

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.<sup>3</sup> 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.<sup>4</sup> 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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<sup>3</sup> 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”).

<sup>4</sup> 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 water districts, the boundaries of which appear to bear no relation to the boundary of the area of common ground water supply.<sup>5</sup> 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

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<sup>5</sup> 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