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JUN 02 2017

DEPARTMENT OF  
WATER RESOURCES

Scott L. Campbell, ISB No. 2251  
CAMPBELL LAW, CHARTERED  
Post Office Box 170538  
Boise, Idaho 83717  
Telephone (208) 949-0599  
scott@slclexh2o.com

Matthew J. McGee, ISB No. 7979  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED  
999 W. Main Street, Suite 1300  
Post Office Box 829  
Boise, Idaho 83701  
Telephone (208) 345-2000  
Facsimile (208) 385-5384  
mjm@moffatt.com  
16845.0032

Attorneys for Sun Valley Company

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

**REPLY IN SUPPORT OF SUN VALLEY  
COMPANY'S MOTION TO DISMISS**

**I. REPLY**

**A. The Association Does Not Have Standing.**

The most glaring omission from the Petitioner's Response to Sun Valley Company's Motion to Dismiss ("Response") is any discussion or acknowledgment of the plain and unambiguous language of the Conjunctive Management Rules ("CM Rules"), which state that a delivery call is to be pursued by "the holder of a senior-priority surface or ground water

**REPLY IN SUPPORT OF SUN VALLEY COMPANY'S  
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right.” *See, e.g.*, IDAPA 37.03.11.001. That is a clear and fundamental requirement. The Association is not a “holder of a senior-priority surface or ground water right.” Therefore, the Association does not alone have standing to pursue the above-captioned water delivery call.

Furthermore, by virtue of both the foregoing legal requirement and the practical and legal necessity of individual participation and fact-finding, the Association cannot meet the test for associational standing. As the Association notes, in *Beach Lateral Water Users Association*, two forms of relief were at issue—an order quieting title in the ditch easement, and injunctive relief to prevent the defendant from blocking the flow of water. 142 Idaho at 604, 130 P.3d at 1142. The Idaho Supreme Court found that the lateral association lacked standing to quiet title, but had standing to seek injunctive relief. *See id.* The reason the lateral association had standing to seek injunctive relief was because (1) individual participation was not required to obtain the relief, and (2) lateral associations have legal authority under chapter 13, title 42, to direct “improvement, repair and maintenance” of the lateral. *See id.* Those are not the circumstances presented to the Director in this delivery call.

First, unlike the claim for injunctive relief in *Beach Lateral Water Users Association*, individual participation is required in this delivery call. There are in excess of 80 separate water rights, owned by scores of water right holders across a large geographic area. Each water right has unique characteristics—place of use, point of diversion, conveyance and application method, operational expense, and efficiency, among others. To evaluate whether the *holders of water rights* are suffering material injury—which evaluation the CM Rules require, *see* IDAPA 37.03.11.042—the actual holders must participate.

Critically, in discussing associational standing, the Association cites *as examples* claims to quiet title and claims for monetary damages as matters “necessitating individual

findings and requiring individualized participation,” and thus not matters granting associational standing. *See Response* at 3. That statement very clearly articulates the key test under the third associational standing factor. Then, in the very next paragraph, the Association completely ignores the test. *See id.*

Instead of actually applying the test to the facts relative to this delivery call, the Association states that this matter is not one of the aforementioned examples—that “the Association is neither seeking to quiet title of its individual members’ water rights in itself, nor seeking an award of monetary damages.” *See id.* That is obvious and true, but it does not resolve the question of associational standing. To determine whether the use of certain junior water rights, individually or collectively, is materially injuring senior water rights, individualized findings relative to each water right will be necessary. The Director cannot make a finding for the entire Association about, for example, “the system diversion and conveyance efficiency, and the method of irrigation water application.” IDAPA 37.03.11.042.01. He cannot make a singular Association-based finding about “[t]he effort or expense of the holder of the water right to divert water from the source.” *See id.* It is extremely unlikely that those, or any of the other factors set forth in the CM Rules, are entirely uniform across all water rights represented by the Association. Put simply, the actual application of the associational standing test—as opposed to a disingenuous reference to two exemplary applications of the test—very clearly demonstrates that the Association does not alone have standing.

Second, unlike the claim for injunctive relief in *Beach Lateral Water Users Association*, there is no legal authority standing for the proposition that an association of water right holders may pursue a delivery call. The lateral association in that case could pursue injunctive relief to preclude blockage of the ditch because it had the statutory right to maintain

the ditch. In this case, there is no similar legal authority relating to an association pursuing water rights administration. In fact, the administrative framework relating to delivery calls—the CM Rules—plainly states that a holder of a senior water right is to initiate the petition.

**B. In the Alternative, the Members of the Association Are Parties.**

The Association attempts to elicit sympathy by complaining that each member's participation in the discovery process, i.e., answering and signing written discovery requests, would be too burdensome.<sup>1</sup> If it is overly burdensome to participate in the discovery process, a member should not participate and should withdraw from the delivery call. Each member has ostensibly alleged that its water right is materially injured by the Sun Valley Company. In turn, the Sun Valley Company is entitled to discover the scope and nature of that alleged injury so that it can defend against such allegations. To suggest otherwise is to deprive Sun Valley Company of fundamental due process of law.

The Sun Valley Company will *not* “clarify[] that its First Set of Discovery Requests to the Big Wood and Little Wood Water Users Association and its Members were directed to, propounded upon, and served solely upon the Association.” *See* Response at 4. To the contrary, the Sun Valley Company expects that each “holder of a senior-priority water right” alleging material injury will participate in the discovery process as a party, consistent with the CM Rules.

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<sup>1</sup> Notably, although the Association has only sought a protective order as to its members, the Association itself still has not responded to the Company's written discovery requests, which responses were due on May 15, 2017.

**C. Amendment.**

The Association seeks amendment in the event the Director finds that the members of the Association are indispensable parties. The Association has wasted the respondents' and the Department's valuable time and money taking a frivolous and unworkable position, and then seeking amendment. To the extent the Director grants amendment at this stage, the Sun Valley Company respectfully requests that the Director order immediate responses to written discovery by all participating members, and account for the unnecessary delay caused by the Association upon further consideration of the timeline for hearings in this delivery call. If the Association and its members are not prepared to file compliant petitions and participate in discovery, they should not be rewarded with a February setting for a contested case hearing.

**II. CONCLUSION**

The Association is not a "holder of a water right" entitled to pursue a delivery call under the CM Rules. The Association's members are "holders of water rights." The members cannot avoid the burden of discovery by joining an association. The Director should so find, and should dismiss the Petition for Administration or order the joinder of any members that will participate, along with immediate responses to written discovery requests. Discovery should not be held up in the name of procedural gamesmanship, and the Sun Valley Company should not be prejudiced by further delay.

DATED this 2nd day of June, 2017.

CAMPBELL LAW, CHARTERED

By   
Scott L. Campbell – Of the Firm  
Attorneys for Sun Valley Company

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

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

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 2nd day of June, 2017, I caused a true and correct copy of the foregoing **REPLY IN SUPPORT OF SUN VALLEY COMPANY'S MOTION TO DISMISS** to be served by the method indicated below, and addressed to the following:

Joseph F. James  
BROWN & JAMES  
130 Fourth Avenue West  
Gooding, Idaho 83330  
Facsimile (208) 934-4101  
joe@brownjameslaw.com  
*Attorneys for Big Wood & Little Wood Water  
Users Association*

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- E-Mail

Gary Spackman  
Director  
IDAHO DEPARTMENT OF WATER RESOURCES  
322 E. Front St.  
P.O. Box 83720  
Boise, ID 837200098  
Facsimile (208) 287-6700  
gary.spackman@idwr.idaho.gov  
garrick.baxter@idwr.idaho.gov  
emmi.blades@idwr.idaho.gov  
kimi.white@idwr.idaho.gov

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- E-Mail

James R. Laski  
Heather E. O'Leary  
LAWSON LASKI CLARK & POGUE, PLLC  
675 Sun Valley Rd., Suite A  
P.O. Box 3310  
Ketchum, ID 83340  
Facsimile (208) 725-0076  
jrl@lawsonlaski.com  
heo@lawsonlaski.com  
*Attorneys for Galena Ground Water District*

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- E-Mail

Laird B. Stone  
STEPHAN KVANVIG STONE & TRAINOR  
102 Main Ave. S., Suite 3  
P.O. Box 83  
Twin Falls, ID 83303-0083  
Facsimile (208) 733-3619  
sks&t@idaho-law.com  
*Attorneys for Dean R. Rogers Inc.*

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 E-Mail

Candice M. McHugh  
Chris M. Bromley  
MCHUGH BROMLEY, PLLC  
380 S. 4th St., Ste. 103  
Boise, ID 83702  
Facsimile (208) 287-0864  
cmchugh@mchughbromley.com  
cbromley@mchughbromley.com  
*Attorneys for City of Bellevue and  
City of Ketchum*

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 E-Mail

Michael C. Creamer  
Michael P. Lawrence  
GIVENS PURSLEY LLP  
601 W. Bannock Street  
P.O. Box 2720  
Boise, ID 83701  
Facsimile (208) 388-1300  
mcc@givenspursley.com  
mpl@givenspursley.com  
*Attorneys for City of Hailey and  
The Valley Club, Inc.*

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 E-Mail

Albert P. Barker  
BARKER ROSHOLT & SIMPSON LLP  
1010 W. Jefferson, Ste. 102  
P.O. Box 2139  
Boise, ID 83702-2139  
Facsimile (208) 344-6034  
apb@idahowaters.com  
*Attorneys for South Valley Ground Water  
District*

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 E-Mail

Gary D. Slette  
J. Evan Robertson  
ROBERTSON & SLETTE, PLLC  
134 3rd Ave. E.  
P.O. Box 1906  
Twin Falls, ID 83303-1906  
Facsimile (208) 933-0701  
gslette@rsidaholaw.com  
erobertson@rsidaholaw.com  
*Attorneys for Picabo Livestock Co., Inc. and  
Sun Valley Water and Sewer District*

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- E-Mail

James P. Speck  
SPECK & AANESTAD  
120 East Avenue North  
P.O. Box 987  
Ketchum, ID 83340  
Facsimile (208) 726-0752  
jim@speckandaanestad.com  
*Attorneys for Linda Woodstock, Kathryn &  
Robert Gardner, CW & RH Gardner Family  
Trust Ltd Partnership, Robert E. Gardner,  
Cloyd W. Gardner & Ruth Helen Gardner, and  
Cliffside Homeowners Association, Inc.*

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- E-Mail



Matthew J. McGee