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DEPARTMENT OF
WATER RESOURCES

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Attorneys for Intervenor Water District 37-B Ground Water Association

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

SUN VALLEY COMPANY,)	Docket No.
)	
Petitioner,)	
vs.)	PETITION TO
)	INTERVENE
GARY SPACKMAN, Director of the Idaho)	
Department of Water Resources,)	
)	
Respondent.)	
)	

The Water District 37B Ground Water Association (the "Camas Group"), through undersigned counsel of record, hereby files this Petition to Intervene in the declaratory ruling proceedings recently initiated by Sun Valley Company's Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area of July 25, 2016, pursuant to Rules 350-354 of the Rules of Procedure of the Idaho Department of Water Resources, IDAPA 37.01.01 (the "Procedural Rules").

ORIGINAL

I. BACKGROUND

The Camas Group is a non-profit association, whose members are ground water irrigators within Idaho's Camas Prairie. On February 23, 2015, the Big Wood & Little Wood Water Users Association submitted letters to the Director of IDWR, requesting administration of ground water rights pursuant to the Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 ("CM Rules). (Ltr. from James to Spackman of 2/23/15, Docket Nos. CM-DC-2015-001, CM-DC-2015-002.) On March 20, 2015, the Director sent a letter to Camas Prairie ground water users, informing them of the delivery call proceedings, and identifying them as "holder[s] of junior-priority ground water right or rights that may be affected by" the delivery calls. (Ltr. From Spackman to Water Users of 3/20/15, Docket Nos. CM-DC-2015-001, CM-DC-2015-002.)

Therefore, the members of the Camas Group formed their non-profit association in order to defend their interests in those proceedings, and formally appeared in the delivery calls through counsel on July 10, 2015. (Not. of Appearance of 7/10/15, Docket No. CM-DC-2015-001). The delivery calls were formally dismissed on June 23, 2016. (Final Order Dismissing Delivery Calls of 6/23/16, Docket Nos. CM-DC-2015-001, CM-DC-2015-002.) No timely appeals were filed.

On July 7, 2016, the Director sent a letter to "[i]nterested [p]art[ies]" (including members of the Camas Group), informing them of "the possible creation of a ground water management area for the [Eastern Snake Plain Aquifer]," and announcing a series of public meetings to discuss that proposal. (Ltr. from Spackman to Interested Parties of 7/7/16, p. 1.) According to that letter, "[t]he Department's technical information suggests that the area that impacts water stored in the ESPA and spring discharge extends into tributary ba-

sins....” (*Id.*, p. 3.) The letter goes on to identify Camas Creek as one of those tributary basins. (*Id.*)

On July 25, 2016, Sun Valley Company (“SVC”) filed its Petition for Declaratory Ruling Regarding Creation of ESPA Ground Water Management Area (the “SVC Petition”), which seeks a variety of declaratory rulings regarding Idaho Code Section 42-233a (the statute governing critical ground water areas), Section 42-233b (the statute governing the creation and effect of ground water management areas), and the CM Rules. (SVC Petition, ¶ 17.)

II. LEGAL STANDARDS

Procedural Rule 350 provides:

Persons not applicants or claimants or appellants, petitioners, complainants, protestants, or respondents to a proceeding who claim a ***direct and substantial interest*** in the proceeding ***may petition for an order from the presiding officer granting intervention to become a party***, if a formal hearing is required by statute to be held in the proceeding.

(Emphasis added).

Petitions to intervene must, among other things, “state the direct and substantial interest of the potential intervenor in the proceeding.” Procedural Rule 351.

If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, ***the presiding officer will grant intervention***, subject to reasonable conditions, unless the applicant’s interest is adequately represented by existing parties. If it appears that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.

Procedural Rule 353 (emphasis added).

III. LEGAL ARGUMENT

A. The Petition to Intervene Is Timely

“Petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order or notice.” Procedural Rule 352. To the Camas Group’s knowledge, a hearing date has not yet been set, a prehearing conference has not yet occurred, and the presiding officer has not otherwise established a deadline for petitions to intervene. Therefore, this Petition is timely, and the heightened standards for petitions to intervene not timely filed of Procedural Rule 352 do not apply.

B. The Camas Group Claims a “Direct and Substantial Interest”

The members of the Camas Group own ground water rights within the area potentially subject to the proposed ESPA ground water management area. Once a ground water management area has been established, the Director has authority to “approve a ground water management plan” for the area, and to “order those water right holders on a time priority basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water.” The fact that the members of the Camas Group could be subject to these types of actions establishes their “direct and substantial interest” in the SVC Petition, pursuant to Procedural Rules 350 and 353.

While it is true that the members of the Camas Group are located within the existing Big Wood River Ground Water Management Area, presumably, the designation of the much larger ESPA ground water management area could subject the Camas Group to ground water management plans and curtailment orders based upon impacts presumed to

occur within a much larger geographic area than the current Big Wood River GWMA. Therefore, the fact that the members of the Camas Group are already located within one ground water management area does not reduce their direct and substantial interest in the SVC Petition.

C. This Petition to Intervene Does Not Unduly Broaden the Issues

The Camas Group seeks to intervene in order to have standing to advance legal arguments related to the issues directly raised or reasonably implicated by the SVC Petition. Therefore, this Petition does not “unduly broaden the issues,” pursuant to Procedural Rule 353.

D. The Camas Group’s Interests Are Not Adequately Represented by Existing Parties

While the Camas Group may ultimately agree with the majority of SVC’s legal arguments in this matter, it cannot be assumed at this early stage of the proceedings that SVC will adequately represent the Camas Group’s interests. As a general matter, one should not expect or require SVC—a ski resort in the upper Big Wood River basin—to consider the interests of a group of farmers on the Camas Prairie as it advances its legal arguments.

A more specific example of this type of unforeseen difference of opinion occurred during the recent judicial appeals in the aforementioned delivery calls. In 2013, members of the Camas Group opposed inclusion of the Camas Creek basin within Water District 37. (In the Matter of the Proposed Combination of Water District Nos. 37, 37A, 37C and 37M, Preliminary Order of 9/17/13, pp. 4-5.) As a result, IDWR established a separate Water District 37-B for the Camas basin. (*Id.*, p. 9.) During the course of the recent delivery call appeal, SVC suggested that proceeding with the delivery calls would have required the en-

tire area of common ground water supply to be “incorporated into a single water district.”¹ The Camas Group, while it agreed with the majority of SVC’s arguments, disagreed with that particular interpretation of the CM Rules.²

Again, this example illustrates that one cannot assume at such an early stage of the proceedings that certain parties will be completely aligned on every issue and argument, particularly when they are in disparate drainages, water districts, and industries. Therefore, one cannot assume that SVC will adequately represent the interests of the Camas Group for the purposes of Procedural Rule 353.

E. A Hearing is Required By Statute

Procedural Rule 350 suggests that a party may file a petition to intervene only if a “formal hearing is required by statute to be held in the proceeding.” Under Procedural Rule 401, a declaratory ruling is “a final agency action decided by order.” Under the Idaho APA, any proceeding that results in an order is considered a “contested case,” IDAHO CODE §§ 67-5201(6), 67-5240, and contested cases require a hearing. *See* IDAHO CODE § 67-5242(1)(a) (“[i]n a contested case, all parties shall receive notice that shall include...a statement of the time, place, and nature of the hearing....”).

Therefore, for the purposes of Procedural Rule 350, a “formal hearing is required by statute to be held in the proceeding.” *See also* IDAHO CODE § 42-1701A(3) (“[u]nless the right to a hearing before the director...is otherwise provided by statute, any person aggrieved by any action of the director..., and who has not previously been afforded an op-

¹ Relevant portions of SVC’s Petitioner’s Brief in the appeal are attached hereto as Exhibit A.

² Relevant portions of the Camas Group’s Intervenor’s Brief in the appeal are attached hereto as Exhibit B.

portunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action”).

F. Even if a Hearing is Not Required By Statute, Due Process Requires Consideration of This Petition to Intervene

Regardless of whether the Idaho APA and Section 42-1701A(3) satisfy the “if a formal hearing is required by statute” language of Procedural Rule 350, basic Due Process requires consideration of this Petition to Intervene, in light of the Camas Group’s substantial interests in this proceeding and the important and state-wide implications of SVC’s requested declarations. Notably, the analogous intervention rule in the Idaho Rules of Administrative Procedure of the Attorney General, IDAPA 04.11.01.350, does *not* require a statutorily-required hearing as a predicate to intervention. While Idaho Code Section 67-5206(5)(b) provides state agencies with authority to adopt their own procedural rules instead of the “default” rules adopted by the Attorney General, they should not be applied to make it more difficult for water right owners to protect their interests. *See, e.g., Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048, 1051 (1977) (“[w]e agree that individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state”).

IV. CONCLUSION

Based on the foregoing, the Camas Group respectfully requests that the Presiding Officer grant this Petition to Intervene, allowing the Camas Group to become a party to this proceeding.

DATED THIS 9th day of August, 2016.

Varin Wardwell LLC

By:



Dylan B. Lawrence
Attorneys for Water District 37-B
Ground Water Association

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Matthew J. McGee
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Dylan B. Lawrence

EXHIBIT A

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

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PETITIONER'S BRIEF

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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).

After completion of the designation and incorporation steps, and the other procedural steps of CM Rule 30.01 through 30.09, then CM Rule 40 would apply, but not before then. Under the administrative record before the Court, there has been no “finding of an area of common ground water supply,” and “such area” has not been incorporated “into an organized water district.” However, the Director is unyielding in his position that he has authority and jurisdiction to proceed pursuant to CM Rule 40, without first requiring that the Petitioners comply with CM Rule 30.

Clearly, if the undefined and undetermined ACGWS in Water Districts 37 and 37-B had been both previously *determined and incorporated* into a water district when the Petitioners casually initiated their purported water delivery calls, the Director’s exercise of authority and jurisdiction under CM Rule 40 might have been appropriate. *See* IDAPA 37.03.11.040.01 (“When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from *an area of common ground water supply* in an organized water district the petitioner is suffering material injury . . .”) (emphasis added). Those are not, however, the facts before the Court. The undefined and undesignated ACGWS has not been determined, either in a contested case proceeding or pursuant to rulemaking. Moreover, the

same purported ACGWS appears to exist, if at all, in two separate water districts—Water District 37 and Water District 37-B—and has not been incorporated into a single water district.

To that end, CM Rule 30.04 further evidences the Director's error in skipping directly to CM Rule 40. That rule provides:

In the event the petition *proposes regulation of ground water rights conjunctively with surface water rights in an organized water district*, and the water rights have been adjudicated, the Department may consider such to be *a petition for modification of the organized water district* and notice of proposed modification of the water district shall be provided by the Director pursuant to Section 42-604, Idaho Code. The Department will proceed to consider the matter addressed by the petition under the Department's Rules of Procedure.

IDAPA 37.03.11.030.04 (emphasis added).

The Association clearly “proposes regulation of ground water rights conjunctively with surface water rights in an organized water district, and the water rights have been adjudicated.” Accordingly, the Department could consider CM Rule 30 compliant petitions as petitions to determine a specifically described ACGWS and for modification of Water Districts 37 and 37-B. The Department declined to do so.

The Director's decision that CM Rule 30 is “irrelevant” in these proceedings is clear legal error. R. Vol. V, pp. 890, 892. The Director is acting in violation of the Department's rules and in excess of the Director's authority under those rules. By their plain, unambiguous terms, the CM Rules demonstrate that CM Rule 40 does not yet apply in the Big Wood River Valley. Equally important, and far from “irrelevant,” the provisions of CM Rule 30 actually provide the only procedures for the Petitioners to initiate a contested case where no

with instructions to dismiss these contested case proceedings. Sun Valley further requests that the Court find the tainted Technical Memoranda an invalid exercise of the Director's authority in a contested case, constituting a violation of procedural due process, and order they shall not be used by any parties or the Department, and that they be expunged from the record.

DATED this 6th day of January, 2016.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell – Of the Firm
Attorneys for Petitioner

By Matthew J. McGee
Matthew J. McGee – Of the Firm
Attorneys for Petitioner

EXHIBIT B

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
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COMFORT HOMEOWNER'S
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

Case No. CV-WA-2015-14500

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First, it is telling that, between Rule 30 and Rule 40, Rule 30 is the only rule that specifies that a conjunctive management delivery call is subject to the contested case procedures of the Procedural Rules. *Compare* CM Rule 30.02 to CM Rule 40. If Rule 40 applies in lieu of Rule 30, then what is the authority for the current contested case proceeding? The Director's more general statutory authorities to initiate a contested case do not answer the question, because if they did, it would not have been necessary to include the contested case authority within Rule 30. The fact that the contested case authority appears in Rule 30, but not in Rule 40, is significant.

Second, and similarly, CM Rule 31.05 states that the Director's findings in determining an area of common ground water supply shall be in an order issued under CM Rule 30. However, according to the Director, this is not a CM Rule 30 proceeding. If that is the case, then what is the authority to establish an area of common ground water supply in the course of the administrative delivery call proceeding? Again, the structure of Rules 30 and 40 demonstrates that the two rules are not necessarily mutually exclusive, and that Rule 30 applies in any conjunctive management delivery call for which the area of common ground water supply has not yet been established.

B. The Director Lacks Authority to Combine Water Districts 37 and 37B Within the Delivery Call Proceeding

While the Camas Group generally agrees with SVC regarding the applicability of CM Rule 30 and Procedural Rule 230, it does need to clarify an ancillary statement in SVC's opening brief. In discussing whether the Director's exercise of jurisdiction under Rule 40 was appropriate, SVC states:

The undefined and undesignated ACGWS has not been determined, either in a contested case proceeding or pursuant to rulemaking. Moreover, the same purported ACGWS appears to exist, if at all, in two separate water districts—

Water District 37 and Water District 37-B—and has not been incorporated into a single water district.

(SVC Petitioner's Br., pp. 37-38 (emphasis added).)

The Camas Group's concerns here relate to the highlighted language, which appears to suggest that the delivery call could proceed only if ground water users in Water Districts 37 and 37B were incorporated into the same water district. Because these are two pre-existing water districts, the only way this could be done would be to either combine Water Districts 37 and 37B, or simultaneously abolish Water District 37B and expand Water District 37.

To be clear, CM Rule 30 does not provide either such authority. When the senior surface water rights in a delivery call are within an organized water district, Rule 30.04 provides the Director with authority to treat the delivery call petition as a request to modify "*the* organized water district." (Emphasis added). Rule 30.04's consistent reference to the modification of a singular water district demonstrates that it does not provide the Director with authority to combine multiple water districts or to simultaneously abolish one water district and expand another. Similarly, Rule 30.05 provides the Director with authority to create a new water district, which of course does not apply when all of the water rights at issue are already within existing water districts.

Critical in this regard is the fact that Idaho Code Section 42-604 provides the Director with specific authority to "abolish" and "combine" water districts "if such action is required in order to properly administer uses of the water resource." Accordingly, the Director has the authority to abolish or combine existing water districts *only* within the context of a proceeding initiated pursuant to Section 42-604, and *not* within the context of a CM Rule 30 delivery call. See generally *Nettleton v. Higginson*, 98 Idaho 87, 94, 558 P.2d 1048, 1055 (1977) (holding that "before such action can be taken creating one district [out of two existing water districts] the

Department of Water Resources must first hold a public hearing, upon reasonable notice, wherein all interested persons may testify before the Department regarding facts relevant to the combined water district"). Needless to say, the same rules regarding the strict construction of administrative authority described in SVC's opening brief, (*see* Petitioner's Br., pp. 16-21), apply here too.

While this may seem an ancillary issue to some, it is of critical importance to the Camas Group. In 2013, the Director proposed for Water District 37 to encompass the area that is now within Water District 37B. (R., Vol. III, p. 452 (Bromley aff.), pp. 464-80 (order).) Area water users testified in support of a separate Water District 37B, and some even hired counsel, who testified that thirty-nine out of forty-one ground water users on the Camas Prairie signed petitions in support of a separate water district. (R., Vol. III, pp. 468-69 (order).) The Director, "with some hesitation," agreed to create a separate Water District 37B. (R., Vol. III, p. 473 (order).) Therefore, while this may be an ancillary issue to some, the Camas Group wants to ensure the Director's water district authorities are accurately described in any orders generated from this appeal.

V. CONCLUSION

For the foregoing reasons, the Camas Group believes the Court's order in this matter should (1) confirm that CM Rule 30 and Procedural Rule 230 apply to this delivery call proceeding, (2) confirm that the senior water right owners' delivery call letter does not satisfy those requirements, and (3) clarify that Rule 30 does not provide the Director with authority to abolish or combine existing water districts.

Dated this 3rd day of February, 2016.

Varin Wardwell LLC

BY: 

Dylan B. Lawrence

*Attorneys for Intervenor Water District 37B
Ground Water Association*