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DEPARTMENT OF
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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

**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**

STATE OF IDAHO)
) ss.
County of ADA)

MATTHEW J. McGEE, having been duly sworn upon oath, deposes and states as follows:

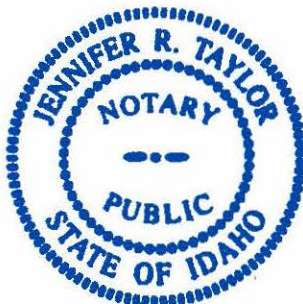
1. I am an attorney representing the Sun Valley Company in the above-captioned proceedings. As such, I have personal knowledge regarding the facts set forth herein.
2. Attached hereto as Exhibit A is a true and correct copy of selections from an internally-prepared rough transcript of the June 3, 2015, pre-hearing conference in the above-captioned proceedings before the Director of the Idaho Department of Water Resources. The audio of such hearing that was the source of such rough transcript was obtained from the Idaho Department of Water Resources.

Further your affiant sayeth naught.



Matthew J. McGee

SUBSCRIBED AND SWORN to before me this 1st day of July, 2015.



NOTARY PUBLIC FOR IDAHO

Residing at Beise, ID

My Commission Expires 7/13/18

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of July, 2015, I caused a true and correct copy of the foregoing **AFFIDAVIT OF COUNSEL** to be served by U.S. Mail and addressed to the following:

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EXHIBIT A

Robertson: With due process to the senior. But the due process to the juniors, did they not have the same option? A reasonable delay in time to see the model?

Spackman: Well, I think the arguments are a legitimate one. John?

Simpson: John Simpson, from Barker Rosholt & Simpson for Al Barker and other clients that the firm has. If you recall, going back even further in time there was a point before even the surface water call where the senior was really precluded from making that call, if you will, or had a even higher burden, because we didn't have a model. Until the model was completed, 1.0 was completed on the ESPA, there wasn't the ability to even go forward with even a really representative call because we couldn't identify which wells were impacting which springs or which river gates. We didn't have the technical information available to the Department and to the parties to even put before a hearing.

Spackman: And I won't question your interpretation or your memory of history. It certainly is better than mine is. But I also will state that there's a lot of precedent and a lot of water under the bridge since those initial determinations. And you've been in bed with a lot of those, John, so I'm not sure that those same standards apply.

Simpson: I would agree because it's been a moving standard as to the surface water call the Department made, the determination of the material injury. At what point, at that point then either side could make a petition to the Department for a formal hearing. That process has changed over time, if you will, until now, in Rangen, where no determination was made until the hearing was conducted. So it's been a moving target for everyone, including the Department, in how that process [inaudible].

Spackman: Scott.

Campbell: I apologize. I didn't know that I was entitled to ask questions, so [inaudible]. Pardon me. This is very short, I hope. To follow up on Chris Bromley's point about the preparation of a staff report or staff reports, is that order going to identify the parameters for the staff to conduct conversations, information exchanges, with the senior water right holders? Because if it doesn't and staff just goes about willy-nilly talking to [inaudible] and going on site without notice to the junior water users, we have a problem with that because it appears to be a circumstance whereby the seniors can provide certain information but the juniors can't rebut that information. So again, the procedure in this case I think is very, very important. And we'll address that in our motion as well if we don't get an order before then.

Spackman: There's a portion of Chris Bromley's question that I didn't address and Scott reminds me. When I request staff memoranda or a staff memorandum, I just issue that as a request. I don't recall whether it has a case heading on it or not. It's not

issued as an order. But the request is distributed to all parties so that you know what's out there, and the specific information that I'm asking for and the questions that I ask is all contained in the document. Now Scott, what you're asking for, in my opinion, goes beyond the standards for communication of Department staff with the various parties, whether they're experts or whatever else, that we followed in previous delivery calls and in previous [inaudible]. In my opinion the ex parte communication rule applies to the tribunal and does not apply to staff or the preparing of memorandum if the person who's – because we would always communicate with the experts.

Campbell: That doesn't make it right. I mean, it doesn't make it right. Just because you've done it that way – and I'm not saying that you're wrong, I'm just saying that's an issue that needs resolution.

Spackman: Well, you can argue it.

Campbell: I will.

Spackman: But if you want to turn around and argue that both the Director and the hearing officer or one and the same, as well as all staff of the Department, are prevented from have – from talking or conversing with any of the representatives of the parties without all of the other parties represented as being there, I can't go there. I mean, Department staff have to be able to interact with. Mr. Rossi.

Rossi: Director, Fred Rossi. I'm a water user. I'd like to return to Mr. Simpson's point. Because we could be here for years to satisfy the juniors' requests that have just come up today. But proving material injury on the seniors' part could happen before all this other discovery and proof of who's causing the injury. We're not saying at this point who's causing our injury. We're just saying we're injured. And we can prove that, in a reasonable time frame. So I think you might consider going back to the original style of the surface coalition call if that is allowable so that at least part of the case could be made and settled.

Spackman: Thank you. John.

Simpson: Mr. Hearing Officer, John Simpson. I think to perhaps Scott's question about participation. In the surface water call there's been occasions where the experts have gotten together with Department staff and people were provided notice. And it seems, from my perspective, it's pretty clear that you've identified a hearing date time frame if you will, and you're going to be working backwards from that time frame. At least from my perspective, notice being provided that the Department is going to talk with the senior water right holders to understand their system and other questions they're going to be asked, notice so that if others want to attend those meetings you may not then have duplication going on in terms of the same questions being asked or supplemental discovery being propounded and

other issues out there like that, at least from an efficiency standpoint, folks have the ability to prepare.

Spackman: That's well said. And I, I just don't see that I can issue some sort of order prohibiting staff from communicating with representatives of the various parties without having given notice. That's just too onerous. I don't think I can do that. Sorry, Scott.

UM: Commissioner?

Spackman: Yes.

UM: Mr. Spackman.

Schoen: So Larry Schoen. I'm a water user and also here observing on behalf of my county for the commissioner. I'd like to ask a question if I could. I'm not an attorney. I'm not familiar with all of the details of these calls. But I am interested in who is affected by the calls and, you know, there's been a lot of – we've been talking about the value of the model but we do know some things about the way surface water and ground water lose [inaudible] in our basin. So is it – and I haven't really been involved in a water call like this before, but I'm used to simply being shut off as a junior user. In a case like this, is it a – my question is, is it a class of users who are affected or is it all of those who are junior to the senior rights holders who are issuing the call whose use of water might affect the senior users? So if, for example, if you have a senior downstream user who is senior, those who are up-gradient using water upstream who are junior – or not just ground water but senior of surface water users as well are subject to the call. So it's by priority date as well as, assuming the Department in making a decision like a curtailment order, would be able to say that your use of water in Point A upstream affects the downstream senior users of water. So we're not just talking about ground water users because they are generally junior, but all those users who are junior are subject to this. Is that, is that correct?

Spackman: Well, I'm not sure I can answer all of your question. And some of these I don't know the relationships right now. I don't know who's junior, I don't know who's senior. But –

Schoen: Well, maybe – let me see if I can explain it. I see my friend Fritz is shaking his head no, like how can I not know this. My concern is –

Spackman: He may be shaking his head at me, Larry.

Schoen: Oh. Well, my concern is, you know, who is affected by these calls. And I think, you know, because this is a big call by a coalition of downstream users, Big Wood and Little Wood, you know, we've kind of grouped together, although

there's two cases, and, you know, I'm just trying to get at who is affected. So, you know, for example, I'm concerned on the basis of seniority, that's one relationship. One being junior to the other. And I'm concerned on the basis, you know, that the model raises, which is, if you're a ground water user below the point at which the Big Wood is a gating reach, how can your ground water used below that point affect users below Magic on the Big Wood. If you're in that area. You're not, you know, you're a ground water user in an area where ground water is not flowing into Silver Creek. So there's different ways to slice it so to speak. You know, if I had a, if I could draw a diagram I could illustrate it. And so I'm, again, just looking at the list of people who are making this call and the nature of these two coalitions, just trying to get a better handle on who's affected by this. Like people in the middle.

Spackman: And I don't know the answer.

Blades: Because there's no model.

Haemmerle: And we won't unless there's a model that's been subjected to scrutiny. Well, maybe. I mean there is a remote possibility that the model's not even necessary. I'm not trying to be smug, I'm just saying.

Schoen: Well there's two, if I could, there's two – again, I guess I'm repeating myself – but there's two framework that I'm thinking about, and one is that one of seniority. Are all junior users subject to a call by all senior users? And the other is conductivity, I guess.

Spackman: Sure. But those are factual matters that need to be presented at the hearing, become part of the evidence, and then there's a determination of those issues after the hearing is conducted. I don't have an answer any better than that. Jim.

Speck: Uh, yes. Jim Speck again. I think the concern, at least the second part of the concern Larry just expressed is part of what I asked. The second part of my question. And maybe I can try to get some clarification. First of all this is, these are calls under Rule 40. Is that correct? Can we all agree that that's the case?

Haemmerle: Yeah. I don't have the rules in front of me but I'm assuming that Rule 40 is the rule that is a call within a water district.

Speck: Correct. So the first subpart under Rule 40 is when a delivery call is made by a senior against junior ground water users in an area of common ground water supply within an organized water district. What we're struggling with here is we don't have the first part of that. We don't have an area of common ground water supply, which is basically what Larry just asked. What I'm asking for, in other words, is the ground water where wells up in the Big Wood [inaudible] depleting, is that a common ground water supply to the Little Wood River? In my mind,

that doesn't make any sense at all. But Mr. James didn't have the benefit of that, so he simply made a call against all the ground water rights in District 37. But at some point this needs to be, I guess are you, is that a determination you're planning to make? And if so, when and how?

Spackman: Well I have some acquaintance with the subject in an area of common ground water supply just because it is a subject before the legislature this year. There's only one area of common ground water supply that's been recognized, at least in conjunctive management rules, which is Eastern Snake Plain Aquifer. And what we represented, at least to the legislature when we were talking about the subject this year, is that the area of common ground water supply would be determined through the hearing process. Now, Jim, if you feel that we should not be proceeding under Rule 40 because there has not yet been a determination of an area of common ground water supply, and I haven't heard this argument previously, but if that's an issue that you want to raise, you're welcome to raise it.

Speck: Well I'm not sure if that's how I meant to characterize it. What I was trying to get at was for my clients. If we get them isolated in either one call or another, rather than having to spend time, effort, and money on analyzing the benefits of use of water rights from the source if they're not connected.

Campbell: Thank you. Thank you very much. That exact issue is one that will be addressed in the motion because frankly, the way the rule is reading, I don't believe that you can even proceed under Rule 40 without having the preconditions of Rule 30 satisfied. The way that the rules are structured it says, in order to proceed with a conjunctive management delivery call a petition has to be filed that contains these elements. And then you go through a hearing process. And then you make a determination at the hearing as to whether or not there's an area of common ground water supply. And then you can proceed under Rule 40. So I would respectfully disagree with Mr. Speck and your characterization. I don't think you can get to Rule 40 without going through Rule and the other rules as well.

Spackman: Okay. Other comments? Chris.

Bromley: Since you're over here again. I can walk around. Chris Bromley.

UM: [inaudible]

Bromley: City of Bellevue. Director, if I could just make one comment just to preserve the record. I do have concerns on behalf of the city if a staff memo or staff memoranda request comes via letter and the extent to which that could be reviewed by other parties for clarification purposes. For instance, in your letter that you sent to the seniors, item number 16 really does go to the ultimate issue of fact for which the Department [inaudible] hearing officer would be deciding which would be material injury. The second staff memorandum that you

described seems to go [inaudible] question. And I just think it would be clearer if your request came in the form of an order. That way we'd all understand [inaudible] Scott's pointed out, the procedural questions. Procedurally we know how to review an order, and I do have questions about review of a letter. Thank you.

Spackman: I didn't anticipate it as a letter. I don't think I characterized it that way. It was just a request of staff and it would be on the case heading and it would go to all the parties. I don't really have a problem with putting that in order form if that's the way you want it. I don't know that we've, I don't know that we have requested staff memorandum through an order in the past. I think that's a procedural matter of insignificance, I guess, I don't know. For me. And if it's important to the parties I don't have a problem with requesting a memorandum or memoranda in an order form. So, I don't have a problem with that. Is there somebody – John?

Simpson: Yeah.

Spackman: [inaudible]

Simpson: I'd prefer not. But Mr. Director, I'll speak up with respect to the issue that Jim Speck raised regarding, I'll call it connection, or area of inclusion, if you will. Is that an area that you envision the second memorandum identifying? You talk about hydrology in connection. Will there be at least, if you will, conclusions by staff regarding the areas of inclusion with respect to each of the delivery calls that are being made? So that, as Jim said, folks can look at that memoranda and determine whether there's grounds to ask for exclusions or clarification regarding particular involvement in both of the cases or consolidated case [inaudible].

Spackman: Let me tell you what I just generally think that technical memoranda will be. And this is an oxymoron in a way because I call it a technical memoranda, but I think it will be a qualitative discussion largely, of the relations, hydrologic relationships, and won't be quantitative in nature. In other words, it's a basis, technically, to build upon. And perhaps challenge, if the parties want to. But at least it lays out the opinions of Department technical staff related to those relationships. So, and honestly, it may be that at some point in time Department staff may need to issue some secondary memorandum. I don't know the answer. But I wanted to get that information out to the participants as soon as possible.

Okay. Other matters we want to talk about?

Anderson: Questions, issues. I got a whole bunch of them. Director Spackman, I'm Lou Anderson. I'm representing the District 37B Groundwater Users. We have concerns along the same lines as Mr. Speck, about inclusion in both calls. And then also in our area there's not only, is there not a almost complete groundwater