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

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 REPLY BRIEF

Appeal from the Director of the Idaho Department of Water Resources

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I. INTRODUCTION

The Big Wood and Little Wood Water Users Association and its members (the "Association" or the "Petitioners") failed to comply with the requirements of Idaho law when they initiated a water delivery call in February 2015 with two letter requesting the Director of the Idaho Department of Water Resources (the "Director") to administer the Association's water rights in accordance with the prior appropriation doctrine (the "Letters"). Conjunctive Management Rule ("CM Rule") 30 governs water the delivery calls in the Big Wood River Valley, not CM Rule 40. The Association has never disputed this contention. In fact, since February 2015, Sun Valley Company ("Sun Valley") has heard very little from the Association. The Director, on the other hand, disagreed, and has taken it upon himself to advocate on behalf of the Association's deficient pleadings. In tandem with such advocacy, the Director engaged the Idaho Department of Water Resources' ("Department") staff to work with the Association to fill in the gaps left by the Association's complete failure to submit a compliant petition for delivery call. Finally, without recognizing the irony, the Director took the position that time is of the essence in addressing the Association's Letters and their deficiency as petitions under the CM Rules, and utilized the issue of timeliness, complexity, and efficiency to deprive Sun Valley of its due process rights. The Respondent's Brief does little to dispute those very fundamental issues.

II. ARGUMENT

A. The Contested Case Proceedings Must Be Dismissed Because The Association Failed To Comply With CM Rule 30's Pleading Requirements.

The Director's arguments concerning Sun Valley's Motion to Dismiss and the Letters submitted to the Department by members of the Association largely restate the positions articulated by the Director's Order Denying Sun Valley Company's Motion to Dismiss (the "Sun Valley Order") and the Order Denying Motion to Revise Interlocutory Order (the "Rule 711 Order"). *See* R. Vol. V, pp. 888-98; Supp. R. Vol. I, pp. 84-88. The following arguments address the specific responses made by the Director in his Respondent's Brief.

1. The Director's continued misleading quotation of the CM Rules illustrates his error.

In the Petitioner's Brief, Sun Valley pointed out the misleading quotation of CM Rule 40, and how that misleading quotation was, in part, leading to the Director's erroneous interpretation of the Department's rules. *See* Pet. Br. at 31-32. In summary, Sun Valley pointed out that by conveniently ignoring portions of the cited rule—CM Rule 40—the Director changed the meaning of the rule. *Compare* CM Rule 40 (addressing delivery calls against junior-priority ground water users from "***an area having a common ground water supply in an organized water district***") (emphasis added) *with* Sun Valley Order, R. Vol. V, p. 890 ("Therefore, the applicable rule is CM Rule 40 that addresses delivery calls against junior-priority ***ground water users 'in an organized water district.'*** IDAPA 37.03.11.040.01.") (emphasis added). The Director provided no explanation for his misleading characterization of the language of CM Rule 40.

Instead of addressing that misleading quotation of CM Rule 40 in the Respondent's Brief, the Director proceeded to similarly mislead and mischaracterize the language of CM Rule 20.07. The Director makes the following argument:

> The Court should instead affirm the Director's determination that the language of the CM Rules demonstrates the test for deciding whether CM Rule 30 or 40 applies is whether delivery calls are against junior ground water rights within water districts. CM Rule 20.07 explicitly states that "Rule 40 provides procedures for responding to delivery calls *within water districts*." IDAPA 37.03.11.020.07 (emphasis added). CM Rule 20.07 makes no similar reference with respect to a CM Rule 30 delivery call.

Resp. Br. at 18.

Comparing the quoted and emphasized language in the Respondent's Brief to the actual language of the rule reveals that the Department's questionable use of quotations continues even after Sun Valley pointed out the issue in its opening brief. The cited sentence from CM Rule 20.07 actually "explicitly states" as follows:

> 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.***

IDAPA 37.03.11.020.07 (emphasis added).

In other words, the Director omitted the critical qualifying phrase. The reason for the Director's omission of that qualifier is clear. Because Water District 37 is not a water district where an applicable area having a common ground water supply ("ACGWS") has been incorporated into the district, the procedures of CM Rule 40 clearly do not apply in this case. Furthermore, reading the rule as a whole, including the portion selectively omitted by the

Department, it becomes very clear that CM Rule 20.07 does not frame the applicability of CM Rules 30 and 40 as contingent upon a water user falling within the boundaries of a water district. If the relevant ACGWS has been incorporated into a water district, the water district encompasses the entirety of the ACGWS as a matter of fact and law. *See* IDAHO CODE § 42-237a(g). Thus, it is reasonable that the more streamlined and simple CM Rule 40 would apply—avoiding the more comprehensive pleading requirements and additional litigation over ACGWS boundaries and related matters. If, on the other hand, the relevant ACGWS has not been determined and incorporated into an existing or new water district, CM Rule 30 applies, and grants the Director authority to address the ACGWS.

The Director's selective quotation of phrases and the singular focus on one or two words within the rules at issue (most emphatically, the words "water districts") not only ignores the plain language of the rules as a whole. In this case, without using an ellipses or other indicator of the omission of the critical qualifying language that follows, the Director's argument affirmatively misrepresents the rule. The Court should reverse the Director's determination that CM Rule 40 applies, absolving the Association of meeting CM Rule 30's pleading requirements, because its mischaracterization of the actual words in the rules at issue reveals clear legal error.

2. The Petitioners must invoke the Director's authority and jurisdiction under the CM Rules, and failed to do so in this case.

The Director commences his argument supporting the Sun Valley Order and Rule 711 Order by mischaracterizing the issue of Department jurisdiction, conflating the designation and incorporation of ACGWS with the clear sequence of actions for responding to

delivery calls in CM Rule 20.07. Sun Valley does not, as the Director contends, argue that "CM Rule 20.06 ***mandates the Director designate an ACGWS*** and incorporate water rights within that area into water districts utilizing CM Rule 30 ***before the Director has 'jurisdiction'*** to proceed with the delivery calls pursuant to CM Rule 40." Resp. Br. at 13 (emphasis added).

First and foremost, the jurisdictional defect is much simpler than the Director asserts. Sun Valley maintains that ***the Petitioners*** must comply with the pleading requirements set forth in CM Rule 30 and Procedural Rule 230 before the Director has jurisdiction to proceed with administering the delivery calls. The legislature has granted the Director authority and jurisdiction to preside in water delivery calls. *See* IDAHO CODE § 42-1805(8); *see also* IDAHO CODE § 42-603. To invoke that authority and jurisdiction, however, a calling senior must comply with the plain and specific mandates of Idaho law. *See A&B Irrigation Dist. v. Spackman*, 155 Idaho 640, 652-53, 315 P.3d 828, 840-41 (2013). Once that occurs, the Director has jurisdiction to determine the existence of the ACGWS alleged by a calling senior and proceed with the delivery call by adjudicating material injury.

In this case, the Director does not dispute that he has not designated or incorporated an applicable ACGWS into an existing or new water district in the Big Wood River Valley. Accordingly, pursuant to the plain, unambiguous provisions of CM Rule 20.07, CM Rule 30 governs these water delivery call proceedings and ***the Petitioners*** must comply with the requirements of that rule.

Second, it is necessary to address a mischaracterization of Sun Valley's position that has been, and remains, prevalent throughout the Director's discussion. Sun Valley does not

contend, and has never contended, that the Director must administer a contested case pursuant to CM Rule 30 to determine and incorporate an ACGWS, then administer a completely separate contested case pursuant to CM Rule 40 relating to a calling senior's claims. CM Rule 30 includes the administrative and regulatory authority of CM Rule 40 once an ACGWS is indeed determined to exist and incorporated into a water district. Accordingly, when ***the Petitioners*** properly invoke the Director's authority and jurisdiction by meeting the pleading requirements set forth in CM Rule 30, a water delivery call may commence, involving the determination of an ACGWS, material injury to senior water users, and the means by which water rights will be administered and regulated.

The Director states that an ACGWS is a factual question that can be resolved in a contested case hearing on the water delivery call, and Sun Valley agrees. *See* Resp. Br. at 14. That is what makes the Director's position in this case all the more confusing: Fundamentally, Sun Valley's position and the position of the Director as to the factual issues to be addressed in a contested case regarding a water delivery call in the Big Wood River Valley are the same. Whether the Department proceeds under CM Rule 30 or CM Rule 40, the Director must hear evidence and issue rulings regarding material injury, waste and reasonable use. The single issue that is not covered under CM Rule 40 is the determination of an ACGWS. In short, and as the Director concedes, in the Big Wood River Valley (as opposed to the ESPA), a factual determination concerning the applicable ACGWS has not been made, and must be made. Importantly, the determination of whether an ACGWS has already been made and subsequently

incorporated into a water district is the true distinction between proceeding under CM Rule 30 and proceeding under CM Rule 40, as the language of CM Rule 20.07 plainly states.

With that in mind, it bears noting that the pleading requirements of CM Rule 30 require, among other things, 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). In other words, where an ACGWS has not been determined and incorporated, ***the Petitioners*** must allege its existence and describe it. Thereafter, in addition to adjudicating issues relating to material injury, the Director must make a factual determination of the ACGWS, pursuant to Idaho Code Section 42-237a(g) and CM Rules 30 and 31, and if an ACGWS is indeed identified and determined by the Director, enter a legal order incorporating that ACGWS into an existing or new water district. An ACGWS is expressly required to be alleged and adjudicated under CM Rule 30, and not adjudicated under CM Rule 40 (prompting the Director to take the awkward position that it may borrow certain narrow and specific authority from CM Rule 30) because, as CM Rule 20.07 makes clear, CM Rule 30 applies within an ACGWS that has not been incorporated into an existing or new water district.

3. CM Rule 20.06 does not demonstrate that the critical inquiry relating to CM Rule 30's applicability is whether a water right is in a water district.

Under Rule 20.07, the threshold question of applicability of CM Rule 30 or 40 is whether a given **ACGWS** has been incorporated into an existing or new water district, not whether a given water right falls within the boundaries of an existing water district. The Director attacks Sun Valley's argument by citing CM Rule 20.06 for the proposition that water rights

within an ACGWS are indeed incorporated into a water district. *See* Resp. Br. at 15. Of course they are. Once an ACGWS is determined, whether by a separate rulemaking or under CM Rule 30, that ACGWS is incorporated into a new or existing water district. Water rights that source ground water within the boundaries of that ***determined*** and ***incorporated*** ACGWS are also necessarily incorporated into the water district. Sun Valley does not suggest otherwise. If an ACGWS were determined and incorporated within a water district, but the water rights sourcing water from the ACGWS were not, that would be a completely useless exercise.

The critical fact remains: Regardless of whether Sun Valley's water rights are in Water District 37, Sun Valley's water rights are not sourced from an ACGWS that has been determined and incorporated into an existing or new water district in accordance with Idaho law. Therefore, Sun Valley is entitled to demand that the Association comply with the procedural requirements of CM Rule 30, and that the Director enforce such compliance. The Director's citation to CM Rule 20.06's language referencing the incorporation of water rights within an ACGWS into water districts does not support the contention that CM Rule 30 does not apply to these proceedings.

4. The Director's efforts to create ambiguity or absurdity are unsuccessful.

The Director next argues that Sun Valley is arguing for an evaluation of the language of CM Rule 20.07 "in a vacuum," citing authority for the proposition that all sections of applicable statutes must be construed together and in a reasonable fashion. *See* Resp. Br. at 15. At the outset, this bald contention clearly ignores Sun Valley's comprehensive examination

of CM Rule 20.07's plain and rational meaning in the context of the CM Rules generally in the opening brief.[1] *See* Pet. Br. at 34-39 (addressing CM Rule 20.07's consistency with Idaho Code Section 42-237a(g) and CM Rules 1, 20.06, 30.04, 30.07, 30.09, 31, and 40). The Director offers very little opposing contextual evaluation, choosing to rest largely on its conclusory "vacuum" comment.

The Director does, however, suggest that the operation of the plain language of CM Rule 20.07, contextually supported by the foregoing authorities, leads to absurd or unreasonable results. To support that contention, the Director sets forth two primary arguments. The first argument is about "equal application" as to the meaning of an ACGWS within CM Rule 20.07. The second argument is simply that delay will result.

a. "Equal Application."

First, the Director, by virtue of "equal application," attempts to create ambiguity or absurdity within the Department's own rules by twisting the plain and unambiguous language of CM Rule 20.07 to mean something other than what it clearly states. *See* Resp. Br. at 16-17. The Director asserts that (i) CM Rule 20.07's references to ACGWS within each of the first two sentences necessarily mean the same thing—the "equal application," and (ii) the rule does not state whether the ACGWS referenced in each such sentence has been "determined." *See id.* The Director asserts that because the ACGWS must necessarily be determined before incorporation,

[1] As a point of clarification, Sun Valley did not, and does not, concede the existence of any ambiguity in CM Rule 20.07, CM Rule 30, or CM Rule 40. It offered an evaluation of CM Rule 20.07 in the broader context of the CM Rules and Idaho Code to illustrate and support the plain meaning of those provisions, as adopted by the Department and approved by the Idaho legislature.

the reference to ACGWS in the second sentence is necessarily a reference to a "determined" ACGWS. Therefore, according to the Director's "equal application" theory, the ACGWS referenced in the first sentence must necessarily be to a determined, but ***un***incorporated ACGWS, rendering the Director's authority under CM Rule 30 to make a factual determination of an ACGWS meaningless.

Such an awkward interpretation of CM Rule 20.07 runs afoul of the very well-established principles of statutory interpretation cited by the Director. *See* Resp. Br. at 15. The Director is not only viewing CM Rule 20.07 "in a vacuum," but is actually evaluating the reference to the ACGWS within that rule "in a vacuum." CM Rule 20.07 as a whole, and in the context of the CM Rules more generally, has a clear purpose—to provide the applicable procedures for a delivery call based on whether the Director has already determined and incorporated an ACGWS within the surface water users' water district. The Director's attempt to make CM Rule 20.07 appear ambiguous is, at best, strained.

More importantly, the Director's strained "equal application" argument is a nullity. Idaho law clearly provides that whenever an ACGWS is determined to impact the flow of surface water within an existing water district, it should be incorporated into that water district, and that when an ACGWS is determined not to impact the flow of surface water in an existing water district, such an ACGWS should be incorporated in a separate water district. *See* IDAHO CODE § 42-237a(g) . In other words, when an ACGWS has been determined, the law requires that it be incorporated in an existing or newly created water district, regardless of its

impacts on the surface waters in question.[2] The concept of a determined, yet unincorporated ACGWS, that the Director relies upon to create ambiguity or absurdity under its novel "equal application" argument, is a legal nullity. A determined and ***un***incorporated ACGWS cannot, as a matter of law, exist in Idaho, and that is not what is contemplated by CM Rule 20.07. In fact, given the clear mandate of Idaho Code Section 42-237a(g) and the unequivocal relationship between determining an ACGWS and incorporating an ACGWS within an existing or new water district, the word "incorporated" within CM Rule 20.07 constitutes the functional equivalent of "determined and incorporated."

The Director's "equal application" theory does not illustrate the absurdity of the plain language of CM Rule 20.07, nor does it weigh in favor of the Director's unsupported argument that the existence of a water district at the site of the delivery call negates the applicability of CM Rule 30.

b. Delay.

The Director also notes that "a timely response is required when a delivery call is made." *See* Resp. Br. at 17 (citing *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*

[2] This concept is critical in this case. There is ***no dispute*** that Water District 37 ***was not formed*** as a result of the Director's determination and incorporation of an ACGWS. If, for example, an adjudicated and determined ACGWS that includes all or part of Water District 37-B impacts the flow of surface waters in Water District 37, Water District 37 may need to be modified to include that ACGWS and any ACGWS that does not impact surface water will need to be in a separate water district. *See* IDAHO CODE § 42-237a(g). Importantly, CM Rule 30, not CM Rule 40, provides guidance regarding that issue. *See* IDAPA 37.03.11.030.04 (citing IDAHO CODE § 42-604). As Sun Valley noted in its opening brief, this is but one of numerous contextual indicators that the determination and incorporation of an ACGWS is the governing factor regarding whether CM Rule 30 or CM Rule 40 applies. It is ***not*** merely a question of whether a water district exists.

("*AFRD 2*"), 143 Idaho 862, 874, 154 P.3d 433, 445 (2007)). This argument is a red herring for several reasons. First, and most importantly, if a timely response is owed, it is owed when the delivery call is made. In *AFRD 2*, there was no dispute that a valid delivery call or request for relief had been made. *See id.* The issue addressed by the Idaho Supreme Court relating to timeliness in that case was about the length of time between when the call was made and a hearing. *See id.* In this case, the Letters do not qualify as a valid delivery call. The Director should have demanded compliance ***by the Petitioners*** with the pleading requirements of CM Rule 30.01 before "consider[ing] the matter as a petition for contested case under the department's Rules of Procedure, IDAPA 37.01.01." IDAPA 37.03.11.030.02. Until a compliant delivery call petition is filed, there can be no valid contested case, and the timeliness of a hearing is not a matter that will be charged against the Director.

In simple terms, the clock does not start running on the Director until the Association files a petition that complies with Idaho law. That very obviously negates the Director's concerns about timeliness. The Director can cite no authority for the proposition that he must timely respond to adjudicate a water delivery call if a water delivery call has not been effectively made. The Director cannot rely upon a duty owed to seniors to timely administer a delivery call when that duty is not yet owed. The Director really appears to be arguing that it is too great a burden, or will delay the exercise of his jurisdiction and authority, to make the Association comply with CM Rule 30 and Procedural Rule 230. That is not sufficient grounds to ignore these mandatory rules. The Association's compliance with Idaho law is a condition precedent to any duty owed by the Director.

In reality, when the Director demands compliance with Department Rules, and specifically the pleading requirements of CM Rule 30 and Procedural Rule 230, as he should have done in this case, his ability to timely respond will be dramatically improved. He will not have to use public resources and Department staff to gather the information required by CM Rule 30.01, as he has done in this case, because the Association will have necessarily provided it in compliance therewith. He will not have to make overinclusive determinations about who should be a party to the contested case proceedings, because that burden falls upon the Association. The Director's concern about timeliness and delay has no bearing on the resolution of this appeal, and certainly does not impact the manner in which the Court should interpret the plain meaning of the CM Rules.

Second, as Sun Valley articulated *supra*, the rules do not provide that a water delivery call pursuant to CM Rule 30 will take any more time or require any additional hearings or proceedings than are contemplated under CM Rule 40. The Director has manufactured that concern.

Third, and related, the Director admits that he must make a factual determination regarding the ACGWS in the instant proceeding. Since that factual determination must be made in this case in the same fashion as it is made pursuant to CM Rule 30, it is unclear how proceeding under the appropriate rule—CM Rule 30—will cause any delay. As to timing, the only distinction between proceeding under CM Rule 30 and proceeding under CM Rule 40 is the process to initiate the case—a matter for which the Director is not responsible. As articulated *supra*, the Association's compliance with CM Rule 30 will aid in more quickly resolving the

case, not cause delay. For that reason, if the Court is inclined to consider the Director's duty to timely respond to a delivery call when applying the plain meaning of the CM Rules to this case, that factor actually militates in favor of dismissal of the case until the Petitioners comply with CM Rule 30.01.

5. The heading of CM Rule 30 does not create an ambiguity.

The Director also argues that "to the extent SVC's arguments suggest the language of the CM Rules create some question as to what test the Director should utilize to decide whether CM Rule 30 or CM Rule 40 applies, the headings of the rules may be consulted to ascertain the intent of the rules." Resp. Br. at 18. Sun Valley's arguments do not suggest that the language of the rules creates any interpretive question. The literal words of the rules at issue are plain and unambiguous, and resort to an examination of headings is unnecessary. *See Walker v. Nationwide Fin. Corp. of Idaho*, 102 Idaho 266, 268, 629 P.2d 662, 664 (1981).

The only ambiguity at issue in this appeal is introduced by the heading of CM Rule 30, as the Director notes and has relied upon throughout these proceedings. But for the language regarding water districts set forth in the heading of CM Rule 30, there can be no reasonable dispute that the threshold inquiry about the applicable procedural rules for a water delivery call depend upon the incorporation of an ACGWS within an existing or new water district. *See* IDAPA 37.03.11.020.07. Idaho law is clear, however, that a title or heading may not be used to create an ambiguity. *See Kelso & Irwin v. State Ins. Fund,* 134 Idaho 130, 997 P.2d 591 (2000); *State v. Peterson*, 141 Idaho 473, 476, 111 P.3d 158, 161 (Ct. App. 2004). The

heading of CM Rule 30 does not support the Director's position, nor does it create any ambiguity.

Most importantly, Idaho Code Section 42-237a(g) vitiates the Director's ambiguity argument. A tenuous interpretation of an agency rule can never supplant the plain language of an Idaho statute: "[T]he director . . . shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined . . . to incorporate such area such area in said water district. . . ." IDAHO CODE § 42-237a(g) . The Director's argument directly contradicts this statutory provision, and must be rejected.

6. The Director's interpretation of the rules is not entitled to deference.

At the close of its argument that the procedural rule that governs water delivery proceedings in the Big Wood River Valley is CM Rule 40, the Director asserts that its interpretation of the CM Rules is entitled to deference. However, an agency's interpretation of a statute or rule it is responsible to administer is only entitled to deference so long as it is "reasonable and not contrary to the express language of the statute." *Two Jinn, Inc. v. Idaho Dep't of Ins.*, 154 Idaho 1, 3, 293 P.3d 150, 152 (2013) (quoting *Kuna Boxing Club, Inc. v. Idaho Lottery Comm'n*, 149 Idaho 94, 97, 233 P.3d 25, 28 (2009)). As Sun Valley has demonstrated, the language of Rule 20.07 and Idaho Code Section 42-237a(g) addresses the matter at issue, and the Director's interpretation of CM Rule 20.07 is both unreasonable and contrary to the express language of the rule and the statute. Accordingly, the Director is not entitled to deference in this appeal. The ultimate responsibility to determine legislative intent rests with the

judiciary, and a rule must be interpreted consistently with the statutory language and in accordance with its plain, usual and ordinary meaning. *See id.*

7. The Director's arguments with respect to Procedural Rule 230 and Section 42-237b are without merit, and were already addressed in the opening brief.

The Director's arguments with respect to the applicability of Procedural Rule 230 and Idaho Code Section 42-237b is a restatement of, and in many instances is identical to, the Director's statements and conclusions in the Sun Valley Order and Rule 711 Order, rather than a response to Sun Valley's arguments. Sun Valley addressed those statements and conclusions in its opening brief.

It bears noting, however, that in response to the applicability of Procedural Rule 230, the Director continues to endorse his purported authority under Procedural Rule 52 to deviate from the Procedural Rules. *See* Resp. Br. at 21. He asserts it is unnecessary for the Association to identify respondents because "the water rights ***at issue***" in the proceedings are in water districts, and the watermaster can appropriately identify the water users in such districts. This action—even the Director's use of the term "at issue"—illustrates the Director's prejudicial treatment of ground water users in Water Districts 37 and 37B. No applicable ACGWS has been determined and incorporated. At this stage, it is not, or should not be, inconceivable that the ACGWS does not comprise the whole of Water Districts 37 and 37B. Nor is it inconceivable that water rights impacting the Association are not in Water District 37 and 37B. When there is not a determined and incorporated ACGWS, that is among the reasons to have a contested case hearing regarding the water delivery call. And, that is why the Association should have alleged

the ACGWS within which it desired regulation. At the outset, the Director overstepped the boundaries of his neutral role as a hearing officer in this contested case by effectively naming the respondents.

Furthermore, and for the foregoing reasons, the Director's application of CM Rule 52 in this case is unconstitutional as applied, and appropriately addressed at this time by the Court for the reasons set forth in the opening brief. *See* Pet. Br. at 39, n.8.

B. The Court Does Not Lack Jurisdiction To Review Challenges Relating To The Staff Memoranda.

The Director argues that the Court only has jurisdiction to review the Sun Valley Order, and should not entertain an evaluation of procedural issues associated with Department staff's collection and investigation of factual information from the Petitioners and preparation of technical staff memoranda (the "Technical Memoranda"). *See* Resp. Br. at 25-26. The Director asserts that he "has not issued any order designating his decisions in the Request for Staff Memoranda or the Staff Memoranda Order as final and subject to review on appeal." *See id.* He acknowledges, however, that the Rule 711 Order upholding the Sun Valley Order is the proper subject of the Court's review. *See id.* Importantly, that Rule 711 Order relies upon the Technical Memoranda to support denial of Sun Valley's motion to dismiss.

Sun Valley does not dispute that, prior to issuance of the Rule 711 Order, issues relating to the Staff Memo Order and Department staff's improper participation in the preparation of the Petitioners' prima facie case were interlocutory in nature and not issues before the Court. However, the Director compounded the procedural errors associated with the order

and staff participation by relying upon the Technical Memoranda in his final determination on Sun Valley's motion to dismiss before the Technical Memoranda were subjected to the requirements of Procedural Rule 602. This reliance upon the Technical Memoranda placed the procedural errors squarely before this Court in its review of the Sun Valley Order.

It is disingenuous for the Director to argue that the Court does not have jurisdiction to evaluate the propriety of the Director's reliance upon the Technical Memoranda when it forms, in part, the basis for the Director's decision on appeal. It is the Director, and not Sun Valley, that introduced Department staff's participation in these proceedings to this appeal.[3] The Director's efforts to explain away such reliance as meaningless should not be countenanced by the Court. If it was meaningless, it should not have been relied upon. The Director's argument that this Court does not have jurisdiction to review Department staff's participation has no merit.

C. The Staff Memoranda And Staff Participation In This Case Are Procedurally Improper, And Are A Result of the Association's Pleading Deficiencies.

In responding to the numerous procedural irregularities addressed in the opening brief, the Director fails to see the forest for the trees. Not only did the Director improperly rely upon the Technical Memoranda to uphold its denial of Sun Valley's motion to dismiss, the Director's procedural missteps and the violations of Sun Valley's substantial rights are tied directly to the Director's failure to demand that the Association comply with CM Rule 30. For

[3] Sun Valley opposed the Director's Motion to Augment the administrative record with the October 16, 2016 Rule 711 Order.

example, when the Association did not identify respondents, as required by CM Rule 30.01(b), the Director accomplished this for the Association by notifying everyone within Water Districts 37 and 37B of the water delivery call without regard for any ACGWS (because the Association also failed to describe the ACGWS within which the Association desired diversion to be regulated pursuant to CM Rule 30.01(d)). R. Vol. I, p. 12.

When the Association failed to describe an ACGWS, as required by CM Rule 30.01(d), and before the parties had any opportunity to conduct discovery or develop expert testimony, the Director ordered Department staff to prepare a staff memorandum regarding hydrology and hydrogeology in Water Districts 37 and 37B. R. Vol. II, p. 334-44.

When the Association failed to provide information, measurements, data or study results relating to material injury, as required by CM Rule 30.01(c), and notwithstanding the Association's pleading obligations and the availability of ***party*** discovery, the Director requested that the Association provide such information directly to the Director.[4] R. Vol. II, pp. 179-259.

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[4] This is one of the clearest indicators of the Association's pleading deficiencies. The Director, by essentially requesting information CM Rule 30.01 requires petitioners to provide, tacitly concedes that the Association failed to comply with CM Rule 30.01. Obviously, the Director has taken the erroneous position that CM Rule 30 does not apply, but in the event the Court disagrees, it is clear that Sun Valley's motion to dismiss must be granted.

Furthermore, the Director insists that the Information Requests to the Association were not made for the purpose of allowing Department staff to address material injury in its analysis and preparation of the Technical Memoranda. *See* Resp. Br. at 32, n.7. If such information is not part of the Association's pleading obligations, and also is not to be evaluated by the Department staff, why did the Director request the information directly from the Association instead of allowing party discovery and the presentation of evidence at a hearing? Clearly, neither the rules nor the specific factual circumstances in this matter contemplate the Director's approach to the development of a record. Again, regardless of whether it is actually the case, it

When the Association failed to adequately describe the water diversion and delivery systems at issue, as required by CM Rule 30.01(a), the Director engaged Department staff in the process of investigating and evaluating the same by conducting site visits and interacting with the Petitioners, and thereafter, preparing staff memoranda. On at least one occasion, the Director himself participated in site visits. *See* Affidavit of Scott L. Campbell, filed December 7, 2015; Supplemental Affidavit of Scott L. Campbell, filed December 10, 2015.

As the foregoing illustrates, virtually all of the procedural missteps by the Director in these proceedings are a direct result of the Association's failure to comply with the Department's rules, and the Director's unwillingness to demand such compliance. The Director would not have to attempt to justify Department staff's fact gathering and evaluation of information that is not yet evidence if the Association had filed a compliant petition, and the contested case proceedings had proceeded as contemplated by the Department's Procedural Rules. Yet when these issues were raised by Sun Valley and others at the outset of the case, 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, instead of dismissing the deficient petition, appropriately placing the pleading burden on the Association, and thereafter placing the burden upon the parties and their respective experts to work up the cases, the Director pressed forward,

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appears as if the Department is acting as special assistant to the Association instead of as a neutral administrator and fact-finder. Whether the Director wishes to acknowledge it or not, the appearance of impropriety or bias is as damaging to the proceedings and the due process rights of Sun Valley as actual impropriety or bias.

choosing to simply bear the Association's burdens at every turn. *See* R. Vol. V, pp. 899-908; Tr. Vol. I, p. 39, L. 14 – p. 40, L. 10; p. 42, LL. 14-19.

It should not go unnoticed that the Association failed to submit any written brief in this appeal or appear at hearings related thereto. And, the Association failed even to respond to the Motion to Dismiss filed by Sun Valley. As far as Sun Valley is aware, the Association does not dispute that its Letters did not satisfy the pleading requirements Idaho law demands in water delivery calls. Why is the Director advocating the Association's compliance with Idaho law when the Association itself will not so advocate? Why is Sun Valley before this Court litigating with the Director over the Association's deficiencies? The answer is simple: The Association has not had to advocate its compliance with Idaho law, because the Director has done so for it, and appears willing to continue to do so, even in the face of the plain and unambiguous language of the CM Rules. The Association need not defend its Letters or its failure to timely respond even to the Director's Information Requests, because the Director has done so. The Association has benefitted because it was not required to allege what water users it believed were impacting its senior surface water rights, evaluate and describe its diversion and delivery system, or describe its material injury in anything more than a conclusory fashion. With the exception of evaluating material injury, the Department has, since the date of the Letters, been accomplishing the Association's tasks for it.

1. Staff's involvement in prior delivery call proceedings, which the courts have not expressly addressed, are demonstrably distinct from staff's involvement in this case.

To that end, and without citing any authority, the Director describes the staff memoranda in this case as part and parcel of a "regular practice" in water delivery calls. *See* Resp. Br. at 30. This despite a complete failure to acknowledge and address a critical distinction—the Department staff's clear role in prior cases as a neutral evaluator of information submitted by ***both*** parties and party experts. Although a more helpful set of documents for this Court's review might have been the Director's scheduling order or requests for staff memoranda in such prior delivery calls, the Addenda attached to the Respondent's Brief demonstrate party and party expert involvement in discovery and evaluation before Department staff issued staff memoranda. *See* Resp. Br., Addenda A, B, C (including, among others, discussions of party information, comments and critiques of expert reports). A review of the Addenda shows that, right or wrong, staff memoranda in prior delivery calls utilized Department staff's specialized skill and knowledge to evaluate and comment upon information gathered, compiled and presented by the parties and their experts.

In this case, however, the Director has, notwithstanding his authorization of party discovery, apparently opted to use Department staff not merely to analyze and evaluate facts and issues presented by both parties, but rather to conduct discovery, collect information, and participate in site visits with the Petitioners, without the involvement of Sun Valley or any other respondents and their respective experts.

Even if one accepts the propriety of the Department's prior practices respecting staff memoranda, which Sun Valley is not aware have been the subject of any judicial challenge, this case is an outlier. Unwilling to wait for the parties to conduct authorized discovery, engage experts, and develop their claims and defenses, or perhaps in recognition of the Association's complete lack of preparedness, the Director has effectively inserted Department staff as the frontline fact gatherers and proponents of the delivery calls, ignoring the role, rights, and obligations of the parties and their experts.

A water delivery call is a contested case proceeding, and the parties' roles are not limited to mere oversight and acceptance of evidence, developed and evaluated by the Director and Department staff. Indeed, the Procedural Rules make clear that the opposite is true. It is the role of the ***parties*** to develop the record, and the Director and Department staff are to receive evidence and assist in such development. *See* IDAPA 37.01.01.600 ("Evidence should be taken [not gathered or discovered] by the agency to ***assist the parties' development of a record.***. . .") (emphasis added). Department staff's improper role in this proceeding is unique even among recent contested delivery call cases, as the Addenda relating to ESPA delivery calls (which this is not) plainly illustrate. *See* Resp. Br., Addenda A, B and C.

2. The Director's interpretation of the rules ignores the Department's limited authority and jurisdiction.

More important than prior practices, which have not been subjected to judicial scrutiny, is the plain language of the rules that govern contested case proceedings before the Department. The Director argues that the plain language of Procedural Rule 602 contemplates

that the Director may request, and the Department staff may prepare, staff memoranda prior to hearing. *See* Resp. Br. at 27. That is not what the plain language contemplates. Rule 602 makes no reference to ***requesting*** the preparation of staff memoranda, nor does it reference the ***preparation*** of staff memoranda. The rule addresses official notice of "agency staff memoranda and data." Sun Valley does not dispute that the Director may take official notice of agency staff memoranda and data that exist when the contested case proceeding is initiated, subject to the notice requirements and the availability of responsible staff employees or agents for cross-examination. The rule does not, however, contemplate that when a contested case proceeding commences, the Director may order Department staff to engage in a pre-hearing gathering and evaluation of information that may or may not ever constitute evidence before the Director in his capacity as hearing officer.

The critical distinction between the "agency staff memoranda and data" contemplated by Rule 602 and the Technical Memoranda in this case is timing and context. "Agency staff memoranda and data" that exist when a contested case is commenced may be relevant, in whole or in part, and will have been developed for a purpose other than the contested case proceeding at issue. The Director or hearing officer will know as much and consider the same in the totality of the evidence presented. Such memoranda or data, a type of which may very well be cited in the Sukow Memorandum, for example, are not prepared to resolve or aid in the resolution of the dispute at issue in the contested case. While such memoranda and data may be relevant to the Director's consideration of the contested case at issue, it remains at all times

during the contested case proceeding the parties' responsibility to present relevant evidence addressing the dispute at hand, and the Director's duty to evaluate it.

The Technical Memoranda in this case are not "agency staff memoranda and data" contemplated by Rule 602. They were prepared by agency staff for the very narrow and clear purpose of constituting wholly relevant evidence in the contested case at issue. They were prepared to resolve or aid in the resolution of the dispute at issue. Most importantly, in this case, they were prepared based on (1) information that is not, and may very well never become, evidence presented to the Director; and (2) agency staff's interpretation, as opposed to the parties' presentation, of the matters at issue in the contested case proceeding. Moreover, in this case, the Technical Memoranda were prepared using exclusively input and information provided by the Association, without the involvement of Sun Valley or any other respondents.

The Director emphasizes the ability to cross-examine the responsible agency staff, but that does not lend support to its interpretation of Rules 602 and 600, nor does it address party concerns in this case. The cross-examination of Department staff related to a report or staff memorandum prepared for purposes other than the contested case at issue, as contemplated by Rule 602, is like any other third party testimony. The cross-examined staff person is acting as a witness, not defending a role as the Director's technical adviser in the contested case at hand. Furthermore, it does not involve inquiry about the very same parties or the very same dispute for which staff will be offering technical guidance to the Director.

The cross-examination of the very staff member that will act as the Director's technical advisor when he issues findings and conclusions of law in the contested case

proceedings—the process for which the Department advocates in this case—is an entirely different story. As Sun Valley has consistently maintained, out of respect for the fundamental fairness of the process, none of the parties—neither petitioners nor respondents—should be compelled to be adverse to the adjudicatory authority, before or during the hearing. That includes cross-examination of the technical expert that will be providing guidance to the Director about the expert's evaluation of information that is or may become evidence in the same proceeding. The Department is not a party to the contested case. It should not have an opinion, or evaluate information, before the evidence is in and the record is complete. This is ***not*** an issue related to Department staff's objectivity or reliability. It is about the procedural fairness of placing the position of one or more of the parties at odds with the evaluation conducted by Department staff before an evidentiary hearing has even taken place.

That is why the language of Rule 600 is important. Department staff's role is to act as a technical specialist in the evaluation of evidence. Its role as the Director's technical advisor is not to gather information for one party's prima facie case, nor is it to prepare staff memoranda before the hearing. If, as the Director maintains, the Procedural Rules "do not limit the Department's role in the delivery call proceedings to evaluating evidence provided by the parties at hearing," Resp. Br. at 28, what purpose do the Procedural Rules serve? If Department staff have carte blanche to evaluate information that is not in the record as it aids the Director to make findings of fact and conclusions of law in contested case proceedings, what is the purpose of making an agency record in the first place? Does that not effectively negate the purpose of a contested case hearing altogether, and in the name of Department staff's expertise?

The Director consistently takes the position that it may take action so long as such action is not expressly "precluded" by the rules. *See* Resp. Br. at 28 ("nothing in Rule 600 precludes the Department from gathering technical and factual information that *may become evidence* admitted into the record"). Such a position contravenes the limited authority granted to executive agencies by the legislature. Agencies such as the Department are limited to specific grants of power and authority. *See e.g. Henderson v. Eclipse Traffic Control*, 147 Idaho 628, 632, 213 P.3d 718, 722 (citations omitted). That is positive law. The Department is not granted unbridled jurisdiction and authority that is thereafter limited by exclusionary or preclusive provisions in Idaho Code and IDAPA. It is granted only the narrow and specific authority expressly set forth in Idaho Code and IDAPA. Here, Department proceedings and hearings must be conducted in accordance with the Idaho Administrative Procedure Act. IDAHO CODE § 42-1701A. That Act provides the specific grant of authority for the Department's Procedural Rules, which in turn provide a specific grant of authority for procedures employed in contested case proceedings. The absence of a provision "precluding" Department staff from evaluating information that is not evidence in a contested case hearing, when acting as the Director's advisor during such contested case, is meaningless. Department staff, in their role as technical advisors pursuant to Rule 600, are limited to the clearly expressed ***grant*** of authority—the use of "[t]he agency's experience, technical competence and specialized knowledge . . . in evaluation of evidence." IDAPA 37.01.01.600. A contrary ruling allows the Department to do anything it wants to do, as long as the statutes or administrative rules do not prohibit it. Due process would no longer exist in this strange land.

3. The Director's procedural errors are a result of the Director's failure to adequately define staff's role in the case, and provide for adequate procedural safeguards.

As the foregoing illustrates, the role of Department staff in these contested case proceedings becomes complicated when the Director treats its advisory staff as a party expert, seeking its discovery and evaluation of information before the evidentiary hearing, and subjecting it to cross-examination.

To that end, the Director argues that Sun Valley's citation to the Attorney General's Rules of Administrative Procedure to illustrate the propriety of Department counsel and staff in various roles is misplaced, because the Department declined to adopt that portion of the Attorney General's rules. *See* Resp. Br. at 35. In fact, Sun Valley maintains that such rules do indeed apply to the Department. Idaho Code Section 67-5220(5)(b) requires that an agency promulgating "its own procedures shall include in the rule adopting its own procedures ***a finding that states the reasons why*** the relevant portion of the attorney general's rules were inapplicable to the agency under the circumstances." IDAHO CODE § 67-5220(5)(b) (emphasis added). No such finding stating the reasons why the relevant portion of the rules were inapplicable is included within the Department's Procedural Rules. *See* IDAPA 37.01.01.050. Accordingly, IDAPA 04.11.01.423 indeed does apply to the Department. *See* IDAHO CODE § 67-5220(5)(a).

Furthermore, regardless of their direct applicability to the Department, the Attorney General's rules regarding the roles within an agency clearly illustrate the procedural irregularities presented in this case. *See* IDAPA 04.11.01.423. Department staff that will be advising the Director are doing pre-hearing factual investigation, including site visits and

interaction with calling senior water users, without the participation of junior water users or their counsel or experts. *See* Affidavit of Scott L. Campbell, filed December 7, 2015; Supplemental Affidavit of Scott L. Campbell, filed December 10, 2015. The Director's counsel is doing investigative work and interacting with such investigative/advisory staff, and perhaps the calling water users on site visits. *See id.* The Director is participating in site visits with investigative/advisory staff and counsel. *See id.* In essence, this contested case is a procedural free-for-all in which the Director, the Director's counsel and Department staff have undertaken the duties of the Association—from collecting factual data that meets the Association's pleading requirements to advocating in this proceeding on behalf of the Association's deficient petition. And the foregoing does not even address the fact that Sun Valley was entitled to, yet not provided notice of, or the opportunity to participate in, any of the site visits.

To that end, and in response to the Director's consistent assertion that Sun Valley has not been prejudiced by the procedures employed, even the appearance of bias in an administrative proceeding impacts one's due process right to a fair and impartial process. *See e.g. Roberts v. Bd. of Trus., Pocatello Sch. Dist. No. 25*, 134 Idaho 890, 894, 11 P.3d 1108, 1112 (2000); *Eacret v. Bonner Cnty,*, 139 Idaho 780, 786-87, 86 P.3d 494, 500-01 (2004).

Put simply, the Director's assurances that Sun Valley's rights are not being prejudiced notwithstanding the foregoing litany of unusual and improper procedures employed by the Director are of little consolation to Sun Valley. It is not as if the Director has employed these improper procedures in ignorance of the appropriate procedures, or the parties' desire to be notified of Department staff's site visits and investigative efforts has not been very clearly

articulated. From the Director's initiation of this case, Sun Valley and others objected to the procedures, and made the Director aware of the violation of their due process rights. 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. In the face of such concerns, the Department pressed on, refusing to grant respondents access to the Department's very significant fact-gathering project and analysis, maintaining that parties will have an opportunity to depose and cross-examine the Director's advisors.

Such an approach exemplifies how the Director has inappropriately modified the roles of the Director and Department, and the parties to the contested case. The Director asks the Court to accept the argument that Sun Valley will not be prejudiced because, at the hearing, Sun Valley can evaluate, rebut, and respond to Department staff's work-up of the underlying facts of the case. *See* Resp. Br. at 32. That is nonsensical. The Director, and the Director's advisor—Department staff—are supposed to hear the evidence presented by the petitioners and the respondents at the hearing and thereafter render a decision, not present the evidence. Under what awkward theory of due process is the advisor to a hearing officer the person who (1) collects and evaluates facts prior to the contested case hearing without procedural limits, (2) presents such facts and evaluation at the hearing, (3) is subjected to cross-examination regarding such facts and evaluation at the hearing, and (4) advises the hearing officer applying those facts to the law? That is not a contested case. That is, at best, unilateral administrative action.

Sun Valley is well aware that in many administrative proceedings, the hearing officer is the head of the agency that is also a party to the proceeding, and assuming certain procedural safeguards are maintained (many of which are addressed in the Attorney General's procedural rules the Department elected not to adopt without providing a reason, *see* IDAPA 04.11.01.423), such proceedings comply with due process. It bears repeating, however, that those are ***not*** the circumstances in this case. The Department is not a party. It is the Director's technical advisor. Even if it were appropriate for Department counsel and staff to prosecute the delivery call before the Director on behalf of the Association (which it is not), the Director and the Department clearly have ***not*** complied with the requisite procedural safeguards.

4. The Director cannot justify his participation in the collection of information from the Association during site visits.

In response to one of the most egregious violations of due process—the Director's participation in site visits—the Department attempts to distinguish the holdings in *Comer v. Cnty. of Twin Falls*, 130 Idaho 433, 942 P.2d 557 (1997), *Eacret v. Bonner Cnty.*, 139 Idaho 780, 86 P.3d 494 (2004), and *Idaho Historic Pres. Council v. City Council of Boise*, 134 Idaho 651, 8 P.3d 646 (2000). Those cases very clearly stand for the proposition that when the fact-finder participates in a viewing or otherwise avails himself of information outside the scope of a proper hearing, the parties should be provided notice and the opportunity to participate in such viewings, and that considering matters that are not in the record violates due process. The Director cites *Evans v. Board of County Commissioners of Cassia County*, 137 Idaho 428, 50 P.3d 443 (2002), asserting that because the Director is not sitting in an appellate capacity and

dealing with a "cold appellate record," *Evans* presents more analogous facts because Sun Valley will have an opportunity to present evidence at the hearing. In essence, the Director again asks the Court to ignore the fact that the Director willfully ignored the procedural requests and rights of the party identified at the outset of the case, in the name of harmless error. The Court should not countenance such an argument, especially since the decision in *Evans* determined that the spirit of *Comer*'s holding was not implicated because the record did not indicate any factual disputes related to the viewing.

The distinction drawn between the foregoing cases is an interesting one in light of the circumstances presented here. In *Comer* and *Eacret*, the decisions of planning and zoning boards (boards with a specialized function that operate as an arm of, and are generally subject to, the authority of the board of commissioners) were at issue on appeal before the county commissioners, whereas in *Evans*, the board participating in the unnoticed site visit was the initial fact-finding body that was not dealing with a "cold appellate record." Here, Department staff and the Director conducted site visits so that Department staff could prepare evaluative memoranda the Director (and presumably the same Department staff) may consider as evidence at the hearing, and on which the Director is ostensibly entitled to rely when rendering his determination in these contested case proceedings. While considering evaluative memoranda prepared based on site visits in which the Director participated is not strictly in the nature of a cold appellate record from a planning and zoning board, neither is it the same as a mere viewing. The memoranda are effectively testimony by the Director's advisor, based in part on site visits in which the Director participated and the respondents did not. The Director was, at a minimum, a

witness to Department staff's work, and if we are to understand the Director's "harmless error" rationale (i.e., that Department staff participating in the site visits and preparation of the memoranda may be subjected to cross-examination, rendering any argument of prejudice a non-issue), the Director is subject to cross examination, a clear problem for a hearing officer imbued with the authority to decide the facts of the case.

The Director has violated the spirit of the holdings in *Comer*, *Eacret*, and *Idaho Historic Preservation Council, Inc.* There can be no dispute that the Director's attendance at the site visits, many of which involved the Petitioners, was procedurally defective and violated Sun Valley's substantial rights. That the Director will entertain cross-examination of participants is cold comfort, and the Director's harmless error argument does not pass muster. Will the Director—the adjudicatory authority—also be subjected to cross-examination concerning his observations? The Technical Memoranda, prepared by the Department for the benefit of the Association, because the Association failed to meet its clear pleading burdens, must be stricken from the record, and afforded no weight in these or any future proceedings initiated by the Association. They are the result of Department overreach with respect to the Department's role in adjudicating contested case water delivery call proceedings between senior surface water users and junior ground water users. And, they are marred by the substantial and inappropriate participation of the Director, Director's counsel, and the Department staff that will act as the Director's technical advisor during the contested case hearings.

D. Sun Valley Is Entitled To Attorney Fees.

The Director asserts that Sun Valley is not entitled to costs and attorney fees pursuant to Idaho Code Section 12-117) because it did not act without a reasonable basis in fact or law. As the foregoing illustrates, that is exactly what the Department did. The facts are undisputed: Neither Sun Valley nor the other ground water users source ground water from an ACGWS that has been determined and incorporated in an existing or new water district in accordance with Idaho law. The CM Rules state, in plain and unambiguous language, that CM Rule 30 applies in such circumstances. There is no reasonable basis in fact or law to take a contrary position, as the Director has done to support the Association's Letters in this case. Accordingly, the Court should award costs and attorney fees to Sun Valley.

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in Sun Valley's opening brief, Sun Valley respectfully requests that the contested cases at issue be remanded to the Director with orders to dismiss the same, and that the Court strike the Technical Memoranda from the record, and order that they not be used by any parties or the Department.

DATED this 24th day of February, 2016.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of February, 2016, I caused a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** to be served by the method indicated below, and addressed to the following:

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