BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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 RIVER	Docket No. CM-DC-2015-001
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 LITTLE WOOD RIVER	Docket No. CM-DC-2015-002 **ORDER DENYING JOINT MOTION TO MODIFY REQUEST FOR STAFF MEMORANDA**

BACKGROUND

On February 24, 2015, the Director ("Director") of the Idaho Department of Water Resources ("Department") received two conjunctive management water delivery call letters from counsel for members of the Big Wood & Little Wood Water Users Association ("Petitioners"). The letters allege senior surface water users on the Big Wood and Little Wood Rivers are being injured by water users diverting ground water hydraulically connected to the Big Wood and Little Wood Rivers. The letters request the Director regulate junior ground water users consistent with the prior appropriation doctrine.

The Director initiated new contested case proceedings and assigned each delivery call letter its own docket number. The Big Wood Delivery Call was assigned docket no. CM-DC-2015-001. The Little Wood Delivery Call was assigned docket no. CM-DC-2015-002.

On March 20, 2015, the Department sent letters to ground water users the Department identified as potentially affected by one or both of the above-described delivery calls. The purpose of the letters was to inform the water users of the delivery calls and notify them of a planned status conference. The letters invited the water users to file a written notice with the Department if they planned to participate in delivery call proceedings. The Department received over 100 notices of intent to participate, including notices filed by the City of Hailey and the City of Bellevue ("Hailey and Bellevue").

The Department also published general notice of the delivery calls and the status conference in the Idaho Mountain Express and Camas Courier on March 25th, 2015 & April 1st, 2015; and the Times News on March 26th, 2015 & April 2nd, 2015. The Director held a status conference on May 4, 2015.

On May 20, 2015, the Director sent a letter to counsel for Petitioners, requesting additional information about Petitioners' diversion and use of water ("Letter"). The Letter requested a response to the information request within thirty days.

On June 3, 2015, the Director held a prehearing conference. At the prehearing conference the participants discussed information in the Department's possession and how it might be disseminated to the parties and participants. The Director stated he would request that staff prepare memoranda regarding how water is delivered to the Petitioners. The Director also stated the staff memoranda would summarize relevant hydrologic and hydrogeologic data and information in the possession of the Department. The Director issued a *Request for Staff Memoranda* ("Request") on June 12, 2015.

On June 26, 2015, Hailey and Bellevue filed a *Joint Motion to Modify Request for Staff Memoranda* ("Motion to Modify"). Joinders in support of the Motion to Modify were filed by attorney James P. Speck on behalf of multiple respondents, and the City of Ketchum and City of Fairfield.

ANALYSIS

Hailey and Bellevue ask the Director to modify the Request in three ways. Each will be addressed below.

1) Modify the Request to Prohibit Department Staff from Determining Issues that Must be Decided by the Director

Hailey and Bellevue argue the "Request asks [Department] staff to evaluate an incomplete record and make determinations" of factors set forth in CM Rule[1] 42 that must instead be decided by the Director. *Motion to Modify* at 3. Specifically, Hailey and Bellevue reference the Director's request that staff prepare "[a] conceptual description of the interaction between ground water and surface water in the Camas Creek drainage, the Big Wood River drainage, the Silver Creek drainage, the Little Wood River drainage, and any other hydrologic units that may be hydraulically connected to the ground water and surface water in the larger Big Wood River and Little Wood River basins." *Id.* at 3-4. Hailey and Bellevue also reference the Director's request that Department staff prepare memoranda describing Petitioners' source of water supply; delivery systems; physical delivery and water application works; and hydrology, hydrogeology, and hydrologic data, methods, or tools. *Id.* at 4. Hailey and Bellevue argue it would be "fundamentally unfair" and "unduly prejudice the parties" if the Department prepares staff memoranda describing such information before "all potentially affected parties" have the opportunity to present their own evidence regarding the topics. *Id.* at 4-5.

The Request does not ask Department staff to opine regarding factors set forth in CM Rule 42 that are "[f]actors the *Director* may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste." IDAPA 37.03.11.042.01 (emphasis added). As Hailey and Bellevue acknowledge, the Director alone is

[1] The term "CM Rule" refers to the Department's Rules for Conjunctive Management of Surface and Ground Water Resources. IDAPA 37.03.11.

responsible for "evaluating evidence, finding facts, drawing conclusions, and ultimately making determinations concerning the Rule 42 factors and other issues that will be decided" in the Big and Little Wood Delivery Calls. *Motion to Modify* at 5. The Request only asks Department staff to prepare memoranda that will supply the parties with technical and scientific information within the Department's specialized knowledge and give the parties an opportunity to evaluate and potentially rebut the information. The Request will not prejudice, but rather benefit, parties in the Big and Little Wood Delivery Calls. There is no need for the Director to modify the Request to "prohibit staff from evaluating information or making determinations of the Rule 42 factors" and other issues the Director will decide in the Big and Little Wood Delivery Calls.

2) Modify the Request to Delay Issuance of Staff Memoranda or Prohibit Staff From Examining Information Submitted in Response to the Letter

Hailey and Bellevue ask the Director to "modify the Request to delay issuance of any staff memoranda until junior-priority ground water users have been given a meaningful opportunity to submit their own information to [the Department] for consideration" or to "prohibit [Department] staff from examining information submitted by Petitioners" in response to the Letter. *Motion to Modify* at 7. Hailey and Bellevue argue that allowing Department staff to review information submitted by Petitioners "without also having information from junior-priority ground water users, will unduly prejudice Bellevue and Hailey's due process rights." *Id.* at 6-7.

As discussed above, the Letter only requests additional information about Petitioners' diversion and use of water. This information may be relevant to the portion of the Request that asks Department staff to prepare a memorandum regarding Petitioners' surface water delivery systems. *See Request* at 3. Allowing Department staff to review information submitted by Petitioners prior to submittal of the staff memoranda at issue in the Request will not prejudice, but rather benefit, parties in the Big and Little Wood Delivery Calls. The parties may review, analyze, and offer any rebuttal to information presented in the staff memoranda. The parties will have full and fair opportunity to cross examine staff participating in writing staff memoranda at hearing. The Director will not modify the Request to delay issuance of staff memoranda or prohibit staff from examining information submitted in response to the Letter.[2]

3) Strike Language from the Request

Hailey and Bellevue request that "the Director remove topics 1, 2, and 5 from the Request because they ask staff to address the type of information that the Director may use to develop an area of common ground water supply ("ACGSW")" that Hailey and Bellevue argue "should be developed within the ACGWS rulemaking process" rather than in the Big and Little Wood Delivery Call proceedings. *Motion to Amend* at 8.

The Director is not required to initiate rulemaking to designate an ACGWS prior to responding to the Big and Little Wood Delivery Calls. *See Order Denying Joint Motion to*

[2] If Petitioners submit any information in response to the Letter, the Director will post that information to the websites for the Big and Little Wood Delivery Calls that may be accessed from the following website link: http://www.idwr.idaho.gov/legal_actions/.

Designate ACGWS by Rulemaking and to Dismiss Delivery Calls. Therefore, the Director will not remove topics 1, 2, or 5 from the Request.

Hailey and Bellevue ask the Director to strike additional language from the Request. Specifically, Hailey and Bellevue point to the Director's request "that Department staff review data and information in possession of the Department, and prepare staff memoranda reading [the Big and Little Wood Delivery Calls], which could include, *without limitation . . . .*" *Request* at 2 (emphasis added). Hailey and Bellevue also point to the Director's request that staff describe "Information about each calling party's physical delivery and water application works, including: [items (a)-(e)]; and (f) *any other relevant information.*" *Request* at 3 (emphasis added). Hailey and Bellevue argue the above-quoted and emphasized language is too "open-ended" and "could lead [Department] staff to opine on CM Rule 42 factors." *Motion to Modify* at 9.

Again, the Request does not ask Department staff to opine regarding factors set forth in CM Rule 42 that are "[f]actors the *Director* may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste." IDAPA 37.03.11.042.01 (emphasis added). The Director alone is responsible for evaluating evidence, finding facts, drawing conclusions, and ultimately making determinations concerning CM Rule 42 factors and other issues that will be decided in the Big and Little Wood Delivery Calls. The Director will not modify the Request.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Motion to Modify is DENIED.

DATED this 22nd day of July 2015.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 22nd day of July 2015, I served a true and correct copy of the above and foregoing document by placing a copy of the same in the United States mail, postage prepaid and properly addressed and by e-mail to participants who have provided e-mail addresses to the Department for service to the following:

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