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, 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

Case No. CV-WA-2015-14500

PETITIONER'S BRIEF

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, VERNOY 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

PETITIONER'S BRIEF

Appeal from the Director of the Idaho Department of Water Resources

Scott L. Campbell, ISB No. 2251
Norman M. Semanko, ISB No. 4761
Matthew J. McGee, ISB No. 7979
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Attorneys for Petitioner

Garrick L. Baxter
Emmi Blades
Deputy Attorneys General
IDAHO DEPARTMENT OF WATER RESOURCES
Post Office Box 83720
Boise, Idaho 83720-0098
Attorneys for Respondents

It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of laws not of men . . . . It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice.

Anti-Fascist Committee v. McGrath, 341 U.S. 123, 177, 179 (1951) (Douglas, J. concurring).

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Pages

Cases

Statutes

Other Authorities

I. STATEMENT OF THE CASE

A. Nature Of The Case

In two short letters, scores of members of the Big Wood and Little Wood Water Users Association (the "Petitioners" or the "Association") requested administration of their water rights by the Idaho Department of Water Resources' Director (the "Director"). This appeal seeks to enforce the plain language of the Rules of Procedure of the Idaho Department of Water Resources ("Procedural Rules") and the Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"). The Director acted in excess of his authority by exercising jurisdiction and commencing contested case proceedings without requiring the Petitioners to comply with these rules, thereby prejudging decisions on fundamental substantive issues such as the "area having a common ground water supply" and violating Sun Valley Company's ("Sun Valley") constitutional and statutory rights. It was clear error to deny Sun Valley's Motion to Dismiss addressing these violations. Further, the Director erred by requesting Department staff to collect information and prepare memoranda to meet the Petitioners' pleading burdens, and thereafter relying upon such memoranda as evidence to make substantive determinations and to uphold denial of Sun Valley's Motion. Consequently, this Court should set aside the Director's Order Denying Sun Valley Company's Motion to Dismiss, and remand the contested cases to the Director for dismissal.

B. Course Of Proceedings

On February 24, 2015, Joseph James, the Association's counsel, sent the Director two letters requesting the Director to administer the Association's water rights in accordance with the prior appropriation doctrine (the "Letters"). BW-R. Vol. I, pp. 1-5; LW-R. Vol. I, pp. 1-5.[1] The Director responded in a March 6, 2015 letter, treating the Letters as two consolidated[2] water delivery calls under the CM Rules. BW-R. Vol. I, p. 6; LW-R. Vol. I, p. 6. Based upon the Association's Letters to the Director, he commenced two contested case proceedings, identified as Contested Case No. CM-DC-2015-001 and Case No. CM-DC-2015-002. He also identified potential respondents and interested parties, and provided notice to them. R. Vol. I, pp. 12-20.

On March 12, 2015, the Association filed a First Amended Request for Administration of Water Rights for each contested case. BW-R. Vol. I, pp. 7-11; LW-R. Vol. I, pp. 7-11. In addition, on May 11, 2015, the Association filed a Second Amended Request for Administration of Water Rights for each contested case. BW-R. Vol. I, pp. 154-59; LW-R. Vol. I, pp. 153-58.

---

[1] There are two agency records involved in this appeal, one for each contested case proceeding. For the record on appeal in the Big Wood Delivery Call, this brief will designate the citation with "BW" and for the record on appeal in the Little Wood Delivery Call, this brief will designate the citation with "LW." To the extent this brief cites only one record, the citation is to the Big Wood Delivery Call record on appeal and cites a document identical to the companion document found in the Little Wood Delivery Call record on appeal.

[2] Sun Valley and the Sun Valley Water and Sewer District challenged the Director's decision to consolidate these matters in a Joint Motion to Determine Consolidated Case Status, still pending and undecided by the Director. R. Vol. V, pp. 910-28. There are 80 water rights and 39 entities/persons owning the rights, as asserted by the Association. R. Vol. I, p. 124.

On June 25, 2015, Sun Valley filed a Motion to Dismiss Contested Case Proceedings, challenging the Association's water delivery calls and the Director's exercise of jurisdiction. R. Vol. II, pp. 382-402. On July 1, 2015, Sun Valley filed a Motion to Modify/Withdraw "Request for Staff Memoranda" and May 20, 2015 "Request for Additional Information" (the "Staff Memo Motion"). R. Vol. III-IV, pp. 616-48. On July 22, 2015, the Director issued the Order Denying Sun Valley Company's Motion to Dismiss (the "Sun Valley Order"), ruling that the Association's "petitions"[3] were sufficient to commence water delivery calls and that the Director had proper jurisdiction under CM Rule 40. R. Vol. V, pp. 888-98. On the same day, the Director also issued the Order Denying Sun Valley Company's Motion to Modify/Withdraw (the "Staff Memo Order"). R. Vol. V, pp. 899-908.

On August 6, 2015, Sun Valley filed a Motion for Review of Interlocutory Order (the "Rule 711 Motion"), asking the Director to review and revise the Sun Valley Order declining to dismiss the contested case. R. Vol. V, pp. 963-77. On August 19, 2015, Sun Valley filed a Petition for Judicial Review of the Sun Valley Order. R. Vol. V, pp. 1039-62.

Subsequent to the filing of its Petition for Judicial Review, Sun Valley entered into a Stipulation with the Department, the Association, and other junior water users, agreeing that the Order Denying Sun Valley's Motion to Dismiss would be deemed a final order. On

[3] Any references to "petition" or "Petitioners" by the Department are incorrect. The "Petitioners" have not completed the Department's mandatory pleading requirements. They are not properly called "Petitioners." Likewise, their Letters are not valid "petitions." Notwithstanding, Sun Valley will use these terms herein, because they are routinely used in the Record.

September 17, 2015, Sun Valley filed with the Department its Joint Motion for Stay of Delivery Calls pending judicial review. Supp. R. Vol. I, pp. 1-5. Then, on September 25, 2015, Sun Valley filed a Joint Motion to Designate ACGWS Order and Sun Valley Order as Final Orders with the Department. Supp. R. Vol. I, pp. 9-13. On October 15, 2015, the Department granted the Joint Motion for Stay and the Joint Motion to Designate ACGWS Order and Sun Valley Order as Final Orders. Supp. R. Vol. I, pp. 71-79.

In addition, on October 16, 2015, the Director issued the Order Denying Motion to Revise Interlocutory Order (the "Rule 711 Order"). Supp. R. Vol. I, pp. 84-88. Relying in part upon the staff memoranda previously requested by the Director and objected to by Sun Valley, the Rule 711 Order upheld the decision of the Sun Valley Order declining to dismiss the contested case proceedings. Supp. R. Vol. I, pp. 86-87. Therefore, this appeal of the Sun Valley Order is properly before this Court.

II. STATEMENT OF FACTS

Sun Valley owns Water Right Nos. 37-7170, 37-7340, and 37-8575A, each of which is implicated by the Association's water delivery calls. Water Right No. 37-7170 has a priority date of October 31, 1972, and authorizes diversion and use of 2.00 cubic feet per second ("cfs") for commercial use for snow-making purposes from November 1 through April 10 each year. Order of Partial Decrees, SRBA Case No. 39576, at 3 (Idaho Apr. 10, 2010). Water Right No. 37-7340 has a priority date of February 8, 1974, and authorizes diversion and use of 0.23 cfs for commercial use for snow-making purposes from November 1 through April 10 each year. *Id.* at 4. Water Right No. 37-8575A is a licensed groundwater right which has a priority date of

October 26, 1989, and authorizes diversion and use of 4.46 cfs for commercial use for snow-making purposes from October 15 through April 1 each year. Idaho Water Right License No. 37-08575A (Feb. 14, 2013). Sun Valley's water rights are within the geographic boundaries of Water District 37. R. Vol. III, p. 126. However, Sun Valley's water rights are not within the geographic boundaries of any "area having a common ground water supply," designated as such in accordance with Idaho Code Section 42-237a(g) and the CM Rules. R. Vol. III, pp. 126, 466, 479, 562.

On February 24, 2015, Joseph James, the Association's counsel, sent the Letters to the Director, requesting administration of the Association's water rights. BW-R. Vol. I, pp. 1-5; LW-R. Vol. I, pp. 1-5. Mr. James claimed that "[d]ue to the failure of the Idaho Department of Water Resources 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." *Id.* at 3. The Letters did not identify any junior ground water users as respondents, nor did the Association serve the Letters on any of those water users. *Id.*

After the Director deemed the Letters to be two water delivery calls[4] and initiated two contested case proceedings, on March 20, 2015, the Department notified by letter all those identified as "a holder of a junior-priority ground water right or rights that may be affected by

[4] Sun Valley uses the term "delivery calls," because the Department designated them so. Sun Valley does not concede the contested case proceedings are valid water delivery calls for the reasons presented herein.

one or both of the above-described delivery calls." R. Vol. I, p. 12. Although the Association Letters failed to identify any water users potentially affected, the Department generated a list of respondents, determining who to notify of the Association's delivery calls. R. Vol. I, pp. 13-20. The Department's notice invited recipients to participate in the contested case proceedings related to the purported delivery calls and notified them of a status conference to be held on May 4, 2015. R. Vol. I, p. 12. The notice letter stated that if the party receiving the notice did not participate, it may still be legally bound by the results of the contested case proceedings. *Id.*

The Department hosted a status conference to discuss the contested case proceedings in Shoshone, Idaho, on May 4, 2015. R. Vol. I, pp. 25-26. Subsequently, on May 13, 2015, in response to Sun Valley's Motion, the Director authorized discovery. R. Vol. I, pp. 160-66.

Notwithstanding the Director's authorization to the parties to conduct discovery, on May 20, 2015, the Director executed the Department's Requests for Additional Information (the "Information Requests") and stated, in the cover letter to Joseph James:

> I stated at the conference that the Department would submit a letter to you seeking additional information about the Association members' diversion and use of water. Consistent with that statement, I respectfully submit the Information Request attached to this letter. Your responses and submittal of additional information will assist me in determining whether the holders of senior water rights are suffering material injury and using water efficiently and without waste as required by the Department's Conjunctive Management Rules.

R. Vol. II, p. 179.

Then, the Department's Information Requests stated:

> Pursuant to Rule 42 of the Department's Rules for Conjunctive Management of Surface Water and Ground Water Resources ("CM Rules"), when a delivery call is made, the Director must determine whether the holders of senior water rights are suffering material injury and using water efficiently and without waste. The Department is collecting information related to the senior surface water rights in these two delivery call proceedings to aid in that determination.

R. Vol. II, p. 180.

The Department's Information Requests presented sixteen (16) separate questions, many with subparts, asking for all of the information the Department deemed relevant to the Director's anticipated future determination of "whether the holders of senior water rights are suffering material injury and using water efficiently and without waste." R. Vol. II, p. 180.

The Department then held a pre-hearing conference on June 3, 2015. *Id.* At the pre-hearing conference, the Director indicated that he intended to request the preparation of two technical staff memoranda (the "Technical Memoranda"). R. Vol. IV, p. 643; Tr. Vol. I, pp. 13-14; 16-17]. At that time, several parties, including Sun Valley, expressed concern over the scope of the Technical Memoranda, and the process by which information might be gathered and evaluated by Department staff during the preparation of such memoranda. R. Vol. IV, pp. 643-45; Tr. Vol. I, p. 14, L. 20 – p. 15, L. 11 (articulating concern about segregation between Department staff and hearing officer); p. 17, L. 21 – p. 19, L. 12 (noting departure from *Rangen* delivery call, the very early request for Department staff evaluation, and trying to determine how much of the Petitioners' work Department staff will do); p. 24, L. 18 – p. 25, L. 12 (objecting to analysis or evaluation regarding conclusions related to interconnection, injury, shortages, etc.

and noting those are issues to be addressed by the parties in discovery); p. 33, LL. 2-13 (suggesting that Department staff not analyze information solely produced by the Petitioners, and that junior water right holders have the opportunity to present information for staff's consideration as well); p. 38, L. 23 – p. 39, L. 13 (objecting to Department staff engaging in site visits and interacting with Petitioners to accomplish staff reports without granting Respondents notice and the opportunity to participate); p. 42, LL. 4-13 (suggesting junior water users and their experts be provided notice and the opportunity to participate in site visits and meetings between Petitioners and Department staff).

In a letter dated June 11, 2015, the Director requested the participants reserve January 11-22, 2016, for a hearing in the contested cases. R. Vol. II, pp. 316-23.

On June 12, 2015, the Director formally requested staff memoranda from Tim Luke, Bureau Chief of Water Compliance Bureau, and Sean Vincent, Manager of the Hydrology Section (the "Request for Staff Memoranda"). R. Vol. II, pp. 334-44. The Request for Staff Memoranda sought (1) a memorandum concerning surface water delivery systems, and (2) a memorandum concerning hydrology, hydrogeology and hydrologic data, to address, among other things, a conceptual description of the interaction between ground water and surface water in various drainages. R. Vol. II, pp. 336-37. The Director stated:

> The following is a request for staff memoranda pursuant to Rule 602 of the Idaho Department of Water Resources' ("Department") Rules of Procedure (IDAPA 37.01.01).
>
> Rule 600 of the Rules of Procedure authorizes the presiding officer to use the Department's "experience, technical competence and

specialized knowledge" in the evaluation of evidence in a contested case proceeding.

Rule 602 of the Rules of Procedure allows the presiding officer to take official notice of technical or scientific facts within the Department's specialized knowledge, including agency staff memoranda and data, in a contested case proceeding.

R. Vol. II, p. 334.

The Request for Staff Memoranda further specifies as follows:

THEREFORE, to assist the Director and the participants involved in this contested case proceeding, the Director requests that Department staff review data and information in the possession of the Department, and prepare staff memoranda regarding the above captioned matter, which could include, without limitation:

Surface Water Delivery Systems

1. A description of all sources of water supply for beneficial use on lands identified as a place of use for water rights that a calling party alleges are being injured by junior ground water diversions. The description of the sources of water supply should identify and link water rights authorizing beneficial use of water to the lands, if possible. The description should also include any water right information that references the use of Snake River water on lands that are identified as a place of use by senior surface water rights that are the basis for the delivery call.

2. A description of the overall delivery systems for water diverted from the Big and Little Wood Rivers and delivered to the holders of the senior surface water rights. This description should include information such as canal headings, points of injection back into natural stream channels, points of re-diversion, commingling of water from various sources, and how the watermaster accounts for the water delivered into the larger delivery system and how he accounts for delivery to the senior surface water right holders.

3. Information about each calling party's physical delivery and water application works, including: (a) diversion

works, including headgates, and control/check structures or valves; (b) measuring and recording device(s); (c) water conveyance systems such as canals, pipes, pumps, lift stations; (d) method of water application or use (for example sprinkler/flood irrigation); (e) wasteways; and (f) any other relevant information.

4. A description of available water delivery records within the Big Wood River and Little Wood River basins.

Hydrology, Hydrogeology, and Hydrologic Data

1. Any hydrologic or hydrogeologic data or publications collected by or available to the Department that may assist the Director in understanding surface and ground water interactions in the Big and Little Wood River basins.

2. A conceptual description of the interaction between ground water and surface water in the Camas Creek drainage, the Big Wood River drainage, the Silver Creek drainage, the Little Wood River drainage, and any other hydrologic units that may be hydraulically connected to the ground water and surface water in the larger Big Wood River and Little Wood River basins.

3. Identification of diversion records for junior ground water pumping available to the Department.

4. Identification of methods and data available for analyzing consumptive use associated with junior ground water pumping.

5. Identification of any hydrologic or hydrogeologic methods or modeling tools that may be employed in analyzing the impacts of junior ground water pumping on calling senior-priority surface water right holders.

R. Vol. II, pp. 335-37.

The Director then stated:

Any such staff memoranda shall be submitted to the presiding officer on or before August 21, 2015, and also served upon the parties to this matter. The Director will require attendance of staff

> participating in writing staff memoranda for examination at any hearing set in this matter pursuant to IDAPA 37.01.01.201 and 602.

R. Vol. II, p. 337.

On June 25, 2015, Sun Valley filed a Motion to Dismiss Contested Case Proceedings, asserting its due process rights and contesting the procedural deficiencies of the initiation of the delivery call contested case proceedings. R. Vol. II, pp. 382-402. Sun Valley specifically argued that the Association failed to file compliant petitions under Idaho law, the Procedural Rules, and the CM Rules. Consequently, the Director did not have jurisdiction to proceed with the contested case proceedings. *Id.* at 383-84. Sun Valley argued that the Department must comply with its own rules and that the Association has burdens and obligations, imposed upon them by those rules, that must be met before it is entitled to invoke the Department's regulatory powers. *Id.* at 392. Sun Valley specifically cited CM Rule 30 and Procedural Rule 230 as the source of procedures to commence a delivery call and contested case proceeding. *Id.* at 387.

On June 26, 2015, the City of Hailey ("Hailey") and the City of Bellevue ("Bellevue") filed a Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls. R. Vol. III, pp. 403-11.

On July 1, 2015, Sun Valley filed the Staff Memo Motion, challenging the propriety of development, gathering, compilation, and evaluation of potentially relevant information by Department staff in the Technical Memoranda before the information is presented to the Director as "evidence" in the contested case proceedings at issue. R. Vol. III-IV, pp. 616-

48. The motion raised the violation of procedural due process that would necessarily occur should the Company not be afforded notice and the opportunity to participate in this process if the Director intended to officially notice or otherwise rely upon the Technical Memoranda. *Id.*

On July 22, 2015, the Director denied Sun Valley's Motion to Dismiss and the Cities' Joint Motion. R. Vol. V, pp. 859-69, 888-98. In the Order Denying Sun Valley's Motion to Dismiss, the Director ruled that CM Rule 40 controlled and that the Association's petitions met the procedural requirements of CM Rule 40. R. Vol. V, pp. 890-91. The Director ruled that CM Rule 30 was "irrelevant" as to the Association's water delivery calls, because the junior-priority ground water rights implicated were within areas of the state in an organized water district. *Id.* at 892. In addition, the Director ruled that Procedural Rule 230 did not apply, because CM Rule 40 is more specific and, therefore, supersedes the procedure of Rule 230. *Id.*

In the Order Denying Hailey and Bellevue's Joint Motion, the Director similarly ruled that CM Rule 40 applied and provided the procedural framework for the water delivery calls. R. Vol. V, p. 860. However, despite the Director's disregard for CM Rule 30 in his Order Denying Sun Valley's Motion to Dismiss, he notably indicated the propriety of using procedures from CM Rule 30 to determine an area of common ground water supply. *Id.* at 861.

Thereafter, on August 6, 2015, Sun Valley filed the Rule 711 Motion. R. Vol. V, pp. 963-77. On August 19, 2015, Sun Valley filed the above-captioned appeal to district court. R. Vol. V, pp. 1039-62.

Between May 26, 2015 and August 31, 2015, Department staff conducted site views on Petitioners' properties, spoke with Petitioners, and collected, compiled and evaluated

the facts and information requested by the Director in the Request for Staff Memoranda. R. Vol. VI-VII, pp. 1080-1342. 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. R. Vol. VI, pp. 1080-1104. On August 31, 2015, Tim Luke submitted a memorandum, including two Appendices, to the Director regarding the Department's investigation of surface water delivery system for the Association's water rights. R. Vol. VI-VII, pp. 1105-1342.

On October 16, 2015, the Director issued the Rule 711 Order. Supp. R. Vol. I, pp. 84-88. The Director, carefully avoiding use of the term "evidence" or "official notice" to cite the Technical Memoranda he relied upon, 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).

Supp. R. Vol. I, p. 86.

A footnote in the Order also states the following findings 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).

Id.

On October 28, 2015, the Director filed a Motion to Augment Agency Record with, among other things, the Rule 711 Order. Sun Valley timely objected to augmentation of the record with the Rule 711 Order. Sun Valley noted that, among other issues, the augmentation expanded the scope of issues on appeal by buttressing denial of Sun Valley's Motion to Dismiss with findings of fact based upon the Technical Memoranda, which Technical Memoranda were neither evidence presented at a public hearing, nor the proper subject of official notice in accordance with the Idaho Administrative Procedure Act and the Department's Procedural Rules. Accordingly, Sun Valley requested that in the event the Court granted the Department's Motion to Augment the Record, it be afforded the opportunity to file a Second Amended Petition for Judicial Review.

On November 16, 2015, the Court granted the Department's Motion to Augment the Record, and also granted Sun Valley's request to file a Second Amended Petition. On December 3, 2015, Sun Valley filed a Second Amended Petition for Judicial Review. The Second Amended Petition for Judicial Review addresses the broadened scope and nature of the instant appeal that results from inclusion of the Rule 711 Order in the agency record, and specifically, the Director's reliance upon the Technical Memoranda therein.

III. ISSUES PRESENTED

1. Whether the Director may exercise authority and jurisdiction over contested case proceedings without requiring a petitioner to meet the minimum pleading requirements, as defined in the Department's CM Rules and Procedural Rules, without violating Sun Valley's due process rights.

2. Whether CM Rule 30 applies to water delivery calls within "areas having a common ground water supply" that have not been determined by the Director and incorporated into an existing or new water district.

3. Whether the Department's factual investigation and evaluation of facts relevant to substantive issues in these contested case proceedings prior to a hearing, and without providing notice and an opportunity to participate to the parties, violated the Department's Procedural Rules, the Idaho Administrative Procedure Act, and Sun Valley's due process rights.

4. Whether the Director erred by making findings of fact related to substantive issues in these contested case proceedings without substantial and competent evidence in the record.

5. Whether Sun Valley is entitled to attorney fees on appeal.

IV. STANDARD OF REVIEW

A party "aggrieved by a final order in a contested case decided by an agency may file a petition for judicial review in the district court." *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 835, 70 P.3d 669, 673 (2003); IDAHO CODE § 67-5270(2). An agency's findings, inferences, conclusions, or decisions must be overturned if they 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." IDAHO CODE § 67-5279(3). The Court must also find that, as a result of the error, "substantial rights of the appellant have been prejudiced." IDAHO CODE § 67-5279(4). The Court's review of the issues of fact must be

confined to the record. *Chisolm v. Idaho Dep't of Water Res.*, 142 Idaho 159, 162, 125 P.3d 515, 518 (2005). The interpretation and application of statutory law and administrative rules or regulations, however, present purely legal issues over which the Court exercises free review. *Schroeder v. Idaho Dep't of Transp.*, 147 Idaho 476, 479, 210 P.3d 584, 587 (Ct. App. 2009). "If the agency's action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." IDAHO CODE § 67-5279(3).

V. ARGUMENT

As far as Sun Valley is aware, this case is the first water delivery call pursued under the CM Rules involving junior-priority ground water rights falling outside the geographic boundaries of the already determined "area having a common ground water supply" known as the ESPA—the Eastern Snake Plane Aquifer. *See* IDAPA 37.03.11.050. In a rush to proceed with administration based solely upon the Letters, the Director has proceeded as he might in a delivery call proceeding involving junior-priority users within the ESPA, ignoring the Petitioners' pleading obligations and clearly defined constraints upon his regulatory authority and jurisdiction, as well as the due process rights afforded to all parties, including Sun Valley, by Idaho law and the Department's own administrative rules. For the reasons that follow, the Court must reverse the decisions made by Director in violation of Idaho law, and remand the contested case proceedings to the Director for dismissal of the same.

A. The Director's Authority Is Limited, And He Must Abide By Idaho Law And The Department's Administrative Rules In The Exercise Of Jurisdiction

The Department, as an administrative agency, has no authority other than that given to it by the Legislature. *See Wash. Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho

875, 879, 591 P.2d 122, 126 (1979). "Administrative agencies are 'creature[s] of statute' and, therefore, are 'limited to the power and authority granted [them] by the Legislature.'" *Henderson v. Eclipse Traffic Control*, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009) (quoting *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996)). An administrative agency "exercises limited jurisdiction, and nothing is presumed in favor of its jurisdiction." *Id.*; *see also United States v. Utah Power & Light Co.*, 98 Idaho 665, 570 P.2d 1353 (1977). As a tribunal of limited jurisdiction, an agency's jurisdiction is "dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves. . . ." *Wash. Water Power Co.*, 99 Idaho at 879, 591 P.2d 126. If the provisions of governing rules or statutes are not met and complied with, no jurisdiction exists. *Id.* (citing *Arrow Transp. Co. v. Idaho Pub. Util. Comm'n*, 85 Idaho 307, 379 P.2d 422 (1963)). Acts taken and orders entered by an agency without statutory authority or jurisdiction are void and must be set aside. *See Arrow Transp. Co.*, 85 Idaho at 314-15, 379 P.2d at 426-27; *A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505, 284 P.3d 225, 230 (2012).

The Director's authority is granted and defined in Title 42 of the Idaho Code, the Idaho Administrative Procedure Act, Idaho Code Section 67-5201, *et seq.* (the "Act"), and the administrative rules promulgated in accordance therewith. However, these grants of power also properly limit jurisdiction and authority in order to comport with due process standards to protect the rights and interests of citizens. In response to a due process challenge relating to the impact of the Department's administration of an appellant's "constitutional use" water right, the Idaho Supreme Court upheld the Department's actions and recognized that "[t]he requirement of

procedural due process is satisfied by the statutory scheme of Title 42 of the Idaho Code." *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977).

To that end, all Department proceedings and hearings must be conducted in accordance with the Idaho Administrative Procedure Act. IDAHO CODE § 42-1701A. Compliance with Title 42, the Idaho Administrative Procedure Act, and the rules promulgated thereunder ensure that appropriate procedural protections are afforded to the property interests of all water right owners. The Director has specific responsibility "[t]o promulgate, adopt, modify, repeal and ***enforce*** rules implementing or effectuating the powers and duties of the department." IDAHO CODE § 42-1805(8) (emphasis added); *see also* IDAHO CODE § 42-603. The applicable rules in this appeal are the Procedural Rules and the CM Rules.

Any legally valid exercise of the Director's authority must comply with the Department's rules. Similarly, the Director must demand compliance by those seeking to invoke his jurisdiction and power. In the *Rangen* water delivery call proceeding, for example, the district court recently made very clear that it expected compliance with the plain, unambiguous mandates set forth in the CM Rules. *See Rangen, Inc. v. Idaho Dep't of Water Res.*, Twin Falls Case No. CV 2014-2446, Memorandum Decision and Order on Petition for Judicial Review at 7 (Dec. 3, 2014) (finding that while the Director has discretion to approve a mitigation plan, he must also follow clearly expressed mandates related thereto as set forth in the Conjunctive Management Rules).

The applicable rules in this dispute are likewise mandatory. *See* IDAPA 37.03.11.030.01 ("the petitioner ***shall*** file with the Director a petition in writing containing . . .");

IDAPA 37.01.01.001.02 ("the rules of procedure which ***shall*** govern contested case proceedings . . ."); IDAHO CODE § 42-237b ("Such statement ***shall*** include . . .") (emphasis added). *See also* IDAHO CODE § 67-5206(2), (4), & (5). The Petitioners must comply with these mandates. *See, e.g., Mallonee v. State*, 139 Idaho 615, 619, 84 P.3d 551, 555 (2004) ("A rule or regulation of a public administrative body ordinarily has the same force and effect of law and is an integral part of the statute under which it is made just as though it were prescribed in terms therein. The same principles of construction that apply to statutes apply to rules and regulations promulgated by an administrative body."). The plain language of the rules at issue require compliance, and the Department cannot legally act to satisfy those mandates for Petitioners, or invoke its governmental powers at the Petitioners' request without that compliance.

The Petitioners have burdens and obligations, imposed upon them by Idaho law and the Department's rules, that they must satisfy, before they are entitled to the benefit of the Director's regulatory powers. *A&B Irrigation Dist. v. Spackman*, 155 Idaho 640, 652-53, 315 P.3d 828, 840-41 (2013). Any result that does not require the Petitioners to bear these burdens and obligations impermissibly shifts them to Sun Valley.

Valuable property rights are at issue. "When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law. . . ." *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). Procedural due process is afforded to all parties subject to the Department's jurisdiction by virtue of compliance with Title 42 of Idaho Code and the Act. *See Nettleton, supra.* Under the Act, the Department has promulgated, and the Legislature has

reviewed, the Procedural Rules and the CM Rules that supplement and implement the statutory requirements for the initiation and administration of a contested case related to the administration of ground water rights, pursuant to Title 42 of Idaho Code, particularly Idaho Code Section 42-237a(g). *See also* IDAHO CODE §§ 67-5224; 67-5291. Just as a court has no jurisdiction to consider litigation absent compliance with the pleading and commencement procedures of the Idaho Rules of Civil Procedure,[5] the Department likewise has no authority or jurisdiction to proceed, absent compliance with the clearly articulated commencement procedures of the Procedural Rules and the CM Rules. Such action would be, and in this case is, *ultra vires*, and contravenes Sun Valley's due process rights and the procedures the Legislature and the Department have deemed mandatory. *See Henderson v. Eclipse Traffic Control*, 147 Idaho at 634-35, 213 P.3d at 724-25; *Arrow Transp. Co.*, 85 Idaho at 314-15, 379 P.2d at 426-27.

The Director failed to comply with and enforce the statutes and rules granting and defining his authority. That is the source of this appeal. To be clear, Sun Valley does not argue that the Director has no authority to hear and administer water delivery calls. This authority has not been granted, however, so broadly that the Director, and parties seeking to invoke his power, can simply ignore procedural mechanisms adopted by the Legislature and the Department to ensure the Director's exercise of power complies with constitutional mandates.

---

[5] A civil litigant does not, for example, initiate litigation and invoke the powers of the judiciary by sending a letter to a judge. In conformance with due process of law, a litigant must file a complaint, petition or application with the court, which pleading designates and appropriately identifies a defendant or respondent, then the litigant must serve such defendant or respondent with a pleading that conforms to certain minimum requirements in accordance with well-established rules of procedure. *See, e.g.*, I.R.C.P. 3, 4.

Based solely upon the Association's Letters to the Director, he commenced two contested case proceedings, identified potential respondents and interested parties, provided notice to those respondents and interested parties, provided notice of default to non-responsive parties, held a status conference, held a pre-hearing conference, requested technical memoranda from Department staff, scheduled dates for a hearing, conducted site visits, and directed preparation of technical memoranda in these contested case proceedings.

All of this, yet the Petitioners failed to file petitions that complied with CM Rule 30.01. The Petitioners did not make written statements under oath pursuant to Idaho Code Section 42-237b. They did not even comply with the minimum requirements of the Department's general Procedural Rules.

The Petitioners and the Director must follow the statutes and rules that define the Legislature's grant of authority to the Director. The Director has no power to exercise jurisdiction, then enter orders and rulings in a contested case proceeding under Idaho law, without demanding Petitioners' compliance with the Department's own procedural rules. The undisputed facts, and the plain, unambiguous language of the governing rules and statutes, demonstrate that the Director acted without authority. Accordingly, the actions have no legal effect. *See A&B Irrigation Dist.*, 153 Idaho at 505, 284 P.3d at 230 (citing IDAHO CODE § 67-5279(3)). The contested case proceedings must be dismissed.

B. The Director Erred By Exercising Jurisdiction And Commencing Contested Case Proceedings Without Requiring Petitioners To Comply With CM Rule 30.01 And The Department's Procedural Rules

1. The Petitioners Failed To Comply With CM Rule 30.01

There is no dispute that the Letters, and the "amended petitions" that followed, do not comply with CM Rule 30.01 and the Department's Procedural Rules. CM Rule 30.01 provides as follows:

> When a delivery call is made by the holder of a surface or ground water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) the petitioner is suffering material injury, the petitioner shall file with the Director a petition in writing containing, at least, the following in addition to the information required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 230.
>
> a. A description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water.
>
> b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of public records.
>
> c. All information, measurements, data or study results available to the petitioner to support the claim of material injury.
>
> d. A description of the area having a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated.

IDAPA 37.03.11.030.01.

Rule 230 of the Department's Procedural Rules, referenced in CM Rule 30.01, provides that petitions must "[f]ully state the facts upon which they are based," "[r]efer to the statute, rule, order or other controlling law upon which they are based," state the requested relief, and "[s]tate the name of the person petitioned against (the respondent), if any." IDAPA 37.01.01.230.02.

In this case, the Petitioners provided a listing identifying themselves and their respective senior water rights, in addition to a broad, unspecific, narrative description of water shortage and a conclusory statement alleging material injury. BW-R. Vol. I, pp. 1-5; LW-R. Vol. I, pp. 1-5. CM Rule 30.01 and Procedural Rule 230 require more, and because the Petitioners failed to comply, the contested cases must be dismissed.

a. The Petitioners Failed To Describe The Diversion And Delivery Systems

The CM Rules require "[a] description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water." IDAPA 37.03.11.030.01(a). The Association members failed to comply. *See* BW-R. Vol. I, pp. 1-5; LW-R. Vol. I, pp. 1-5 (the Letters); BW-R. Vol. I, pp. 7-11; LW-R. Vol. I, pp. 7-11 (the First Amended Request for Administration of Water Rights); BW-R. Vol. I, pp. 154-59; LW-R. Vol. I, pp. 153-58 (the Second Amended Request for Administration of Water Rights). Although they identified the water right number and the beneficial use being made of the water, they did not identify and describe the "water diversion and delivery system

being used" by each Petitioner. The petitions are incomplete. Therefore, the Department lacked jurisdiction to initiate and proceed with the contested cases.

b. The Petitioners Failed To Identify Respondents

The CM Rules require "[t]he names, addresses and description of the water rights of the ground water users ("Respondents") who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of public records." IDAPA 37.03.11.030.01(b). The Department's Procedural Rules are also in accord, requiring a petitioner to "[s]tate the name of the person petitioned against (the respondent), if any." IDAPA 37.01.01.230.02(d). The Petitioners failed to comply with these requirements. *See* BW-R. Vol. I, pp. 1-5; LW-R. Vol. I, pp. 1-5; BW-R. Vol. I, pp. 7-11; LW-R. Vol. I, pp. 7-11; BW-R. Vol. I, pp. 154-59; LW-R. Vol. I, pp. 153-58. The Petitioners simply demanded administration of "hydrologically connected" ground water rights within Water District No. 37. *See* BW-R. Vol. I, p. 3; LW-R. Vol. I, p. 3. The Petitioners did not evaluate which ground water users might be causing material injury, and to which Petitioner. Public records identify all owners of ground water rights in the Big Wood River Valley. *See* IDAHO CODE § 74-101, *et seq.* To that end, the Department has very sophisticated water right research and mapping capabilities the general public may use on its public website. *See* www.idwr.idaho.gov. Respondents could "be reasonably determined by a search of public records," yet Petitioners failed to do so. Rather, the Petitioners shifted to the Director the burdens of identifying and providing notice to the respondents he identified,

effectively asking the Director to draw prejudicial conclusions about potential causation and hydrological connection.

Sun Valley still does not know if any single Petitioner, or all Petitioners, are actually alleging that Sun Valley is causing material injury to any of their respective water rights. Yet, Sun Valley has been compelled to participate in these proceedings, because of conclusions drawn by the Department, rather than allegations made by the Petitioners. Sun Valley does not know if it is actually a Respondent in ***all*** of the ***Petitioners'*** respective delivery calls, or in any ***single*** delivery call, or if Sun Valley was merely identified as a potentially interested party by the Department. A ground water user is entitled to know ***why*** Petitioners seek to curtail its ground water use. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 877, 154 P.3d 433, 448 (2007); IDAHO CODE § 42-237b. If that is the case, it is a logical conclusion that a ground water user is entitled to know that Petitioners actually do seek to curtail its ground water use in the first place. It is axiomatic that Respondents, should the Petitioners eventually identify any, are adverse to the Petitioners in these proceedings, not the Director. Respondents should not be forced to be adverse to the Department or the Director, yet by virtue of (i) the Petitioners' failure to abide by the pertinent rules, and (ii) the Department's decision to identify Respondents on the Petitioners' behalf, the Petitioners have created this adverse posture. This circumstance improperly compromises the Director's status as a neutral, objective adjudicator and clouds the validity of any final decision under IDAPA and constitutional standards.

Respondents bear difficult evidentiary burdens with respect to material injury. *See A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho at 524, 284 P.3d at 249. If the

Petitioners intend to prosecute delivery calls alleging Sun Valley water use causes them injury, consistent with fundamental concepts of due process and CM Rule 30.01, the Petitioners must identify Sun Valley as a respondent and describe Sun Valley's water rights (the potentially impacted property rights) in conformance with Idaho law, the CM Rules, and the Department's Procedural Rules. Until ***each Petitioner*** identifies Respondents and the water rights at issue, the petitions are incomplete and the Department lacks jurisdiction.

c. The Petitioners Failed To Provide *All* Information, Measurements, Data Or Study Results Available To Each And Every Petitioner

The CM Rules require that each Petitioner set forth "[a]ll information, measurements, data or study results available to the petitioner to support the claim of material injury." IDAPA 37.03.11.030.01(c). The Procedural Rules are in accord, requiring that petitions "[f]ully state the facts upon which they are based." IDAPA 37.01.01.230.02(a). In the Letters the Director deemed petitions, the Petitioners cited two reports which evaluated aggregated trends and measurements. *See* BW-R. Vol. I, p. 2; LW-R. Vol. I, p. 2. The Petitioners provided no other information, measurements, data, or study results. *Id.* If each of the Petitioners claims material injury, each Petitioner presumably has information related to its claims.[6] Again, Sun Valley is entitled to know why the Petitioners seek to curtail its ground water use. *Am. Falls*

[6] Even if it was appropriate for the Petitioners to file a consolidated petition as it has in this case (and it was not appropriate), *see* R. Vol. V, pp. 910-19, that does not reduce the burden for each Petitioner to provide all available information relating to the claim of material injury. The fact that a group of Petitioners has formed a "coalition" to pursue a water delivery call does not somehow excuse each such Petitioner from compliance with the Department's Procedural Rules and the CM Rules or allow the presentation of broad and aggregated technical conclusions in lieu of actual data and information pertinent to each Petitioner's alleged injury.

Reservoir Dist. No. 2, 143 Idaho at 877, 154 P.3d at 448. Unless a petition presents ***all*** information, measurements, data, or study results available to the Petitioners to support each of their separate claims of material injury in writing, the Director does not have jurisdiction to initiate contested cases. The Director was, and is, required to dismiss the petitions.

d. The Petitioners Failed To Describe The Area Having A Common Ground Water Supply

The CM Rules require that each Petitioner provide "[a] description of the area having a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated." IDAPA 37.03.11.030.01(d). The Petitioners did not provide that description, and Sun Valley is not aware that the source of any of its water rights has been determined to be an "area having a common ground water supply" ("ACGWS") that has been incorporated into a water district. *See* IDAPA 37.03.11.031. The Petitioners broadly discussed Water District 37 and Water District 37-B, but did not describe an ACGWS. As with the requirement to identify Respondents, the Petitioners effectively delegated their initial pleading obligations under the CM Rules to the Director. Then, the Director presumably generated his list of Respondents by drawing conclusions about a yet to be determined or incorporated ACGWS. Because the Petitioners did not identify Sun Valley as a respondent and did not describe an ACGWS, the Director did not have jurisdiction to "consider the matter as a petition for contested case[s] under the Department's Rules of Procedure." IDAPA 37.03.11.030.02.

2. CM Rule 30 Applies To The Petitioners' Attempted Delivery Calls

In its Motion to Dismiss, Sun Valley made the foregoing arguments, asserting that the Petitioners had failed to invoke the jurisdiction of the Department, because they did not file compliant petitions pursuant to CM Rule 30.01. R. Vol. II, pp. 388-92. The Director rejected the arguments, quoting from the ***heading*** of CM Rule 30 as follows:

> 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).

R. Vol. V, p. 890 (quoting the heading at IDAPA 37.03.11.030).

The Director also noted that the Petitioners sought relief from junior-priority ground water right holders in organized water districts, and accordingly, "the applicable rule is CM Rule 40 that addresses delivery calls against junior-priority ground water users 'in an organized water district.'" *Id.* (quoting IDAPA 37.03.11.040.01). The plain, unambiguous language of the CM Rules demonstrates that the Director does not yet have jurisdiction under CM Rule 40. Because the Director has not determined and incorporated an ACGWS into Water Districts 37 or 37-B, CM Rule 30 applies to the Petitioners, and to the Director.

a. The Plain, Unambiguous Language Of The CM Rules Confirms CM Rule 30's Applicability To The Petitioners And The Director

"A rule or a regulation of a public administrative body or officer ordinarily has the force and effect of law and is an integral part of the statute under which it is made just as though it were prescribed in terms therein." *Higginson v. Westergard*, 100 Idaho 687, 690-91,

604 P.2d 51, 54-55 (1979) (citing *Howard v. Missman*, 81 Idaho 82, 337 P.2d 592 (1959)). Consequently, the rules of statutory construction apply to the Department's rules. *See id.*; *Mason v. Donnelly Club*, 135 Idaho 581, 586, 21 P.3d 903, 908 (2001). Interpretation of an administrative rule should begin with the literal words of the rule. *Mason*, 135 Idaho at 586, 21 P.3d at 908 (citing *Thomas v. Worthington*, 132 Idaho 825, 829, 979 P.2d 1183, 1187 (1999)). "The language of the rule, like the language of a statute, should be given its plain, obvious, and rational meaning." *Id.* In the event there is any ambiguity, however, the Idaho Supreme Court has held that the rules should be strictly construed against an adopting agency, and "[a]ny ambiguities contained therein should be resolved in favor of the adversary." *Higginson v. Westergard*, 100 Idaho at 691, 604 P.2d at 55.

At the outset, the phrase "area having a common ground water supply," or "ACGWS," is a critical definition and concept. It means:

> 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.

IDAPA 37.03.11.010.01. *See also* IDAHO CODE § 42-237a(g).

Furthermore, an ACGWS is to be "determined" by the Director, either by rulemaking, *see* IDAPA 37.03.11.050, or pursuant to contested case proceedings. *See* IDAPA 37.03.11.030.07(c); *see also* IDAHO CODE § 42-237a(g) (". . . the director of the department of water resources shall also have the ***power to determine*** what areas of the state have a common

ground water supply . . .") (emphasis added). The "determination" of an ACGWS may be made, if at all, following consideration of a contested case. *See* IDAPA 37.03.11.030.07 ("Following consideration of the contested case . . ."). An ACGWS must also be "incorporated" into an existing water district or a new water district. IDAHO CODE § 42-237a(g); IDAPA 37.03.11.030.07(d). As a matter of simple logic, an ACGWS cannot be "incorporated" into a water district until it has been "determined" in the first place. *See* IDAPA 37.03.11.030.09.

In this case, the text of CM Rule 20.07, in plain, unambiguous terms, states that "Rule 30 provides procedures for responding to ***delivery calls within areas having a common ground water supply that have not been incorporated into an existing or new water district***. . . ." IDAPA 37.03.11.020.07 (emphasis added). Grammatical construction of that sentence reveals that the clause "that have not been incorporated into an existing or new water district" modifies "areas having a common ground water supply." *See id.* The clause does not modify a particular set of ground water right holders, as the Director concluded. Therefore, if a delivery call is made within an alleged ACGWS that has "not been incorporated into an existing or new water district," CM Rule 30 is the rule any petitioner, and the Director, must follow. IDAPA 37.03.11.020.07. The determinative factors are whether the purported ACGWS has been determined and then has been incorporated into an existing or new water district, not whether a given junior water right falls within the geographic boundaries of an existing water district.

The pertinent, undisputed facts in these contested case proceedings are simple. The Petitioners attempted delivery calls against ground water rights within a geographic area where no ACGWS has been determined. Indeed, as articulated *supra*, the Petitioners' Letters did

not even attempt to describe an ACGWS, as the rule requires. Since the purported ACGWS within which the Petitioners seek relief has not been determined by the Director, obviously, such ACGWS has not been incorporated into Water Districts 37 or 37-B. CM Rule 30.01 therefore provides the procedures with which the Petitioners must comply, before "[t]he Department will consider the matter as a petition for contested case under the Department's Rules of Procedure." IDAPA 37.03.11.030.02.

Because the Petitioners did not comply with CM Rule 30—the applicable rule in the absence of a determined and incorporated ACGWS—the Department's exercise of jurisdiction was *ultra vires*, and Sun Valley's Motion to Dismiss should have been granted.

b. The Sun Valley Order's Characterization Of CM Rule 40's Requirements Is Misleading

Besides failing to acknowledge CM Rule 30's plain, unambiguous language, the Sun Valley Order provides incomplete quotation of the language of CM Rule 40. This gives the false impression that the only inquiry is whether the delivery call is made against junior-priority ground water users "***in an organized water district.***" R. Vol. V, pp. 890, 892. CM Rule 40's plain, unambiguous language actually addresses delivery calls against junior-priority ground water users in "***an area having a common ground water supply in an organized water district.***" IDAPA 37.03.11.040.01 (emphasis added). *See also* IDAPA 37.03.11.020.07 ("Rule 40 provides procedures for responding to ***delivery calls within water districts where areas having a common ground water supply have been incorporated into the district*** or a new district has been created.") (emphasis added). An accurate characterization of the text of CM Rule 40 is

important in this case. No ACGWS was previously "determined" by the Director. Consequently, it could not be "incorporated" into the existing water district. *See* IDAHO CODE § 42-237a(g). These are the obvious reasons that CM Rule 40 does ***not*** apply. The Sun Valley Order's convenient election to simply ignore the most critical language is disingenuous and evidences its error.

c. The Director's Citation Of CM Rule 30's Heading Does Not Salvage His Interpretation, Nor Create Ambiguity As To The Rule's Applicability

Besides ignoring plain, unambiguous language in CM Rule 20.07, and a critically important clause in CM Rule 40, the Sun Valley Order quotes language from Rule 30's ***heading*** to support the contention that CM Rule 30 does not apply. *See* R. Vol. V, p. 890. The quoted heading states, in pertinent part, as follows:

> 030. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR-PRIORITY GROUND WATER RIGHTS WITHIN AREAS OF THE STATE NOT IN ORGANIZED WATER DISTRICTS . . . .

IDAPA 37.03.11.030. The heading suggests that CM Rule 30's applicability hinges upon whether a delivery call is made against junior-priority water rights located outside an organized water district.

However, the ***actual text*** of the CM Rules provides:

> Rule 30 provides procedures for responding to ***delivery calls within areas having a common ground water supply that have not been incorporated into an existing or new water district*** or designated a ground water management area.

IDAPA 37.03.11.020.07 (emphasis added). As discussed *supra*, this text clearly states that CM Rule 30's applicability hinges upon whether the delivery call is made within an ACGWS that has been determined and then incorporated into an existing or new water district.

The text of a statute or rule controls over its heading or title. Descriptive titles do not change the provisions of a statute or rule. *Cluff v. Bonner Cnty.*, 121 Idaho 184, 187, 824 P.2d 115, 118 (1992). Only when the meaning of a statute or provision is unclear may a court resort to a heading to ascertain intent. *Walker v. Nationwide Fin. Corp. of Idaho*, 102 Idaho 266, 268, 629 P.2d 662, 664 (1981). However, a title may not be used to create an ambiguity when the body of the statute or rule is clear. *State v. Peterson*, 141 Idaho 473, 476, 111 P.3d 158, 161 (Ct. App. 2004) (citing *State v. Browning*, 123 Idaho 748, 750, 852 P.2d 500, 502 (Ct. App. 1993)).

In *Kelso & Irwin v. State Insurance Fund*, 134 Idaho 130, 997 P.2d 591 (2000), the appellant argued that because Article III, Section 16 of the Idaho Constitution requires that the subject of an Act be contained in its title, and the Act creating the State Insurance Fund uses the term "mutual insurance carrier," the State Insurance Fund was necessarily a mutual insurance carrier. The Idaho Supreme Court held that "under the normal rules of statutory construction, although the title is part of the Act, it cannot be used to create an ambiguity when the body of the Act is clear." *Id.* at 134 n.2, 997 P.2d at 595 n.2 (citing 2A SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 47.03 (5th ed. 1992)). The Idaho Supreme Court determined that despite the statutory title's use of the term "mutual insurance carrier," the plain language of the statutes made it clear that the State Insurance Fund is not a mutual insurance carrier. *Id.* "[A]ny

ambiguity as to the status of the SIF is only created by the use of the term 'mutual insurance carrier' in the title." *Id.*

In this case, the only indication that junior water rights' geographic location within a water district alone determines the applicability of CM Rule 30 or CM Rule 40 is within the ***heading*** of CM Rule 30. That concept appears nowhere else within the CM Rules. Any ambiguity suggesting that a water right's existence within an organized water district is singularly determinative of the applicable rule is only created by reference to CM Rule 30's heading. Accordingly, the Court should find that the ***text*** of the CM Rules applies to conjunctive management proceedings in the Big Wood River Valley, and require that the Department dismiss the Petitioners' delivery calls for failure to comply with the provisions of the correct rule.

d. The Context Of CM Rules 20.07 And 30 Confirm That CM Rule 30 Applies In The Big Wood River Valley

Not only CM Rule 20.07 demonstrates that CM Rule 30 applies in these contested case proceedings, and that the existence of a determined and incorporated ACGWS is of paramount importance. The context and structure of the CM Rules is in accord.[7] The language of a rule "should be construed in the context of the rule and statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement." *Mason v. Donnelly Club*, 135 Idaho at 586, 21 P.3d at 908. All sections of a statute or rule should be considered and

[7] Notably, the structure of Idaho Code is likewise in accord. Section 42-237a(g) provides that "the director . . . shall also have the power to ***determine*** what areas of the state have a common ground water supply and whenever it is ***determined*** that any area has a ground water supply which affects the flow of water in any stream or streams in an organized water district, to ***incorporate*** such area in said water district . . ." (emphasis added).

construed together to ascertain intent. *Friends of Farm to Market v. Valley Cnty.*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002) (citing *Lockhart v. Dep't of Fish & Game*, 121 Idaho 894, 897, 828 P.2d 1299, 1302 (1992)).

Here, CM Rule 1 states that the CM Rules "prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." IDAPA 37.03.11.001. It does not, as the Director decided, provide that the CM Rules prescribe procedures for responding to a delivery call against the holder of a junior-priority ground water right that merely falls within or outside of an organized water district. The existence of an ACGWS is clearly the touchstone.

Additionally, CM Rule 20.06 states explicitly that the CM 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 or creating new districts . . . ." IDAPA 37.03.11.020.06 (emphasis added). *See also* IDAHO CODE § 42-237a(g). Plainly, an ACGWS must be "designated" and "incorporated" in accordance with formal rule-based procedures. Those procedures are set forth, in part, in CM Rule 30.07, which provides that:

> ***Following consideration of the contested case*** under the Department's Rules of Procedure, the Director may, by order, take any or all of the following actions:
>
> . . . .

> c. ***Determine an area having a common ground water supply*** which affects the flow of water in a surface water source in an organized water district;
>
> d. ***Incorporate an area having a common ground water supply into an organized water district*** following the procedures of Section 42-604, Idaho Code, provided that the ground water rights that would be incorporated into the water district have been adjudicated relative to the rights already encompassed within the district;
>
> . . . .

IDAPA 37.03.11.030.07 (emphasis added).

Importantly, CM Rule 31 provides guidance concerning information the Director should consider and the criteria for making findings related to ACGWS designation, pursuant to a CM Rule 30 proceeding. *See* IDAPA 37.03.11.031. It also provides that "[t]he findings of the Director ***shall be included in the Order issued pursuant to Rule Subsection 030.07.***" IDAPA 37.03.11.031.05 (emphasis added). An order issued after a finding of an ACGWS is issued pursuant to ***CM Rule 30***, not CM Rule 40.

The provisions of CM Rule 30 are not, as the Order concluded, "irrelevant" in these proceedings. R Vol. V, p. 890. When a water delivery call is made within a geographic area that has not been determined an ACGWS and then incorporated into an existing or new water district, the CM Rules ***require*** the Director, and any petitioners, to proceed under CM Rule 30, not CM Rule 40. The foregoing operation of the CM Rules is confirmed and crystalized in Rule 30.09, which states plainly as follows:

> ***Upon a finding*** of an area of common ground water supply ***and upon the incorporation*** of such area into an organized water district, or the creation of a new water district, ***the use of water***

shall be administered in accordance with the priorities of the various water rights as provided in Rule 40.

IDAPA 37.03.11.030.09 (emphasis added).

After completion of the designation and incorporation steps, and the other procedural steps of CM Rule 30.01 through 30.09, then CM Rule 40 would apply, but not before then. Under the administrative record before the Court, there has been no "finding of an area of common ground water supply," and "such area" has not been incorporated "into an organized water district." However, the Director is unyielding in his position that he has authority and jurisdiction to proceed pursuant to CM Rule 40, without first requiring that the Petitioners comply with CM Rule 30.

Clearly, if the undefined and undetermined ACGWS in Water Districts 37 and 37-B had been both previously ***determined and incorporated*** into a water district when the Petitioners casually initiated their purported water delivery calls, the Director's exercise of authority and jurisdiction under CM Rule 40 might have been appropriate. *See* IDAPA 37.03.11.040.01 ("When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from ***an area of common ground water supply*** in an organized water district the petitioner is suffering material injury . . .") (emphasis added). Those are not, however, the facts before the Court. The undefined and undesignated ACGWS has not been determined, either in a contested case proceeding or pursuant to rulemaking. Moreover, the

same purported ACGWS appears to exist, if at all, in two separate water districts—Water District 37 and Water District 37-B—and has not been incorporated into a single water district.

To that end, CM Rule 30.04 further evidences the Director's error in skipping directly to CM Rule 40. That rule provides:

> In the event the petition ***proposes regulation of ground water rights conjunctively with surface water rights in an organized water district***, and the water rights have been adjudicated, the Department may consider such to be ***a petition for modification of the organized water district*** and notice of proposed modification of the water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter addressed by the petition under the Department's Rules of Procedure.

IDAPA 37.03.11.030.04 (emphasis added).

The Association clearly "proposes regulation of ground water rights conjunctively with surface water rights in an organized water district, and the water rights have been adjudicated." Accordingly, the Department could consider CM Rule 30 compliant petitions as petitions to determine a specifically described ACGWS and for modification of Water Districts 37 and 37-B. The Department declined to do so.

The Director's decision that CM Rule 30 is "irrelevant" in these proceedings is clear legal error. R. Vol. V, pp. 890, 892. The Director is acting in violation of the Department's rules and in excess of the Director's authority under those rules. By their plain, unambiguous terms, the CM Rules demonstrate that CM Rule 40 does not yet apply in the Big Wood River Valley. Equally important, and far from "irrelevant," the provisions of CM Rule 30 actually provide the ***only*** procedures for the Petitioners to initiate a contested case where no

ACGWS has been determined.[8] They also articulate the procedures the Director must use to issue findings concerning an ACGWS, and if determined as such, incorporate it into a water district.

In sum, CM Rule 30 and the Department's Procedural Rules govern conjunctive management of ground water rights in the Big Wood River Valley, unless and until there exists a designated and then incorporated ACGWS. The Petitioners were therefore required to comply with the petition requirements of CM Rule 30.01 and Procedural Rule 230, before the Director

---

[8] In the Sun Valley Order, the Director relies upon Procedural Rule 52 in support of the proposition that Procedural Rule 230 (which is incorporated by reference into CM Rule 30.01) does not apply to the Petitioners, or that deviation from Procedural Rule 230 is appropriate because compliance is "unnecessary." R. Vol. V, p. 892. In sum, the Director holds it is "unnecessary" to require compliance with Procedural Rule 230 because, for purposes of identifying respondents under CM Rule 40, water masters for water districts know all junior ground water users. *Id.* That determination relies upon the erroneous conclusion that CM Rule 40 applies to the Petitioners, notwithstanding the fact that no applicable ACGWS has been determined and incorporated within Water Districts 37 and 37-B. To the extent the Director seeks to rely upon Procedural Rule 52 to deviate from Petitioners' compliance with the correct rule—CM Rule 30—such reliance is unconstitutional as applied, and in violation of Idaho law. This Court may address whether the Director's application of Procedural Rule 52 to allow the Petitioners to avoid compliance with mandatory pleading requirements even though a complete factual record has not been developed. *See Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 872, 154 P.3d 433, 443 (2007) ("There are two exceptions to the rule that an as applied analysis is appropriate only if all administrative remedies have been exhausted: when the interests of justice so require and when an agency has acted outside of its authority."). Sun Valley's water rights are not within an ACGWS, as determined and incorporated into Water District 37 by the Director in accordance with Idaho Code Section 42-237a(g). The Petitioners have not described the ACGWS or identified Sun Valley as a respondent, both of which are required by CM Rule 30.01. Accordingly, not only has the Director acted outside his authority by proceeding with a water delivery call solely on the basis of the Petitioners' Letters, but the application of Procedural Rule 52 to avoid compelling the Petitioners' compliance with Department rules deprives Sun Valley of adequate notice, and procedural due process. Procedural Rule 52 is therefore unconstitutional as applied.

had authority and jurisdiction to proceed with the contested cases. They did not. The Director is required to dismiss the contested case proceedings.

3. The Director's October 16, 2015 Order Provides No Authority Supporting His Jurisdiction Under CM Rule 40

On October 16, 2015, after the initiation of this appeal, and in response to Sun Valley's Rule 711 Motion, which sets forth in greater detail Sun Valley's position with respect to the applicability of CM Rule 30, the Director issued the Rule 711 Order. In that Rule 711 Order, the Director doubles down on his position that he has jurisdiction pursuant to CM Rule 40, and may proceed thereunder.

He begins by mischaracterizing Sun Valley's argument as asserting "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." Supp. R. Vol. I, p. 85. That mischaracterization reveals the Director's tunnel vision with respect to CM Rule 40. Sun Valley does not argue that the Director must determine and incorporate an ACGWS ***before*** proceeding with the Big and Little Wood Delivery Calls. In fact, Sun Valley argues that the Director may determine and incorporate an ACGWS ***after*** proceeding with the Big and Little Wood Delivery Calls.

As the Director repeatedly states, an ACGWS is a factual question that requires resolution in the context of a contested case proceeding. Supp. R. Vol. I, pp. 85-86. Accordingly, since an ACGWS has not yet been determined or incorporated, the ***Petitioners***—not the Director—must ***allege*** an ACGWS, among other things, in accordance with CM Rule 30.

See IDAPA 37.03.11.030.01(d). Thereafter, "[f]ollowing consideration of the contested case," the Director can make findings about an ACGWS, among other things, incorporate an ACGWS into a water district, and administer water rights within that ACGWS in accordance with CM Rule 40. *See* IDAPA 37.03.11.030.07-10. However, before the Director has jurisdiction to proceed with administration under CM Rule 40, the Petitioners must file a compliant petition in accordance with the requirements of CM Rule 30.01, and then properly support the Petitions in contested hearings. In short, and for all of the reasons stated *supra*, the most critical thing the Director must do "before proceeding with the Big and Little Wood Delivery Calls" is comply with the rules that govern his jurisdiction and authority, and likewise demand compliance by those seeking to invoke such authority. His failure to do so in this case constitutes clear error, and has operated to prejudice the substantial rights of Sun Valley.[9]

The Order continues the mischaracterization of Sun Valley's argument as "prescrib[ing] 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." Supp. R. Vol. I, p. 85. The Order asserts that approach is untenable because "[t]hroughout much of Idaho, water districts have been created and water rights incorporated into the districts." *Id.* Although there is no evidence in the record before this Court to support that conclusion, Sun Valley does not necessarily dispute it. More importantly, that conclusion is meaningless to the issue at hand. The Director's problem is one of false equivalency. The inclusion or existence of a water right

[9] Due process rights are substantial rights under Idaho law. *Eddins v. City of Lewiston*, 150 Idaho 30, 36, 244 P.3d 174, 180 (2010).

within a water district is not the same thing as the determination of an ACGWS and incorporation of it into a water district. More simply, a water right is not the same thing as an ACGWS. The fact that Sun Valley's water rights fall within the geographic boundaries of Water District 37 does not mean that those rights fall within an ACGWS that has been determined and incorporated within the geographic boundaries of Water District 37 in accordance with Idaho law.

While the Procedural Rules and the CM Rules provide a mechanism for the Director to make such a finding—specifically CM Rule 30—that mechanism has been ignored in the proceedings on review before this Court. The Court should find that the Director must comply with the rules. Otherwise, the rules and Idaho Code Section 42-237a(g), which the rules implement, are rendered meaningless.

C. The Director's Rejection Of Applicable Statutory Pleading Requirements Illustrates His Unwillingness To Enforce The Due Process Protections Afforded Water Right Holders By Title 42

In addition to Petitioners' pleading deficiencies under the CM Rules and the Procedural Rules, Sun Valley's Motion to Dismiss pointed out that the pleading requirements of Idaho Code Section 42-237b[10] are substantially similar to those set forth in CM Rule 30.01 and Procedural Rule 230.02 to illustrate that the Petitioners failed to properly invoke the jurisdiction of the Director. R. Vol. II, pp. 388-92. The Director first dismissed the argument by asserting

[10] It is significant that the Legislature enacted Idaho Code Section 42-237b so it immediately follows Section 42-237a. The relationship between the two statutes is obvious. The context of this statutory sequence directly supports Sun Valley's arguments. *See Friends of Farm to Market v. Valley Cnty., supra.*

that the pleading requirements were permissive. R. Vol. V, p. 890. Second, the Director stated that the Petitioners' Letters were "not a request for the Director to set the matter for hearing *before a local ground water board.*" *Id.* (emphasis in original).

The pleading requirements of Section 42-237b are mandatory, not permissive. *See* IDAHO CODE § 42-237b ("Such statement ***shall*** include: . . .") (emphasis added). The Director emphasizes the fact that when a person believes use of a junior water right is adversely affecting such person's water right, "such person, as claimant, ***may*** make a written statement under oath of such claim to the director of the department of water resources." IDAHO CODE § 42-237b (emphasis added). The use of the permissive term "may" does not mean that compliance with the pleading requirements is elective and not mandatory. It simply means that a person claiming injury has the discretion to seek relief from the Director if he chooses. If one person damages another's property—a car, for example—the person whose property has been damaged ***may*** file a lawsuit. If that person files a lawsuit, however, he or she ***must*** comply with the pleading and commencement procedures that Idaho law demands. The same is true with respect to Section 42-237b's pleading requirements. A senior water right holder ***may*** seek to invoke the regulatory powers of the Director or a local ground water board. If he does, however, he ***must*** meet the statutory pleading requirements. They are not permissive, as evidenced by the statute's requirement that the Director "deem[] the statement sufficient ***and meets the above requirements***." IDAHO CODE § 42-237b (emphasis added).

Additionally, Section 42-237b does not state compliance with the statute is only required if one is "request[ing] for the Director to set the matter for hearing *before a local*

ground water board." R. Vol. V, p. 890 (emphasis in original). The reference to a "hearing before a local ground water board" is part of the Director's responsibilities after receipt of a statement under oath submitted by an injured water right holder. The injured person does not make an election of who will adjudicate his claim of injury. An injured person notifies the Director that he or she has been injured, in a statement under oath, pursuant to the plain, unambiguous language of Section 42-237b. The Director thereafter assumes responsibility for proceeding with the appropriate course of adjudicating the matter if the mandatory pleading standards have been met.

To that end, while the Petitioners' Letters did not "request . . . the Director to set the matter for hearing before a local ground water board," *see* R. Vol. V, p. 890, neither did the Letters request a contested case proceeding pursuant to the CM Rules. *See* BW-R. Vol. I, pp. 1-5; LW-R. Vol. I, pp. 1-5. The Letters certainly made no reference to CM Rule 40, as the Director suggests. *See id.*

The pleading requirements of Section 42-237b apply "***[w]henever*** 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." IDAHO CODE § 42-237b (emphasis added). The Petitioners were required to comply with Section 42-237b, and the Director's finding otherwise is clear error.

D. The Director Failed To Comply With The Procedural Rules Related To Department Expertise And Official Notice In Violation Of Sun Valley's Due Process Rights

The *ultra vires* nature of these contested case proceedings is not without consequence. Because the Petitioners failed to comply with the procedural requirements set forth *supra*, the Director enlisted Department staff to accomplish those tasks on behalf of the Petitioners. The Director's Information Requests to the Petitioners (issued after discovery among the parties had been allowed and commenced) and, even more, his directive to Department staff to prepare Technical Memoranda investigating and evaluating numerous facts that should have been set forth in compliant petitions effectively requests Department staff to bear the pleading burdens that otherwise belong to the Petitioners. These actions, particularly in light of the procedures employed (and not employed) during the investigation by Department staff, have violated Sun Valley's due process rights.

In his Request for Staff Memoranda, the Director cites Rule 600 and Rule 602 of the Department's Procedural Rules. However, such rules, the Procedural Rules in general, as well as fundamental requirements of due process, preclude the gathering and use of information by Department staff in the manner contemplated by the Request, and actually conducted, subsequently.

Rule 600 and Rule 602 must be read in context and with precision. Both rules follow Procedural Rules 550 through 566, which rules set forth the bulk of the procedures

adopted by the Department to govern the conduct of contested case ***hearings***.[11] It is of particular importance to emphasize that the presiding officer takes evidence at hearings. *See, e.g.,* IDAPA 37.01.01.555 ("***[b]efore taking evidence*** the presiding officer will call the hearing to order . . .") (emphasis added); IDAPA 37.01.01.557 (describing the process by which parties to a contested case may stipulate to facts, and confirming that a process for the presentation of "evidence" and argument must be afforded to the parties); *see also* IDAPA 37.01.01.157 ("***Subject to Rules 558, 560, and 600***, all parties and agency staff may appear ***at hearing or argument***, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate ***in hearings or arguments***.") (emphasis added). In this context, Rule 600 and Rule 602 can be properly analyzed.

> Rule 600 states:
>
> > ***Evidence*** should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer ***at hearing*** is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of ***taking testimony*** invalidates any order. The presiding officer, with or without objection, may exclude ***evidence*** that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any ***evidentiary*** privilege provided by statute or recognized in the courts of Idaho. All other ***evidence*** may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. ***The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence***.

IDAPA 37.01.01.600 (emphasis added).

---

[11] Adherence to the Procedural Rules is mandatory. *See* IDAPA 37.01.01.001.02 ("the rules of procedure which ***shall*** govern contested case proceedings . . ."). (Emphasis added.) *See also* IDAHO CODE § 67-5206(2), (4), and (5).

The Department's Procedural Rules do not expressly define "evidence," "hearing" or "testimony." Consequently, other authority must be utilized to clarify the meaning of these terms. Black's Law Dictionary, eighth revised edition, defines evidence as "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact." BLACK'S LAW DICTIONARY (8th ed.) at 595. "Testimony" connotes sworn statements, typically presented under oath and, at a trial or hearing, subject to cross-examination. *See id.* at 1514; IDAPA 37.01.01.559 ("***All*** testimony presented in formal hearings will be given under oath.") (emphasis added). Finally, a hearing is the forum for the "full disclosure of all relevant facts and issues, including such cross-examination as may be necessary," affording "all parties the opportunity to respond and present evidence and argument on all issues involved." IDAHO CODE § 67-5242. Clearly, the provisions of Rule 600 contemplate the presentation of "evidence," including "testimony" under oath at a "hearing," where parties have the opportunity to object and otherwise make their record, not an informal fact-finding process outside the due process protections of such a hearing.

The Director also cites Rule 602 in the Requests for Staff Memoranda. Rule 602 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.

The plain language of the Procedural Rules is clear and will be interpreted accordingly by the courts of Idaho. *See, e.g., Mallonee v. State*, 139 Idaho 615, 619, 84 P.3d 551, 555 (2004) ("A rule or regulation of a public administrative body ordinarily has the same force and effect of law and is an integral part of the statute under which it is made just as though it were prescribed in terms therein. The same principles of construction that apply to statutes apply to rules and regulations promulgated by an administrative body."). The Requests for Staff Memoranda improperly deviate from the procedural due process protections established by the Procedural Rules and are contrary to the language of Rule 600 and Rule 602. Consequently, the Department's actions violate Sun Valley's rights under the Idaho Administrative Procedures Act, the Idaho Constitution and the U.S. Constitution.

Put simply, the purpose of the contested case hearings at issue is the presentation of ***evidence*** relating to an ACGWS and the Petitioners' alleged material injury, among other things. At a minimum, the Petitioners bear the initial burden of showing material injury at the hearings. *See* Twin Falls County Case No. CV-2010382, Memorandum Decision and Order on Petitions for Judicial Review, at 38 (Sept. 26, 2014). The parties, not the Department, gather and present information, and each such party bears its respective burdens by presenting information, via testimony or documents, that may be admitted by the Director as ***evidence***, subject to

objection and cross-examination as necessary. *See* IDAPA 37.01.01.600 – 606. The Director's role is to oversee proper development of a record and to consider admitted evidence presented by the parties at hearing. *See* IDAPA 37.01.01.600. Department staff's role is to evaluate ***evidence***, only after it is admitted at hearing, as the Director's technical advisor. *See id.* Consistent with due process protections, Department staff should not engage in the gathering, assembly and organization of information on behalf of the Petitioners. Nor should the Department engage in the analysis or evaluation of such information, before it is actually admitted as evidence in the hearing record.

1. The Department Has No Authority To Engage In The Gathering, Assembly, And Organization Of Information For The Petitioners

The Director erred by directing Department staff to conduct discovery by gathering, assembling, and organizing information for and from the Petitioners. The Petitioners were obligated to provide all information related to their water delivery systems, as well as material injury, to the Department and the Respondents as part of their petition when they made their delivery call. They failed to do so. *See* Section V.B., *supra*. Thereafter, upon the appropriate order from the Director, the Petitioners and Respondents were each subject to discovery and depositions. R. Vol. I, pp. 160-66. Such discovery allowed the parties to gather evidence to submit for the Director's consideration in a contested administrative hearing and for the consequent development of a record. Neither the Procedural Rules,[12] nor the Idaho Rules of Civil Procedure governing the discovery process contemplate contemporaneous discovery by the

[12] The Department's Procedural Rules derive from the Act and implement the due process protections of that statutory framework.

Director or Department staff without the attendant statutory authority therefor. *See* IDAPA 37.01.01.520 – 532; I.R.C.P. 26-37. Neither the Director, nor the Department is a party. IDAPA 37.01.01.150.

Furthermore, Rule 600 specifically addresses the role of Department staff as it relates to evidence in a contested case proceeding. It states that "[t]he agency's experience, technical competence and specialized knowledge may be used in ***evaluation of evidence.***" IDAPA 37.01.01.600 (emphasis added). The Procedural Rules do not contemplate the gathering, compilation or organization of factual information from the parties by Department staff before that information becomes evidence. The proper role, if any, of the Department staff in this proceeding is, upon the Director's request, to evaluate the evidence that has been gathered, compiled, organized, and presented ***by the parties—both Petitioners and Respondents—at a hearing*** and properly admitted, as evidence, into the hearing record by the Director.

Gathering, compilation and organization of information from the Petitioners by Department staff (instead of by the parties themselves) ultimately resulted in a premature and incomplete evaluation of the facts by Department staff. This produced opinions, and, ultimately, findings by the Director that were unsupported by substantial, competent evidence in the record. *See* Section V.E., *infra*. Furthermore, in the absence of a fair process that comports with well-established concepts of due process, factual investigation risks the development of a bias or, at a minimum, the appearance of a bias in favor of the information collected from the Petitioners by Department staff.

For example, Department staff informally visited the properties of the Petitioners without providing notice or the opportunity to participate to Sun Valley, informally met with the Petitioners or toured the properties with a knowledgeable person, asked questions staff deemed relevant, neglected to ask questions that arguably should have been asked, failed to ensure complete answers by the Petitioners, observed and took notes about what staff deemed relevant, assembled information provided by the Petitioners, and organized the presentation of this information for Department staff's use and, ultimately, the Director's use. R. Vol. VI-VII, pp. 1080-1342. In doing so, Department staff collected and generated information, analyses, impressions and opinions that may form the basis of its eventual "evaluation of evidence" in accordance with Rule 600.

Sources of this information, however, may not ever become part of the hearing record for any number of reasons. And such actions improperly inserted the Department staff into the role of a special assistant to the Petitioners. Under Rule 600 and fundamental due process requirements, Petitioners must provide the "evidence" to the presiding officer in a "hearing" and allow the Respondents to object to admissibility and subject it to challenge or cross-examination if the evidence is testimony. Then, but only through the truth sieve of the hearing process, the "agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence." IDAPA 37.01.01.600.

In light of the potential importance and utility of Department staff's specialized expertise to the Director's ultimate resolution of these matters, the risks favor strict adherence to the Procedural Rules. Again, such risks include, but are not limited to: (i) information beyond

the scope of hearing evidence that forms the basis of any staff memoranda employing Department staff's specialized knowledge and expertise, and (ii) Sun Valley or any other possible Respondents not having a full and fair opportunity to observe and pose legitimate evidentiary objections to the information gathered by Department staff during any informal meetings or discussions involving Petitioners and Department staff, in order to ensure completeness and accuracy.

Importantly, Department staff conducted the foregoing gathering, assembly and organization of information without adequate notice to, or participation by, Sun Valley. After issuance of the Department's Information Requests and prior to the Director's Request for Staff Memoranda, Sun Valley and others, during the Pre-Hearing Conference, voiced due process concerns about this anticipated use of Department staff. *See* Tr. Vol. I, p. 14, L. 20 – p. 15, L. 11; p. 17, L. 21 – p. 19, L. 12; p. 24, L. 18 – p. 25, L. 12; p. 33, LL. 2-13; p. 38, L. 23 – p. 39, L. 13; p. 42, LL. 4-13. Sun Valley reiterated its objections and concerns in its Staff Memo Motion. R. Vol. III-IV, pp. 616-48. The concerns were dismissed and appropriate procedural protections rejected.[13] *See* R. Vol. V, pp. 899-908; Tr. Vol. I, p. 39, L. 14 – p. 40, L. 10; p. 42,

[13] The Director suggested that providing such protections was "too onerous." Tr. Vol. I, p. 42, LL. 14-19. Sun Valley questions whether it would really be too onerous if there was only one petitioner as opposed to 39 petitioners. Surely a process that would allow adequate protections for junior ground water holders during the gathering of information could be maintained in such a circumstance. Again, by virtue of the Petitioners' inappropriate "coalition" approach, and in light of the complexity of this water delivery call, the Director has effectively reduced or removed, in the name of efficiency and the Director's concerns over undue burden, certain protections to which Sun Valley and other ground water users would otherwise be entitled.

LL. 14-19. Under the plain language of Rule 600, however, Department staff had no authority to conduct this investigation, and organization, of facts to assist the Petitioners in this contested case proceeding. Such actions did not constitute the "evaluation of evidence." IDAPA 37.01.01.600.

To be clear, Sun Valley acknowledges that Department staff may evaluate ***evidence***. It was in excess of the Department's authority, however, to gather, compile and organize ***facts, information, and observations from and for the Petitioners that may or may not ultimately be evidence*** admitted in the appropriate forum before the Director. The Petitioners and the Respondents, respectively, are responsible for that process during the course of discovery and the presentation of their respective cases at a contested case hearing. As he properly recognized, the Director is responsible for admitting and considering evidence at such hearing and deciding the ultimate issues in the case. *See* Tr. Vol. I, p. 46, LL. 1-5 ("But those are ***factual matters that need to be presented at the hearing, become part of the evidence***, and then there's a determination of those issues after the hearing is conducted.") (emphasis added). Department staff, should the Director find it useful, is responsible for evaluating the ***admitted evidence*** using the Department staff's experience, technical competence and specialized knowledge. *See* IDAPA 37.01.01.600. Employing Department staff, before the hearing, to collect data and information from the Petitioners is not contemplated by the Procedural Rules and prejudices the rights of Sun Valley and all potential Respondents (who do not, as the proceedings presently dictate, receive the benefit of reliance upon the Department to aid in the collection and preparation of their evidence).

The Director acted in violation of Department rules, Idaho statutes and common law, the Idaho Constitution and the U.S. Constitution. He was required to allow the development of the record to occur in accordance with due process, via a hearing, where all parties would have the opportunity to present testimony and information that ultimately may be admitted as evidence.

2. The Department Has No Authority To Engage In The Analysis Or Evaluation Of Information Obtained From The Petitioners Before Such Information Is Actually Admitted As Evidence In The Hearing Record

Instead of demanding Petitioners' compliance with the pleading requirements or, at a minimum, relying upon the presentation of evidence by the parties in these contested case proceedings, the Director directed Department staff to conduct "evidence" gathering, assembly, and organization for the benefit of the Petitioners without Sun Valley's participation. *See* R. Vol. II, pp. 334-44. Then, pursuant to the Request for Staff Memoranda, the Department staff proceeded to discuss, analyze and evaluate "responses and submittal of additional information" by the Petitioners to "assist" the Director "in determining whether the holders of senior water rights are suffering material injury and using water efficiently and without waste as required by the Department's Conjunctive Management Rules." *See* R. Vol. II, p. 179; R. Vol. II, pp. 334-44; *see also* Tr. Vol. I, p. 51, LL. 13-23 (technical memoranda will "lay[] out the opinions of Department technical staff related to those [hydraulic and hydrologic] relationships"). Use of Department staff in this one-sided evaluative process was highly prejudicial, violated Sun Valley's due process rights, and directly conflicted with the protections of the Act and

constitutionally sufficient due process. As a result, Department staff's objectivity, neutrality and fairness, or the appearance thereof, have been significantly compromised.

Department staff's use of information it gathered directly from the Petitioners for the preparation of technical memoranda that may be officially noticed under Rule 602 constitutes the offering and taking of evidence by the Director outside the scope of a formal contested case hearing. That is an unjust result and deprives Sun Valley of the procedural protections contemplated by the Department's Procedural Rules, the Act and due process of law. It is inappropriate for the Director to develop a factual record by memoranda that are not made part of the record. *See* IDAHO CODE § 67-5251; Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 IDAHO L. REV. 273, 319-20 (1994).

Furthermore, contrary to the language of the Request for Staff Memoranda, at this stage of a contested case proceeding, Procedural Rule 602 ***does not*** "allow the presiding officer to take official notice of technical or scientific facts within the Department's specialized knowledge, including staff memoranda and data . . . ." Particularly here, where the "staff memoranda and data" did not even exist and have not been subjected to challenge, rebuttal or cross-examination, there is nothing in Rule 602 that allowed the Director's approach.

The authority of the presiding officer to "take official notice" is restricted by the first sentence of Rule 602. It proscribes the type of information that may be used by the presiding officer in taking "official notice" in a contested case proceeding. This language reads:

> 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.

IDAPA 37.01.01.602; *see also* IDAHO CODE § 67-5251(4).

The standards for judicial notice in Idaho courts are set forth in Idaho Rule of Evidence 201 and the appellate cases construing this rule. *See* I.R.E. 201 (judicial notice of a fact is not subject to reasonable dispute because it is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). Other than certain facts that may have been addressed in the SRBA, very little information set forth in the Request for Staff Memoranda could satisfy the standards for judicial notice in Idaho courts. Consequently, aside from certain adjudicated elements of the Petitioners' water rights, that judicial notice provision of Rule 602 does not apply here.

Turning to the second provision of Rule 602's first sentence, it allows "[o]fficial notice" to "be taken of any facts . . . of generally recognized technical or scientific facts within the agency's specialized knowledge." Such language identifies the type of "facts" that may be officially noticed. Moreover, the language contemplates that the "generally recognized technical or scientific facts" already exist, *see id.* ("***within the agency's specialized knowledge***") (emphasis added), and are not generated by Department staff in a one-sided fact gathering and subsequent "evidence" evaluation process that produces new staff memoranda prior to the hearing officer receiving any "evidence." Any contrary interpretation ignores the restrictive phrase "generally recognized."

It is self-evident that most of the facts gathered from the Petitioners and assembled, organized and evaluated by the Department staff did not consist of "generally recognized technical or scientific facts within the agency's specialized knowledge." Only if the information meets this specific criteria can the presiding officer take "official notice" of the items. Moreover, the "evaluation of evidence" by the Department staff, using Rule 600's language, cannot justify taking "official notice" of the staff memoranda requested in the Memoranda Requests.

Quite simply, the Technical Memoranda are the result of a major fact gathering and analysis project, undertaken outside the due process protections of a contested case hearing, that performs tasks and bear burdens properly performed and borne by the Petitioners. In essence, the Technical Memoranda constitute expert reports that are based upon facts and information collected from the Petitioners without participation by the Respondents and without the truth sieve of a contested hearing. The expert reports have been generated by the very agency charged with objectivity and the duty to provide due process protections to all parties in this contested case. The process employed by the Director significantly compromised that objectivity or, at a minimum, the appearance thereof, and the due process rights of Sun Valley.

Instead of proceeding in this fashion, the Director should have allowed the contested case to proceed in accordance with the Procedural Rules. Utilizing the discovery process, the ***parties***, not Department staff, should have been afforded the opportunity to develop the information that will ultimately be presented in the contested case hearing. The Director might then request that the "agency's experience, technical competence and specialized

knowledge [] be used in the evaluation of the evidence" under Rule 600, but the evaluation must be an **evaluation of evidence** and not information independently procured by Department staff. That approach would have preserved the objectivity of Department staff in its role as the Director's technical advisor, and avoided substantial prejudice to the due process rights of Sun Valley.

3. The Site Visits Violated Sun Valley's Due Process Rights

Site visits to the Petitioners' properties occurred on, at a minimum, May 26, 2015, June 26, 2015, July 2, 2015, and August 17, 2015. *See* R. Vol. VI-VII, pp. 1080-1342. The Department did not provide notice or the opportunity to participate in these site views to Sun Valley, nor does the record reflect that the Department provided such notice or opportunity to any other Respondent.

Furthermore, participation of Department staff was not limited to scientific or technical staff. *See* Affidavit of Scott L. Campbell, filed December 7, 2015; Supplemental Affidavit of Scott L. Campbell, filed December 10, 2015. Photographs show that legal counsel for the Director and the Department, Mr. Garrick Baxter,[14] also participated in the site views. *Id.*

---

[14] To be clear, Sun Valley is unaware of the exact nature of Mr. Baxter's role as counsel in these proceedings, *i.e.*, whether Mr. Baxter is fulfilling the role of an investigative attorney or an advisory attorney. *See, e.g.,* IDAPA 04.11.01.423. If Mr. Baxter acts in a capacity similar to that of an investigative attorney, working with and advising only Department staff in their investigation of the facts that will be tried before the Director, his presence at site views or field examinations may be appropriate. If, on the other hand, Mr. Baxter is acting as an advisory attorney to the Director, his substantive communication concerning the contested cases at issue, including site views or field examinations, involving Department staff and/or the Petitioners was inappropriate and in violation of the prohibition of indirect ex parte communication with the Director. *See* IDAHO CODE § 67-5253; IDAPA 37.01.01.417 and IDAPA 04.11.01.420 – 425. In

In at least one photograph Mr. Baxter appears to be taking notes. *See id.* Likewise, the Director was present with Mr. Baxter during the site views. *See id.*

Additionally, several photographs include unidentified persons who do not appear to be affiliated with the Department at all. *See* Campbell Aff., ¶¶ 6-7. Narrative in the Appendices reflects that owners and parties—the Petitioners—were present at site views in some instances and directly communicated substantive information to Department staff. *See* R. Vol. VI, p. 001188 ("The owner was present and explained . . ."); *id.* at 1204 (site view made with Alan Romans, ditch rider for Robertson Ditch Company and Big Wood Canal Company, a Petitioner); *id.* at 1208 ("Owner present at time of visit . . ."); *id.* at 1340 ("Owner reported that system includes 3 pivots . . .").

Property viewing in an administrative proceeding is analogous to a viewing in a trial, which requires notice to all parties prior to a viewing by a judge or jury. *Comer v. Cnty. of Twin Falls*, 130 Idaho 433, 439, 942 P.2d 557, 563 (1997). In *Eacret v. Bonner County*, 139

---

other words, in the event Mr. Baxter is counseling both Department staff preparing the Technical Memoranda and the Director as to substantive issues in these proceedings, there are clearly no adequate procedural safeguards in place to avoid indirect ex parte communication or, at a minimum, the appearance of impropriety. Moreover, Mr. Baxter may have participated in communications with Department staff or drafted or commented on portions of the Technical Memoranda. There are, for example, numerous examples of inappropriate legal conclusions, legal commentary, or legal opinion set forth within the Technical Memoranda. *See* R. Vol. VI, p. 1220 ("Some adjustment of water right place of use may be warranted."); p. 1222 ("A transfer is recommended to update the water right point of diversion."); Vol. VII, p. 1328 ("Water right place of use should be updated."). If he did so, as an attorney participating in this proceeding, he effectively testified. Such testimony would not be competent.

Idaho 780, 787, 86 P.3d 494, 501 (2004), *overruled on other grounds*, the Idaho Supreme Court stated:

> A quasi-judicial officer must confine his or her decision to the record produced at the public hearing. Any ex parte communication must be disclosed at the public hearing, including a "general description of the communication." The purpose of the disclosure requirement is to afford opposing parties with an opportunity to rebut the substance of any ex parte communications. In a similar vein, the opportunity to be present at a view provides opposing parties the opportunity to rebut facts derived from the visit that may come to bear on the ultimate decision and create an appearance of bias. A view of the subject property without notice to the interested parties by a board considering an appeal from the commission has been held a violation of due process.

139 Idaho at 786-87, 86 P.3d at 500-01.

In *Eacret*, a commissioner viewed the subject property without notice to any of the parties and communicated ex parte with the applicant for a variance. The *Eacret* court held that the commissioner's pre-hearing ex parte contacts with the applicant concerning the variance at issue "reveal a lack of impartiality and denial of an opportunity for opponents of the variance to challenge or answer the *ex parte* evidence." *Id.* at 787, 86 P.3d at 501. In addition, the court held that even if the commissioner's view of the property in question was unrelated to the pending matter, he still should have disclosed the fact of the view prior to the hearing in order to allow the parties to object or move for a viewing by all of the commissioners. *Id.* Idaho case law demands that "any view of a parcel of property in question must be preceded by notice and the opportunity to be present to the parties in order to satisfy procedural due process concerns." *Id.* (citing *Comer v. Cnty. of Twin Falls*, 130 Idaho 433, 439, 942 P.2d 557, 563 (1997)). The

Eacret court ultimately held that under these circumstances the commissioner's actions "not only created an appearance of impropriety but also underscored the likelihood that he could not fairly decide the issues in the case." *Id.*

In *Idaho Historic Preservation Council v. City Council of Boise*, the court recognized that "when a governing body deviates from the public record, it essentially conducts a second fact-gathering session without proper notice, a clear violation of due process." 134 Idaho 651, 654, 8 P.3d 646, 649 (2000). The court held that the city council's receipt of phone calls from concerned citizens regarding the demolition of a warehouse in a historic district violated procedural due process, because the substance of the calls was not recorded or disclosed at the public hearing. *Id.* at 655, 8 P.3d at 650. By considering the input received in the ex parte telephone conversations, the city council improperly extended its inquiry beyond the limits of the record. *Id.*

In this case, the Director has drawn conclusions and issued findings based upon Technical Memoranda produced after procedural irregularities that involved invalid site views and ex parte communications, in violation of Idaho Code Sections 67-5248(2), 67-5251 and 67-5253.[15] Sun Valley was not afforded the opportunity for a hearing or to otherwise participate in developing the facts upon which the Director based his findings. The Director coordinated and conducted fact-gathering sessions without notice to all of the parties, and improperly

[15] Because Department staff visited virtually all of the Petitioners' properties, the invalid site views undoubtedly totaled 39, at a minimum. R. Vol. VI-VII, pp. 1105-1342.

considered facts and staff evaluation and opinion as evidence, in violation of fundamental concepts of procedural due process.

For all of the foregoing reasons, the Technical Memoranda are tainted. They are the result of the Director's ignorance of Sun Valley's substantial rights. Not only the preparation and submission of the Technical Memoranda, but also the Director's participation and reliance thereupon, illustrate his failure to administer the contested case proceedings at issue in accordance with Idaho law. If the Court does not require the Director to dismiss the contested case proceedings for the Petitioners' failure to comply with the requirements to initiate a water delivery call, the Court should hold that the Technical Memoranda are procedurally deficient, cannot be used by parties or the Director, and order them expunged from the agency record.

E. The Director's Factual Findings Are Not Based Upon Substantial, Competent Evidence In The Record

In the Rule 711 Order, the Director cited the Technical Memoranda and 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).

Supp. R., Vol. I, p. 86.

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).

Id.

In making the foregoing findings prior to a contested case hearing, the Director failed to comply with Idaho law in several respects. First, as addressed *supra*, the Technical Memoranda upon which the Director relies are not the proper subject of official notice because (1) they are not facts that could be judicially noticed in the courts of Idaho; and (2) they are not generally recognized technical or scientific facts within the agency's specialized knowledge. Instead, they are facts gathered and evaluated in reports prepared specifically in anticipation of the contested case hearings at issue.

Second, the Director did not notify Sun Valley of the specific facts or material to be noticed. *See* IDAHO CODE § 67-5251(4). While the Director notified the parties of his request for Technical Memoranda, citing Procedural Rules 600 and 602, he did not indicate an intent to officially notice such Technical Memoranda, or any portion thereof. R. Vol. II, pp. 334-44. Such notification was required "before the issuance of any order that is based in whole or in part on facts or material noticed." IDAHO CODE §§ 67-5251(4); 67-5248(2). Here, the Rule 711 Order was based in part on facts from the Technical Memoranda, in violation of Idaho law.

Third, the Director did not provide the parties "a timely and meaningful opportunity to contest and rebut the facts or material so noticed" prior to issuing his findings based on the Technical Memoranda. *See* IDAHO CODE § 67-5251(4). And, while the Director

indicated in his Request for Staff Memoranda an intent to make "a responsible staff member available for cross-examination at a hearing," *see id.*, the Director has already made findings in reliance upon the Technical Memoranda, rendering his intention meaningless as to matters already decided without a hearing.

Furthermore, and of critical importance, the foregoing findings of fact were not only made by the Director in advance of any contested case hearing and in violation of Idaho law, but they speak to one of the issues at the very core of the case—the ACGWS. An ACGWS is

> [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.

IDAPA 37.03.11.010.01.

A comparison of that definition to the foregoing findings illustrates the Director's prejudicial error. *See* Supp. R. Vol. I, p. 86 ("[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.") (emphasis added); *id.* ("Ground water use in the upper Little Wood River valley above Silver Creek ***does not appear to affect*** the calling surface water rights.") (emphasis added). Without a contested case hearing in which all parties have the opportunity to present and challenge evidence (and indeed without any allegation by the Petitioners describing the ACGWS in accordance with

CM Rule 30.01), the Director has not only improperly taken official notice of the Technical Memoranda and considered them as evidence, but has already made factual findings concerning the existence and general scope of an ACGWS. Such findings are of particular note in light of the fact that in the very Rule 711 Order in which he makes such findings, the Director twice states that the ACGWS is a factual question to be resolved in a contested case hearing. *See* Supp. R. Vol. I, pp. 85, 86 (the ACGWS "***is a factual question that can be answered*** using the framework of CM Rule 40 based upon information presented ***at hearing*** . . .") (emphasis added).

There can be no reasonable dispute that an ACGWS, including its existence and the scope thereof, is a factual question to be resolved based upon evidence presented ***by the parties*** in a contested case hearing.[16] *See* IDAPA 37.03.11.030.07. Since no hearing occurred in which to make a record, however, the foregoing findings are not based upon substantial, competent evidence in the record and, accordingly, must be overturned. *See* IDAHO CODE

---

[16] More specifically, ***the Petitioners*** were required to allege the existence and scope of an ACGWS pursuant to CM Rule 30.01(d). *See* IDAPA 37.03.11.030.01(d) ("A description of the area having a common ground water supply ***within which petitioner desires*** junior-priority ground water diversion and use to be regulated.") (emphasis added). Thereafter, in accordance with the Procedural Rules, the Petitioners and Respondents were required to present evidence concerning, among other matters, that very description for the Director's consideration and ultimate decision. Unfortunately, the Director has, in part, foreclosed that opportunity, prejudicially bearing the burden of both describing, and now, without a hearing, drawing conclusions about a previously undetermined and unincorporated ACGWS. Critically, Sun Valley remains entirely unaware of whether its water rights exist within an ACGWS ***within which the Petitioners desire*** junior-priority ground water use to be regulated, in violation of its due process rights. Sun Valley is aware only that the Department (not the Petitioners) identified Sun Valley as a respondent, and that the Director has drawn premature and prejudicial conclusions, which conclusions appear to advocate on behalf of the Petitioners for an extremely broad ACGWS.

§ 67-5279(3); IDAHO CODE § 67-5248(2); *A&B Irrigation Dist.*, 153 Idaho at 505, 284 P.3d at 230; *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 43, 981 P.2d 1146, 1153 (1999) ("Substantial and competent evidence is ***relevant evidence*** which a reasonable mind might accept to support a conclusion.") (emphasis added).

In light of the Director's lack of jurisdiction and the numerous procedural irregularities present in these contested case proceedings, Sun Valley has experienced substantial prejudice. The Director's failure to abide by the procedural rules that govern his conduct and authority in these contested case proceedings has resulted in a process that deprives Sun Valley of any legitimate, even-handed opportunity to defend its valuable property rights. By accepting perfunctory Letters from the Petitioners as valid petitions, essentially requesting that Department staff meet the mandatory pleading requirements on behalf of the Petitioners by virtue of its own factual investigation, failing to afford the parties any notice or opportunity to participate in such factual investigation, and making conclusory findings in reliance solely upon Department staff's evaluation of the facts, the Director has effectively removed the parties from any viable role in these contested case proceedings.

The role of the parties in contested case proceedings such as this is to gather and present evidence to the hearing officer or agency head in support of relief or defense of a claim, not merely to observe and agree or disagree with agency staff's findings or, as in this case, to attempt to ensure that the agency follows its own rules. In other words, it is wholly inappropriate that Sun Valley is forced into a position adverse to the Director and the Department in these contested case proceedings. Regardless of the results of this Petition for Judicial Review, and

whether or not the Court remands the contested case proceedings for dismissal, Sun Valley requests that the Court require the Director and the Department to ensure that the Petitioners present their own case in support of the delivery call (as opposed to Department staff), and to allow Sun Valley, and the Respondents generally, the opportunity to participate in a meaningful defense. The prejudice to Sun Valley's due process rights as a result of the Department acting as the Petitioners' factual investigator and *de facto* expert is readily apparent, as the foregoing premature and prejudicial findings by the Director regarding the ACGWS so clearly illustrate.

F. Sun Valley Is Entitled To Its Costs And Reasonable Attorney's Fees

Sun Valley requests its costs and attorney's fees on review pursuant to Idaho Code Section 12-107, as well as Section 12-117(1) that provides "the court shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if the court finds that the nonprevailing party acted without a reasonable basis in fact or law." IDAHO CODE § 12-117(1). A party acts without a reasonable basis in fact or law when it "has no authority to take a particular action." *Univ. of Utah Hosp. v. Ada Cnty.*, 143 Idaho 808, 812, 153 P.3d 1154, 1158 (2007) (quoting *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005)).

As the foregoing clearly demonstrates, the Director did not have authority to exercise his jurisdiction, and to proceed under CM Rule 40, without first requiring compliance with the minimum pleading requirements set forth in CM Rule 30. The plain language of the CM Rules, as well as the Department's Procedural Rules and the statute governing water delivery calls involving ground water, all support that proposition. Furthermore, the record

before the Court clearly demonstrates that the Director directed Department staff to engage in improper fact-finding and evaluation of information that is not yet evidence before him. His actions have resulted in Department staff stepping into the shoes of the Petitioners as to both pleading obligations and expert evaluation, to the detriment of Sun Valley and other Respondents. Equally important, such actions resulted in factual determinations by the Director without a hearing and in exclusive reliance upon Department staff, in violation of Idaho law, which determinations the Director has stated on numerous occasions are factual determinations to be made after a properly noticed hearing. Sun Valley is entitled to its reasonable costs and fees.

VI. CONCLUSION

"[D]ue process rights are substantial rights." *Eddins v. City of Lewiston*, 150 Idaho at 36, 244 P.3d at 180. Sun Valley's due process rights have been violated by the Director's failure to require Petitioners to comply with the Procedural Rules and laws that grant the Director jurisdiction and authority to administer and curtail water rights in the first place. Compounding the Director's violation of Sun Valley's rights by acting without jurisdiction, the Director ignored the most fundamental requirements of procedural due process by engaging in gathering facts and considering information outside of a properly developed record, and without the opportunity for participation by the parties. For those reasons, Sun Valley respectfully requests that the Court find the Director acted without jurisdiction and in excess of his statutory authority by failing to comply, and by failing to require Petitioners' compliance, with Idaho Code, the CM Rules and Procedural Rules, and to remand the contested cases to the Director

with instructions to dismiss these contested case proceedings. Sun Valley further requests that the Court find the tainted Technical Memoranda an invalid exercise of the Director's authority in a contested case, constituting a violation of procedural due process, and order they shall not be used by any parties or the Department, and that they be expunged from the record.

DATED this 6th day of January, 2016.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

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

By _____
Matthew J. McGee – Of the Firm
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of January, 2016, I caused a true and correct copy of the foregoing **PETITIONER'S BRIEF** to be served by the method indicated below, and addressed to the following:

Joseph F. James
BROWN & JAMES
130 Fourth Ave. W.
Gooding, ID 83330
Facsimile (208) 934-4101
Attorneys for Big Wood/Little Wood Water Users Association

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Garrick L. Baxter
Emmi Blades
Deputy Attorneys General
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Facsimile (208) 287-6700
Attorneys for Idaho Department of Water Resources

( ) U.S. Mail, Postage Prepaid
(X) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Dylan B. Lawrence
VARIN WARDWELL LLC
242 N. 8th St., Suite 220
P.O. Box 1676
Boise, ID 83701-1676
Facsimile (866) 717-1758
Attorneys for Water District 37-B Groundwater Group

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Susan E. Buxton
Cherese McLain
MOORE SMITH BUXTON & TURCKE, CHTD.
950 W. Bannock St., Suite 520
Boise, ID 83702
Facsimile (208) 331-1202
Attorneys for the City of Ketchum and City of Fairfield

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

James R. Laski
Heather E. O'Leary
LAWSON LASKI CLARK & POGUE, PLLC
675 Sun Valley Rd., Suite A
P.O. Box 3310
Ketchum, ID 83340
Facsimile (208) 725-0076
Attorneys for Intervenors Animal Shelter of Wood River, Dennis J. Card, Edward A Lawson and Maureen E. McCanty

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Albert P. Barker
Paul L. Arrington
BARKER, ROSHOLT & SIMPSON, LLP
1010 W. Jefferson St., Suite 102
P.O. Box 2139
Boise, ID 83701-2139
Facsimile (208) 344-6034
Attorneys for South Valley Ground Water District

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

James P. Speck
SPECK & AANESTAD
120 E. Ave.
P.O. Box 987
Ketchum, ID 83340
Facsimile (208) 726-0752
Attorneys for Intervenors

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Director of the Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

( ) U.S. Mail, Postage Prepaid
(X) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Scott L. Campbell