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

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, et al., Intervenors.	Case No. CV-WA-2015-14500
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	

CITY OF KETCHUM AND CITY OF FAIRFIELD JOINDER IN AND SUPPORT OF PETITIONER SUN VALLEY COMPANY'S OPENING BRIEF

Appeal from the Director of the Idaho Department of Water Resources

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The City of Ketchum and City of Fairfield, (hereinafter referred to as "Ketchum" and "Fairfield") by and through their attorney of record, Susan E. Buxton, of the law firm of MOORE SMITH BUXTON & TURCKE, CHTD., pursuant to Idaho Rules of Civil Procedure 18(a), hereby join in and fully support the Petitioners' Opening Brief filed herein by the Sun Valley Company ("SVC") on January 7, 2016 ("Petitioner's Opening Brief"). "Petitioner" may be referred to herein as SVC.

I. STATEMENT OF THE CASE

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

II. FACTUAL BACKGROUND

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

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

On April 23, 2015, Ketchum submitted a Notice of Intent to Participate. BW-R, Vol. I, pp. 67-69; LW-R, Vol. I, pp. 67-69. On May 26, 2015, Fairfield submitted a Notice of Intent to Participate. BW-R, Vol. I, pp. 261-263; LW-R, Vol. II, pp. 261-263. Neither Fairfield nor Ketchum's water rights are located within the ESPA area of common ground water supply.

III. ISSUES PRESENTED ON JUDICIAL REVIEW

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

IV. ARGUMENT

A. Ketchum and Fairfield Join Sun Valley Company's Arguments.

Ketchum and Fairfield join the arguments presented in Petitioner Sun Valley Company's Opening Brief, and offer the following additional argument.

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

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

The Department is only entitled to the authority granted to it by the legislature. As a condition precedent, the Department is required to find that a delivery call petition satisfied both Idaho Code and the IDAPA Rules before the Department has any authority to exercise the agency's powers. WUA's members have burdens and obligations, imposed upon them by Idaho law and the Department's rules, that they must satisfy before they are entitled to the benefit of the Department Director's regulatory powers. *A&B Irrigation Dist. v. Spackman*, 155 Idaho 640, 652-53, 315 P.3d 828, 840-41 (2013). WUA did not meet this burden,

Ketchum and Fairfield hold significant water rights that are very valuable and necessary for the overall health, safety and welfare of their collective residents and taxpayers. The Department's action to conclude that Ketchum and Fairfield are part of the Contested Cases detrimentally affects their interests and has caused them to expend significant taxpayer monies unfairly in a premature process prior to establishing an area of common ground water supply where

one has not been established in Basins 37 and 37B.[1] Idaho Code § 42-237a(g); IDAPA 37.03.11.020.07. (*See* Department Delivery Call Letters to Junior-Priority Ground Water Right or Rights Holders and Mailing List which lists Ketchum and Fairfield's affected water rights, R. Vol. I, p. 12 and 14). The threat of curtailment, or other potential abridgement of Ketchum and Fairfield's water rights, requires the Department must provide proper due process of law. *See Bennett v. Twin Falls North Side Land & Water Co.,* 27 Idaho 643, 651, 150 P.3d 336, 339 (1915).

The Rules of Conjunctive Management of Surface and Ground Water Resources ("CM Rules") were promulgated by the Department and approved by the Idaho Legislature in 1994. IDAPA 37.03.11 *et. seq*. The CM Rules have not been amended.

In support of SVC's arguments, "it is a familiar rule of administrative law that an agency must abide by its own regulations." *Fort Steward Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 654 (1990); *Watkins v. United States Bureau of Customs and Border Protection,* 643 F.3d 1189 (9th Cir. 2011). Agencies that circumvent their own rules without waiving, suspending or amending them is arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law. *See Align Tech., Inc. v. ITC,* 771 F.3d 1317, 1322 (Fed. Cir. 2014).

The Department cannot now circumvent the CM Rules that address procedures for delivery call petitions. The WUA members have not provided nor proven facts required under the CM Rule 30 or CM Rule 40 to show that either Ketchum or Fairfield have affected WUA's senior water rights. The Department cannot shift the burden to the junior waters users to prove a negative to facts that have not even been shown by the WUA in the first place. *See* generally the June 3, 2015 Transcript pp. 30-32.[2] Additionally, even the WUA's attorney procedurally disagreed with the

[1] Ketchum is located in Basin 37 and Fairfield is located in Basin 37B.
[2] The June 3, 2015 Transcript as a whole demonstrates the extent of the concerns regarding the Department's process for the Contested Cases since their inception.

Department and believed the Department could not proceed under Rule 40 without having the preconditions of Rule 30 satisfied." *See* Transcript p. 48, lines 18-20.

C. The Rule 711 Order and Supplementation of the Staff Technical Memorandums Violates the Junior Water User's Due Process.

On October 16, 2015, the Director issued the Rule 711 Order. Supp. R. Vol. I, pp. 84-88. The Technical Memoranda that was reviewed by the 711 Order 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.

During the June 3, 2015, pre-hearing conference, many of the respondents expressed major concern over the Director's decision to request two memorandums be provided by staff during this preliminary process. The concerns primarily focused on the staff evaluation and their future memoranda having no real peer review or any participation or involvement by any of the parties but the Department staff. *See generally* Transcript pp. 13-19. The Director disagreed with this issue and expressed that he "does not intend to be involved in the evaluation." *See* Transcript p. 21, lines 10-11. When asked about the concerns of ex parte communications and the request for the parties to be involved during this process, the Director stated: "In my opinion, the ex parte communication rule applies to the tribunal and does not apply to staff that are preparing the memorandum…" Transcript, p. 40, lines 6-8.

Ketchum and Fairfield generally agree with the Director's stated analysis of ex parte communications, however, unfortunately, this did not play out in practice. The Director did participate in the evaluation which resulted in the 711 Order. He conducted site visits. *See* Affidavit of Scott L. Campbell, filed December 7, 2015; Supplemental Affidavit of Scott L. Campbell, filed December 10, 2015. There are photos showing the Director actively viewing the water systems of the petitioner. *See id.*

Furthermore, the technical memorandum that derived from these investigations state Director's conclusions of fact:

> "The watermaster explained that flows at Station 54 "account for return flows into the Little Wood River from the Richfield-Magic Reservoir system. This flow volume credits the return flow out of Richfield and allows more junior water rights to stay on longer. See Attachment 6 for a map of river gage station locations."
> "The watermaster does not consider use of any river gage below the Milner Gooding Canal to determine or adjust priority cuts because the river reach below the Milner Gooding Canal is a losing reach. BWCC-AFRD2 water in the river reach below the Milner Gooding absorbs river channel losses."

Surface Water Delivery Systems Staff Memorandum, p. 16. R. Vol. VI., pp. 1105-1300. This is exactly what the prohibition of ex parte communications is designed to protect against. The Director is the judge and jury. He should not be participating in site visits that have not been noticed nor an opportunity provided to attend by all parties. In *Eacret v. Bonner County*, 139 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 *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).

Not only did the Director actively participate in the evaluation, he then relies on this evaluation in his Rule 711 Order to deny the Sun Valley Company's Motion to Revise the Interlocutory Order.

> In addition, SVC's suggestion that CM Rule 20.06 prescribes a fixed two-step process for delivery calls where water rights are put into water districts only after an area of common groundwater is designated is not tenable. Throughout much of Idaho, water districts have been created and water rights incorporated into the districts. Here, current information demonstrates the water rights at issue in the Big and Little Wood Delivery Calls are already in water districts. Specifically, the

> junior-priority ground water right diversions that **impact flow in water sources** for the Petitioners' senior surface water rights are diverted from the Wood River Valley aquifer system and the Camas Prairie aquifer system. *IDWR Staff Memo Re: Hydrology, Hydrogeology, and Hydrologic Data* at 1, 6-14 (Aug. 28, 2015). (Emphasis added.)

October 16, 2015 Director's Order Denying Motion to Revise Interlocutory Order (Rule 711 Order), p. 3. This effectively end-runs the record and the "evidence" relied upon in making Department findings without any ability for the respondent's to participate. This is a violation of due process and should not be made part of the record. Both Fairfield and Ketchum's water rights are affected by the language of the 711 Order without due process.

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

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

In this particular matter, the Director has determined that the agency will make its own investigation and findings and, only after those are made, will the junior holders be able to challenge the Department's decisions. *See generally* Transcript pp. 17-20. This process is arguably a 180 degree change from the Department's process in the *Rangen* call which required thorough discovery and expert consultation prior to making any findings. *See Id.;* p. 31, lines 21-23, p. 38,

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

By accepting the Petitioners' February 23, 2015 letter as a valid delivery call under CM Rule 30 and Title 42 of the Idaho Code, the Department failed to require WUA to provide the pertinent and crucial information identifying those junior users that WUA alleges injure their senior rights. In failing to do so, every water right holder in Basin 37 and 37B (except some exempt users) were considered by the Director as a potential respondent. R. Vol. I, p. 12. It is wholly unjust and unfair to allow senior water right holders to hold hostage junior water right holders within a Basins 37 and 37B, by merely writing letters to the Director. The Director's acceptance of the WUA's letters as a valid delivery call petition was arbitrary and capricious and should be overturned.

V. CONCLUSION

Due to the Department's failure to follow its own rules, the Contested Cases should be dismissed and SVC's motions granted. In the alternative, SVC's motions should be granted, the requirements of CM 30 should be followed, the Technical Memorandums of Tim Luke and Jennifer Sukow be expunged from the record, and the area of common ground water supply should be determined prior to any proceeding in the Contested Cases moving forward.

DATED this 7th day of January, 2016.

MOORE SMITH BUXTON & TURCKE, CHTD.

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