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,

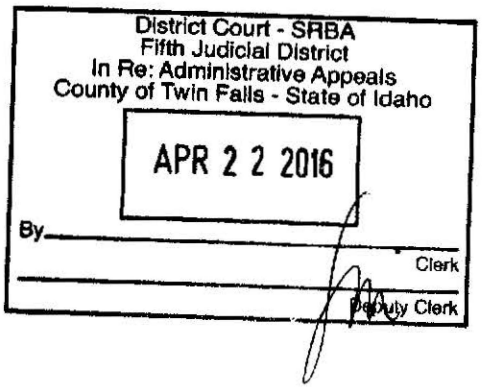
Respondents,

and

CITY OF 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 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

Case No. CV-WA-2015-14500

MEMORANDUM DECISION AND ORDER



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

I.

STATEMENT OF THE CASE

A. Nature of the case.

This case originated when the Sun Valley Company ("Sun Valley") filed a *Petition* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department"). Under review is the Director's *Order Denying Sun Valley Company's Motion to Dismiss* issued on July 22, 2015 ("*Final Order*"). The *Final Order* denies Sun Valley's request to dismiss two requests for administration submitted by members of the Big Wood and Little Wood Water Users Association ("Association"). Sun Valley asserts that the *Final Order* is contrary to law and requests that the Court set it aside and remand with instructions to dismiss the requests for administration.

B. Course of proceedings and statement of facts.

This case involves a demand for the priority administration of water. The seniors are Association members located in water district 37. R., pp.1-5; LW R., pp.1-5.[1] They hold approximately 80 senior water rights that divert from the Big Wood and Little Wood Rivers. *Id.* In two letters to the Director dated February 23, 2015, the seniors assert they are short water due to junior use. *Id.* They demand priority administration of their surface water rights and hydrologically connected ground water rights within water district 37. *Id.* The Director informed the seniors he would treat the requests for administration as delivery calls under the CM Rules and proceeded to initiate two contested case proceedings.[2] R., p.6; LW R., p.6. The first, designated IDWR docket number CM-DC-2015-001, involves those seniors that divert from the Big Wood River. *Id.* The second, designated IDWR docket number CM-DC-2015-002, involves those diverting from the Little Wood River. *Id.*

The Director identified junior water users he determined may be affected by one or both of the calls. R., p.12. He proceeded to serve notice of the filing of the calls on those juniors. *Id.*

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[1] Two agency records make the record in this matter. The first arises out of IDWR Docket No. CM-DC-2015-001, relating to the requests for priority administration of water rights diverting from the Big Wood River. The citation "R., p.__" refers to that agency record. The second arises out of IDWR Docket No. CM-DC-2015-002, relating to the requests for priority administration of water rights diverting from the Little Wood River. The citation "LW R., p.__" refers to that agency record.

[2] The term "CM Rules" refers to Idaho's *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11.

The notice invited the juniors to participate in contested case proceedings and warned that if they did not they "may still be legally bound by the results of the contested case proceedings." *Id.*

On June 25, 2015, Sun Valley moved the Director to dismiss the calls for their failure to comply with applicable filing requirements. *Id.* at 382-402. Among other things, it argued that Rule 30 of the CM Rules governs the calls and that the seniors did not satisfy the filing requirements of that Rule. *Id.* In his *Final Order*, the Director denied Sun Valley's *Motion. Id.* at 888-898. He held the calls are governed by Rule 40 of the CM Rules and that the seniors' letters meet the filing requirements of that Rule. *Id.* Sun Valley subsequently filed a *Motion* asking the Director to review and revise his *Final Order. Id.* at 963-977. The Director denied the *Motion* on October 16, 2015. Supp. R., pp.84-88.

Meanwhile, on August 19, 2015, Sun Valley filed a *Petition for Judicial Review*, asserting that the Director's *Final Order* is contrary to law. The case was reassigned by the clerk of the court to this Court on August 28, 2015. On September 29, the Court entered an *Order* permitting the Intervenors to appear as parties to this proceeding. Although the administrative proceedings pertaining to the calls have not concluded, the Director entered an *Order* designating the *Final Order* as final and subject to judicial review on October 15, 2015. Supp. R., pp.71-74. This was done pursuant to the joint motion and stipulation of the parties. *Id.* at 9-13; 72. Sun Valley subsequently filed an *Amended* and *Second Amended Petition for Judicial Review*. A hearing on the *Second Amended Petition* was held before this Court on March 3, 2016. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day, or March 4, 2016.

II.

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of

constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or, (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.
ANALYSIS

A. Introductory analysis.

The issue before the Court is whether the Director properly denied Sun Valley's *Motion to Dismiss*. To address the issue the Court must determine what set of procedures govern the calls. The CM Rules provide the "procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." IDAPA 37.03.11.001. The Rules do not provide a single set of procedures uniform to all calls. Rather, they provide three sets of procedures, the application of which turns on the circumstances surrounding the call. These are set forth in Rule 30, 40 and 41 respectively. Rule 41 can be dispensed with for the purposes of this decision as it applies to calls made by senior ground water right holders. IDAPA 37.03.11.041.01. That leaves the Court to evaluate Rule 30 and Rule 40.

Neither Rule squarely applies to the circumstances of the Association's calls. Rule 30 presumes that the call is made "against the holders of junior-priority ground water rights within areas of the state not in organized water districts. . . ." IDAPA 37.03.11.030. That is not the case here. There are numerous organized water districts in IDWR Basin 37, including water district 37, 37B, 37N, 37O and 37U. Rule 40 presupposes that the call is made 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). Again, that is not the

case here. All parties agree that the potentially affected juniors are *not* in an area of the state designated as having a common ground water supply. Thus, while the CM Rules purport to "apply to all situations in the state" where junior ground water use causes material injury to a senior, an argument can be made that one situation is unaccounted for. IDAPA 37.03.11.020.01. That situation, which is present here, is where juniors potentially subject to a call are in organized water districts, but are not within an area of the state designated as having a common ground water supply.

How did this happen? At the time the CM Rules were promulgated, most ground water rights in the state had not been incorporated into water districts.[3] As a result, the CM Rules made some assumptions on how this would occur and the resulting effect. The Rules presume the boundary of a water district which encompasses ground water rights will be co-extensive with the boundary of an area of the state designated as having a of common ground water supply.[4] This presumption pervades the Rules. Were this presumption true, the procedures set forth in Rule 30 and Rule 40 would interact flawlessly with one another. Where affected ground water rights are not in an organized water district, the Rules assume that area of the state has not been designated as having a common ground water supply. In that situation, Rule 30 clearly applies. On the other hand, where affected ground water rights are in an organized water district, the Rules presume the water district has been designated as an area of the state having a common ground water supply. In that situation, Rule 40 applies. However, for reasons that are not before the Court the presumption that the boundary of a water district will be co-extensive with the boundary of an area of common ground water supply has not materialized.

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[3] *See e.g.*, I.C. § 42-604 (providing that the statutory criteria for the creation of water districts "shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts having jurisdiction thereof").

[4] There is some basis in law for this assumption. In many instances ground water rights, once decreed, are incorporated into an existing water district. That existing water district would have been formed originally to effectuate the administration of solely surface water rights on a given surface water source. To incorporate ground water rights into the district, the Director is required to make the determination that the ground water rights are hydraulically connected to the surface water source. I.C. § 42-237a.g. Further, if the Director determines that no hydraulic connection to the surface source exists then incorporate such rights into a separate water district. *Id.* Therefore, the assumption could be made that once ground water rights are incorporated into an existing water district, the boundary of that district will be co-extensive with the area of the state having a common ground water supply relative to the surface water source that acted as the basis for the original formation of the district. However, for reasons set forth herein, this assumption has not materialized in reality.

An example is illustrative. Consider the Eastern Snake Plain Aquifer ("ESPA"). Through the rulemaking process, the ESPA was designated as an area of the state having a common ground water supply relative to the Snake River. IDAPA 37.03.11.050. It is the only area of the state to have been designated as having a common ground water supply under the CM Rules. *Id.* A contemporary review of the boundary of the ESPA area of common ground water supply reveals that it is not coextensive with the boundary of any single water district. To the contrary, it encompasses many water districts (i.e., water district 110, 120, 130, etc.). There are even water districts, such as water district 37, that straddle the boundary of the ESPA area of common ground water supply. R., p.126. That the ESPA area of common ground water supply encompasses many water districts and partially encompasses others is not a possibility envisioned by the CM Rules.

That such is the case is evidenced by the Rules themselves. The ESPA area of common ground water supply was created well before ground water rights in that area were incorporated into water districts. The CM Rules contemplated that those ground water rights would eventually be incorporated into a single water district co-extensive with the ESPA area of common ground water supply:

> The Eastern Snake Plain Aquifer area of common ground water supply will be created as a new water district or incorporated into an existing or expanded water district as provided in Section 42-604, Idaho Code, when the rights to the diversion and use of water from the aquifer have been adjudicated . . . .

IDAPA 37.03.11.050.01.d. This has not occurred. Although adjudicated, ground water rights located in the ESPA area of common ground water supply have been incorporated into many waters districts, the boundaries of which appear to bear no relation to the boundary of the area of common ground water supply.[5] Therefore, although the CM Rules presumed the boundary of the ESPA area of common ground water supply would be co-extensive with a single water district, this presumption is not reflected by reality.

The ESPA example is representative of a larger trend. The CM Rules' assumption that the boundary of a water district will reflect the boundary of an area designated as having a common ground water supply is not materializing. Water district 37 – the district in which the

[5] Ground water rights incorporated into a water district must share a common ground water supply. However, not all ground water rights within the area of common ground water supply have been incorporated in to the water district. As such, the area of common ground water supply extends beyond the boundaries of the water district.

seniors in this case reside – is representative of this trend. The southern portion the district is within the boundary of the ESPA area of common ground water supply. *Id.* at 125. The northern portion of the district is not. *Id.* at 126. It lies in an area of the state that has not been designated as having a common ground water supply. *Id.* The district is inclusive of both surface and ground water rights, all of which are hydraulically connected to the Big Wood and Little Wood Rivers. However, no party argues that the boundary of water district 37 is one and the same with that area of the state having a common ground water supply relative to those rivers. The consensus appears to be that that area is larger than water district 37 and, like the ESPA area of common ground water supply, encompasses multiple water districts.

In this case, the Director denied Sun Valley's *Motion to Dismiss* because he determined the Association's calls are governed by Rule 40. He arrived at that decision by applying the simple dichotomy that Rule 40 applies when affected juniors are in organized water districts and Rule 30 applies when they are not. Applying that dichotomy would suffice if, as the Rules presume, the boundary of a water district is co-extensive with that of the area of common ground water supply. This introductory analysis establishes that is not the case, and it should be noted that the Director does not even argue that such is the case. As will be shown below, the fact that juniors are in organized water districts is not necessarily relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water. Much more relevant, in fact critical, to processing such a call is identifying that area of the state which has a common ground water supply relative to the senior's surface water source and the junior ground water users located therein. Since it is Rule 30 that provides the procedures and criteria for making this determination, the Court, for the reasons sets forth herein, holds that the Director's determination that Rule 40 governs the calls must be reversed and remanded.

B. Rule 30 of the CM Rules sets forth the procedures governing the Association's calls and, in conjunction with Rule 31, provides the procedures and criteria for determining that area of the state having a common ground water supply relative to the Big Wood and Little Wood Rivers.

All parties agree that an area of common ground water supply applicable to the Big Wood and Little Wood Rivers must be determined. They disagree how this should happen and as to the rules and procedures that should govern. An area having a common ground water supply is defined in pertinent part as "[a] ground water source within which the diversion and use

of ground water or changes in ground water recharge affect the flow of water in a surface water source." IDAPA 37.03.11.010.01. Determining an area of common ground water supply is critical in a surface to ground water call. Its boundary defines the world of water users whose rights may be affected by the call, and who ultimately need to be given notice and an opportunity to be heard. In the Court's estimation, determining the applicable area of common ground water supply is the single most important factor relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water.

There is only one area of the state that has been determined as having an area of common ground water supply under the CM Rules. That area is the ESPA area of common ground water supply. IDAPA37.03.11.050. Some parties argue that the fact the seniors are located within the ESPA area of common ground water supply has some legal significance. It does not. While it is true a portion of water district 37 is located within the ESPA area of common ground water supply, the ESPA area of common ground water supply is not relevant to the instant calls. It defines an area of the state having a common ground water supply relative to the Snake River. The seniors do not divert from the Snake River, but rather from the Big Wood and Little Wood Rivers. Therefore, to process the Association's calls, a determination must be made identifying an area of the state that has a common ground water supply relative to the Big Wood and Little Wood Rivers and the junior ground water users located therein.

By their terms, the CM Rules "provide the basis for the designation of areas of the state that have a common ground water supply . . . ." IDAPA 37.03.11.020.06. The Director argues that this determination may be made under Rule 40. Sun Valley and the Water District 37-B Groundwater Group argue the determination must be made under Rule 30. The Court agrees with the latter.

i. Rule 30 provides procedures and processes necessary to safeguard juniors' due process rights when determining an area of common ground water supply.

The area of common ground water supply in a surface to ground water call defines the world of juniors whose rights to use ground water may be curtailed. It is paramount that junior users who may be found to be within that area be given proper notice and the opportunity to be heard. Rule 30 of the CM Rules provides the procedural safeguards necessary to ensure these

basic due process rights. Where, as here, the senior seeks to curtail juniors in an area of the state that has not been determined as having a common ground water supply, Rule 30 requires the senior to include certain information in his petition. IDAPA 37.03.11.030.01. The senior must allege the area he believes to be the area of common ground water supply relative to his water source. IDAPA 37.03.11.030.01.d. The senior must then identify the junior users within that area he alleges are causing material injury (i.e., respondents). IDAPA 37.03.11.030.01.b. To ensure proper notice, Rule 30 requires the senior to serve his petition on those respondents. IDAPA 37.03.11.030.02. To ensure an opportunity to be heard, it requires the Director to initiate a contested case proceeding under the Department's Rules of Procedure. *Id.* These safeguards provide juniors proper notice of the alleged area of common ground water supply as well as the opportunity to be heard and present evidence in opposition to the petitioner's allegations.

Rule 40 lacks these procedural safeguards. It does not require the senior to allege the area of common ground water supply nor to identify juniors alleged to be within that area causing injury. It does not require the senior to serve his petition on junior users nor the Director to initiate a contested case proceeding. The reason Rule 40 lacks these safeguards is that it presupposes the area of common ground water supply applicable to the call has already been determined. IDAPA 37.03.11.040. It contemplates a process of administration that is more efficient than that set forth in Rule 30. *Id.* The process contemplated is similar to the administration of surface water rights within a water district by a watermaster. *Id.* Since Rule 40 assumes the world of juniors subject to curtailment is already determined and known, it does not include the same procedural safeguards set forth in Rule 30. Therefore, the Court finds that Rule 30 provides the procedures and processes necessary to safeguard juniors' due process rights. It follows that when a call is made by a senior surface water user against junior ground water users in an area of the state that has not been determined to be an area having a common ground water supply, the procedures set forth in Rule 30 must be applied to govern the call.

ii. Rule 30 provides the Director the authority to determine an area of common ground water supply.

In addition to providing procedural safeguards, it is Rule 30 of the CM Rules that provides the Director with the express authority to determine an area of common ground water supply. It provides that following consideration of a contested case, the Director may enter an

order determining "an area having a common ground water supply which affects the flow of water in a surface water source in an organized water district." IDAPA 37.03.11.030.07.c. Rule 40 provides no such authority, as it presupposes that determination has already been made. That such a determination must be made under Rule 30 is further evidenced by Rule 31. That Rule sets forth the criteria for determining whether an area of the State may be designated as having a common ground water supply. IDAPA 37.03.11.031.03. Critically, it instructs that the Director's findings with respect to those criteria must "be included in the Order issued pursuant to Rule [30]." IDAPA 37.03.11.031.05. Therefore, the Court finds that it is Rule 30 that provides the Director the authority to determine an area of common ground water supply. It follows the procedures set forth in Rule 30 must be applied to govern the calls.

The Court rejects the Director's arguments that a determination of an area of common ground water supply can be made under Rule 40. There are simply no procedures, criteria or authorization under that Rule for making such a determination. The Director applied Rule 40 due to the fact that the juniors here are in organized water districts. However, applying the dichotomy that Rule 40 applies when juniors are in an organized water district and Rule 30 applies when they are not does not provide the critical information needed to process a surface to ground water call under the circumstances present here. Most notably, the fact that junior water right holders are in organized water districts does not address the issue of which areas of the state may be subject to curtailment as a result of a given call. It is the designation of an area of common ground water supply relative to the senior's surface water source that answers this question. Since the procedures and criteria for making this determination are associated with Rule 30, it is Rule 30 that must govern a call where a senior surface water user seeks to curtail junior ground water users in an area of the state that has not been designated as an area having a common ground water supply.

Finally, Rule 30 addresses when administration is to occur pursuant to Rule 40. It provides that "[u]pon a finding of an area of common ground water supply and upon the incorporation of such area into an organized water district, or the creation of a new water district, the use of water shall be administered in accordance with the priorities of the various water rights as provided in Rule 40." IDAPA 37.03.11.030.09 (emphasis added). Clearly the first prerequisite to Rule 40 administration is the determination of an area of common ground water

supply.[6] This prerequisite is expressly addressed in Rule 30 and Rule 30 provides the only mechanism for making such a determination. The application of Rule 40 presumes that the determination has already been made.

C. The requests for administration submitted to the Director by the Association do not satisfy the filing and service requirements set forth in Rule 30.

Having determined that Rule 30 governs the Association's calls, the Court turns to evaluating whether their requests for administration satisfy that Rule's filing and service requirements. The Court finds they do not. Rule 30 requires a senior making a delivery call to include at least the following information in his petition:

> a. A description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water.
>
> b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of public records.
>
> c. All information, measurements, data or study results available to the petitioner to support the claim of material injury.
>
> d. A description of the area having a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated.

IDAPA 37.03.11.030.01.

In this case, the seniors submitted letters to the Director seeking administration on February 23, 2015. R., pp.1-5; LW R. pp.1-5. A review of those letters reveals that they lack much of the information expressly required by Rule 30. Among other things, absent is a description of the area having a common ground water supply within which the seniors seek administration. Likewise absent is the identification of the "names, addresses and description" of the respondents the seniors allege are causing the material injury. Therefore, the Court finds that the seniors' letters fail to satisfy the filing requirements set forth in Rule 30.

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[6] Thereafter, the other prerequisite is to incorporate the rights into an existing water district or into a new water district. *See also* I.C. § 42-237a.g.

More troubling, however, is the fact that the letters were not served by the seniors on the juniors they seek to curtail. This lack of service violates Rule 30, which expressly requires that "[t]he petitioner shall serve the petition upon all known respondents as required by IDAPA 37.01.01, 'Rules of Procedures of the Department of Water Resources.'" IDAPA 37.03.11.030.02. It also raises issues regarding due process of law. The Director engaged in correspondence with counsel for the seniors regarding the calls, including a request for further information and clarification, before junior users had notice the calls had been filed. R., p.6; LW R. p.6. The seniors filed their *First Amended Petitions for Administration* in response to that correspondence before any notice of the filing of the original letters had been provided to juniors. R., pp.7-9; LW R. pp.7-9. Again, when the seniors submitted their *First Amended Petitions for Administration* to the Director they did not serve them on the juniors.

The Director attempted to address the notice and service concerns by taking it upon himself to provide notice of the calls to juniors. On March 20, 2015, he sent out a letter to certain junior users informing them of the filing of the calls and inviting them to participate in contested case proceedings. R., p.12. Since the seniors did not identify respondents in their petitions, the Director was placed in the unenviable position of unilaterally determining whom to serve with the letter. To do this, the Department undertook the exercise of identifying those junior water right users in those areas of the state it believed may be affected by one or both of the calls. *Id.* These included junior ground water users in water district 37 and water district 37B. *Id.*

At the time, no explanation was given as to how the Director determined whom to serve, or as to what areas of the State may be affected by the calls. Nor was an explanation given as to why junior water users in other organized water districts within IDWR Basin 37 (i.e., water district 37N, 37O and 37U) were not served. However, the exercise undertaken by the Director leads Sun Valley and other juniors[7] to assert that he has already prejudged the area of common ground water supply relative to the Big Wood and Little Wood Rivers to be the boundaries of water district 37 and 37B. They assert this determination was made without notice to them and without an opportunity for them to present evidence and be heard on the issue. The Director denies these allegations, but the Court understands the concerns of the juniors. To them, the

[7] Specifically, the City of Fairfield, the City of Ketchum and the Water District 37B Ground Water Association.

Director appears as having determined issues relevant to the contested case proceedings before they were noticed or joined to the proceedings. These include determining that area of the state having a common ground water supply relative to the seniors' sources and which juniors are properly identified as respondents. The Director, as the decision maker, should not have been placed in the position of appearing to have made these kinds of determinations prior to the juniors having been given notice of the calls. The reason Rule 30 requires the calling senior to identify and serve the respondents he seeks to curtail is so that the Director is not placed in the position of appearing to prejudge any issues relevant to the contested case proceeding.

Therefore, the Court finds that the seniors failed to satisfy both the filing and service requirements of Rule 30 to the prejudice of the substantial rights of Sun Valley, the Cities of Fairfield and Ketchum, and the Water District 37B Ground Water Association. These include the right to have the seniors comply with the mandatory filing and service requirements of Rule 30. *See e.g., Jasso v. Camas County*, 151 Idaho 790, 796, 264 P.3d 897, 903 (2011) (holding that due process rights are substantial rights). Since the seniors' requests for administration fail to meet these mandatory requirements of Rule 30, the Director's decision to deny Sun Valley's motion to dismiss is in violation of the CM Rules and violates the substantial rights of the juniors. As a result, the *Final Order* must be reversed and remanded. I.C. §§ 67-5279(3) and (4).

D. The Court rejects the South Valley Groundwater District's argument.

Intervenor South Valley Groundwater District argues that neither Rule 30 nor Rule 40 of the CM Rules may be applied to the Association's calls. It asks this Court to take the following action:

> 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.

South Valley Ground Water District Reply Brief, p.9.

There are several problems with this argument. First, although it asks this Court to remand this proceeding to the Director to initiate a comprehensive proceeding, it does not

identify the rules, procedures or criteria that should govern. It simply asserts that neither Rule 30 nor Rule 40 may be applied, but does not proffer any alternative set of rules, procedures or criteria to be applied. Second, the District raises this argument for the first time in a reply brief.[8] It is the only party to take the position that neither Rule 30 nor Rule 40 may be applied. Yet, by raising the issue for the first time in a reply brief, the South Valley Groundwater District has not allowed any other party to respond to this position. For this reason, issues raised for the first time in a reply brief are not addressed by reviewing courts on appeal. *See e.g., State v. Raudenbaugh*, 124 Idaho 758, 763, 864 P.2d 595, 601 (1993) (raising an issue for the first time in a reply brief "does not allow for full consideration of the issue, and we will not address it"); *Henman v. State*, 132 Idaho 49, 51, 966 P.2d 49, 51 (Ct. App. 1998) ("Issues raised for the first time in a reply brief will not be addressed on appeal"). The Court therefore rejects the South Valley Groundwater District's argument and holds that the procedures set forth in Rule 30 govern the Association's calls.

E. The Court does not reach issues concerning the propriety of the Director's request for staff memoranda or his decision to conduct a site visit.

Sun Valley raises issues concerning the propriety of the Director's requests for the preparation of certain staff memoranda in this matter, as well as his decision to conduct a site visit of certain property. The Court need not reach these issues. For the reasons set forth above, the Director's decision to deny Sun Valley's motion to dismiss is reversed and remanded. The issues are therefore moot. The Court also finds that the issues regarding the propriety of the Director's requests for staff memoranda are not properly before the Court. The Director issued a *Request for Staff Memoranda* in the underlying administrative proceedings on June 12, 2015. R., pp.334-344. Various parties moved the Director to modify and/or withdraw the *Request*. *Id.* at 435-451; 616-635. The Director entered *Orders* denying those motions on July 22, 2015. *Id.* at 870-879; 899-908. Unlike his *Final Order*, the Director has not designated his *Orders* denying the parties' motions to modify and/or withdraw his *Request for Staff Memoranda* as final orders subject to judicial review. Therefore, those *Orders*, and the issues addressed therein, are not properly before the Court in this proceeding. I.C. §§ 67-5270(3) and 67-5271.

[8] The South Valley Ground Water District did not file an opening brief in support of the appeal raised by the Petitioner.

F. Sun Valley is not entitled to an award of attorney fees on judicial review.

Sun Valley seeks an award of attorney fees under Idaho Code § 12-117. The decision to grant or deny a request for attorney fees under Idaho Code § 12-117 is left to the sound discretion of the court. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). The Idaho Supreme Court has instructed that attorney fees under Idaho Code § 12-117 will not be awarded against a party that presents a "legitimate question for this Court to address." *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012). In this case, the Court holds that the Respondents have presented legitimate questions for this Court to address regarding the *Final Order*. These include, but are not limited to, whether the delivery calls at issue should be governed by the procedures set forth in Rule 30 or Rule 40 of the CM Rules. The circumstances surrounding the Association's calls present issues of first impression under the CM Rules. In light of that, the Court does not find the Respondents' arguments to be frivolous or unreasonable. Therefore, the Court in an exercise of its discretion denies Sun Valley's request for attorney fees.

IV.
ORDER

Therefore, based on the foregoing, IT IS ORDERED that the Director's *Order Denying Sun Valley Company's Motion to Dismiss* issued on July 22, 2015, **is hereby set aside and remanded for further proceedings consistent with this *Order*.**

Dated April 22, 2016

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on April 20, 2016, with sufficient first-class postage to the following:

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