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 SUN VALLEY COMPANY'S MOTION TO MODIFY/WITHDRAW**

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 a notice filed by Sun Valley Company ("SVC").

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").[1] 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 July 1, 2015, SVC filed *Sun Valley Company's Motion to Modify/Withdraw "Request for Staff Memoranda" and May 20, 2015 "Request for Additional Information"* ("Motion to Modify/Withdraw") and the *Affidavit of Counsel in Support of Sun Valley Company's Motion to Modify/Withdraw "Request for Staff Memoranda" and May 20, 2015 Request for Additional Information* ("Affidavit").[2] Joinders in support of the Motion to Modify/Withdraw were filed by attorney James P. Speck on behalf of multiple respondents, and the City of Ketchum and City of Fairfield. Water District 37-B Groundwater Group filed a *Response to Motion to Modify/Withdraw "Request for Staff Memoranda."*[3]

ANALYSIS

1. Staff Memoranda may be Prepared Prior to Hearing

SVC requests the Director withdraw the Request because the Department's Rules of Procedure do not authorize Department staff to prepare staff memoranda in advance of the hearing on the Big and Little Wood Delivery Calls. *Motion to Modify/Withdraw* at 5-8, 13-14. SVC argues "[t]he proper role of the Department staff in this proceeding, if any, is, upon the Director's request, to evaluate the evidence that has been gathered, compiled, organized, and

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[1] SVC characterizes the Letter as the "Department's Discovery Requests." *Motion to Modify/Withdraw* at 2. But as SVC previously recognized, the Letter is distinguishable from a discovery request. *See Opposition to Motion for Protective Order* at 2-3 ("As to the contention that there exists substantial overlap between the information requested by the Department and the written discovery propounded by SVC, it bears noting that the evidentiary value of responses to interrogatories is distinguishable from information that is simply supplied to an agency upon request, in light of the fact that responses to interrogatories and requests for admission both must be verified by the party responding.").

[2] Attached to the Affidavit is Exhibit A, "an internally-prepared rough transcript of the June 3, 2015, pre-hearing conference." *Affidavit* at 2. The "rough transcript" contains an incorrect attribution. Page seventeen of the "rough transcript" attributes the statement "Because there's no model" to counsel for the Department. Upon review of the audio of the pre-hearing conference, the speaker is not Department's counsel.

[3] On April 22, 2015, the Water District 37-B Groundwater Group filed a notice of intent to participate only in proceedings related to the Big Wood Delivery Call. On July 15, 2015, counsel Dylan B. Lawrence, of the law firm Varin Wardwell LLC, filed the *Response to Motion to Modify/Withdraw "Request for Staff Memoranda"* on behalf of the Water District 37-B Groundwater Group in both the Big and Little Wood Delivery Calls. The Water District 37-B Groundwater Group did not file a notice of intent to participate in the Little Wood Delivery Call in compliance with the Director's May 13, 2015, *Order Governing Participation*. Therefore, the Director will not consider filings by the Water District 37-B Groundwater Group in Little Wood Delivery Call proceedings.

presented ***by the parties at a hearing*** and properly admitted, as evidence, into the hearing record by the Director." *Id.* at 9 (emphasis in original).

SVC ignores the plain language of Rule 602 that states:

> Official notice may be taken of any facts that could be judicially noticed in the courts of Idaho and of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified of the specific facts or material noticed and the source of the material noticed, including any agency staff memoranda and data. Notice that official notice will be taken should be provided ***either before or during the hearing***, and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed. Parties must be given an opportunity to contest and rebut the facts or material officially noticed. When the presiding officer proposes to notice agency staff memoranda or agency staff reports, ***responsible staff employees or agents shall be made available for cross-examination*** if any party timely requests their availability.

IDAPA 37.01.01.602 (emphasis added). The plain language of Rule 602 emphasized above expressly authorizes the Director to notify the parties before hearing that official notice will be taken of staff memoranda. In addition, Rule 602's requirement that staff employees responsible for staff memoranda be available for cross-examination at hearing presupposes staff memoranda may be prepared prior to hearing. Rule 602 clearly authorizes preparation of staff memoranda prior to hearing. The Director will not withdraw the Request.

2. The Department may Gather and Disseminate Information Prior to Hearing

SVC requests the Director withdraw the Letter and "require Department staff to immediately cease any information gathering" from Petitioners because the Department's Rule of Procedure 600 does "not contemplate the gathering, compilation, or organization of factual information from the parties by Department staff before that information becomes evidence." *Motion to Modify/Withdraw* at 9-12. In support of this argument, SVC points to Rule 600's statement that: "The agency's experience, technical competence and specialized knowledge may be used in *evaluation of evidence*." IDAPA 37.01.01.600 (emphasis added).

While Rule 600 speaks to the Department's authority to evaluate *evidence*, nothing in Rule 600 precludes the Department from gathering technical and factual information that *may become evidence* admitted into the record at hearing and disseminating that information to the parties prior to hearing for evaluation and potential rebuttal. The Department's Rules of Procedure do not preclude its information gathering efforts in the Big and Little Wood Delivery Calls.

SVC argues the Department's information gathering efforts may cause staff to develop "bias in favor of the information collected from the Petitioners" that may influence "its eventual 'evaluation of evidence' in accordance with Rule 600" and "preparation of technical memoranda that may be officially noticed under Rule 602." *Motion to Modify/Withdraw* at 9-13. SVC asserts it does not have "a full and fair opportunity to observe and pose legitimate evidentiary objections to the information gathered by Department staff, to ensure completeness and

accuracy." *Id.* at 10. SVC asserts "this one-sided evaluative process is highly prejudicial" and "violates [SVC's] due process rights." *Id.* at 13.

Department efforts to collect and disseminate information about the Petitioners' diversion and use of water and hydrologic and hydrogeologic data to the parties for evaluation and potential rebuttal prior to hearing do not prejudice, but rather assist, all the parties.[4] In addition, as SVC recognizes, the Director alone is responsible for admitting evidence at hearing and deciding what weight to give that evidence in his determination of the ultimate issues to be decided in the Big and Little Wood Delivery Calls. *See Motion to Modify/Withdraw* at 11. All parties will have full and fair opportunity to examine and object to any information proposed for admission as evidence into the record at hearing. If the Director notifies the parties that official notice will be taken of staff memoranda, responsible staff employees will be available for cross-examination at hearing. The Director will not withdraw the Letter or instruct Department staff to cease information gathering.

ORDER

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

DATED this 22nd day of July 2015.

GARY SPACKMAN
Director

[4] 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/.

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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