood Rivers. *Id.* at 403-404. Among other things, they argue that the Director must initiate rulemaking in accordance with the Idaho Administrative Procedure Act to designate an applicable area of common ground water supply before the Association may submit its calls. *Id.* Once rulemaking is completed, and the Association is permitted to submit its calls, the Cities argue that the calls must be governed by Rule 40 of the CM Rules. *Id.* In his *Final Order*, the Director denied the Cities’ *Motion*. *Id.* at 859-869. While the Director agreed the calls should be governed by Rule 40, he disagreed that he must initiate rulemaking in order to process the calls. *Id.* The Director denied the Cities’ request to dismiss the calls and to initiate rulemaking. *Id.* The Cities subsequently filed a *Motion* asking the Director to review and revise his *Final Order*. *Id.* at 1002-1010. The Director denied the *Motion* on October 16, 2015. Supp. R., pp.80-83.

Meanwhile, on August 18, 2015, the Cities filed a *Petition for Judicial Review*, asserting that the Director’s *Final Order* is contrary to law. The case was reassigned by the clerk of the court to this Court on August 28, 2015. On September 29, the Court entered an *Order* permitting the Intervenor to appear as parties to this proceeding. Although the administrative proceedings pertaining to the calls have not concluded, the Director entered an *Order* designating the *Final Order* as final and subject to judicial review on October 15, 2015. Supp. R., pp.71-74. This was done pursuant to the joint motion and stipulation of the parties. *Id.* at 9-13; 72. The Cities subsequently filed an *Amended Petition for Judicial Review*. A hearing on the *Amended Petition* was held before this Court on March 3, 2016.³ The parties did not request the opportunity to

³ On February 4, 2016, Intervenor Water District 37-B Groundwater Group (“Intervenor”) filed an Intervenor’s Brief in this matter. The filing of the brief was objected to by the Cities as well as the State. They assert the brief is untimely and raises new issues not raised in the *Amended Petition* filed. This Court agrees the Intervenor’s Brief raises issues that go beyond the scope of the arguments raised by the Petitioners and the Respondents. For instance, the Intervenor argues that Rule 30 should apply to govern the calls when neither the Petitioners nor the Respondents have raised that issue. Therefore, the objections by the Cities and the State are noted. Because the Court’s decision

submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day, or March 4, 2016.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or, (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.

ANALYSIS

This is a companion case to Ada County Case No. CV-WA-2015-14500, which is also before the Court (hereinafter, "Sun Valley Case"). Both cases raise issues concerning the proper procedures to be applied to the Association's delivery calls. In the Sun Valley Case, the Court entered a *Memorandum Decision* contemporaneously herewith holding that the procedures set

in the Sun Valley Case is dispositive of the issues raised by the parties in this matter, the Court does not rely upon or address the arguments set forth by the Intervenor in its brief.

forth in Rule 30 of the CM Rules govern the calls. The Court hereby incorporates by reference the analysis set forth in that *Memorandum Decision*. The Court's decision in the Sun Valley Case is dispositive of the issues raised by the parties in this matter. That said, the Court will take this opportunity to address some of the arguments raised by the Petitioners in this case that were not raised or addressed in the Sun Valley Case.⁴

A. The Cities' argument that the Director must dismiss the Association's calls until such time as rulemaking is successfully undertaken is inconsistent with the CM Rules and case law.

The Cities argue that the seniors may not seek the administration of their water rights until such time as rulemaking is successfully undertaken to designate an area of the state having a common ground water supply relative to the Big Wood and Little Wood Rivers. This Court disagrees. The issue is governed by precedent set forth in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). Prior to the Department's promulgation of the CM Rules, senior surface water users in that case submitted a call asserting injury to their senior rights due to junior water use. *Id.* at 394, 871 P.2d at 811. When the Director denied the call, the seniors sought a writ of mandate to compel him to address the call. *Id.* The Director sought the dismissal of the senior's request for a writ of mandate. *Id.* Among other things, he argued that before the call could be made and properly processed, he needed to initiate rulemaking to promulgate rules that "would allow the director to respond to the [seniors'] demands by providing for the conjunctive management of the aquifer and the Snake River." *Id.*

Both the district court and the Idaho Supreme Court held that the Director had a clear legal duty to distribute water to the senior right in accordance with the doctrine of prior appropriation. *Id.* at 811-813, 871 P.2d at 394-396; Twin Falls County Case No. 39576, *Order and Memorandum Decision Granting Petition for Writ of Mandate*, pp.4-8 (Aug. 5, 1993). Further, that his duty in this respect is ministerial in nature. *Id.* Of significance, they rejected the argument that the Director could deny the call on the grounds that it was necessary to first initiate rulemaking to allow him to properly respond to, and process, the seniors' demands. Notwithstanding this precedent, this is what the Cities ask the Director to do in this case. *Id.*

⁴ The position of the Respondents in this case is the same position the Respondents take in the Sun Valley Case. The Court addressed that position in the *Memorandum Decision* issued in the Sun Valley Case. Therefore, the Court need not revisit the Respondents' position in this decision.

They assert the Director should deny the seniors' calls on the grounds that it is first necessary to initiate rulemaking to allow him to properly respond to, and process, their demands. This argument was addressed, and rejected, in *Musser*. It is likewise rejected here.

In addition to being contrary to precedent, the Cities' argument faces other difficulties. Requiring the Director to initiate rulemaking may leave the seniors without an adequate remedy under the Cities' position. Rulemaking may be inconclusive. It requires the involvement of the Legislature, which may decide to reject a rule promulgated by an agency. The Cities' position fails to account for the possibility that Legislature may not approve a proposed rule identifying an area of the state having a common ground water supply relative to the Big Wood and Little Wood Rivers. Indeed, it may reject such a rule for many reasons, including reasons that are political rather than factual. Under the position taken by the Cities, the seniors would then be left without an adequate remedy. The Cities would assert the seniors could not submit a call under Rule 30, as the juniors are in organized water districts. Further, they would assert the seniors could not submit a call under Rule 40 since no determination has been made of an applicable area of common ground water supply via the rulemaking process. The Cities fail to identify how the Director should carry out his clear legal duty to distribute water to the senior right in accordance with the doctrine of prior appropriation under those circumstances.

Fortunately, the CM Rules provide procedures and criteria for determining an area of common ground water supply outside of the rulemaking process. They provide an avenue to make such a determination in a contested case proceeding held before the Director under Rule 30 of the CM Rules. For the reasons set forth in this Court's *Memorandum Decision* entered contemporaneously herewith in the Sun Valley Case, the Court finds that when a call is made by a senior surface water user against junior ground water users in an area of the state that has not been determined to be an area having a common ground water supply, the procedures set forth in Rule 30 must be applied to govern the call.

B. The Cities are not entitled to an award of attorney fees on judicial review.

The Cities seek an award of attorney fees under Idaho Code § 12-117. That provision provides in part:

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal,

shall award the prevailing party reasonable 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.

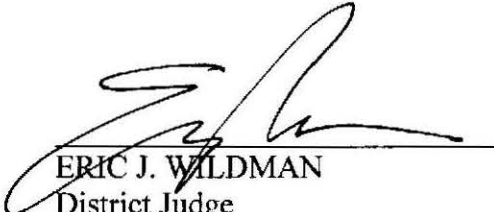
The decision to grant or deny a request for attorney fees under Idaho Code § 12-117 is left to the sound discretion of the court. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). Since the Cities have not prevailed in the position they assert, they are not prevailing parties. Therefore, the Court in an exercise of its discretion denies the Cities' request for attorney fees.

IV.

ORDER

For the reasons set forth in the Sun Valley Case, IT IS ORDERED that the Director's *Order Denying Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* issued on July 22, 2015, is **hereby set aside and remanded for further proceedings consistent with this Order.**

Dated April 22, 2016


ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on April 20, 2016, with sufficient first-class postage to the following:

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