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DEPARTMENT OF  
WATER RESOURCES

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

CITY OF HAILEY, an Idaho municipal  
corporation, and CITY OF BELLEVUE, an  
Idaho municipal 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, SUN VALLEY  
COMPANY, 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

Case No. CV-WA-2015-14419

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. JOAN CONGER, DANIEL T.  
MANOOGIAN REVOCABLE TRUST,  
DONNA F. TUTTLE TRUST, DAN S.  
FAIRMAN MD 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,  
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VALLEY WATER CO LCC, MARGO  
PECK, PIONEER RESIDENTIAL &  
RECREATIONAL PROPERTIES LLC,  
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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,  
MARIO 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, VERNON IRREVOCABLE  
TRUST, CHARLES & COLLEEN WEAVER,  
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LINDA D. WOODCOCK, STARLITE  
HOMEOWNERS ASSOCIATION, GOLDEN  
EAGLE RANCH HOMEOWNERS ASSN  
INC. TIMBERVIEW TERRACE  
HOMEOWNERS ASSN, and  
HEATHERLANDS HOMEOWNERS  
ASSOCIATION INC.,

Intervenors.

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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

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### INTERVENOR'S BRIEF

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Appeal from the Director of the Idaho Department of Water Resources

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The Water District 37B Ground Water Association (the “Camas Group”),<sup>1</sup> through undersigned counsel of record, hereby files this brief in response to the Petitioners’ Opening Brief filed by the City of Hailey and the City of Bellevue (the “Cities”) in this appeal.<sup>2</sup>

## I. STATEMENT OF THE CASE

### A. Nature of the Case

This appeal addresses whether the Director of the Idaho Department of Water Resources (“IDWR”) may determine the area of common ground water supply during the course of the administrative delivery call proceeding, or whether he must do so by rulemaking before the delivery call can proceed. This includes the issue of whether IDWR’s Conjunctive Management Rule (“CM Rule”) 30 applies, or whether it is appropriate for the Director to proceed pursuant to CM Rule 40, even though an area of common ground water supply has not been established.

### B. Course of Proceedings and Concise Statement of Facts

The Camas Group is a non-profit association formed by several ground water irrigators located within Idaho’s Camas Prairie and the State’s Water District 37B, for the purposes of defending against this delivery call. (*See* R., Vol. I, p. 62 (notice of intent to participate), Vol. IV, pp. 722-32 (joinder in motion to dismiss).)<sup>3</sup> All of the members of the Camas Group received the initial March 20, 2015 letter from Director Spackman regarding the delivery call. (*See generally* R., Vol. I, pp. 12-20 (letter and mailing list).) The Camas Group itself filed a

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<sup>1</sup> As reflected in the accompanying Notice of Substitution, the Water Dist. 37-B Groundwater Group has changed its name with the Idaho Secretary of State to the Water District 37B Ground Water Association.

<sup>2</sup> The Court’s September 29, 2015 Order approving intervention by the Camas Group and other parties did not specifically designate the intervening parties as intervenor-appellants or intervenor-respondents, as contemplated by Idaho Appellate Rule 7.1. Because the Camas Group does not necessarily agree with all of the Cities’ arguments, it is appropriate to file and consider this brief as an intervenor-response brief.

<sup>3</sup> All references to the record are to the record for the Big Wood River proceeding, CM-DC-2015-001, unless otherwise noted.

notice of intent to participate in the administrative delivery call proceeding on April 22, 2015. (R. Vol. I, p. 62.) Several members of the Camas Group filed individual notices of intent to participate at the early stages of the delivery call, (*see, e.g.*, R., Vol. I, pp. 31, 51, 52, 61, 70, 71-72, 75, 80, 81, 82, 86, 153), but are now represented through the Camas Group. (*See* R., Vol. IV, pp. 706-21 (notice of appearance).)

The Cities filed their Joint Motion that is the subject of this appeal on June 26, 2015. (R., Vol. III, pp. 403-11.) In general, that motion sought to dismiss these delivery call proceedings based primarily on the argument that an area of common ground water supply needs to be established through a rulemaking before the delivery call can take place. (*See* R., Vol. III, pp. 412-34 (mem. in supp. of Joint Motion).) At the time the Cities filed their Joint Motion, counsel for the Camas Group had not yet appeared as counsel of record, (R., Vol. IV, pp. 706-21 (notice of appearance)), and the Camas Group was only able to file a brief joinder in the Cities' Joint Motion contemporaneously with the notice of appearance. (R., Vol. IV, pp. 722-32.) The Camas Group filed its Notice of Appearance in this appeal on September 11, 2015, which the Court approved in its order of September 29, 2015. Therefore, the Camas Group is a proper party to this appeal. *See* IDA. R. OF CIV PROC. 84(r) (incorporating Idaho Appellate Rules); IDA. APP. R. 7.1 (approved intervenor is party to the appeal).

## **II. ADDITIONAL ISSUES PRESENTED ON APPEAL**

The Camas Group is not raising additional issues in this appeal.

## **III. ATTORNEYS FEES ON APPEAL**

Idaho Code Section 12-117 provides a mandatory award of attorneys fees and other expenses to a prevailing party when a state agency acts "without a reasonable basis in fact or law." Here, the dispute over the applicability of CM Rules 30 and 40 is a direct result of

ambiguity in rules IDWR itself drafted and adopted. Therefore, the Camas Group requests an award of attorneys fees pursuant to Idaho Code Section 12-117.

#### IV. LEGAL ARGUMENT

A. **It Is More Efficient to Determine the Area of Common Ground Water Supply Before Proceeding With the Remainder of the Delivery Call**

It is important to understand that when the senior water right holders initiated this delivery call, they did *not* seek administration of ground water diversions within the Camas Prairie. This is demonstrated by the conclusion of their initial request for administration, which states:

Due to the failure of the Idaho Department of Water Resources to administer the subject water rights under the prior appropriation doctrine, the Petitioners have suffered from premature curtailment of delivery of their surface water rights, along with the accompanying material injury. Any future delay in the requested administration will result in further injury. *Accordingly, Petitioners hereby demand that you direct the Watermaster for Water District No. 37* to administer Petitioners' surface water rights, and hydrologically connected to ground water rights within *the district* in accordance with the prior appropriation doctrine.

(R., Vol. I, p. 3 (ltr. from James to Spackman of 2/23/15 (emphasis added).)

Through their exclusion of Water District 37B, the seniors did not request administration of ground water rights on the Camas Prairie.<sup>4</sup> Instead, it was IDWR who determined that the members of the Camas Group should be included in the delivery call and therefore provided them with the notices of the proceeding. (*See generally* R., Vol. I, pp. 12-20 (notice letter and mailing list).)

As the Camas Group noted in its joinder to the Joint Motion, the Camas Prairie region is within the area for which, according to IDWR, it lacks sufficient technical information to “accurately determine what the depletions would be from ground water pumping or even from

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<sup>4</sup> Camas Prairie ground water rights are within Water District 37B, not Water District 37. (*See, e.g.,* R., Vol. III, pp. 452, 465, 477-78 (order creating Water District 37B).)

surface water withdrawals in those basins,” and the Camas Prairie is not within the current USGS modeling effort. (R., Vol. III, pp. 453-54 (Bromley aff.), p. 514 (legislative testimony), p. 562 (map), Vol. IV, pp. 722-24 (joinder); *see also* R., Vol. VI, p. 1098 (IDWR staff hydrology memo) (“there are not sufficient data available to calibrate a model to predict the timing of impacts [of ground water use from the Camas Prairie on aquifer discharge]”).) Therefore, from the perspective of the Camas Group, it makes little sense, and is potentially wasteful of their resources, to participate in all aspects of a full-blown delivery call action, without yet knowing whether they are proper respondents in the first place—particularly when they were not identified as respondents in the initial delivery call petition.

**B. CM Rule 30 Applies to This Delivery Call Because the Area Of Common Ground Water Supply Has Not Been Established**

The overall structure of the conjunctive management rules dictates that CM Rules 30 and 31 apply to delivery call proceedings in which an area of common ground water supply has not yet been designated, and that Rule 40 applies only after an area of common ground water supply has been designated.

First, it is telling that, between CM 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 there is no authority for the contested case proceedings. The Director’s more general statutory authorities to initiate a contested case must not provide that authority, 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, and supports the conclusion that Rules 30 and 31 apply in any conjunctive

management delivery call action for which an area of common ground water supply has not already been established.

**C. If the Court Concludes that Rule 40 Applies to the Exclusion of Rule 30, then the Cities Are Correct that the Area of Common Ground Water Supply Must Be Established Through Rulemaking**

Because the Camas Group believes that CM Rule 30 applies in any delivery call for which an area of common ground water supply has not already been established, it cannot go so far as to conclude, as the Cities do, that a rulemaking is the only procedural mechanism for establishing the area of common ground water supply. With that said, if the Court concludes that the Camas Group is incorrect, and that the delivery call can proceed under Rule 40 exclusive of Rule 30, then the Cities are undoubtedly correct that a rulemaking is the only avenue available for establishing the area of common ground water supply.

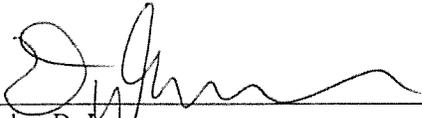
This is because CM Rule 31.05 states that the Director's findings in determining an area of common ground water supply within a delivery call proceeding shall be in an order issued under CM Rule 30. In other words, Rules 30 and 31 provide the only authority to determine the area of common ground water supply within the administrative proceeding context. If the Director is indeed correct that Rules 30 and 31 do not apply to this delivery call, then a rulemaking is the only other avenue available to IDWR to determine the area of common ground water supply.

**V. CONCLUSION**

For the foregoing reasons, the Camas Group believes the Court should confirm that CM Rules 30 and 31 apply to this delivery call proceeding. If the Court concludes that the delivery call can proceed pursuant to CM Rule 40 exclusive of Rules 30 and 31, then the Court should confirm that the area of common ground water supply must be established through rulemaking.

Dated this 3<sup>rd</sup> day of February, 2016.

Varin Wardwell LLC

BY:   
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 3<sup>rd</sup> day of February, 2016, I caused to be served a true and correct copy of the foregoing **INTERVENOR'S BRIEF** by the method indicated below, and addressed to the following:

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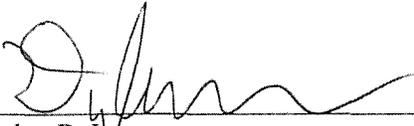
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