

Scott L. Campbell, ISB No. 2251  
Matthew J. McGee, ISB No. 7979  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Floor  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208) 345-2000  
Facsimile (208) 385-5384  
slc@moffatt.com  
mjm@moffatt.com  
16845.0025  
16845.0026

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DEPARTMENT OF  
WATER RESOURCES

Attorneys for Sun Valley Company

J. Evan Robertson  
ROBERTSON & SLETTE, PLLC  
134 3rd Ave. E.  
P.O. Box 1906  
Twin Falls, ID 83303-1906  
(208) 933-0700  
Facsimile: (208) 933-0701  
erobertson@rsidaholaw.com

Attorneys for Sun Valley Water and Sewer District

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

**JOINT MOTION TO DETERMINE  
CONSOLIDATED CASE STATUS**

## **I. MOTION**

The Sun Valley Company (“Sun Valley”) and Sun Valley Water and Sewer District (the “District”) (collectively, the “Movants”), through counsel of record and pursuant to Rule 260 of the Rules of Procedure of the Idaho Department of Water Resources, hereby move the Director to reconsider or determine the consolidated status of the above-referenced proceedings. Specifically, for the reasons set forth below, the Movants request:

1. That the Director issue an order dividing the 39 separate delivery calls, with articulated procedures for proceeding to entertain consolidation of the delivery calls only after (i) some affirmative indication of an intent to proceed from each of the Petitioners, including submission of responses to outstanding discovery requests and outstanding requests for information from the Department, and (ii) notice to all participants and an opportunity to be heard on the question of consolidation at a meaningful time and in a meaningful manner; and
2. That, in the event the proceedings ultimately remain consolidated, that the Director establish sub-cases, and provide for sub-hearings, within the consolidated proceedings to address the separate delivery calls of each of the numerous Petitioners.

## **II. ARGUMENT**

### **A. Background**

On February 24, 2015, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) received two letters (the “February 24 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 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 joint status conference for the Big Wood Delivery Call and the Little Wood Delivery Call. The letters invited water users to file a written notice with the Department if they planned to participate in delivery call proceedings.

**B. These Proceedings Involve 39 Separate Delivery Calls.**

The two above-captioned cases involve delivery calls made by 39 water right owners, involving 80 water rights. *See Preliminary Overview of Delivery Call Water Rights*, dated May 4, 2015. A “delivery call” is “[a] request from *the holder of a water right* for administration of water rights under the prior appropriation doctrine.” IDAPA 37.03.11.010.04 (emphasis added). The “holder of a water right” is “[t]he legal or beneficial owner or user pursuant to lease or contract of a right to divert or to protect in place surface or ground water of the state for a beneficial use or purpose.” IDAPA 37.03.11.010.11.

Clearly, a person that does not hold a water right does not have standing to pursue a delivery call related thereto. Accordingly, in these matters, each member of the Association that is a water right holder is, individually, a “petitioner,” which is defined as a “[p]erson who

asks the Department to initiate a contested case or to otherwise take action that will result in the issuance of an order or rule.” IDAPA 37.03.11.010.17.

A contested case is “[a] proceeding which results in the issuance of an order.” IDAPA 37.01.01.005.07. Assuming, solely for the sake of argument, that the February 24 Letters qualify as each Association member’s “petition” or “delivery call,” under the Conjunctive Management Rules and the Department’s Procedural Rules, each such member asked the Department to initiate a contested case. In sum, there are 39 Petitioners, and, at a minimum, 39 water delivery calls.

**C. The Preemptive Consolidation of All 39 Delivery Calls Demands Further Consideration by the Director Under the Department’s Procedural Rules.**

The Department assigned only two case numbers to the proceedings consistent with the two separate February 24 Letters—one for the Big Wood River senior surface water rights and one for the Little Wood River senior surface water rights. Further, the Director noted at the pre-hearing conference on June 3, 2015 that, even with respect to the existing two cases, they were consolidated “because of at least an initial perception and determination that there were sufficient common issues of fact and law that they should be connected.” *See* June 3, 2015 Hearing Tr. at 11.

The Director also noted, however, that when compared to the Rangen delivery call, these proceedings present a “scattered group of points of diversion,” and are distinguishable “both spatially and [with respect to] the number of points of diversion” that are being evaluated. *See* June 3, 2015 Hearing Tr. at 7.

Under the circumstances, further consideration of the Department’s decision to consolidate 39 delivery calls is warranted. The Department’s Procedural Rules govern consolidation of contested case proceedings. The Department “may consolidate two (2) or more

proceedings for hearing upon finding that they present issues that are related and that the rights of the parties will not be prejudiced.” IDAPA 37.01.01.556. In this case, there exists no written findings, discussion of common factual or legal issues, evaluation of prejudice, or any order of consolidation setting forth such findings. The absence of such an order or such findings contravenes the Department’s Procedural Rules. Furthermore, the Movants did not have notice or an opportunity to be heard at a meaningful time in a meaningful manner on the issue of consolidation, prior to the Department’s determination to consolidate the proceedings.

Prior to the Director making any findings or issuing an order consolidating the proceedings, the Respondents are entitled to notice and an opportunity to be heard on whether the 39 water delivery calls at issue meet the two requirements of consolidation: (1) related issues; and (2) no prejudice to the rights of the parties. In light of the Petitioners’ failure to timely respond to discovery, or to the requests for information from the Department, neither the Movants nor, one assumes, the Department, has sufficient information or knowledge to evaluate either of the elements associated with consolidation.

With that said, even though the Petitioners are all within the same water district, divert from the Big Wood and Little Wood Rivers, and have presented their respective delivery calls as a “coalition,” each such Petitioner’s water rights, conveyance, maintenance and use thereof are undoubtedly unique in many respects, especially in light of the “scattered” points of diversion and numerous water rights at issue. The factors set forth in Rule 42 of the Conjunctive Management Rules must be evaluated for each water right. Among those factors are very individualized considerations, including without limitation the “effort or expense of the *holder of the water right* to divert water from the source,” “[w]hether the exercise of junior-priority ground water rights *individually or collectively* affects the quantity and timing of when water is

available,” “the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application,” “the existence of water measuring and recording devices,” conservation practices, and reasonable alternative diversions. *See* IDAPA 37.03.11.042.

A consolidated proceeding involving 39 owners and 80 water rights, and especially any aggregated evaluation of material injury and reasonableness of water diversion, prejudices the Movants’ right and opportunity to present separate evidence and defenses against each Petitioner’s water delivery call. In other words, even assuming *arguendo* that an identical source within a water district is alone sufficient to demonstrate “related issues” for purposes of the consolidation inquiry, the Department still must evaluate whether consolidation prejudices the Movants’ rights, including the opportunity to be heard at a meaningful time and in a meaningful manner regarding the Rule 42 evaluation for *each Petitioner*.

**D. If Consolidated Status Continues, the Director Should Order Sub-Hearings for Each Petitioner.**

The Department’s consolidation rule also provides that, “[i]n consolidated hearings the presiding officer determines the order of the proceeding.” IDAPA 37.01.01.556. In the event the Director ultimately makes the required findings and enters an order consolidating the 39 delivery calls, or is not inclined to issue an order dividing the consolidated delivery calls, and without waiving objection to such consolidation, the Movants urge the Director to adopt a procedure and order of the proceeding that incorporates sub-cases and sub-hearings as to each Petitioner in order to address the separate delivery calls of each of the numerous Petitioners.

**III. CONCLUSION**

For the foregoing reasons, the Movants respectfully request an order dividing the 39 individual water delivery calls, or, at a minimum, an order clarifying the consolidated status

of the 39 delivery calls that are at issue in the two above-captioned contested case proceedings and adopting a procedure for the orderly and efficient hearing of the consolidated delivery calls that does not prejudice the rights of any party to defend against the Petitioners' claims, either collectively or individually.

DATED this 30 day of July, 2015.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By   
Matthew J. McGee – Of the Firm  
Attorneys for Sun Valley Company

DATED this 30 day of July, 2015.

ROBERTSON & SLETTE, PLLC

By   
J. Evan Robertson – Of the Firm  
Attorneys for Sun Valley Water and  
Sewer District

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of July, 2015, I caused a true and correct copy of the foregoing **JOINT MOTION TO DETERMINE CONSOLIDATED CASE STATUS** to be served by U.S. Mail and addressed to the following:

JOSEPH F JAMES  
BROWN & JAMES  
130 FOURTH AVENUE WEST  
GOODING ID 83330

ALBERT BARKER  
BARKER ROSHOLT & SIMPSON  
PO BOX 2139  
BOISE ID 83701-2139

PATRICK D BROWN  
PATRICK D BROWN PC  
PO BOX 125  
TWIN FALLS ID 83303

RANDALL C BUDGE  
RACINE OLSON  
PO BOX 1391  
POCATELLO ID 83204-1391

SUSAN E BUXTON  
CHERESE D MCLAIN  
MOORE SMITH  
950 W BANNOCK ST STE 520  
BOISE ID 83702

MICHAEL C CREAMER  
MICHAEL P LAWRENCE  
GIVENS PURSLEY LLP  
PO BOX 2720  
BOISE ID 83701-2720

S BRYCE FARRIS  
SAWTOOTH LAW PLLC  
PO BOX 7985  
BOISE ID 83707

FRITZ X HAEMMERLE  
HAEMMERLE LAW PLLC  
PO BOX 1800  
HAILEY ID 83333

JAMES R LASKI  
HEATHER E O'LEARY  
LAWSON LASKI CLARK & POGUE  
PO BOX 3310  
KETCHUM ID 83340

DYLAN LAWRENCE  
VARIN WARDWELL LLC  
PO BOX 1676  
BOISE ID 83701-1676

CHAS F MCDEVITT  
MCDEVITT & MILLER LLP  
PO BOX 2564  
BOISE ID 83701

EILEEN MCDEVITT  
732 FALLS VIEW DR  
TWIN FALLS ID 83301

CANDICE MCHUGH  
CHRIS BROMLEY  
MCHUGH BROMLEY  
380 S 4TH ST STE 103  
BOISE ID 83702

J EVAN ROBERTSON  
ROBERTSON & SLETTE PLLC  
PO BOX 1906  
TWIN FALLS ID 83303-1906

JOHN K SIMPSON  
BARKER ROSHOLT & SIMPSON  
PO BOX 2139  
BOISE ID 83701-2139

JAMES P SPECK  
SPECK & AANESTAD PC  
PO BOX 987  
KETCHUM ID 83340

LAIRD B STONE  
STEPHAN KVANVIG STONE  
PO BOX 83  
TWIN FALLS ID 83303-0083

TRAVIS THOMPSON  
BARKER ROSHOLT & SIMPSON  
195 RIVER VISTA PL STE 204  
TWIN FALLS ID 83301-3029

ANTHONY & JUDY D ANGELO  
PO BOX 3267  
KETCHUM ID 83340

BARBARA CALL  
PO BOX 4  
ROSS CA 94957

BERNARD I FRIEDLANDER PHD  
116 VALLEY CLUB DR  
HAILEY ID 83333

BLUEGROUSE RIDGE HOA  
BRIAN MCCOY  
PO BOX 3510  
KETCHUM ID 83340

BRIAN LAMAR SMITH  
DIANE STEFFEY-SMITH  
PO BOX 629  
BELLÉVUE ID 83313

BRITTA S HUBBARD  
PO BOX 1167  
KETCHUM ID 83340

BRUCE & KAREN TRUXAL  
PO BOX 431  
BELLEVUE ID 83313

CANADIAN CLUB  
HOMEOWNERS ASSN  
PO BOX 4041  
KETCHUM ID 83340

COLD SPRINGS WATER COMPANY  
PO BOX 254  
KETCHUM ID 83340

DAVID BERMAN  
PO BOX 1738  
CAVE CREEK AZ 85327

DOUGLAS C WALTON  
DIANA L WHITING  
109 RIVER GROVE LN  
HAILEY ID 83333

ERNEST & JUDITH GETTO TRUST  
ERNEST J GETTO  
417 ENNISBROOK DR  
SANTA BARBARA CA 93108

GARY HOFFMAN  
PO BOX 1529  
KETCHUM ID 83340

GREGORY R BLOOMFIELD  
REVOCABLE TRUST  
PO BOX 757  
HAILEY ID 83333

HARRY S RINKER  
949 SOUTH COAST DR STE 500  
COSTA MESA CA 92626

HARRY S RINKER  
PO BOX 7250  
NEWPORT BEACH CA 92658

HULEN MEADOWS WATER  
COMPANY AND ASSN INC  
PO BOX 254  
KETCHUM ID 83340

INNOVATIVE  
SOLUTIONS LLC  
2918 N EL RANCHO PL  
BOISE ID 83704

MITIGATION

JAMES D WHITE  
PO BOX 367  
BELLEVUE ID 83313

JARED R WILLIAMS  
REVOCABLE TRUST  
PO BOX 99658  
SEATTLE WA 98139

JIM W KOONCE  
PO BOX 2015  
HAILEY ID 83333

KATHERINE BRECKENRIDGE  
B BAR B INC  
PO BOX 685  
PICABO ID 83348

KEN SANGHA  
ASAM TRUST  
PO BOX 9200  
KETCHUM ID 83340

KEVIN D LAKEY  
107 W 1ST  
SHOSHONE ID 83352

LAWRENCE SCHOEN  
18351 US HWY 20  
BELLEVUE ID 83313

LUBOFF SENAVSKY &  
CHARLES TIMOTHY FLOYD  
PO BOX 1240  
EAGLE ID 83616

MARLYS J SCHMIDT  
10901 HWY 75  
BELLEVUE ID 83313

NANCIE C TATUM &  
THOMAS F HENNIG  
PO BOX 1365  
SUN VALLEY ID 83353

PAUL & POLLY CARNEY LLOYD &  
DEANN RICHINS MARK & SUSAN  
WILLIAMS FISH CREEK RESERVOIR  
RANCH, LLC  
384 2 2900 E  
PAUL ID 83347

PAUL & TANA DEAN  
40 FREEDOM LOOP  
BELLEVUE ID 83313

PETER ZACH SEWELL  
LORI SEWELL  
PO BOX 3175  
HAILEY ID 83333

PHILIP J VANDERHOEF  
KATHLEEN MCKAY  
5069 HAROLD PL NE  
SEATTLE WA 98105

POPPY ENGLEHARDT  
10965 HIGHWAY 75  
BELLEVUE ID 83313

ROBERT BOUTTIER  
PO BOX 476  
BELLEVUE ID 83313

ROBERT & JUDITH PITTMAN  
121 LOWER BROADFORD RD  
BELLEVUE ID 83313

ROBERT J STRUTHERS  
762 ROBERT ST PICABO ROUTE  
BELLEVUE ID 83313

RUSTY KRAMER  
PO BOX 591  
FAIRFIELD ID 83327

SAGE SPRINGS HOMEOWNERS  
ASSN INC  
PO BOX 254  
KETCHUM ID 83340

SILVER SAGE OWNERS ASSN INC  
C/O CAROLS BOOKKEEPING  
PO BOX 1702  
KETCHUM ID 83340

STARWEATHER OWNERS ASSN INC  
PO BOX 254  
KETCHUM ID 83340

STEVEN C FUNK  
90 FREEDOM LOOP  
BELLEVUE ID 83313

SV RANCH LLC  
PO BOX 333  
FAIRFIELD ID 83327

THOMAS & AMY MISTICK  
149 ASPEN LAKES DR  
HAILEY ID 83333

USDA FOREST SERVICE  
ATTN JAMIE GOUGH  
324 25TH ST  
OGDEN UT 84401

VALLEY CLUB OWNERS ASSN INC  
PO BOX 254  
KETCHUM ID 83340

WILLIAM R & KATHRYN L RATLIFFE  
206 BAYHORSE RD  
BELLEVUE ID 83313

WOOD RIVER LAND TRUST  
119 E BULLION ST  
HAILEY ID 83333

ED REAGAN  
COURIER NEWS  
PO BOX 339  
FAIRFIELD ID 83327



Matthew J. McGee