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DEPARTMENT OF  
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE PETITION FOR  
ADMINISTRATION BY BIG WOOD &  
LITTLE WOOD WATER USERS  
ASSOCIATION

Docket No. CM-DC-2017-001

**RESPONSE TO PETITIONER'S  
MOTION FOR PROTECTIVE ORDER /  
MOTION TO DISMISS**

**I. INTRODUCTION**

The Petitioner filed its Motion for Protective Order on May 3, 2017. The Sun Valley Company ("Company") provides this Response to Petitioner's Motion within the 14 days specified by Rule 270.02 of the Idaho Department of Water Resources ("IDWR") Rules of Procedure, IDAPA 37.01.01.

The Company also concurrently moves to dismiss the Petition for Administration, based upon the Petitioner's admissions that it is not qualified to seek the requested relief under the requirements of IDWR's Conjunctive Management Rules ("CMRs").

## II. ARGUMENT

### A. **Delivery Calls Must Be Brought by the "Holder of a Water Right."**

The CMRs state very clearly:

001. TITLE AND SCOPE (Rule 1).

These rules may be cited as "Rules for Conjunctive Management of Surface and Ground Water Resources. The rules prescribe procedures for responding to a delivery call made by **the holder of a senior-priority surface or ground water right** against the **holder of a junior-priority ground water right** in an area having a common ground water supply. . . .

IDAPA 37.03.11.001 (emphasis added). The CMRs "provide the basis for determining the reasonableness of the diversion and use of water by **both the holder of a senior-priority water right who requests priority delivery and the holder of a junior-priority water right against whom the call is made.**" IDAPA 37.03.11.020.05 (emphasis added).

The CMRs impose a fundamental requirement for standing to bring a petition for administration of water rights. The party pursuing a delivery call must be the "**holder of a water right.**" See IDAPA 37.03.11.010.04. 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 beneficial use or purpose." IDAPA 37.03.11.010.10.

A person that does not hold a water right does not have standing under the CMRs to pursue a delivery call related thereto. Petitioner has not alleged that it is a "**holder of a water right.**" It does not meet this fundamental requirement of the CMRs to pursue the Petition for Administration. Consequently, the Petition should be dismissed.

**B. The Association Does Not Meet the Test for Associational Standing.**

The Association cites Idaho corporate code for the proposition that it has standing to pursue a delivery call on behalf of its membership, without regard for its members' status as parties to the administrative proceeding.

In Idaho, an association has standing on behalf of its membership when:

(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.<sup>1</sup>

*In the Matter of the Jerome Cty. Bd of Com'rs*, 153 Idaho 298, 310, 281 P.3d 1076, 1088 (2012) (quoting *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 604, 130 P.3d 1138, 1142). It is the third element that the Association cannot meet in this case. Associational standing is only appropriate when the benefits of the relief sought will likely be shared by the association's membership "without any need for individualized findings of injury that would require the direct participation of its members." *See Beach Lateral Water Users Ass'n*, 142 Idaho at 604, 130 P.3d at 1142.

In *Beach Lateral Water Users Association*, the lateral association sought, among other things, to quiet title to a ditch easement, and the district court granted such relief. *See id.* The Idaho Supreme Court reversed, finding that the lateral association lacked standing because it did not own any of the dominant estates served by the ditch. *See id.* ("The Association, both parties agree, does not own any of the dominant estates that would be served by the ditch easement in dispute. . . . [T]itle to any appurtenant easements could only be quieted in favor of

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<sup>1</sup> This is the same test articulated in the now-repealed corporate code provisions cited by the Association, Idaho Code Section 53-707.

th[e] actual owners.”). Because quieting title required the participation of individual members, the lateral association failed to satisfy the third factor enumerated above. In short, the actual owners of the disputed property rights were required to participate in order to obtain a declaration quieting each owner’s title in such property rights.

Likewise, in this case, the Association does not own or hold any of the water rights that may be benefitted by the administration. The calling water rights belong to the members, not the Association, and the right of prior appropriation via a delivery call may only be exercised by the member holders, as prescribed very plainly in the CMRs. *See* Section II.A, *supra*.

The claim asserted by the Association, and the relief requested, requires the participation of the individual members. Such participation is essential because individualized findings of injury are required by the CMRs. The Director must determine “the reasonableness of the diversion and use of water by . . . **the holder of a senior-priority water right** who requests priority delivery.” IDAPA 37.03.11.020.05 (emphasis added). The factors set forth in Rule 42 of the CMRs further illustrate the necessity of individualized findings. 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.

The Association alone does not have standing to petition the Director for administration, because the members' participation is necessary, both practically and as a matter of law. The Association asserts that the members did not file the Petition for Administration, and that the members are not parties. Because the Association does not have standing, the Petition for Administration must be dismissed.

**C. Petitioner Cannot Insulate Its Members from Discovery, Yet Assert the Legal Interests of the "Holder of a Water Right."**

Petitioner argues in its Motion that, "[t]he individual members of the Association are not parties to the above captioned contested case." *See* Motion at 2. Based on this assertion, Petitioner then claims that it "is **unable** to respond to the requests as propounded to non-party members, and to require them (sic) to do so would cause an undue burden and expense." *Id.* at 3 (emphasis added).

First, it is insightful that the Association is asserting that it is "unable" to respond to the requests for discovery, but it does not state why it is "unable" to do so. In the same breath, the Association then argues that "to require them [non-party members] to do so would cause an undue burden and expense." *Id.* If the members are truly non-parties to these proceedings, the Association cannot argue their positions to protect them from "undue burden and expense."

Second, the Association consistently alleges in its Petition that "the members ...hold surface water rights[,]...the members...are entitled to delivery of water[,]...the water rights held by the members...are within Water District 37...the...claim of material injury to its members..." *See* Petition for Administration, ¶¶ 2, 3, 4, 5, 8, 9, 10. The Association does not, nor could it legitimately, allege that its water rights are being materially injured. It does not allege that it is "a holder of water rights." It has not, and could not, comply with the CMRs'

standing requirement that it is the actual “legal or beneficial owner or user...of a right to divert or protect in place surface or ground water of the state for a beneficial use or purpose.” CMR Rule 10.11.

Despite these fundamental pleading deficiencies, the Association attempts to assert the legal interests of its members as “the holder of a water right” under the CMRs. In the same breath, the Association claims that it is “unable” to answer discovery requests, without explaining why. It then claims that its “non-party members” should not be required to answer the requests because “to do so would cause an undue burden and expense.”

Mumbo jumbo! The Sun Valley Company has vested property interests in its water rights that have been attacked, once again, by the Association and its members. The Company is entitled to discover all of the information that is available to the Association **and its members** regarding the issues to be determined by the Director in this contested case. The CMRs and the IDWR Rules of Procedure require timely, honest disclosure of this information. The Association is playing games with its Motion for Protective Order.

The Association cannot have it both ways. It is either “in or out” for its members. It cannot invoke the jurisdiction of the IDWR under the CMRs “to assert material injury to the rights of its members,” yet hide its members from the reasonable burdens of discovery behind the Association, because they are “non-parties” to these proceedings. It doesn’t pass the straight face test.


The Sun Valley Company and the other ground water right holders in the Big Wood River Valley should not have their hands tied in this fight by the Association’s dubious tactics. The Association, and each member, must respond to discovery as parties to the proceeding, or else the Petition for Administration must be dismissed.

### III. CONCLUSION


The Association's Motion for Protective Order should be denied and the discovery requests answered immediately, with a finding by the Director that the members of the Association are indeed parties. In the alternative, the Petition should be dismissed, based on the failure of the Association to meet the standing requirements of the CMRs, because it is not "a holder of a water right."

DATED this 12th day of May, 2017.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12th day of May, 2017, I caused a true and correct copy of the foregoing **RESPONSE TO PETITIONER'S MOTION FOR PROTECTIVE ORDER / MOTION TO DISMISS** to be served by the method indicated below, and addressed to the f

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