

**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,

Petitioners,

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,

CITY OF KETCHUM, CITY OF FAIRFIELD, WATER DISTRICT 37B GROUND WATER ASSOCIATION, 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 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 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

Case No. CV-WA-2015-14419

RESPONDENTS' BRIEF

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 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 TERI SZOMBATHY, THE BARKER LIVING TRUST, CAROL BURDZY THIELEN, TOBY B. LAMBERT LIVING TRUST, VERNON 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

RESPONDENTS' BRIEF

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. STATEMENT OF THE CASE3

 A. NATURE OF THE CASE3

 B. STATEMENT OF FACTS & PROCEDURAL BACKGROUND3

II. ISSUES ON APPEAL7

III. STANDARD OF REVIEW8

IV. ARGUMENT.....9

 A. THE CM RULES DO NOT REQUIRE THE DIRECTOR TO PROMULGATE A RULE DESIGNATING AN ACGWS THAT ENCOMPASSES THE SENIOR AND JUNIOR RIGHTS BEFORE PROCEEDING PURSUANT TO CM RULE 40.....9

 B. STATEMENTS REGARDING PRIOR DELIVERY CALLS AGAINST JUNIOR RIGHTS SOURCED FROM THE ESPA ACGWS DO NOT PRECLUDE THE DIRECTOR FROM PROCEEDING WITH THE BIG AND LITTLE WOOD DELIVERY CALLS.....17

 C. STATEMENTS REGARDING THE PROPOSED REPEAL OF CM RULE 50 DO NOT PRECLUDE THE DIRECTOR FROM PROCEEDING WITH THE BIG AND LITTLE WOOD DELIVERY CALLS.....19

 D. THE CITIES ARE NOT ENTITLED TO ATTORNEY FEES AND COSTS.....21

V. CONCLUSION.....22

TABLE OF AUTHORITIES

Cases

<i>Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.</i> , 143 Idaho 862, 874, 154 P.3d 433, 445 (2007)	15, 17
<i>Barron v. Idaho Dept. of Water Resources</i> , 135 Idaho 414, 417, 18 P.3d 219, 222 (2001).....	8
<i>City of Huetter v. Keene</i> , 150 Idaho 13, 15, 244 P.3d 157, 159 (2010).....	10, 11
<i>Dovel v. Dobson</i> , 122 Idaho 59, 61, 831 P.2d 527, 529 (1992).....	8
<i>Duncan v. State Bd. of Accountancy</i> , 149 Idaho 1, 3, 232 P.3d 322, 324 (2010).....	15, 16
<i>Hewson v. Asker's Thrift Shop</i> , 120 Idaho 164, 166-67, 814 P.2d 424, 426-27 (1991)	17
<i>Hillside Landscape Const., Inc. v. City of Lewiston</i> , 151 Idaho 749, 753, 264 P.3d 388, 392 (2011).....	10
<i>Idaho Power Co. v. Idaho Dep't of Water Res.</i> , 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).....	8
<i>In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170</i> , 148 Idaho 200, 210, 220 P.3d 318, 328 (2009)	10
<i>In re SRBA</i> , 157 Idaho 385, 393, 336 P.3d 792, 800 (2014)	15, 17
<i>Mason v. Donnelly Club</i> , 135 Idaho 581, 583, 21 P.3d 903, 905 (2001)	10
<i>Musser v. Higginson</i> , 125 Idaho 392, 395, 871 P.2d 809, 812 (1994)	15, 16, 17
<i>Tupper v. State Farm Ins.</i> , 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998)	8

Statutes

I.C. § 12-117	22
I.C. § 12-117(1)	22
I.C. § 42-1701A(4)	9
I.C. § 42-602	16, 18
I.C. § 67-5201	4
I.C. § 67-5277	9
I.C. § 67-5279(3)	9
I.C. § 67-5279(4)	9
I.C. § 67-5291	17

Rules

I.R.C.P. 54	21
I.R.C.P. 54(d)(1)(A).....	21
IDAPA 37.01.01.710	6
IDAPA 37.01.01.750	6
IDAPA 37.03.11.000	3, 15
IDAPA 37.03.11.001	11
IDAPA 37.03.11.010.01	5, 9, 13, 17, 18
IDAPA 37.03.11.020.07	11
IDAPA 37.03.11.030	11, 12, 17
IDAPA 37.03.11.030.07.c	12
IDAPA 37.03.11.031.01-05.....	12
IDAPA 37.03.11.040	3, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 17, 20, 21, 22
IDAPA 37.03.11.050	6, 7, 19, 20, 21, 22
IDAPA 37.03.11.050.01	5, 13, 14

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a judicial review proceeding in which the City of Hailey and the City of Bellevue (“the Cities”) appeal an order issued by the Director (“Director”) of the Idaho Department of Water Resources (“Department”) denying the Cities’ motion to dismiss two conjunctive management water delivery call contested cases. The order appealed is the Director’s *Order Denying Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* (“ACGWS Order”).

The issues raised in this appeal stem from two delivery calls (referred to herein as “the Big and Little Wood Delivery Calls”) initiated by the Big Wood and Little Wood Water Users Association (“Association”) pursuant to the Department’s *Rules for Conjunctive Management of Surface and Ground Water Resources* (“CM Rules”).¹ The Cities challenge the Director’s determination that the CM Rules do not require the Director to promulgate a rule designating an area of common ground water supply (“ACGWS”) in accordance with the Idaho Administrative Procedure Act, Idaho Code § 67-5201 *et seq.*, before responding to the Big and Little Wood Delivery Calls pursuant to CM Rule 40.

B. STATEMENT OF FACTS & PROCEDURAL BACKGROUND

On February 24, 2015, the Director received two conjunctive management water delivery call letters from the Association. The Association alleges its members on the Big and Little Wood Rivers “have suffered from premature curtailment of delivery of their surface water rights, along with the accompanying material injury.” *BW CM-DC-2015-001* at 1-5; *LW CM-DC-2015-*

¹ The CD containing the record on appeal includes filings in the Big Wood Delivery Call matter in a folder labeled BW CM-DC-2015-001, filings in the Little Wood Delivery Call matter in a folder labeled LW CM-DC-2015-002, and documents as a result of the Court’s November 16, 2015, *Order Granting Motion to Augment* in a folder labeled Supp AR Lodged w-DC. Citations to the record herein are consistent with these labels.

002 at 1-5.² The Association also alleges that its members' senior surface rights "are all located in Water District 37, and are hydrologically connected to ground water rights in the Wood River Valley aquifer system." *Id.* at 1; *Id.* at 1. The Association states that "[g]round water use from the Wood River Valley aquifer has increased" and "accompanying downward trend[s] in ground-water levels [have] resulted in significantly lower flows in the Big Wood River" and "in Silver Creek." *Id.* at 2; *Id.* at 2. The Association cites a 1991 order of the Department finding that the surface and ground waters of the Big Wood River drainage are interconnected, and that diversion of ground water can deplete the surface water flow in streams and rivers. *Id.* at 1; *Id.* at 1. The Association cites a 1994 study demonstrating that "[g]round water use in the Bellevue Triangle, for pumped irrigation, almost doubled during the period of 1975 to 1993" and a 2007 study confirming "a significantly declining trend in ground water levels." *Id.* The 2007 study concluded that "streamflow in Silver Creek can be used as a proxy for trends in ground-water discharge to the Big Wood River on the Bellevue fan." *Id.* The Association points out that discharge from the Wood River Valley aquifer system via Silver Creek is at an all time low. *Id.* at 3; *Id.* at 3. The Association demands that the Director remedy injury to its members' senior rights by directing "the Watermaster for Water District 37 to administer [the Association members'] surface water rights, and hydrologically connected to ground water rights within the district in accordance with the prior appropriation doctrine." *Id.* at 3; *Id.* at 3.

In response to the Association's delivery call letters, the Director initiated the Big and Little Wood Delivery Call contested case proceedings. On March 20, 2015, the Director sent letters to ground water users potentially affected by one or both of the delivery calls. *BW CM-*

² A list of the Association members' senior surface water rights is attached to the letters as Exhibit A. *BW CM-DC-2015-001* at 4-5; *LW CM-DC-2015-002* at 4-5.

DC-2015-001 at 12. The Department received over 100 notices of intent to participate in the delivery call proceedings, including notices filed by the Cities. *Id.* at 859.

On June 26, 2015, the Cities filed a *Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* and a *Memorandum in Support of Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* (together the “Motion to Dismiss”). The Cities argued that the CM Rules prevent the Director from proceeding with the Big and Little Wood Delivery Calls “because the Cities’ ground water rights are not within the [Eastern Snake Plain Aquifer (“ESPA”) ACGWS described in CM Rule 50.01], while all of the calling seniors’ water rights are,” and “the CM Rules require the Director designate an [ACGWS] by rule” before responding to the delivery calls pursuant to CM Rule 40. *Petitioners’ Opening Brief* at 8. In support of these arguments, the Cities cited CM Rule 40’s statement that the rule governs delivery calls against junior-priority ground water rights “from an area having a common ground water supply in an organized water district,” statements of the Director and the Court regarding the Surface Water Coalition (“SWC”) and Rangen, Inc. (“Rangen”) delivery call cases, and statements of the Director and Idaho Legislature regarding the proposed repeal of CM Rule 50. *BW CM-DC-2015-001* at 415-17, 421-26.

In the ACGWS Order denying the Motion to Dismiss, the Director determined that CM Rule 40 does not require the Director to promulgate a rule designating an ACGWS before responding to the Big and Little Wood Delivery Calls. *Id.* at 860. The Director determined that, “[w]hile the Director has authority to establish an ACGWS by rule (and in fact did for the [ESPA],” the CM Rules do not require that he do so prior to proceeding with the Big and Little Wood Delivery Calls. *Id.* The Director concluded “[t]he ACGWS for the Big and Little Wood Delivery Calls is a factual question that can be established based upon information presented at hearing applying the definition set forth in CM Rule 10.01.” *Id.* at 861. The Director also

concluded that statements in the SWC and Rangen delivery call cases regarding the scope of the Director’s authority to curtail junior ground water rights whose source is the ESPA ACGWS “are irrelevant to the Director’s authority to curtail junior ground water rights” in response to the Big and Little Wood Delivery Calls where the junior ground water rights are sourced “outside the ESPA ACGWS.” *Id.* at 862. Similarly, the Director concluded that statements “specific to the effect of the repeal of CM Rule 50 on ESPA delivery calls . . . are irrelevant to CM Rule 40 delivery calls initiated by holders of senior water rights against junior ground water rights outside the ESPA ACGWS and, therefore, not a basis to dismiss the Big and Little Wood Delivery Calls.” *Id.* at 863.

On August 18, 2015, the Cities filed a *Joint Motion for Review of Interlocutory Order* requesting the Director revise the ACGWS Order to grant the Motion to Dismiss. That same day, the Cities filed a *Joint Petition for Judicial Review of Agency Action* with the Court seeking judicial review of the ACGWS Order. Thereafter, the Respondents, the Cities, and certain other parties entered discussions regarding the propriety of the Petition given the ACGWS Order was an interlocutory, not final, order of the Department. Following these discussions, a *Stipulation* was filed with the Court on September 18, 2015. Consistent with the *Stipulation*, on September 25, 2015, the Cities and other parties filed a motion requesting the Director designate the ACGWS Order as a final order pursuant to the Department’s Rules of Procedure 710 and 750. *Supp AR Lodged w-DC* at 9-13. The Director issued an order designating the ACGWS Order as a final appealable order on October 15, 2015. *Id.* at 71-74. The Director issued the *Order Denying Joint Motion to Revise Interlocutory Order* on October 16, 2015. *Id.* at 80-83. The Director re-affirmed his determination that the CM Rules “do not require the Director establish an ACGWS by rule prior to moving forward with the Big and Little Wood Delivery Calls.” *Id.* at 81. The Cities filed an *Amended Joint Petition for Judicial Review* on November 6, 2015.

II. ISSUES ON APPEAL

Respondents' formulation of the issues presented is as follows:

- a. Whether the Director must promulgate a rule designating an ACGWS that encompasses the senior surface water rights and junior ground water rights before responding to the Big and Little Wood Delivery Calls pursuant to CM Rule 40.
- b. Whether statements of the Director and Court regarding prior delivery calls against junior ground water rights whose source is the ESPA ACGWS preclude the Director from responding to the Big and Little Wood Delivery Calls pursuant to CM Rule 40.
- c. Whether statements of the Director and Idaho Legislature related to the proposed repeal of CM Rule 50 preclude the Director from responding to the Big and Little Wood Delivery Calls pursuant to CM Rule 40.
- c. Whether the Cities are entitled to attorney fees and costs on appeal.

III. STANDARD OF REVIEW

Judicial review of a final decision of the Department is governed by the Idaho Administrative Procedure Act, chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The court shall affirm the agency decision unless it finds 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. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. "Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion." *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

IV. ARGUMENT

A. **THE CM RULES DO NOT REQUIRE THE DIRECTOR TO PROMULGATE A RULE DESIGNATING AN ACGWS THAT ENCOMPASSES THE SENIOR AND JUNIOR RIGHTS BEFORE PROCEEDING PURSUANT TO CM RULE 40.**

In the ACGWS Order, the Director determined that CM Rule 40 governs the Director's response to the Big and Little Wood Delivery Calls because it applies "[w]hen 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 having a common ground water supply in an organized water district the petitioner is suffering material injury. . . ." *BW CM-DC-2015-001* at 860. The Director rejected the Cities' argument that CM Rule 40 requires the Director to promulgate a rule designating an ACGWS in accordance with the Idaho Administrative Procedure Act before proceeding with the Big and Little Wood Delivery Calls. Specifically, the Director determined that, "[w]hile the Director has authority to establish an ACGWS by rule (and in fact did for the [ESPA]), the CM Rules do not mandate" that he do so. *Id.* The Director concluded that "[t]he ACGWS for the Big and Little Wood Delivery Calls is a factual question that can be established based upon information presented at hearing applying the definition set forth in CM Rule 10.01." *Id.*

The Cities first argue that "CM Rule 40's plain language states that the Director may respond against only those junior ground water right holders who are within a defined [ACGWS]." *Petitioners' Opening Brief* at 15. The Cities also argue that, because "the CM Rules do not provide for delivery calls by senior water right holders against junior ground water right holders who are not within the same designated [ACGWS]," the Director cannot proceed with the Big and Little Wood Delivery Calls "because the Cities' ground water rights are not within the ESPA [ACGWS], while all of the calling senior's water rights are." *Id.* at 8.

“The goal of statutory interpretation is to discover the intention of the legislature in drafting a statute, and to apply the statute accordingly, examining not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history.” *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 210, 220 P.3d 318, 328 (2009) (internal quotations and citations omitted). “Where the language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to construe the language.” *Id.* Where language of a statute is ambiguous, however, the Court looks to rules of construction for guidance. *Id.* “Language of a particular section need not be viewed in a vacuum. And all sections of applicable statutes must be construed together so as to determine the legislature's intent.” *Id.* “Constructions that would lead to absurd or unreasonably harsh results are disfavored.” *Id.* The Court “cannot add by judicial interpretation words that are not found in the statute as written.” *City of Huetter v. Keene*, 150 Idaho 13, 15, 244 P.3d 157, 159 (2010). “[E]ffect must be given to all the words of the statute, if possible, so that none will be void, superfluous, or redundant.” *Hillside Landscape Const., Inc. v. City of Lewiston*, 151 Idaho 749, 753, 264 P.3d 388, 392 (2011). These principles apply to the Court’s review of administrative rules. *See Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001).

1. The CM Rules do not require the Director to promulgate a rule designating an ACGWS before proceeding pursuant to CM Rule 40.

As described above, the Cities argue that the Director must promulgate a rule designating an ACGWS before responding to the Big and Little Wood Delivery Calls because “CM Rule 40’s plain language states that the Director may respond against only those junior ground water right holders who are within a defined [ACGWS].” *Petitioners’ Opening Brief* at 15. The

Cities' interpretation is inconsistent with the plain language of CM Rule 40 and construction of the Rule with other applicable rules.

The plain language of CM Rule 40 states that the Rule governs “responses 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 from areas having a common ground water supply in an organized water district.” IDAPA 37.03.11.040. CM Rule 40 does not state that an ACGWS must be “defined” or “designated” before the Rule applies. The Court should reject the Cities' attempt to add words into CM Rule 40 that are not found in the Rule as written. *City of Huetter*, 150 Idaho at 15, 244 P.3d at 159.

In addition, construction of CM Rule 40 with other applicable rules demonstrates that an already-defined or designated ACGWS is not required for the Director to proceed with the Big and Little Wood Delivery Calls. Specifically, CM Rule 20.07 states, in relevant part:

07. Sequence of Actions for Responding to Delivery Calls. Rule 30 provides procedures for responding to delivery calls within areas having a common ground water supply that have not been incorporated into an existing or new water district or designated a ground water management area. Rule 40 provides procedures for responding to delivery calls within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created.

IDAPA 37.03.11.020.07. CM Rule 1 states that the rules “prescribe procedures for responding” to delivery calls against holders of junior-priority ground water rights “in an area having a common ground water supply.” IDAPA 37.03.11.001.

Like CM Rule 40, CM Rule 20.07 and CM Rule 1's references to an ACGWS do not describe it as “defined” or “designated.” The Cities' argument also breaks down because the sentence in CM Rule 20.07 referencing CM Rule 30 and the sentence in CM Rule 20.07 referencing CM Rule 40 utilize identical language: “areas having a common ground water supply.” Under CM Rule 20.07, equal application of the Cities' interpretation that the language

“areas having a common ground water supply” means an ACGWS must be designated before CM Rule 40 applies would mean that an ACGWS must also be designated before CM Rule 30 applies. This interpretation leads to an absurd result because the CM Rules clearly contemplate the Director may determine an ACGWS *within* the context of a CM Rule 30 proceeding. *See* IDAPA 37.03.11.030.07.c; IDAPA 37.03.11.031.01-05. If the Cities’ interpretation were accepted, the Director’s ability to determine an ACGWS within the context of a CM Rule 30 proceeding would be read out of the CM Rules. Thus, the Court should reject the Cities’ interpretation that the Director must promulgate a rule designating an ACGWS before proceeding with the Big and Little Wood Delivery Calls pursuant to CM Rule 40.

2. The CM Rules do not require that an ACGWS include the junior ground water rights and senior surface water rights.

The Cities argue that the Director cannot proceed with the Big and Little Wood Delivery calls without first promulgating a rule designating an ACGWS that “encompasses the junior ground water rights *and* the calling senior rights.” *Petitioners’ Opening Brief* at 8 (emphasis added). The Cities assert that “CM Rule 40’s plain language” requires the junior ground water right holders be located “within a defined [ACGWS] that *also includes* the senior calling rights.” *Id.* at 15 (emphasis added). The Cities’ interpretation is inconsistent with the plain language of CM Rule 40 and other applicable rules. The source of the junior ground water rights is the focus of an ACGWS determination, not the location of the calling senior surface water rights.

Again, the plain language of CM Rule 40 states that the Rule governs “responses 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 from areas having a common ground water supply* in an organized water district.” IDAPA 37.03.11.040 (emphasis added). The plain language of the Rule focuses on the junior ground water rights and their supply. The phrase

“areas having a common ground water supply” modifies the phrase “holders of junior-priority groundwater rights.” CM Rule 40 does not state, or even suggest, that the ACGWS must “encompass” or “include” the calling senior surface water rights.

Other CM Rules confirm that a designated ACGWS is not required to include the calling senior surface water rights. CM Rule 10.01 defines the ACGWS, in relevant 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 (emphasis added). The CM Rules’ very definition of an ACGWS focuses on the ground water source. Even the name itself—area of common *ground water* supply—establishes that the focus is on the ground water supply, not the location of the senior surface water rights. The language of CM Rule 50 also affirms this. Specifically, CM Rule 50 states “[t]he area of coverage of this rule is the *aquifer* underlying the Eastern Snake River Plain.” IDAPA 37.03.11.050.01 (emphasis added). While the senior surface water rights at issue in a delivery call *may* be physically located over or adjacent to the “ground water source within which the diversion and use of ground water . . . affect the flow of water” to the senior, IDAPA 37.03.11.010.01, the CM Rules do not require that the ACGWS “encompass” or “include” the senior surface water rights as well as the junior ground water rights. Thus, the Court should reject the Cities’ argument that the CM Rules require the Director to promulgate a rule designating an ACGWS that encompasses the junior ground water rights and calling senior rights.

3. The fact that the Cities’ junior ground water rights are not sourced from the ESPA ACGWS does not preclude the Director from proceeding with the Big and Little Wood Delivery Calls.

The Cities argue the Director cannot proceed with the Big and Little Wood Delivery Calls “because the Cities’ ground water rights are not within the ESPA [ACGWS], while all of

the calling senior's water rights are." *Id.* at 8. The Cities' argument must be rejected because the ESPA ACGWS is not relevant to the Big and Little Wood Delivery Calls.

CM Rule 50.01 describes the ESPA ACGWS and states:

The area of coverage of this rule is the aquifer underlying underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian.

IDAPA 37.03.11.050.01. While the Association members' surface water rights are located over the ESPA aquifer, the ESPA ACGWS is not relevant to the Big and Little Wood Delivery Calls because current information demonstrates the Big and Little Wood Rivers are "perched above the ESPA." *BW CM-DC-2015-001* at 1086; *id.* at 1093 (explaining that the ESPA becomes hydraulically connected to the lower Malad River downstream of the Big and Little Wood Rivers after the lower Malad enters an incised canyon approximately two miles before the confluence with the Snake River.). Thus, the ESPA is not a "ground water source" that "affects the flow of water" to the Big and Little Wood Rivers.³ Instead, the relevant ground water sources that appear to affect the flow of water to the Big and Little Wood Rivers are the Wood River Valley aquifer system and the Camas prairie aquifer system. *See BW CM-DC-2015-001* at 1085-93. Thus, the fact that the Cities' ground water rights are not sourced from the ESPA ACGWS does not preclude the Director from proceeding with the Big and Little Wood Delivery Calls pursuant to CM Rule 40.

4. The Director's interpretation of the CM Rules is entitled to deference.

The Director's interpretation that the CM Rules do not require him to promulgate a rule designating an ACGWS before proceeding with the Big and Little Wood Delivery Calls pursuant

³ Because the ESPA ACGWS is not applicable to the Big and Little Wood Delivery Calls, it is incorrect for the Cities to assert that "there are thousands of junior-priority ground water rights *inside* the ESPA [ACGWS] that the Director presumably could timely administer under [the delivery calls]." *Petitioners' Opening Brief* at 31.

to CM Rule 40 is entitled to deference. The Court “applies a four-pronged test to determine the appropriate level of deference to the agency interpretation.” *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010). Specifically, the Court “must determine whether: (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present.” *Id.* “There are five rationales underlying the rule of deference: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation.” *Id.*

Here, the four-pronged test set forth in *Duncan* is met. First, the Director is responsible for administration of the CM Rules. IDAPA 37.03.11.000.

Second, the Director's construction of the CM Rules is reasonable because it allows for the timely administration of water. The Idaho Legislature has given the Director “broad powers to direct and control distribution of water from all natural water sources within water districts.” *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014); see Idaho Code § 42-602. A construction of the CM Rules that would require the Director to promulgate a rule designating an ACGWS prior to responding to every CM Rule 40 delivery call against junior ground water rights whose source is outside the ESPA ACGWS would result in lengthy delay and run afoul of the Director's mandatory duty to timely distribute water in water districts in accordance with the prior appropriation doctrine. Idaho Code § 42-602; see *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014); see also *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 874, 154 P.3d 433, 445 (2007); see also *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). As the Idaho Legislature has the authority to reject any agency rule,

I.C. § 67-5291, a requirement to promulgate a rule may altogether prevent the Director from complying with this mandatory duty. In addition, the history and background surrounding the CM Rules demonstrate the unreasonableness of the Cities' interpretation. The CM Rules were promulgated in response to the Musser delivery call. *See Musser*, 125 Idaho at 394, 871 P.2d at 811. A criticism raised by the Mussers and the Court was the timeliness of the Director's response to the delivery call. *See id.* at 394-95, 871 P.2d at 811-12. Requiring the Director to promulgate a rule to designate an ACGWS before proceeding with the Big and Little Wood Delivery calls could not have been an intent of the drafters of the CM Rules as this would only delay the timely administrative of water.

Third, to the extent the Cities' arguments create some question as to whether the Director is required to promulgate a rule designating an ACGWS prior to proceeding with the Big and Little Wood Delivery Calls, the language of the CM Rules does not expressly treat the matter at issue. *See supra* at Section A(1)-(3).

Fourth, rationales underlying the rule of deference are present, including that the Director's interpretation of the CM Rules is practical and based on the Department's expertise in interpreting the Rules.

Because the four-pronged test set forth in *Duncan* is met, the Director's interpretation of the CM Rules is entitled to deference. Thus, the Court should affirm the Director's determination that, "[w]hile the Director has authority to establish an ACGWS by rule (and in fact did for the [ESPA]), the CM Rules do not mandate that the Director go through the rulemaking process to establish an ACGWS." *BW CM-DC-2015-001* at 860.

The Court should also reject the Cities' argument that the "maxim of *expressio unius est exclusio alterius*" requires that "[t]he express inclusion of procedures for determining and [ACGWS] in Rule 30 delivery calls and the exclusion of such procedures in CM Rule 40

delivery calls must be construed to limit the CM Rule 30 [ACGWS] designation procedures to delivery calls properly pursued under that rule.” *Petitioners’ Opening Brief* at 30. “[T]he maxim, *expressio unius est exclusio alterius*, is only a tool used to determine legislative intent. It is not an unimpeachable rule of law.” *Hewson v. Asker’s Thrift Shop*, 120 Idaho 164, 166-67, 814 P.2d 424, 426-27 (1991).

As explained above, an interpretation of the CM Rules that requires the Director promulgate a rule designating an ACGWS before responding to any CM Rule 40 delivery call against junior ground water rights whose source is outside the ESPA ACGWS would result in lengthy delay and run afoul of the Director’s duty to timely distribute water in water districts in accordance with the prior appropriation doctrine. Idaho Code § 42-602; *see In re SRBA*, 157 Idaho at 393, 336 P.3d at 800; *see also Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 874, 154 P.3d at 445; *see also Musser v. Higginson*, 125 Idaho at 395, 871 P.2d at 812. This could not have been the intent of the drafters of the CM Rules. The Director correctly determined that designating an ACGWS through rulemaking is not a precondition to proceeding with the Big and Little Wood Delivery Calls. Instead, “[t]he ACGWS for the Big and Little Wood Delivery Calls is a factual question that can be established based upon information presented at hearing applying the definition set forth in CM Rule 10.01.” *BW CM-DC-2015-001* at 861.

B. STATEMENTS REGARDING PRIOR DELIVERY CALLS AGAINST JUNIOR RIGHTS SOURCED FROM THE ESPA ACGWS DO NOT PRECLUDE THE DIRECTOR FROM PROCEEDING WITH THE BIG AND LITTLE WOOD DELIVERY CALLS.

The Cities argue that statements of the Director and this Court related to the SWC and Rangen delivery call cases preclude the Director from proceeding with the Big and Little Wood Delivery Calls pursuant to CM Rule 40. *Petitioners’ Opening Brief* at 20. The Cities cite the Director’s statement in the SWC delivery call case that “the Director can only curtail junior

ground water rights within the [ESPA ACGWS], CM Rule 50.01.” *Id.* The Cities cite the Court’s statement on judicial review of the SWC delivery call case that the Director should have used the ESPA ACGWS boundary instead of the ESPA Model boundary “to determine a curtailment priority date.” *Id.* The Cities also cite the Director’s statement in the Rangen delivery call case that the Director “is only authorized to curtail diversion within the [ACGWS] described in CM Rule 50 of the CM Rules.” *Id.* at 22.

The SWC and Rangen delivery calls were by holders of senior surface water rights against junior ground water rights whose source of water is the ESPA ACGWS.⁴ Thus, statements of the Director and the Court cited by the Cities regarding the SWC and Rangen delivery call cases would be relevant to the Big and Little Wood Delivery Calls if the ESPA ACGWS was the applicable ACGWS for the calls, but as discussed above, it is not.

Again, CM Rule 10.01 defines the ACGWS, in relevant 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. The surface water sources at issue in the Big and Little Wood Delivery Calls are the Big and Little Wood Rivers. *BW CM-DC-2015-001* at 1-5; *LW CM-DC-2015-002* at 1-5 (alleging the Association members on the Big and Little Wood Rivers “have suffered from premature curtailment of delivery of their surface water rights, along with the accompanying material injury.”). The Association alleges that its senior surface rights “are all located in Water District 37, and are hydrologically connected to ground water rights in the Wood River Valley aquifer system.” *Id.* at 1; *Id.* at 1.

⁴ In 2005, the SWC submitted a letter to the Director regarding “*Request for Water Right Administration in Water District 120 (portion of the Eastern Snake Plain Aquifer)/Request for Delivery of Water to Senior Surface Water Rights*” and a “*Petition for Water Right Administration and Designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area.*” *Petitioners’ Opening Brief* at Addendum C p. 2. In 2011, Rangen filed its *Petition for Delivery Call* with the Department alleging its senior surface water rights were “being materially injured by junior-priority ground water pumping in the areas encompassed by the Enhanced Snake Plain Aquifer Model Version 2.0 . . . and requesting the Director administer and distribute water in the areas encompassed by ESPAM 2.0 in accordance with the prior appropriation doctrine.” *Id.* at Addendum E p. 1.

Current information demonstrates the Big and Little Wood Rivers are “perched above the ESPA.” *BW CM-DC-2015-001* at 1086; *id.* at 1093. Thus, the ESPA is not a “ground water source” that “affects the flow of water” to the Big and Little Wood Rivers. Unlike the SWC and Rangen delivery calls, the applicable ACGWS in the Big and Little Wood Delivery Calls is *not* the ESPA ACGWS. Thus, the Director correctly determined that statements related to the SWC and Rangen delivery calls “are irrelevant to the Director’s authority to curtail junior ground water rights” in response to the Big and Little Wood Delivery Calls where the junior ground water rights are sourced “outside the ESPA ACGWS.”⁵ *Id.* at 861-62. Such statements do not preclude the Director from responding to the Big and Little Wood Delivery Calls pursuant to CM Rule 40.

C. STATEMENTS REGARDING THE PROPOSED REPEAL OF CM RULE 50 DO NOT PRECLUDE THE DIRECTOR FROM PROCEEDING WITH THE BIG AND LITTLE WOOD DELIVERY CALLS.

The Cities argue that statements of the Director and Idaho Legislature regarding the proposed repeal of CM Rule 50 preclude the Director from responding to the Big and Little Wood Delivery Calls pursuant to CM Rule 40. *Petitioners’ Opening Brief* at 24-25. The Cities’ argument must be rejected because statements specific to the effect of the proposed repeal of CM Rule 50 on ESPA ACGWS delivery calls are not relevant to delivery calls against junior ground water rights whose source is outside the ESPA ACGWS.

⁵ Contrary to the Cities’ assertion, in the ACGWS Order the Director did distinguish the Big and Little Wood Delivery Calls from other delivery calls cited by the Cities in the Motion to Dismiss. *See Petitioners’ Opening Brief* at 33; *see also BW CM-DC-2015-001* at 415-17 (demonstrating the Cities only cited to statements related to the SWC and Rangen delivery calls in the Motion to Dismiss). On appeal, the Cities also refer to the “the Blue Lakes Trout Farm, Inc., and Clear Springs delivery calls” in support of the argument that CM Rule 40 precludes the Director from curtailing junior ground water rights whose source is outside the ESPA ACGWS. *Petitioners’ Opening Brief* at 27. Similar to the SWC and Rangen delivery calls, the Blue Lakes Trout Farm, Inc., and Clear Springs delivery calls implicated junior ground water rights whose source is the ESPA ACGWS and are irrelevant to the Director’s ability to proceed with the Big and Little Wood Delivery Calls against junior ground water rights whose source is outside the ESPA ACGWS.

With respect to the proposed repeal of CM Rule 50, the Director stated that “[CM] Rule 50 should be repealed because the administrative hearings and deliberations associated with individual delivery calls is the proper venue to address which ground water rights should be subject to administration under a delivery call.” *BW CM-DC-2015-001* at 535. The Director repeated this conclusion in testimony before the Idaho Legislature. The Director testified:

Ultimately, we felt that the fairest approach was to simply repeal the Rule and then in every delivery call I would then be responsible for taking evidence in a contested case hearing from all of the parties and then determining what the individual area of common groundwater supply was for each delivery call.

Id. at 543. The Director also testified:

[W]hat we are proposing is to repeal the Rule, which results in *no* definition of a boundary for the [ACGWS] for the [ESPA]. And it will require me in every single delivery call now to determine based on evidence that’s presented in a contested case hearing what the boundary should be. So, there will not be any hard-wire boundary in the Rules for the [ACGWS] for the [ESPA].

Id. at 513. The Idaho Legislature’s *Statement of Purpose* related to rejection of the Director’s repeal of CM Rule 50 explains:

This rule was rejected in committee because it eliminated the current boundary lines of the [ESPA], and not enough technical data was available at the present time for the [Department] to accurately evaluate the underground water sources available in the additional territory to the ESPA to define the effects on the various sections of the Aquifer.

Id. at 566.

As the Director explained in the ACGWS Order, the above cited testimony and *Statement of Purpose* “are specific to the effect of the repeal of CM Rule 50 on ESPA delivery calls” and, therefore, “irrelevant to CM Rule 40 delivery calls initiated by holders of senior water rights against junior ground water rights outside the ESPA ACGWS.” *Id.* at 863. In other words, statements of the Director and Idaho Legislature regarding the proposed repeal of CM Rule 50 demonstrate that the Director can only curtail junior ground water rights within the ESPA

ACGWS in response to a delivery call implicating junior ground water rights whose source of supply is the ESPA. The statements do not relate to the Director's authority to curtail water use in response to CM Rule 40 delivery calls implicating junior ground water rights whose source of supply is not the ESPA, such as the Big and Little Wood Delivery Calls. Thus, the Court should reject the Cities' argument that statements related to the proposed repeal of CM Rule 50 preclude the Director from proceeding with the Big and Little Wood Delivery Calls pursuant to CM Rule 40.

D. THE CITIES ARE NOT ENTITLED TO ATTORNEY FEES AND COSTS

The Cities argue they "are entitled to their reasonable attorney fees and costs should they prevail in this action pursuant to Idaho Code Section 12-117 and Rule 54 of the Idaho Rules of Civil Procedure." *Petitioners' Opening Brief* at 15. Idaho Code § 12-117(1) provides that "the court shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law." Idaho Rule of Civil Procedure 54(d)(1)(A) states that "costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court."

As discussed above, the Director's decision in the ACGWS Order that he may proceed with the Big and Little Wood Delivery Calls pursuant to CM Rule 40 without first promulgating a rule to designate an ACGWS is consistent with the language of the CM Rules and Idaho law. The Director's decision is also consistent with statements regarding prior delivery calls and the proposed repeal of CM Rule 50. Thus, the Director has not acted in an arbitrary or capricious manner and the ACGWS Order does not prejudice the Cities' substantial rights. The Director has acted with a reasonable basis in fact and law. The Cities are not entitled to attorney fees or costs on appeal.

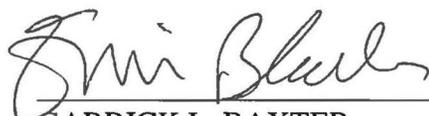
V. CONCLUSION

The CM Rules do not require the Director to promulgate a rule designating an ACGWS that encompasses the senior surface water rights and junior ground water rights before responding to the Big and Little Wood Delivery Calls pursuant to CM Rule 40. Statements of the Director and Court regarding prior delivery call cases and statements of the Director and Idaho Legislature regarding the proposed repeal of CM Rule 50 do not preclude the Director from responding to the Big and Little Wood Delivery Calls pursuant to CM Rule 40. The Cities are not entitled to attorney fees or costs on appeal. The Director and Department respectfully request the Court issue an order affirming the ACGWS Order.

RESPECTFULLY SUBMITTED this 8th day of February 2016.

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