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 the Director of the Idaho Department of Water Resources; and the IDAHO DEPARTMENT OF WATER RESOURCES

Respondents

and

CITY OF KETCHUN, 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. LARSON, FLYING HEART RANCH II SUBDIVISION OWNERS ASSOCIATION, INC., HELIOS DEVELOPMENT, LCC, SOUTHERN COMFORT HOMEOWNER'S ASSOCIATION, THE VILLAGE GREEN AT THE VALLEY CLUB HOMEOWNERS ASSOCIATION, INC., AIRPORT WEST BUSINESS PARK OWNERS ASSN INC., ANNE L. WINGATE TRUST, AQUARIUS SAW LLC, ASPEN HOLLOW HOMEOWNERS, DON R. and JUDY H. ATKINSON, BARRIE FAMILY PARTNERS, BELLEVUE FARMS LANDOWNERS ASSN, BLAINE COUNTY RECREATION DISTRICT, BLAINE COUNTY SCHOOL DISTRICT #61, HENRY and JANNE

CASE NO. CV-WA-2015-14500

SOUTH VALLEY GROUNDWATER DISTRICT'S REPLY TO RESPONDENTS' BRIEF

BURDICK, LYNN H. CAMPION, CLOEAR 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. LAPHM, LAURA L. LUCERE, CHARLES L. MATTHEISEN, MID VALLEY WATER CO LLC, 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 TERRI SZOMBATHY, THE BARKER LIVING TRUST, CAROL BURDZY THIELEN, TOBY B. LAMBERT LIVING TRUST, VERNOY IRREVOCABL 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 AND LITTLE WOOD WATER USERS ASSOCIATION DIVERTING FROM THE BIG WOOD AND LITTLE WOOD RIVERS

SOUTH VALLEY GROUNDWATER DISTRICT'S REPLY TO RESPONDENTS' BRIEF

ATTORNEYS FOR INTERVENOR, SOUTH VALLEY GROUND WATER DISTRICT

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On September 15, 2015, South Valley Ground Water District filed a Notice of Appearance in the Petition for Judicial Review filed in this matter by the Sun Valley Company. Under the Court's Procedural Order Governing Judicial Review, Notices of Appearance of entities or parties to the underlying proceeding, like the South Valley Ground Water District, would be granted status as an intervenor. Procedural Order p. 2, ¶ 3 (Sept. 1, 2015). On September 29, 2015, the Court entered an Order recognizing the timely Notice of Appearance by the South Valley Ground Water District and finding that South Valley Ground Water District and other movants were real parties in interest in this proceeding entitling them to intervene as parties. Order, p. 3 (Sept. 29, 2015).

South Valley Ground Water District did not file an opening brief in support of the appeal raised by the Sun Valley Company, or a Response to Sun Valley Company's appeal. However, the Response filed by the Department of Water Resources and the Director (collectively the Department) on February 4, 2016 raises significant concerns for the interests of the South Valley Ground Water District that justify filing this Reply to the Department's Response.

INTRODUCTION

As South Valley Ground Water District understands the appeal, Sun Valley Company argues that the Association did not follow the appropriate rules to initiate a contested case and did not provide adequate information to the Department to justify treating their letters as an initiation of a contested case under the Conjunctive Management Rules. It is not disputed that there has been no determination of an Area of Common Ground Water Supply. Sun Valley Company contends that the delivery call must be dismissed until the Area of Common Ground Water Supply is properly determined. Further, Sun Valley Company contends that the Director

has improperly made findings of facts and has improperly personally engaged in site visits to collect factual information without knowledge of and notice to the parties to the contested case.

As we understand the Department's position in response to the Sun Valley Company appeal, the Department argues that Rule 40 of the Conjunctive Management Rules gives it the authority to proceed in this case and that Rule 40 does not require any detailed information from the persons making a delivery call. Moreover, the Department asserts that it has the authority to decide what portions of the ground water in Water District 37 and 37-M are part of an Area of Common Ground Water Supply during the delivery call proceedings. The Department then seeks to justify its reliance on Staff Memoranda and attempts to justify the scope of the proceeding and the parties involved by pointing to those Staff Memoranda and even suggesting that additional documents could be "judicially noticed" by the Director to support his decisions. Then the Department asserts that the Director, in his capacity as a hearing officer, may freely engage in a site visit and perhaps other fact-finding without notice to the parties because the contested case is not an appellate proceeding.

The Department's rationale for its actions causes the South Valley Ground Water District significant concern over the scope of the proceeding and the determination of what ground water rights are included in the delivery call and what rights are not. Accordingly, the South Valley Ground Water District submits this Reply to the Department's Response.

ADDITIONAL FACTUAL BACKGROUND

On September 17, 2013, the Department issued a Preliminary Order affecting Water District 37. *See In the Matter of the Proposed Combination of Water District Nos. 37, 37-A, 37-C, and 37-M, and Inclusion of Both Surface and Ground Water Rights in the Combined Water District; and In the Matter of Abolishing the Upper Wood Rivers Water Measurement*

District.[1] (*Partial Consideration Order*) In that Order, the Department created a combined Water District 37, covering parts of the Big and Little Wood Rivers. This Order combined former Water District 37 and Water District 37-M and included ground water rights within the boundaries of these two districts, but excluded ground water located in the boundaries of the Eastern Snake Plain Aquifer (ESPA) and Water District 130. The Order also excluded surface and ground water in Camas Creek and its tributaries and excluded all water in Water District 37-N (Upper Little Wood River and tributaries), Water District 37-O (Muldoon Creek and tributaries) and Water District 37-U (Fish Creek and tributaries), and the lower portion of the Malad River and tributaries downstream. *Partial Consolidation Order* p. 13. This Order became final on October 4, 2013 and became effective January 6, 2014. *Id.*

The Order provided no explanation for why Districts 37-N, 37-O, and 37-U were not made part of Water District 37, even though the map appended as attachment B to the Preliminary Order, showed that those basins are tributary to the Little Wood River where some of the callers are located. *Id.* It is also important that the Order did not make any determination as to which portions of the new Water District 37 contained Areas of Common Ground Water Supply, within the meaning of the Conjunctive Management Rules. Nor did the Order determine whether ground water in the boundaries of Water Districts 37-N, 37-O, and 37-U contained any Areas of Common Ground Water Supply relative to any of the other portions of Basin 37.

The Conclusions of Law in the Order were based upon the concern that conjunctive administration is "likely imminent." *Partial Consolidation Order*, ¶ 12. The Order further

[1] This Order is not part of the Administrative Record developed for this Appeal. However, this Order is an adjudicative fact admissible under IRE 201, this Order provides background, and a public act of the executive branch which is subject to notice by the Court under Idaho Code § 9-101(3). It is fundamental to the question of whether Rule 30 or Rule 40, or neither, apply here. Moreover, the Department's Response relies upon a 1991 Order creating Water District 37, which was also not part of the Administrative Record.

recognizes that "conjunctive administration of water rights in Basin 37 may be more challenging when the water rights are in separate water districts. . . ." *Id.* ¶ 14.

Thereafter, in February 2015, the Big Wood and Little Wood Water Users Association filed letters with the Department, described as a request for administration of water rights under the prior appropriation doctrine. R.0001. The letter listed the water rights of the association members, but did not list any water rights that the Association believed were subject to its request for administration. The request for administration did not cite any of the Conjunctive Management Rules or any authority other than "the prior appropriation doctrine." The scope of the requests are directed to what the Association described as the "Wood River Valley Aquifer System," but that aquifer system was not described.

In response, on March 20, 2015, the Department sent a notice of Water Right Delivery Calls to some water users located in Basin 37. R.0012. It is undisputed that the Department issued the notice of the Delivery Calls only to those ground water users in the Big Wood above Stanton Crossing, Silver Creek above its confluence with the Little Wood, and portions of Camas County. Excluded from the Delivery Call were any water rights located within the boundaries of Water District 37-N, Water District 37-Q, or Water District 37-U. Also excluded were any water rights in the ESPA, even though the physical location of the surface water rights held by the Association members is within the boundaries of the ESPA.

ARGUMENT

A. THE CONJUNCTIVE MANAGEMENT RULES DO NOT ADDRESS THE PROPER PROCEDURE FOR A DELIVERY CALL UNDER THE UNIQUE CIRCUMSTANCES OF BASIN 37

The Sun Valley Company and the Department argue over whether or not Conjunctive Management Rule 40 applies to these requests for administration or whether Conjunctive

Management Rule 30 applies. Conjunctive Management Rule 30 applies "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 or within water districts where ground water regulation has not been included in the functions of such districts or within areas that have not been designated ground water management areas." IDAPA 37.03.11.030 (emphasis added). Rule 40 in contrast applies to "calls for water delivery made by holders of seniority priority surface or ground water rights against the holders of junior priority ground water rights from areas having a common ground water supply in an organized water district." IDAPA 37.03.11.040 (emphasis added).

The Department predicted that its decision fragmenting Basin 37 into multiple separate water districts would create challenges in its ability to efficiently administer water through the Conjunctive Management Rules. *Partial Consolidated Order, supra.* That fear has come to pass in the very first delivery call in Basin 37.

Here, the callers are located below the confluence of Silver Creek and Little Wood and below Magic Reservoir on the Big Wood. Some ground water rights above those locations are in the newly consolidated Water District 37. Some are in no water district, such as the ground water rights in the boundaries of Water Districts 37-N, 37-O, and 37-U.

The Department says this is a simple case because the only ground water rights that are being called out are ground water rights that are in an organized water district. Therefore, they claim Rule 40 applies. The Department makes this claim based entirely on its decision to send notice of the calls only to water users in Water District 37 and exclude all others. Therefore, the delivery call has created a situation where arguably some water rights that might be affected are not in an organized water district. In addition, some water rights that might be affected are in an

organized water district, and that some rights in the organized water district might not be affected, as the Department contends it has not made any decision about what ground water rights in Water District 37 are in an Area of Common Ground Water Supply. There is no justification in the record for any of these decisions.

Rule 40 specifically applies to calls made "against the holders of junior ground water rights from areas having a common ground water supply in an organized water district" (emphasis added). The difficulty that the Department has created here is that when it combined Water Districts 37 and 37-M into a single water district, it did not make any findings about the extent of the Area of Common Ground Water Supply within Water District 37. The Department's reading of Rule 40 renders the emphasized language superfluous. The Department argues that Rule 40 applies to all holders of ground water rights in an organized water district, regardless of whether they are in an Area of Common Ground Water Supply.

The Department responds by saying that Rule 30 gives it the authority to issue an Order in the contested case to "determine an area having a common ground water supply." IDAPA 37.03.11.030.07.c. The Department argues therefore that it must have the same authority under Rule 40. The problem with the Department's argument is that Rule 40 does not grant the Department the authority to make that determination in response to a call for a water delivery made under Rule 40. The Department correctly notes that IDAPA 37.03.11.020.06 states that the Conjunctive Management Rules provide a basis for designating areas in the state with common ground water supply. Rule 31 explains how Areas of Common Ground Water Supply are determined when a call is made under Rule 30. No rule states how a decision is made about which ground water in an organized water district is in an Area of Common Ground Water

Supply. Rule 40 provides no separate mechanism for determining an Area of Common Ground Water Supply. IDAPA 07.03.11.040.

The Department asks the Court to bless the Department's decision to determine an Area of Common Ground Water Supply within the context of a Rule 40 Conjunctive Management proceeding in the absence of any explicit authority in the statute or the rules. This goes too far. This is not an interpretation of the rule. It is a complete re-writing of the rule by the Department to fill in the blanks.

An even bigger problem is that there is no mechanism in the rules at all for determining an Area of Common Ground Water Supply when some ground water is in an organized water district and some ground water is not. While the Department understandably desires to deal with that problem by making the determination in this proceeding, doing so would also require a re-write of the Conjunctive Management Rules without subjecting the rules or its interpretive rewrite of the rules to the requirements of the Administrative Procedure Act. Idaho Code § 67-5201(19) defines a rule as a procedural requirement of an agency that has been promulgated in compliance with the APA. Failure to follow the APA rulemaking renders the "rule" voidable. *ASARCO Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003).

B. THE DEPARTMENT'S ATTEMPT TO INTERPRET THE CONJUNCTIVE MANAGEMENT RULES IN THIS FASHION IS NOT SUPPORTED BY THE LANGUAGE OF THE RULES

Essentially, the Department argues that the rules are not clear as to which of the Conjunctive Management Rules, Rule 30 or Rule 40, applies to the Big Wood and Little Wood Delivery Calls. Hence, the Department argues that it gets to make that decision and that the Court must defer to that decision. This claim vastly overstates any principle of agency deference. For example, in *Perez v. Mortgage Bankers Ass'n*, 575 U.S. ___, 135 S. Ct. 1199, 1209, n 4

(2015), the Supreme Court made it clear that "even in cases where an agency's interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says." *Accord, Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 645 (7th Cir 2015). Idaho law is to the same effect:

> The determination of the meaning of a statute and its application is a matter of law over which this [C]ourt exercises free review." *Woodburn v. Manco Prods., Inc.,* 137 Idaho 502, 504, 50 P.3d 997, 999 (2002). "Where the language of the statute is clear and unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *State v. Hart,* 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). Administrative rules are subject to the same principles of statutory construction as statutes. *Mason v. Donnelly Club,* 135 Idaho 581, 21 P.3d 903 (2001).

Brandon Bay v. Payette County, 142 Idaho 681, 132 P.3d 438 (2006) (emphasis added).

Further,

> Administrative regulations are subject to the same principles of statutory construction as statutes. *Rhodes v. Industrial Commission,* 125 Idaho 139, 142, 868 P.2d 467, 470 (1993). Interpretation of such a rule should begin, therefore, with an examination of the literal words of the rule. *Thomas v. Worthington,* 132 Idaho 825, 829, 979 P.2d 1183, 1187 (1999)(citing *State ex rel. Lisby v. Lisby,* 126 Idaho 776, 779, 890 P.2d 727, 730 (1995)). The language of the rule, like the language of a statute, should be given its plain, obvious and rational meaning. *Id.* In addition, this language 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. *Grand Canyon Dories v. Idaho State Tax Com'n,* 124 Idaho 1, 5, 855 P.2d 462, 466 (1993).

Mason v. Donnelly Club, 135 Idaho 581, 21 P.3d 903 (2001). *See also, Order on Motions for Summary Judgment, Little Sky Farms v. North Snake Groundwater Dist.*, p. 5, CV-2014-412 (May 4, 2015)(setting out standards for statutory interpretation).

Thus, the Court cannot not walk away from the clear and plain language of the rules simply because the agency concludes that the regulations ought to require certain procedures or results, especially when those procedures and results are not expressly mandated by the

regulations. The Department recognized the difficulty it was creating when it failed to include all segments of Basin 37 and all of the ground water in Basin 37 into a single water district. *Partial Consolidation Order, supra.* Moreover, the Department had the opportunity to make a determination of an Area of Common Ground Water Supply when it combined Water District 37 and Water District 37-M and all ground water rights therein into a single water district, but failed to do so.

The Court should remand to the Director to initiate a comprehensive proceeding to determine which ground water rights in Basin 37 are in an Area of Common Ground Water Supply that would be subject to the Association's delivery call, rather than simply assuming that only ground water rights in Water District 37 are subject to the call and that all ground water outside Water District 37 are not. Once that determination has been made in a properly convened contested case or, as in the ESPA by regulation, then the delivery call can commence or resume.

C. THE STAFF MEMOS ARE NOT AN ADEQUATE BASIS FOR PROCEEDING WITH THIS CONTESTED CASE

The Department and Sun Valley argue over the ability of this Court to review the Staff Memoranda requested by the Director. The Department claims the Staff Memoranda are unreviewable. Response pp. 25-26. Then, the Department argues that it is perfectly acceptable to prepare Staff Memoranda, citing Rules 600 and 602. South Valley Ground Water District's view is that Staff Memoranda can be appropriate tools in a contested case, but that the Department's use of them in these circumstances is not appropriate.

It cannot be the case that the Director is entitled to rely on the Staff Memos to decide what rights are subject to the call, and then deny the Court and parties any opportunity to review the basis for that decision. The Department claims the sole purpose for citing the Staff Memos was to demonstrate which rights were subject to the delivery call and which were in the

organized water district. Response p. 37. The Department admits that the Staff Memos conclude that ground water in the Upper Little Wood is "not relevant" to the delivery call. Response p. 38. This conclusion seems to be the basis for the Director's prior Orders creating the contested case and responding to Sun Valley Company's Motion to Dismiss.

The Department then argues that, even if the Director cannot rely on the Staff Memo, created after the fact to justify his decision, he can still rely on the documents cited in the Staff Memo. He makes this claim even though his Order does not mention any of those documents. Under Rule 602, "official notice" applies to documents identified either before or at the hearing. It does not allow the Department to reach back after the decision is made. Notice "must be provided before the issuance of any order. . ." IDAPA 37.01.01.602. Yet, the Director's Order Denying Sun Valley's Motion promises that the Staff Memo, if it is to be used at the hearing, would subject responsible employees to cross-examination. R.0990. That did not happen before the Order was issued. The Department's effort to bootstrap a rationale for excluding the Little Wood ground water rights from this proceeding is not supported by the Administrative Record. It appears to be a *post hoc* rationalization for a decision made without input from any of the parties to the contested case, including the Association. None of this information is in the Administrative Record or has been subjected to cross examination as required by Rule 602. Therefore, the Staff Memos cannot be used to support the Department's decision or the scope of the delivery call.

D. THE DIRECTOR AS PRESIDING OFFICER MAY NOT COLLECT INFORMATION OUTSIDE THE CONTESTED CASE PROCESS

The Department does not deny that the Director and the Deputy Attorney General took part in a site visit to view the Association members' diversions and to gather other information

associated with the call. *See* Supplemental Affidavit of Scott Campbell (and exhibits), December 11, 2015, and *Order Granting Leave to Present Additional Evidence*, January 4, 2016.

The Director states that he alone is responsible for evaluating evidence and rendering a decision on the merits of the delivery call. R.000873. These delivery calls are treated by the Director as contested case proceedings. R.000012, R.000335, and R.000888. At the initial Status Conference, the Director, in response to a question from Mr. Campbell, stated that he would be the presiding officer. The Director's request for Staff Memo relies on his status as "presiding officer" to request two Staff Memos. R.000335. The Director also stated that this request was based on the authority of Rules 600 and 602, which allow the presiding officer to seek the Department's expertise and to take official notice of technical or scientific facts. R.000334. Thus, there is no doubt that the Director is the presiding officer in this contested case.

A contested case must be decided on the evidence properly admitted in a proceeding. *Eacret v. Bonner County*, 139 Idaho 780, 787 86 P.3d 494, 501 (Idaho 2004)(a quasi-judicial officer must confine his or her decision to the record produced at the public hearing. *Idaho Historic Preservation Council v. City Council of City of Boise*, 134 Idaho 651, 89 P.3d 646 (2000). Any other procedure would deprive the parties of their due process *rights. Id.*

Accordingly, a presiding officer is prohibited from communicating directly or indirectly with any party upon any substantive issue, without notice and an opportunity for all parties to participate. Idaho Code § 67-5253; *Eacret, supra.* The Director has appointed himself as presiding officer and announced that he is the one who will be making the decisions in this case. He is precluded under the APA and the Due Process clauses of the Idaho and United States Constitutions from independently gathering information.

In particular, in contested case proceedings on a water call, the presiding officer cannot conduct site visits without proper notice to the parties to those proceedings. Failure to provide notice of such site visits violates the water users' due process rights. *Comer v. County of Twin Falls*, 130 Idaho 433 (1997); *Eacret v. Bonner County*, 139 Idaho 780, 787, 86 P.3d 494, 501 (2004).

This is evident from the Department's procedural rules regarding ex parte communications. Specifically, during contested case proceedings, such as the proceedings on these water calls, the presiding officer is prohibited from communicating either "directly or indirectly" with any party to the proceedings without notice to all involved. Specifically, the rule provides:

> Unless required for the disposition of a matter specifically authorized by statute to be done ex parte, ***a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the contested case with any party, except upon notice and opportunity for all parties to participate in the communication***. The presiding officer may communicate ex parte with a party concerning procedural matters (e.g., scheduling). Ex parte communications from members of the general public not associated with any party are not required to be reported by this rule. ***A party to a contested agency proceeding shall not communicate directly or indirectly with the presiding officer or the agency head regarding any substantive issue in the contested case.***

IDAPA 37.01.01.417 (emphasis added).

In this case, the Director requested a staff memorandum by ordering specific Department employees to gather specific information regarding the diversions and use of water under the calling parties' water rights. This direction to these Department employees clearly constitutes indirect communication with the water users. Since the purpose of the communications involved substantive issues relating to the water calls – as opposed to procedural issues – the rule

specifically mandates that "notice and opportunity for all parties to participate" must be provided.

The decision in *Comer* further supports the mandate that the Director must provide notice prior to conducting site visits and communicating, directly or indirectly, with parties to a contested case proceeding. In that case, the Court held that the Twin Falls County Board of Commissioners violated the appellants' due process rights when it viewed certain property without notice to the parties involved. 130 Idaho at 439. The Court held that the Commissioners did not have the right to conduct to the site visit without notice. According to the Court, "the 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.* (citation omitted). This is because "notice to the parties provides them with an opportunity to contest the propriety of such a viewing under the particular circumstances." *Id.* Further, it allows the parties 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." *Id.*; *see also Id.* (Without notice and an opportunity to participate, the parties would have "no way of knowing if the judge viewed the proper area, or took note of the relevant features of the premises in question").

Similarly, the Court in *Eacret, supra*, found a due process violation where one of the Commissioners had visited the property without notice to the parties and that such a visit "created an appearance of impropriety" and "underscored the likelihood that he could not fairly decide the issues in the case." 139 Idaho at 786-87.

The Department attempts to distinguish these cases, asserting that they "involved appellate proceedings to a county board of commissioners from the decisions of a county planning and zoning commission" and represent a situation where the appellate bodies failed "to

confine themselves to the records on appeal." Response, 33-34. These assertions are particularly troubling. The idea that the Department's hearing officer can talk to parties and gather evidence without notice to the parties in a contested case is contrary to all principles of procedural due process. First, the Department misreads the Supreme Court's decisions – which did not confine the holdings to the appellate review process. No case says that the parties' due process rights are only implicated in appellate proceedings. For example, in *Comer*, the Court specifically held that "before a local zoning body, ***whether it be the Commission or the Board***, views a parcel of property in question, it must provide notice and the opportunity to be present to the parties." 130 Idaho at 439 (emphasis added). In other words, the notice mandate applies not only to the "appellate proceedings" before a board of commissioners, but also to the planning and zoning commission itself.

Nor does *Evans v. Bd. of Commissioners of Cassia County, Idaho*, 137 Idaho 428 (2002), provide the Department or the presiding officer with the ability to conduct site visits in contested case proceedings without proper notice to the parties. In that case, the Court recognized that the Court's ruling in *Comer, supra*, is "still good law in this state." 137 Idaho at 433. In *Noble v. Kootenai County*, 148 Idaho 937, 742-3, 231 P.3d 1034, 1039-40 (2010), the court held that the county violated the open meeting laws by conducting a site visit that made it practically impossible for the public to participate and hear what is said.

Nothing in the rules of procedure allow the Department, and specifically, the presiding officer, to privately gather information without notice to the parties and then force the parties to wait until hearing to challenge that information. Indeed, as discussed above, any *ex parte* communications must be preceded with notice and an opportunity to participate. IDAPA 37.01.01.417.

The Supreme Court has described an "overarching due process principle that everyone with a statutory interest in the outcome of a decision is entitled to meaningful notice and a fair hearing." *Hawkins v. Bonneville County Board of Commissioners*, 151 Idaho 228, 233, 254 P.3d 1224, 1229 (2001). Here, there was no notice, meaningful or otherwise, no record of the presiding officers' actions or what he saw, learned, or obtained. There is simply no explanation why the presiding officer was out on an evidence gathering site visit. This practice deprives the parties of their opportunity for meaningful notice and a fair hearing. *Eacret, supra.*

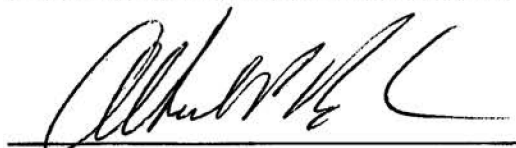
CONCLUSION

This Court should hold that neither Rule 30 nor Rule 40 govern the contested case proceedings here and remand the case to the Director to make an on-the-record determination of which ground water rights are and are not implicated by the delivery call, after providing notice to all ground water users in Basin 37.

This Court should rule that the Director, as presiding officer, may not engage in ex parte site visits and information gathering relative to the deliver call, and require full disclosure of all notes, internal memos, and other documentation of the site visit and other information gathering engaged in by the presiding officer, and remand for further proceedings consistent with this Court's determination.

DATED this 25th day of February, 2016.

BARKER ROSHOLT & SIMPSON LLP



Albert P. Barker
Attorney for South Valley Ground Water District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 25th day of February, 2016, I caused a true and correct of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

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