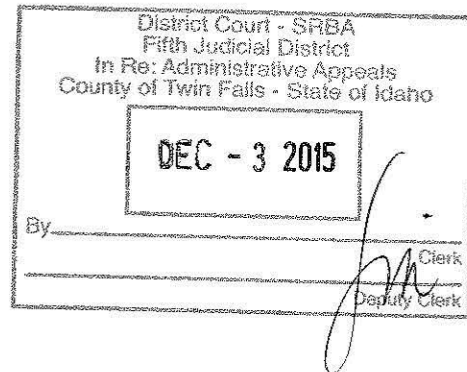


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Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

SUN VALLEY COMPANY, a Wyoming  
corporation,

Petitioner,

vs.

GARY SPACKMAN, in his official capacity  
as 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, SOUTH VALLEY  
GROUND WATER DISTRICT, ANIMAL  
SHELTER OF WOOD RIVER VALLEY,

Case No. CV-WA-2015-14500

**SECOND AMENDED PETITION FOR  
JUDICIAL REVIEW**

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 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

Sun Valley Company (the "Company"), by and through its undersigned counsel,  
and pursuant to Idaho Code Sections 67-5270 through 67-5279 and Rule 84 of the Idaho Rules of  
Civil Procedure, hereby submits this Amended Petition for Judicial Review of an agency action  
by the Director of the Idaho Department of Water Resources ("Director") and the Idaho  
Department of Water Resources ("Department").

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I.**

The Company owns and operates a resort in Sun Valley, Blaine County, State of Idaho. The Company operates the resort with water rights, which the Department has identified as subject to water delivery calls allegedly pursued by members of the Big Wood & Little Wood Water Users Association (the "Petitioners"), identified in Contested Case Nos. CM-DC-2015-001 and Case No. CM-DC-2015-002.

### **II.**

The Idaho Department of Water Resources is a state agency, with its main office located at 322 E. Front Street, Boise, Idaho. Gary Spackman is the Director of the Department.

### **III.**

On February 24, 2015, Joseph James, on behalf of the Petitioners, sent the Director two letters requesting the Director to administer Petitioners' water rights in accordance with the prior appropriation doctrine. The letters failed to meet the mandatory, minimum pleading requirements to invoke jurisdiction under the Department's Conjunctive Management Rules ("CM Rules"), the Department's Procedural Rules (the "Procedural Rules"), and the Idaho Administrative Procedure Act (the "Act"), including without limitation, the identification of respondents and the identification of the applicable area of common ground water supply.

### **IV.**

In a letter to Joseph James and Petitioners dated March 6, 2015, the Director responded to the Petitioners' letters and treated the letters as two consolidated delivery calls under the CM Rules. Consequently, in a March 20, 2015 letter, the Department notified all those identified as "a holder of a junior-priority ground water right or rights that may be affected by one or both of the above-described delivery calls," including the Company. The notice invited



recipients to participate in contested case proceedings related to the purported delivery calls and notified them of a status conference to be held on May 4, 2015.

V.

On May 20, 2015, notwithstanding an existing order, dated May 13, 2015, allowing the *parties to the contested case proceedings* to conduct discovery, the Director sent a letter to the Petitioners that included an "Information Request" with 16 specific requests for information.

VI.

On information and belief, Department staff, both technical *and legal*, conducted site visits on the Petitioners' properties on one or more occasions, including without limitation May 26, 2015; June 26, 2015; July 2, 2015; July 29, 2015 and August 18, 2015, ostensibly for the purpose of gathering facts of a *technical or scientific* nature in order to prepare the Technical Memoranda (defined below). The Department did not provide the Company with notice of, and opportunities to participate in, such site visits.

VII.

On June 3, 2015, the Director held a pre-hearing conference, at which conference the Director indicated he intended to request the preparation of two technical staff memoranda (the "Technical Memoranda"). At that time, several parties, including the Company, expressed concern over the scope of such Technical Memoranda, and the process by which information might be gathered and evaluated by Department staff during the preparation of such memoranda.

VIII.

On June 12, 2015, the Director issued a Request for Staff Memoranda to Tim Luke, Bureau Chief of the Water Compliance Bureau, and Sean Vincent, Manager of the Hydrology Section. The Request for Staff Memoranda sought (1) a memorandum concerning

surface water delivery systems, and (2) a memorandum concerning hydrology, hydrogeology and hydrological data, to address, among other things, a conceptual description of the interaction between ground water and surface water in various drainages.

#### IX.

On June 25, 2015, the Company filed a Motion to Dismiss Contested Case Proceedings, challenging the Petitioners' water delivery call petitions as deficient under the CM Rules, the Procedural Rules, and the Act, and challenging the Director's exercise of jurisdiction over the contested water delivery call cases as improper.

#### X.

On July 1, 2015, the Company filed a Motion to Modify/Withdraw "Request for Staff Memoranda" and May 20, 2015 "Request for Additional Information" (the "Motion to Modify/Withdraw") challenging, among other things, the propriety of the Department staff's development, gathering, compilation and evaluation of potentially relevant information before such information is presented to the Director as "evidence" in the contested case proceedings at issue, and raising the violation of procedural due process that would necessarily occur should the Company not be afforded notice and the opportunity to participate in such process in the event the Director intended to officially notice or otherwise rely upon the Technical Memoranda.

#### XI.

On July 22, 2015, the Director issued an Order Denying the Company's Motion to Dismiss (the "Sun Valley Order"), a true and correct copy of which is attached hereto as **Exhibit A**, ruling that, among other things, the February 24, 2015 letters were sufficient to commence water delivery calls and that the Director had proper jurisdiction under CM Rule 40.

**XII.**

On July 22, 2015, the Director also issued the Order Denying Sun Valley Company's Motion to Modify/Withdraw (the "Staff Memoranda Order"), a true and correct copy of which is attached hereto as **Exhibit B**, ruling that the Department's efforts to collect and disseminate information would not prejudice, but rather, would assist, all of the parties to the proceedings.

**XIII.**

In response to the Sun Valley Order, on August 6, 2015, the Company filed a Motion for Review of Interlocutory Order, pursuant to the Department's Procedural Rules, IDAPA 37.01.01.260 and 711. The Company asked the Director to review and revise his Order Denying the Company's Motion to Dismiss, because it ignored the plain language of the Department's CM Rules and Procedural Rules, and prejudged fundamental substantive issues.

**XIV.**

On August 19, 2015, the Company timely filed a Petition for Judicial Review (the "Petition") in the above-captioned matter. Thereafter, Garrick Baxter, counsel for the Department, informed counsel for the Company that it would contest the Petition because the Petition sought review of an interlocutory order, not a "final order" of the Department.

**XV.**

On August 28, 2015, Jennifer Sukow submitted a memorandum to the Director regarding hydrology, hydrogeology, and hydrological data in the Big and Little Wood River basins. Such memorandum was served on all parties to the above-referenced contested case proceedings.

**XVI.**

On August 31, 2015, Tim Luke submitted a memorandum to the Director regarding the Department's investigation of surface water delivery systems for the Petitioners' water rights. Such memorandum was served on all parties to the above-referenced contested case proceedings.

**XVII.**

At the request of the Director, between May 26, 2015 and August 31, 2015, without ever requiring the Petitioners to meet the minimum pleading requirements set forth in the Procedural Rules, the CM Rules, and title 42, Idaho Code, Department staff conducted site visits on Petitioners' properties, and collected, compiled, and evaluated the facts and information that Petitioners would ordinarily have been required to supply and present pursuant to such rules. At the request of the Director, with the possible exception of alleging or drawing conclusions as to material injury, Department staff met, or attempted to meet, the foregoing pleading requirements for and on behalf of the Petitioners.

**XVIII.**

The Director will act as a hearing officer in the above-referenced contested case proceedings.

**XIX.**

On September 17, 2015, in response to the Department's opposition to proceeding with a judicial appeal of an interlocutory agency order, the Company, the Department and certain other parties entered into and filed a Stipulation that would allow, among other things, the Director to address the finality of the Sun Valley Order in the underlying contested case proceedings, and a Corrected Stipulation that simply included all related attachments was filed September 18, 2015.

**XX.**

Pursuant to paragraph 14(a) of the Corrected Stipulation, on September 25, 2015, the Company and certain other parties filed a Joint Motion to Designate ACGWS Order and Sun Valley Order as Final Orders (the "Motion to Designate"), pursuant to Rule 750 of the Procedural Rules, which Motion to Designate requested, among other things, that the Director designate the Sun Valley Order as a final order subject to judicial review pursuant to Rule 740 of the Procedural Rules.

**XXI.**

On October 15, 2015, the Director issued an Order Designating ACGWS Order and Sun Valley Order as Final Orders, a true and correct copy of which is attached hereto as **Exhibit C**.

**XXII.**

On October 16, 2015, the Director issued an Order Denying Motion to Revise Interlocutory Order (the "Order Denying Motion to Revise"), a true and correct copy of which is attached hereto as **Exhibit D**. The Director, carefully avoiding use of the term "evidence" or "official notice" to cite the Technical Memoranda he relied upon, instead referring to "current information," stated the following findings of fact:

[T]he 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). . . . 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).

A footnote in the Order also states the following finding of fact:

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).

**XXIII.**

The Director did not provide notice to the Company that official notice of the Technical Memoranda would be taken by the Director prior to issuance of the Order Denying Motion to Revise. The Company was not given an opportunity to contest and rebut the facts or material in the Technical Memoranda prior to issuance of the Order Denying Motion to Revise.

**XXIV.**

On October 28, 2015, the Director filed a motion to augment the agency record with, among other things, the Order Denying Motion to Revise. The motion was opposed by the Company, but ultimately granted on November 16, 2015. The augmented record, including the factual findings made by the Director in the Order Denying Motion to Revise, broadened the scope of the Director's Sun Valley Order, and added to the legal errors ripe for review before the district court on appeal.

**XXV.**

The Company seeks judicial review of the actions taken by the Director and the Department in violation of Idaho law, including Department staff site views without affording notice and the opportunity to participate to all interested parties, the Director's Request for Staff Memoranda, the Sun Valley Order, the Staff Memoranda Order and the Order Denying Motion to Revise.

**VENUE****XXVI.**

The Company seeks review in the district court for Ada County, Fourth Judicial District of the State of Idaho pursuant to Idaho Code Section 67-5272 because the final agency action was taken by the Director and the Department at Department headquarters in Ada County, Idaho.

**JURISDICTION****XXVII.**

The Company seeks judicial review of the Sun Valley Order, and this Court has jurisdiction for review of such order, because it is a final order in a contested case. *See* IDAHO CODE § 67-5270(3); IDAPA 37.01.01.740. The Petitioners have failed to adequately invoke the Department's jurisdiction under the CM Rules and the Procedural Rules, and thus, the only adequate remedy is dismissal. Specifically, and without limiting the foregoing, the petitioners in the above-referenced administrative proceedings have not complied with Procedural Rule 230 and CM Rule 30 by identifying the Company as a respondent, identifying an area of common ground water supply, and producing the documents and information necessary to initiate a water delivery call. Notwithstanding such clear deficiencies, including the Company's inability to know whether it is even properly subject to such water delivery call, the Department threatens to proceed with a contested case that could result in curtailment of the Company's valuable water rights.

**XXVIII.**

The Company has exhausted all administrative remedies required under chapter 52, title 67, Idaho Code and the Procedural Rules. *See* IDAHO CODE § 67-5271(1); IDAPA 37.01.01.740.

**ISSUES ON REVIEW****XXIX.**

Pursuant to Idaho Code Sections 42-1707A and 67-5279, the Company seeks review of the Sun Valley Order, the Staff Memoranda Order and the Order Denying Motion to Revise, and the findings, inferences, conclusions or decisions therein and related actions of the Department, which were: (1) in violation of constitutional, statutory provisions, and administrative rules of the Department; (2) in excess of the Department's statutory authority and its authority under the administrative rules of the Department; (3) made upon unlawful procedure; and (4) arbitrary, capricious, and/or an abuse of the Department's discretion. By ignoring jurisdictional predicates and subjecting the Company to curtailment in a contested case proceeding without demanding the Petitioners' compliance with basic petition requirements, and by making findings of fact in reliance upon purported facts and "current information" that are not evidence in the contested case proceeding, were not the subject of proper official notice, and are not supported by substantial, competent evidence in the record, the Director has prejudged determinations of an area of common ground water supply, hydraulic interconnectedness, and causation. Such prejudicial conduct constitutes irreparable harm to the Company's defense of its water rights, violates its due process rights, and also subjects the Company to costly litigation without adequate notice of its status as a real party in interest.

**XXX.**

Specifically, and without limiting the foregoing, the Company contends that:

1. The Director and the Department erred when they exceeded their authority, and violated constitutional law, statutory provisions, and administrative rule



requirements by exercising jurisdiction over the above-referenced proceedings under the Procedural Rules, the CM Rules, title 42, Idaho Code and the Act;

2. The Director and the Department violated the Company's due process rights by refusing to require the Petitioners to comply with petition requirements, including identification of respondents;

3. The Director erred by ignoring that the only administrative means to determine and incorporate an area of common ground water supply into a water district is pursuant to CM Rules 30 and 50;

4. The Director erred by dismissing the applicability of CM Rule 30 by improperly equating "junior-priority ground water rights in organized water districts" with "areas having a common ground water supply" in organized water districts;

5. The Director erred by prejudging or pre-determining an area of common ground water supply based solely on the existence of a water district;

6. The Director erred by proceeding under CM Rule 40 without incorporating an applicable area of common ground water supply into Water District 37 pursuant to CM Rule 30, thus purportedly excusing the Petitioners' pleading deficiencies;

7. Procedural Rule 52 is unconstitutional as applied in the Sun Valley Order;

8. The Director erred by failing to make the requisite findings to apply Procedural Rule 52;

9. The Director erred by instructing Department staff to collect and evaluate facts and information that was not yet evidence;

10. The Director and the Department violated the Company's due process rights by failing to provide notice of, and the opportunity to participate in, site visits during

which Department staff gathered information used to produce the requested Technical Memoranda;

11. The Director violated the Company's due process rights, including without limitation Procedural Rule 602 and Idaho Code Section 67-5251, by issuing an Order Denying Motion to Revise that made findings that rely in part upon facts identified as "current information" without affording the Company with proper notice and an opportunity to contest and rebut such facts in a properly conducted contested hearing;

12. The Director violated Idaho Code Section 67-5248 by making findings of fact in the Order Denying Motion to Revise based upon information that was not "evidence in the record of the contested case" or "matters officially noticed in that proceeding";

13. Upon information and belief, the Department violated the Company's due process rights, including without limitation Procedural Rule 417, Idaho Code Section 67-5253, the Idaho Rules of Administrative Procedure, IDAPA 04.11.01.420 through 425, and Idaho Code Section 67-5206(5)(b), by conducting site visits, during which communication took place with parties regarding substantive issues in the contested case proceeding with no notice and opportunity for all parties to participate in the communications;

14. The Department erred by collecting and stating the factual information and data in the Technical Memoranda, as well as the legal conclusions therein, without substantial competent evidence in the record; and

15. The Department violated Idaho Code Section 67-5251 by stating legal opinions and conclusions in the Technical Memoranda.

Pursuant to Idaho Rule of Civil Procedure 84(d)(5), this list of issues "shall not prevent the Company from asserting other issues later discovered."

**ATTORNEY FEES****XXXI.**

The Company respectfully requests an award of its attorneys' fees and costs pursuant to Idaho Code Section 12-117 and any other applicable statutes.

**AGENCY RECORD****XXXII.**

The Company understands that the Department keeps and maintains a record of documents and proceedings in the above-referenced contested cases. The record shall include, without limitation, the following:

- (a) The Order Denying Sun Valley Company's Motion to Dismiss;
- (b) The Order Denying Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls;
- (c) The Order Denying Sun Valley Company's Motion to Modify/Withdraw;
- (d) The Order Designating ACGWS Order and Sun Valley Order as Final Orders; and
- (e) Sun Valley Company's Motion to Dismiss Contested Case Proceedings;
- (f) Sun Valley Company's Motion for Review of Interlocutory Order.

**TRANSCRIPT OF PROCEEDINGS****XXXIII.**

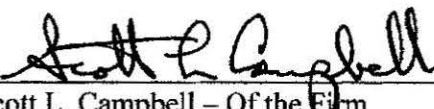
Pursuant to Rule 84(f)-(g), Idaho Rules of Civil Procedure, the Company respectfully requests the preparation of a reporter's transcript of the pre-hearing conference, held by the Director and the Department on or about June 5, 2015 at 1 p.m. at the Lincoln County Community Center, 201 South Beverly Street, Shoshone, Idaho 83352.

## Petitioner CERTIFIES:

- A. That the Department has been paid the costs for the preparation of Department record referenced above, and that payment arrangements have been made with the transcriber for the preparation of a reporter's transcript of the June 3, 2015 pre-hearing conference pursuant to Rule 84(g)(1)(A), Idaho Rules of Civil Procedure;
- B. That the District Court's filing fee applicable to petitions for judicial review of a final decision from administrative agencies, including the Department, has been paid; and
- C. That service has been made upon all parties required to be served.

DATED this 3rd day of December, 2015.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By   
Scott L. Campbell – Of the Firm  
Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 3rd day of December, 2015, I caused a true and correct copy of the foregoing **SECOND AMENDED PETITION FOR JUDICIAL REVIEW** to be served by the method indicated below, and addressed to the following:

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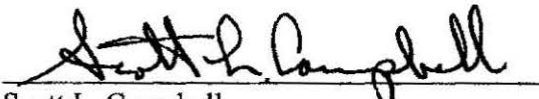
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Director of the Idaho Department of Water  
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Scott L. Campbell

**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 SUN VALLEY  
COMPANY'S MOTION TO DISMISS**

**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 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 March 20, 2015, the Department sent letters to ground water users the Department identified as potentially affected by one or both of the above-described delivery calls. The purpose of the letters was to inform the water users of the delivery calls and notify them of a planned status conference. The letters invited the water users to file a written notice with the Department if they planned to participate in delivery call proceedings. The Department received over 100 notices of intent to participate, including a notice filed by Sun Valley Company ("SVC").

The Department also published general notice of the delivery calls and the status conference in the Idaho Mountain Express and Camas Courier on March 25th, 2015 & April 1st, 2015; and the Times News on March 26th, 2015 & April 2nd, 2015. The Director held a status conference on May 4, 2015, and a pre-hearing conference on June 3, 2015.

On June 25, 2015, SVC filed a *Motion to Dismiss Contested Case Proceedings* ("Motion to Dismiss"). Joinders in support of the Motion to Dismiss were filed by attorney James P. Speck on behalf of multiple respondents; City of Bellevue; City of Hailey; City of Ketchum and City of Fairfield; AF 2014 Trust, Geoffrey Smith, and the Mariana S. Paen Trust; Dean R. Rogers Inc., and Dean R. Rogers, III; and attorney Heather E. O'Leary on behalf of multiple respondents.

### ANALYSIS

SVC argues the Big and Little Wood Delivery Calls should be dismissed for Petitioners' failure "to file compliant petitions" under Idaho law, the Department's Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"), and the Department's Rules of Procedure. *Motion* at 2. Each argument will be addressed below.

#### Compliance with Idaho Law

SVC argues the Petitioners' delivery call letters do not "satisfy the specific pleading requirements under Idaho Code Section 42-237b." *Motion* at 6. Idaho Code § 42-237b states:

Whenever any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affected by one or more user[s] of ground water rights of later priority, or whenever any person owning or having the right to use a ground water right believes that the use of such right is being adversely affected by another's use of any other water right which is of later priority, such person, as claimant, *may* make a written statement under oath of such claim to the director of the department of water resources.

Such statement shall include:

1. The name and post-office address of the claimant.
2. A description of the water right claimed by the claimant, with amount of water, date of priority, mode of acquisition, and place of use of said right, if said right is for irrigation, a legal description of the lands to which such right is appurtenant.
3. A similar description of the respondent's water right so far as is known to the claimant.
4. A detailed statement in concise language of the facts upon which the claimant founds his belief that the use of his right is being adversely affected.

Upon receipt of such statement, if the director of the department of water resources deems the statement sufficient and meets the above requirements, the director of the department of water resources shall issue a notice setting the matter



for hearing *before a local ground water board*, constituted and formed as in this act provided.

(emphasis added). SVC asserts the Big and Little Wood Delivery Calls should be dismissed because Petitioners' letters do not contain a "written statement under oath" setting forth information required by Idaho Code § 42-237b.

The plain language of Idaho Code § 42-237b demonstrates Petitioners were not required to execute a written statement under oath to initiate the Big and Little Wood Delivery Calls. The statute states that a claimant *may* make a written statement under oath. Here, Petitioners did not file their letters to initiate delivery call proceedings pursuant to Idaho Code § 42-237b, but rather demanded the Director instruct "the Watermaster for Water District No. 37 to administer Petitioners' surface water rights, and hydrologically connected to ground water rights within the district in accordance with the prior appropriation doctrine." This is not a request for the Director to set the matter for hearing *before a local ground water board*. Instead, the Petitioners' letters initiated the Big and Little Wood Delivery Calls under CM Rule 40 that addresses delivery calls against junior-priority ground water users "in an organized water district." IDAPA 37.03.11.040.01. Accordingly, the specific pleading requirements set forth in Idaho Code § 42-237b do not apply and are not a basis to dismiss the Big and Little Wood Delivery Calls.

#### **Compliance with the CM Rules and Department's Rules of Procedure**

SVC argues the Big and Little Wood Delivery Calls should be dismissed because the Petitioners' letters do not include all information required of a petition set forth in CM Rule 30. *Motion* at 6-11. 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.

SVC also argues the Big and Little Wood Delivery Calls should be dismissed because the Petitioners' letters do not include all information set forth in Rule 230 of the Department's Rules of Procedure. *Motion* at 5-6. Rule 230 lists general requirements of petitions, including that they should "[f]ully state facts upon which they are based" and "[s]tate the name of the person petitioned against (the respondent), if any." IDAPA 37.01.01.230.02 (a) & (d). 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.

With respect to the Big Wood Delivery Call, Petitioners' letter states:

[The Petitioners] are entitled to delivery of water from the Big Wood River below Magic Dam. All the [Petitioners'] surface water rights listed in Exhibit "A" are all located in Water District 37, and are hydrologically connected to ground water rights in the Wood River Valley aquifer system.

...

Due to the failure of the [Department] to administer the subject water rights under the prior appropriation doctrine, the Petitioners have suffered from premature curtailment of delivery of their surface water rights, along with the accompanying material injury. Any future delay in the requested administration will result in further injury. Accordingly, Petitioners hereby demand that you direct the Watermaster for Water District No. 37 to administer Petitioners' surface water rights, and hydrologically connected to ground water rights within the district in accordance with the prior appropriation doctrine.

The Petitioners' letter regarding the Little Wood Delivery Call states:

[The Petitioners] are entitled to delivery of water from the Little Wood River below its confluence with Silver Creek. All the [Petitioners'] surface water rights listed in Exhibit "A" are all located in Water District 37, and are hydrologically connected to ground water rights in the Wood River Valley aquifer system.

...

Due to the failure of the [Department] to administer the subject water rights under the prior appropriation doctrine, the Petitioners have suffered from premature curtailment of delivery of their surface water rights, along with the accompanying material injury. Any future delay in the requested administration will result in further injury. Accordingly, Petitioners hereby demand that you direct the Watermaster for Water District No. 37 to administer Petitioners' surface water rights, and hydrologically connected to ground water rights within the district in accordance with the prior appropriation doctrine.

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.

SVC takes particular issue with the failure of Petitioners' letters to comply with Rule 230's requirement that a petition "[s]tate the name of the person petitioned against (the respondent), if any." SVC asserts this 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." *Motion* at 8.

Even if Rule 230 applied to petitions filed to initiate CM Rule 40 delivery calls, the Department's Rule of Procedure Rule 52 instructs that "this chapter will be liberally construed to secure just, speedy and economical determination of all issues presented to the agency. Unless prohibited by statute, the agency may permit deviation from these rules when it finds that compliance with them is impracticable, unnecessary or not in the public interest." IDAPA 37.01.01.052.

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. Watermasters for water districts, upon appointment by the Director, "shall be responsible for distribution of water within said water district." Idaho Code § 42-605(3). Watermasters make annual reports to the Department including the total amount of water delivered by the watermaster during the preceding year, the amount delivered to each water user, records of stream flow the watermaster used or made in distributing water supplies, and other information requested by the Director "deemed necessary in assuring proper distribution of water supplies within the district." Idaho Code § 42-606. The water rights at issue in the Big and Little Wood Delivery Calls have been defined through partial decrees entered in the Snake River Basin Adjudication. The watermaster is to distribute water according to those decrees. *See* Idaho Code § 42-607. In sum, the watermaster in a water district already possesses the names and water right information of junior-priority ground water users that may be subject to a delivery call by senior users within that district. It is unnecessary for the Director to require a petition for a CM Rule 40 delivery call to list each junior-priority ground water user petitioned against. The Big and Little Wood Delivery Calls will not be dismissed for Petitioners' failure to list in the delivery call letters the name of each junior-priority ground water user petitioned against. 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

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that SVC's Motion to Dismiss is DENIED.

DATED this 22<sup>nd</sup> day of July 2015.

  
GARY SPACKMAN  
Director

**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 SUN VALLEY  
COMPANY'S MOTION TO  
MODIFY/WITHDRAW**

**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 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 March 20, 2015, the Department sent letters to ground water users the Department identified as potentially affected by one or both of the above-described delivery calls. The purpose of the letters was to inform the water users of the delivery calls and notify them of a planned status conference. The letters invited the water users to file a written notice with the Department if they planned to participate in delivery call proceedings. The Department received over 100 notices of intent to participate, including a notice filed by Sun Valley Company ("SVC").

The Department also published general notice of the delivery calls and the status conference in the Idaho Mountain Express and Camas Courier on March 25th, 2015 & April 1st, 2015; and the Times News on March 26th, 2015 & April 2nd, 2015. The Director held a status conference on May 4, 2015.

On May 20, 2015, the Director sent a letter to counsel for Petitioners, requesting additional information about Petitioners' diversion and use of water ("Letter").<sup>1</sup> The Letter requested a response to the information request within thirty days.

On June 3, 2015, the Director held a prehearing conference. At the prehearing conference the participants discussed information in the Department's possession and how it might be disseminated to the parties and participants. The Director stated he would request that staff prepare memoranda regarding how water is delivered to the Petitioners. The Director also stated the staff memoranda would summarize relevant hydrologic and hydrogeologic data and information in the possession of the Department. The Director issued a *Request for Staff Memoranda* ("Request") on June 12, 2015.

On July 1, 2015, SVC filed *Sun Valley Company's Motion to Modify/Withdraw "Request for Staff Memoranda" and May 20, 2015 "Request for Additional Information"* ("Motion to Modify/Withdraw") and the *Affidavit of Counsel in Support of Sun Valley Company's Motion to Modify/Withdraw "Request for Staff Memoranda" and May 20, 2015 Request for Additional Information* ("Affidavit").<sup>2</sup> Joinders in support of the Motion to Modify/Withdraw were filed by attorney James P. Speck on behalf of multiple respondents, and the City of Ketchum and City of Fairfield. Water District 37-B Groundwater Group filed a *Response to Motion to Modify/Withdraw "Request for Staff Memoranda."*<sup>3</sup>

## ANALYSIS

### 1. Staff Memoranda may be Prepared Prior to Hearing

SVC requests the Director withdraw the Request because the Department's Rules of Procedure do not authorize Department staff to prepare staff memoranda in advance of the hearing on the Big and Little Wood Delivery Calls. *Motion to Modify/Withdraw* at 5-8, 13-14. SVC argues "[t]he proper role of the Department staff in this proceeding, if any, is, upon the Director's request, to evaluate the evidence that has been gathered, compiled, organized, and

<sup>1</sup> SVC characterizes the Letter as the "Department's Discovery Requests." *Motion to Modify/Withdraw* at 2. But as SVC previously recognized, the Letter is distinguishable from a discovery request. See *Opposition to Motion for Protective Order* at 2-3 ("As to the contention that there exists substantial overlap between the information requested by the Department and the written discovery propounded by SVC, it bears noting that the evidentiary value of responses to interrogatories is distinguishable from information that is simply supplied to an agency upon request, in light of the fact that responses to interrogatories and requests for admission both must be verified by the party responding.").

<sup>2</sup> Attached to the Affidavit is Exhibit A, "an internally-prepared rough transcript of the June 3, 2015, pre-hearing conference." *Affidavit* at 2. The "rough transcript" contains an incorrect attribution. Page seventeen of the "rough transcript" attributes the statement "Because there's no model" to counsel for the Department. Upon review of the audio of the pre-hearing conference, the speaker is not Department's counsel.

<sup>3</sup> On April 22, 2015, the Water District 37-B Groundwater Group filed a notice of intent to participate only in proceedings related to the Big Wood Delivery Call. On July 15, 2015, counsel Dylan B. Lawrence, of the law firm Varin Wardwell LLC, filed the *Response to Motion to Modify/Withdraw "Request for Staff Memoranda"* on behalf of the Water District 37-B Groundwater Group in both the Big and Little Wood Delivery Calls. The Water District 37-B Groundwater Group did not file a notice of intent to participate in the Little Wood Delivery Call in compliance with the Director's May 13, 2015, *Order Governing Participation*. Therefore, the Director will not consider filings by the Water District 37-B Groundwater Group in Little Wood Delivery Call proceedings.



presented *by the parties at a hearing* and properly admitted, as evidence, into the hearing record by the Director.” *Id.* at 9 (emphasis in original).

SVC ignores the plain language of Rule 602 that states:

Official notice may be taken of any facts that could be judicially noticed in the courts of Idaho and of generally recognized technical or scientific facts within the agency’s specialized knowledge. Parties shall be notified of the specific facts or material noticed and the source of the material noticed, including any agency staff memoranda and data. Notice that official notice will be taken should be provided *either before or during the hearing*, and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed. Parties must be given an opportunity to contest and rebut the facts or material officially noticed. When the presiding officer proposes to notice agency staff memoranda or agency staff reports, *responsible staff employees or agents shall be made available for cross-examination* if any party timely requests their availability.

IDAPA 37.01.01.602 (emphasis added). The plain language of Rule 602 emphasized above expressly authorizes the Director to notify the parties before hearing that official notice will be taken of staff memoranda. In addition, Rule 602’s requirement that staff employees responsible for staff memoranda be available for cross-examination at hearing presupposes staff memoranda may be prepared prior to hearing. Rule 602 clearly authorizes preparation of staff memoranda prior to hearing. The Director will not withdraw the Request.

## **2. The Department may Gather and Disseminate Information Prior to Hearing**

SVC requests the Director withdraw the Letter and “require Department staff to immediately cease any information gathering” from Petitioners because the Department’s Rule of Procedure 600 does “not contemplate the gathering, compilation, or organization of factual information from the parties by Department staff before that information becomes evidence.” *Motion to Modify/Withdraw* at 9-12. In support of this argument, SVC points to Rule 600’s statement that: “The agency’s experience, technical competence and specialized knowledge may be used in *evaluation of evidence*.” IDAPA 37.01.01.600 (emphasis added).

While Rule 600 speaks to the Department’s authority to evaluate *evidence*, nothing in Rule 600 precludes the Department from gathering technical and factual information that *may become evidence* admitted into the record at hearing and disseminating that information to the parties prior to hearing for evaluation and potential rebuttal. The Department’s Rules of Procedure do not preclude its information gathering efforts in the Big and Little Wood Delivery Calls.

SVC argues the Department’s information gathering efforts may cause staff to develop “bias in favor of the information collected from the Petitioners” that may influence “its eventual ‘evaluation of evidence’ in accordance with Rule 600” and “preparation of technical memoranda that may be officially noticed under Rule 602.” *Motion to Modify/Withdraw* at 9-13. SVC asserts it does not have “a full and fair opportunity to observe and pose legitimate evidentiary objections to the information gathered by Department staff, to ensure completeness and

accuracy." *Id.* at 10. SVC asserts "this one-sided evaluative process is highly prejudicial" and "violates [SVC's] due process rights." *Id.* at 13.

Department efforts to collect and disseminate information about the Petitioners' diversion and use of water and hydrologic and hydrogeologic data to the parties for evaluation and potential rebuttal prior to hearing do not prejudice, but rather assist, all the parties.<sup>4</sup> In addition, as SVC recognizes, the Director alone is responsible for admitting evidence at hearing and deciding what weight to give that evidence in his determination of the ultimate issues to be decided in the Big and Little Wood Delivery Calls. *See Motion to Modify/Withdraw* at 11. All parties will have full and fair opportunity to examine and object to any information proposed for admission as evidence into the record at hearing. If the Director notifies the parties that official notice will be taken of staff memoranda, responsible staff employees will be available for cross-examination at hearing. The Director will not withdraw the Letter or instruct Department staff to cease information gathering.

#### ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Motion to Modify/Withdraw is DENIED.

DATED this 22<sup>nd</sup> day of July 2015.

  
GARY SPACKMAN  
Director

<sup>4</sup> If Petitioners submit any information in response to the Letter, the Director will post that information to the websites for the Big and Little Wood Delivery Calls that may be accessed from the following website link: [http://www.idwr.idaho.gov/legal\\_actions/](http://www.idwr.idaho.gov/legal_actions/).

**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 DESIGNATING ACGWS  
ORDER AND SUN VALLEY ORDER  
AS FINAL ORDERS**

**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 ("WUA"). The letters allege that 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 March 20, 2015, the Department sent letters to ground water users the Department identified as potentially affected by one or both of the Big Wood and Little Wood Delivery Calls ("Delivery Calls"). The purpose of the letters was to inform the water users of the Delivery Calls and notify them of a planned status conference. The letters invited the water users to file a written notice with the Department if they planned to participate in delivery call proceedings. The Department received over 100 notices of intent to participate.

**ORDER DESIGNATING ACGWS ORDER AND SUN VALLEY ORDER AS FINAL  
ORDERS - Page 1**

**EXHIBIT C**



The Department also published general notice of the Delivery Calls and the status conference in the Idaho Mountain Express and Camas Courier on March 25th, 2015 & April 1st, 2015; and the Times News on March 26th, 2015 & April 2nd, 2015.

On June 25, 2015, Sun Valley Company ("SVC") filed a *Motion to Dismiss Contested Case Proceedings* ("Sun Valley's Motion") arguing, among other things, the WUA failed to file petitions for delivery calls compliant with the requirements of Idaho Code § 42-237b, the Department's Rules of Procedure, and the CM Rules.

On June 26, 2015, the City of Hailey and City of Bellevue ("Hailey and Bellevue") filed a *Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* ("Cities' Motion") arguing the Department may not administer ground water rights in Water Districts 37 and 37B in response to the Delivery Calls under CM Rule 40 unless and until the Department, through rulemaking, establishes an area of common ground water supply that encompasses the WUA's members' water rights and potentially implicated junior ground water rights.

On July 22, 2015, the Department issued its *Order Denying Sun Valley Company's Motion to Dismiss* ("Sun Valley Order") denying Sun Valley's Motion, and its *Order Denying Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* ("ACGWS Order") denying the Cities' Motion. Neither the Sun Valley Order nor the ACGWS Order contain language or are accompanied by a document containing language indicating they are recommended orders, preliminary orders, or final orders. Thus, under the Department's Rule of Procedure 710, the Sun Valley Order and ACGWS Order are interlocutory orders. *See* IDAPA 37.01.01.710.

On August 18, 2015, Hailey and Bellevue filed a *Petition for Judicial Review of Agency Action* ("Cities' Petition") in Ada County District Court, Case No. CV-OC-1514419, seeking judicial review of the ACGWS Order pursuant to Idaho Code §§ 67-5270 and 67-5271(2) and Rule 84 of the Idaho Rules of Civil Procedure. On August 19, 2015, SVC filed a *Petition for Judicial Review* ("SVC Petition") in Ada County District Court, Case No. CV-OC-1514500, seeking judicial review of the Sun Valley Order pursuant to Idaho Code §§ 67-5270 and 67-5271(2) and Rule 84 of the Idaho Rules of Civil Procedure. The Cities' Petition and the SVC Petition were reassigned to the Snake River Basin Adjudication District Court of the Fifth Judicial District. The Cities' Petition was renumbered to CV-WA-2015-14419. The SVC Petition was renumbered to CV-WA-2015-14500.

On September 17, 2015, Hailey and Bellevue, SVC, the WUA, the City of Ketchum, the City of Fairfield, and the Department entered into a *Stipulation* ("Stipulation"). The signatories agreed Hailey and Bellevue, the City of Ketchum, the City of Fairfield, and SVC (collectively, the "Movants") would file a motion requesting the Director designate the ACGWS Order and the Sun Valley Order "as final orders pursuant to the Department's Rules of Procedure 710 and 750." *Stipulation* at 5.

On September 25, 2015, the Movants filed a *Joint Motion to Designate ACGWS Order and Sun Valley Order as Final Orders* ("Motion to Designate"). The Movants request "the Director designate the Sun Valley Order and the ACGWS Order as final orders and issue separate orders as provided for [in the Stipulation]." *Motion to Designate* at 2.

**ORDER DESIGNATING ACGWS ORDER AND SUN VALLEY ORDER AS FINAL ORDERS - Page 2**

### ANALYSIS

As explained above, neither the Sun Valley Order nor the ACGWS Order contain language or are accompanied by a document containing language indicating they are recommended orders, preliminary orders, or final orders. Thus, under the Department's Rule of Procedure 710, the Sun Valley Order and ACGWS Order are interlocutory orders. *See* IDAPA 37.01.01.710.

Rule 750 of the Department's Rules of Procedure states:

If an order does not designate itself as recommended, preliminary or final at its release, but is designated as recommended, preliminary or final after its release, its effective date for purposes of reconsideration or appeal is the date of the order of designation. If a party believes that an order not designated as a recommended order, preliminary order or final order according to the terms of these rules should be designated as a recommended order, preliminary order or final order, the party may move to designate the order as recommended, preliminary or final, as appropriate.

IDAPA 37.01.01.750.

Consistent with Rule 750, the Movants filed the Motion to Designate. In the Stipulation, the Department agreed that, if no objections were filed to the Motion to Designate, the Director would issue "orders designating the [ACGWS Order] and the [Sun Valley Order] as final orders subject to judicial review consistent with the Department's Rule of Procedure 740." *Stipulation* at 5. The Department received no responsive pleadings to the Motion to Designate. Accordingly, the Director will grant the Motion to Designate.

### ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Motion to Designate is GRANTED. The ACGWS Order and the Sun Valley Order are hereby designated as final orders of the Department subject to judicial review consistent with the Department's Rule of Procedure 740 (IDAPA 37.01.01.740). The effective date of the ACGWS Order and the Sun Valley Order for purposes of reconsideration or appeal is the date of this *Order Designating ACGWS Order and Sun Valley Order as Final Orders. See* IDAPA 37.01.01.750.

DATED this 15<sup>th</sup> day of October 2015.

  
GARY SPACKMAN  
Director

**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 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 25, 2015, Sun Valley Company ("SVC") filed a *Motion to Dismiss Contested Case Proceedings* ("Motion to Dismiss"). SVC argued, among other things, the Big and Little Wood Delivery Calls should be dismissed because the Petitioners' letters do not include all information required of a petition set forth in CM Rule 30. *Motion to Dismiss* at 6-11.

On July 22, 2015, the Director issued an *Order Denying Sun Valley Company's Motion to Dismiss* ("Order"). The Director determined CM Rule 40 is applicable to the Big and Little Wood Delivery Calls, not CM Rule 30. *Order* at 3. The Director also determined the Petitioners' letters meet the specific pleading requirement set forth in CM Rule 40 in that the calling party 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. . . ." IDAPA 37.03.11.040.01." *Id.* at 4.

On August 6, 2015, SVC filed a *Motion for Review of Interlocutory Order* requesting the Director revise the Order to grant the Motion to Dismiss ("Motion to Revise").<sup>1</sup> SVC argues the Director incorrectly concluded "the Department has jurisdiction to conduct these contested case proceedings under CM Rule 40." *Motion to Revise* at 4.

### ANALYSIS

In its Motion to Revise, SVC argues: "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." *Id.* at 8. In other words, SVC argues that CM Rule 20.06 requires the Director first establish an area of common ground water supply and then incorporate the water rights at issue into water districts before proceeding with the Big and Little Wood Delivery Calls pursuant to CM Rule 40.

CM Rule 20.06 does not mandate that the Director designate an area of common ground water supply prior to proceeding with the Big and Little Wood Delivery Calls pursuant to CM Rule 40. 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 and the procedures that will be followed in incorporating the water rights within such areas into existing water districts. . . ." IDAPA 37.03.11.020.07. This statement simply explains the CM Rules "provide the basis" for the designation of an area of common ground water supply. CM Rule 10.01 defines "Area Having a 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 or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights. (Section 42-237a.g., Idaho Code)

IDAPA 37.03.11.010.01. The area of common ground water supply for the Big and Little Wood Delivery Calls is a factual question that can be answered using the framework of CM Rule 40 based upon information presented at hearing and applying the definition set forth in CM Rule 10.01. This is consistent with CM Rule 20.06.

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<sup>1</sup> On August 7, 2015, the City of Ketchum and City of Fairfield filed a *Joinder in and Support of Motion for Review of Interlocutory Order*.

In addition, SVC's suggestion that CM Rule 20.06 prescribes a fixed two-step process for 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. 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).<sup>2</sup> 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.

SVC continues to argue that CM Rule 30 applies to the Big and Little Wood Delivery Calls. *Motion to Revise* at 6. SVC argues the Department's only "vehicle to make a determination of 'an area of common ground water supply'" and to incorporate ground water rights in that area into organized water districts is to follow "the process set forth in the provisions of CM Rule 30.01 through 30.09." *Id.* at 6, 8-10.

CM Rule 30 lays out the administrative process for when a delivery call is made against junior-priority water rights and the water rights are *not* in a water district. When this occurs, a new water district can be created or an existing water district can be modified to allow for administration of the water rights pursuant to the prior appropriation doctrine. In short, CM Rule 30 outlines a pathway to ensure administration can take place if the water rights subject to a delivery call are not currently in a water district. In contrast, CM Rule 40 outlines a pathway for when a delivery call is made against junior-priority water rights that *are already* in a water district. As explained above, current information demonstrates the water rights at issue in the Big and Little Wood Delivery Calls are already in water districts. Therefore, the applicable rule is not CM Rule 30, but rather CM Rule 40 that governs responses to calls for water delivery "in an organized water district." IDAPA 37.03.11.040. As discussed above, the area of common ground water supply for the Big and Little Wood Delivery Calls is a factual question that can be answered in the framework of CM Rule 40 based upon information presented at hearing and applying the definition of area of common ground water supply set forth in CM Rule 10.01.

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<sup>2</sup> 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).

**ORDER**

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

DATED this 16<sup>th</sup> day of October 2015.

  
GARY SPACKMAN  
Director