

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,)	Case No. CV-WA-2015-14500
)	
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.)	

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 REPLY BRIEF**

Appeal from the Director of the Idaho
Department of Water Resources

Scott L. Campbell, ISB #2251
Norman M. Semanko, ISB #4761
Matthew J. McGee, ISB #7979
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
Post Office Box 829
Boise, Idaho 83701
Attorneys for Petitioner

Garrick L. Baxter, ISB #6301
Emmi Blades, ISB #8682
Deputy Attorneys General
IDAHO DEPARTMENT OF WATER RESOURCES
Post Office Box 83720
Boise, Idaho 83720-0098
Attorneys for Respondents

Susan E. Buxton, ISB #4041
Cherese D. McLain, ISB #7911
MOORE SMITH BUXTON & TURCKE, CHTD.
950 W. Bannock Street, Suite 520
Boise, ID 83702
*Attorneys for City of Ketchum and City of
Fairfield*

Joseph F. James, ISB #5771
BROWN & JAMES
130 Fourth Avenue W.
Gooding, ID 83330
*Attorneys for Intervenor Big Wood/Little
Wood Water Users Association*

Albert P. Barker, ISB #2867
Paul L. Arrington, ISB #7198
BARKER, ROSHOLT & SIMPSON, LLP
1010 W. Jefferson Street, Suite 102
P.O. Box 2139
Boise, ID 83701-2139
*Attorneys for Intervenor South Valley Ground
Water District*

Dylan B. Lawrence, ISB #7136
J. Will Varin, ISB #6981
VARIN WARDWELL, LLC
242 N. 8th Street, Suite 220
P.O. Box 1676
Boise, ID 83701-1676
*Attorneys for Intervenor Water District 37B
Ground Water Association*

James R. Laski, ISB #5429
Heather E. O'Leary, ISB #8693
LAWSON LASKI CLARK & POGUE, PLLC
675 Sun Valley Road, Suite A
P.O. Box 3310
Ketchum, ID 83340
*Attorneys for Intervenors Animal Shelter of
Wood River Valley, et al.*

James P. Speck, ISB #2067
SPECK & AANESTAD
120 E. Avenue
P.O. Box 987
Ketchum, ID 83340
*Attorneys for Intervenors Airport West
Business Park Owners Association Inc.*

TABLE OF AUTHORITIES

Cases

<i>Comer v. County of Twin Falls</i> , 130 Idaho 433, 942 P.2d 557 (1997).....	1, 2
<i>Eacret v. Bonner County</i> , 139 Idaho 780, 86 P.3d 494 (2004).....	1
<i>Highbarger v. Thornock</i> , 94 Idaho 829, 498 P.2d 1302 (1972)	2, 3
<i>Idaho Historic Pres. Council, Inc. v. City of Boise</i> , 134 Idaho 651, 8 P.3d 646 (2000)	1
<i>Lobdell v. State ex rel. Board of Highway Directors</i> , 89 Idaho 559, 407 P.2d 135 (1965).....	2
<i>Sanders v. State Highway Dept.</i> , 212 S.Ct. 224 (1948).....	2

Other Authorities

2 Jones on Evidence, § 462 (5th ed. 1958).....	2
--	---

Rules

Idaho Rules of Civil Procedure 18(a)	1
--	---

The City of Ketchum and City of Fairfield, (hereinafter referred to as “Ketchum” and “Fairfield” or collectively “Intervenors”) by and through their attorney of record, Susan E. Buxton and Chereese D. McLain, 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’ Reply Brief filed herein by the Sun Valley Company (“SVC”) on February 25, 2016 (“Petitioner’s Reply Brief”).

Intervenors’ agree with Petitioner Sun Valley Company that procedural due process violations occurred when IDWR staff conducted site visits without providing the parties notice or opportunity to be present. *See* Petitioner’s Brief, at 58. Intervenors’ respectfully disagree with the Respondent’s assertion that the holdings in *Comer*, *Eacret*, and *Idaho Historic Pres. Council, Inc.* are not implicated in this case in regard to the due process owed to Respondent and Intervenors. *See* Respondent’s Brief, p. 34 (dated February 4, 2016), citing *Comer v. County of Twin Falls*, 130 Idaho 433, 942 P.2d 557 (1997), *Eacret v. Bonner County*, 139 Idaho 780, 86 P.3d 494 (2004), and *Idaho Historic Pres. Council, Inc. v. City of Boise*, 134 Idaho 651, 8 P.3d 646 (2000) The holdings in those cases are that a quasi-judicial body cannot conduct private fact-finding during a proceeding and that site viewing or other similar investigations “require notice and an opportunity to be present in order to satisfy procedural due process concerns.” *See* 139 Idaho at 787.

Respondent’s attempts to distinguish this rule by arguing that these cases involve reviewing bodies in the appellate capacity is without merit. While this is true for *Comer*, *Eacret*, and *Idaho Historic Pres. Council, Inc.*, the cases the Idaho Supreme Court relies on to establish this precedent were trial level reviewing bodies. The fact that these cases involve an appellant body is irrelevant. The requirement that notice and opportunity to be present is required by any government body, sitting in a quasi-judicial capacity, including the IDWR Director.

In *Comer*, the County of Twin Falls Board of County Commissioners conducted a site visit of the land at issue without providing written notice of the viewing, and provided none of the parties with the opportunity to be present. *See* 130 Idaho at 439. The Idaho Supreme Court found that it violated the parties' procedural due process rights. *Id.* The court stated "[t]he property viewing in this case is analogous to a viewing in a trial. We have held that a judge or jury may not view premises without notice to the parties." *Id.*, citing *Highbarger v. Thornock*, 94 Idaho 829, 831, 498 P.2d 1302, 1304 (1972).

IDWR statutes and rules allow the Director to sit as a finder of fact, which is akin to a trial court. There are many important reasons that a judge or quasi-judicial body, like the IDWR Director, must allow the parties to participate in the process. In *Highbarger*, the trial judge viewed the scene of an accident without notice to any of the parties and relied on his observations in ruling on the defendant's motion to dismiss. 94 Idaho at 830. The Idaho Supreme Court found that the trial judge erred for not providing notice to the parties. The court stated:

A judge trying a case without a jury may not properly view premises without notice to the parties or use the result of his inspection in weighing the testimony of a witness. *Lobdell v. State ex rel. Board of Highway Directors*, 89 Idaho 559, 407 P.2d 135 (1965); *Sanders v. State Highway Dept.*, *supra*; see 2 Jones on Evidence, § 462, at 875 (5th ed. 1958) (and cases cited). The same rule should apply where a judge, sitting with a jury, is considering a motion for involuntary dismissal. Thus, the view of the scene of the accident by the trial court was improper because it was undertaken without notice to the parties. Persuasive reasons exist for requiring the court to notify the parties of its intention to view the property which is the subject of the litigation. First, notice to the parties provides them with an ***opportunity to contest*** the propriety of such a viewing under the particular circumstances. Thus, in the case at bar, the appellants may have convinced the court that a view of the premises was not necessary in order to understand and apply the evidence introduced by the plaintiff. More importantly, notice to the parties provides them with an ***opportunity to be present*** at the time of the inspection, which in turn will insure that the court does not mistakenly view the wrong object or premises. In this case, the court indicated that it had 'viewed the premises yesterday and identified the rock pile and pieces of chrome and the hills and valleys there.' As the appellants correctly point out, they have absolutely ***no way of knowing whether the trial judge actually found the place where the accident in fact occurred.*** They also have ***no***

way of knowing whether the 'rock pile' mentioned by the judge was the same one discussed by the witnesses who testified in court. We conclude that the trial court erred in viewing the premises without prior notice to the parties.

Id. at 831 (emphasis added).

The same issues apply in this case. The IDWR Director and staff conducted site visits and other ex parte communications as part of a fact-finding endeavor which later resulted in two technical memorandums that were relied upon by the Director. The Intervenor's have no way of knowing whether the information compiled was valid and had no way to challenge it prior to it becoming agency record. This predicament is squarely what is contemplated and prohibited in *Highbarger*. Accordingly, Department's actions violated the Intervenor's procedural due process rights.

DATED this 25th day of February, 2016.

MOORE SMITH BUXTON & TURCKE, CHTD.



Chere D. McLain
Attorneys for City of Ketchum & City of Fairfield

CERTIFICATE OF SERVICE

I do hereby certify that, on this 25th day of February, 2016, I served a true and correct copy of the CITY OF KETCHUM AND CITY OF FAIRFIELD JOINDER IN AND SUPPORT OF PETITIONER SUN VALLEY COMPANY'S REPLY BRIEF the above and foregoing document by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Michael C. Creamer
Michael P. Lawrence
Givens Pursley, LLP
601 W. Bannock Street
Boise, ID 83701-2720
Email: mcc@givenspursley.com
mpl@givenspursley.com

Candice M. McHugh
Chris M. Bromley
McHugh Bromley, PLLC
380 S. 4th Street, Suite 103
Boise, ID 83702
Email: cmchugh@mchughbromley.com
cbromley@mchughbromley.com

Joseph James
Brown & James
130 – 4th Avenue W.
Gooding, ID 83330
Email: joe@brownjames.com

Garrick Baxter
Emmi Blades
IDWR
PO Box 83720-0098
Boise, ID 83720-0098
Email: Garrick.baxter@idwr.idaho.gov
Emmi.blades@idwr.idaho.gov

James Laski
Heather O'Leary
Lawson Laski Clark & Pogue
PO Box 3310
Ketchum, ID 83340
Email: jrl@lawsonlaski.com
heo@lawsonlaski.com

Dylan B. Lawrence
Vain Wardwell LLC
PO Box 1676
Boise, ID 83701-1676
Email: dylanlawrence@varinwardwell.com

Albert P. Barker
Barker Rosholt & Simpson
1010 W. Jefferson Street,
Suite 102
Boise, ID 83701-2139
Email: apb@idahowaters.com

James Speck
Speck & Aanestad
PO Box 987
Ketchum, ID 83340-0987
Email: jim@speckaanestad.com

Scott Campbell
Moffatt Thomas
PO Box 829
Boise, ID 83701-0829
Email: slc@moffatt.com

IDWR
322 E. Front Street
Boise, ID 83702


Chere D. McLain