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DEPARTMENT OF
WATER RESOURCES

Scott L. Campbell, ISB No. 2251
Norman M. Semanko, ISB No. 4761
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
nms@moffatt.com
mjm@moffatt.com
16845.0025

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

SUN VALLEY COMPANY, a Wyoming
corporation,

Petitioner,

vs.

GARY SPACKMAN, in his capacity as
Director of the Idaho Department of Water
Resources, and THE IDAHO DEPARTMENT
OF WATER RESOURCES,

Respondents.

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 AND
LITTLE WOOD RIVERS

Case No. CV-2015- CV-00-1514500

PETITION FOR JUDICIAL REVIEW

Sun Valley Company (the “Company”), by and through its undersigned counsel, and pursuant to Idaho Code Sections 67-5270 through 67-5279 and Rule 84 of the Idaho Rules of Civil Procedure, hereby submits this Petition for Judicial Review of an agency action by the Director of the Idaho Department of Water Resources (“Director”) and the Idaho Department of Water Resources (“Department”).

FACTUAL AND PROCEDURAL BACKGROUND

I.

The Company owns and operates a resort in Sun Valley, Blaine County, State of Idaho. The Company operates the resort with water rights, which the Department has identified as subject to water delivery calls allegedly pursued by members of the Big Wood & Little Wood Water Users Association (the “Petitioners”), identified in Contested Case Nos. CM-DC-2015-001 and Case No. CM-DC-2015-002.

II.

The Idaho Department of Water Resources is a state agency, with its main office located at 322 E. Front Street, Boise, Idaho. Gary Spackman is the Director of the Department.

III.

On February 24, 2015, Joseph James, on behalf of the Petitioners, sent the Director two letters requesting the Director to administer Petitioners’ water rights in accordance with the prior appropriation doctrine. The letters failed to meet the mandatory minimum pleading requirements to invoke jurisdiction under the Department’s Conjunctive Management Rules (“CM Rules”) and the Department’s Procedural Rules (the “Procedural Rules”), including without limitation, the identification of respondents and the identification of the applicable area of common ground water supply.

IV.

In a letter to Joseph James and Petitioners dated March 6, 2015, the Director responded to the Petitioners' letters and treated the letters as two consolidated delivery calls under the CM Rules. Consequently, in a March 20, 2015 letter, the Department notified all those identified as "a holder of a junior-priority ground water right or rights that may be affected by one or both of the above-described delivery calls," including the Company. The notice invited recipients to participate in contested case proceedings related to the purported delivery calls and notified them of a status conference to be held on May 4, 2015.

V.

On June 25, 2015, the Company filed a Motion to Dismiss Contested Case Proceedings, challenging the Petitioners' water delivery call petitions as deficient under the CM Rules and Procedural Rules, and challenging the Director's exercise of jurisdiction over the contested water delivery call cases as improper.

VI.

On July 22, 2015, the Director issued an Order Denying the Company's Motion to Dismiss, a true and correct copy of which is attached hereto as **Exhibit A**, ruling that, among other things, the February 24, 2015 letters were sufficient to commence water delivery calls and that the Director had proper jurisdiction under CM Rule 40.

VII.

In response to the Director's Order, on August 6, 2015, the Company filed a Motion for Review of Interlocutory Order, pursuant to the Department's Procedural Rules, IDAPA 37.01.01.260 and 711. The Company asked the Director to review and revise his Order Denying the Company's Motion to Dismiss, because it ignored the plain language of the

Department's CM Rules and Procedural Rules, and prejudged fundamental substantive issues. The Director has not yet issued any order in response to such motion.

VIII.

The Company seeks judicial review of the actions taken by the Director and the Department for the reasons set forth in the Motion to Dismiss Contested Case Proceedings and the Motion for Review of Interlocutory Order.

VENUE

IX.

The Company seeks review in the district court for Ada County, Fourth Judicial District of the State of Idaho pursuant to Idaho Code Section 67-5272 because the final agency action was taken by the Director and the Department at Department headquarters in Ada County, Idaho.

JURISDICTION

X.

The Company seeks judicial review of the Order Denying Sun Valley Company's Motion to Dismiss, and this Court has jurisdiction for review of such intermediate agency action, because review of a final agency action would not provide the Company with an adequate remedy. *See* IDAHO CODE § 67-5271(2). The Petitioners have failed to adequately invoke the Department's jurisdiction under the CM Rules and the Procedural Rules, and thus, the only adequate remedy is dismissal. Specifically, and without limiting the foregoing, the petitioners in the above-referenced administrative proceedings have not complied with Procedural Rule 230 and CM Rule 30 by identifying the Company as a respondent, identifying an area of common ground water supply, and producing the documents and information necessary to initiate a water delivery call. Notwithstanding such clear deficiencies, including the Company's inability to

know whether it is even subject to such water delivery call, the Department threatens to proceed with a contested case that could result in curtailment of the Company's valuable water rights. In sum, a final agency action will not provide an adequate remedy because (1) the Department has already erroneously determined it will ignore the pleading requirements required to grant it jurisdiction and will proceed under CM Rule 40 even though no appropriate area of common ground water supply has yet been identified or incorporated into the applicable water district legislatively or pursuant to CM Rule 30, and (2) the Company will be forced to defend its interests when it is entirely unclear whether the petitioners have identified the Company as a respondent.

XI.

Further, the Company seek judicial review of the Order Denying Sun Valley's Motion to Dismiss, and this Court has jurisdiction for review of such intermediate agency action, because the interests of justice so require and such action will result in irreparable harm to the Company. *See Bohemian Breweries v. Koehler*, 80 Idaho 438, 446, 332 P.2d 875, 880 (1958); *see Fuchs v. State, Dep't of Idaho State Police*, 152 Idaho 626, 630, 272 P.3d 1257, 1261 (2012); *see Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 629, 586 P.2d 1068, 1073 (1978).

Specifically, and without limiting the foregoing, by ignoring jurisdictional predicates and subjecting the Company to curtailment in a contested case proceeding without demanding the Petitioners' compliance with basic petition requirements, the Director has prejudged determinations of an area of common ground water supply, hydraulic interconnectedness, and causation. Such prejudicial conduct constitutes irreparable harm to the Company's defense of its water rights, and also subjects the Company to costly litigation without adequate notice of its status as a real party in interest.

ISSUES ON REVIEW

XII.

Pursuant to Idaho Code Sections 42-1707A and 67-5279, the Company seeks review of the Director's Order Denying Sun Valley Company's Motion to Dismiss, and the findings, inferences, conclusions or decisions therein, which were: (1) in violation of constitutional, statutory provisions, and administrative rules of the Department; (2) in excess of the Department's statutory authority and its authority under the administrative rules of the Department; (3) made upon unlawful procedure; and (4) arbitrary, capricious, and/or an abuse of the Department's discretion.

XIII.

Specifically, and without limiting the foregoing, the Company contends that the Director and Department:

1. Erred when it exceeded its authority, and violated constitutional law, statutory provisions, and administrative rule requirements by exercising jurisdiction over the above-referenced proceedings under the CM Rules;
2. Violated the Company's due process rights by refusing to require the Petitioners to comply with petition requirements, including identification of respondents;
3. Erred by ignoring that the only administrative means to determine and incorporate an area of common ground water supply is pursuant to CM Rules 30 and 50
4. Erred by dismissing the applicability of CM Rule 30 by improperly equating "junior-priority ground water rights in organized water districts" with "areas having a common ground water supply" in organized water districts;

5. Erred by prejudging or pre-determining an area of common ground water supply based solely on the existence of a water district;

6. Erred by proceeding under CM Rule 40 without incorporating an applicable area of common ground water supply into Water District 37 pursuant to CM Rule 30, thus purportedly excusing the Petitioners' pleading deficiencies.

Pursuant to Idaho Rule of Civil Procedure 84(d)(5), this list of issues "shall not prevent the Company from asserting other issues later discovered."

ATTORNEY FEES

XIV.

The Company respectfully requests an award of its attorneys' fees and costs pursuant to Idaho Code Section 12-117 and any other applicable statutes.

AGENCY RECORD

XV.

The Company understands that the Department keeps and maintains a record of documents and proceedings in the above-referenced contested cases. The Company anticipates that an agreement will be reached among all parties regarding the agency record, and the Company will pay the fees it is obligated to pay for preparation of the record as necessary. The record shall include, without limitation, the following:

- (a) The Order Denying Sun Valley Company's Motion to Dismiss;
- (b) The Order Denying Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls;
- (c) Sun Valley Company's Motion to Dismiss Contested Case Proceedings;
- (d) Sun Valley Company's Motion for Review of Interlocutory Order.

Petitioner CERTIFIES:

A. That the Department will be paid concurrently with the service hereof an estimate of the costs for the preparation of Department record referenced above;

B. That the District Court's filing fee applicable to petitions for judicial review of a final decision from administrative agencies, including the Department, has been paid;
and

C. That service has been made upon all parties required to be served.

DATED this 19th day of August, 2015.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Matthew J. McGee – Of the Firm
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of August, 2015, I caused a true and correct copy of the foregoing **PETITION FOR JUDICIAL REVIEW** to be served by U.S. Mail and addressed to the following:

IDAHO DEPARTMENT OF WATER RESOURCES 322 E. FRONT STREET BOISE ID 83702	GARY L. SPACKMAN, DIRECTOR IDAHO DEPARTMENT OF WATER RESOURCES 322 E. FRONT STREET BOISE ID 83702
---	---

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

ALBERT BARKER
BARKER RSHOLT & 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 RSHOLT & 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
BELLEVUE 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

A handwritten signature in black ink, appearing to read 'Matt McGee', written over a horizontal line.

Matthew J. McGee

EXHIBIT A

**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 DISMISS**

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, and a pre-hearing conference on June 3, 2015.

On June 25, 2015, SVC filed a *Motion to Dismiss Contested Case Proceedings* ("Motion to Dismiss"). Joinders in support of the Motion to Dismiss were filed by attorney James P. Speck on behalf of multiple respondents; City of Bellevue; City of Hailey; City of Ketchum and City of Fairfield; AF 2014 Trust, Geoffrey Smith, and the Mariana S. Paen Trust; Dean R. Rogers Inc., and Dean R. Rogers, III; and attorney Heather E. O'Leary on behalf of multiple respondents.

ANALYSIS

SVC argues the Big and Little Wood Delivery Calls should be dismissed for Petitioners' failure "to file compliant petitions" under Idaho law, the Department's Rules for Conjunctive Management of Surface and Ground Water Resources ("CM Rules"), and the Department's Rules of Procedure. *Motion* at 2. Each argument will be addressed below.

Compliance with Idaho Law

SVC argues the Petitioners' delivery call letters do not "satisfy the specific pleading requirements under Idaho Code Section 42-237b." *Motion* at 6. Idaho Code § 42-237b states:

Whenever any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affected by one or more user[s] of ground water rights of later priority, or whenever any person owning or having the right to use a ground water right believes that the use of such right is being adversely affected by another's use of any other water right which is of later priority, such person, as claimant, *may* make a written statement under oath of such claim to the director of the department of water resources.

Such statement shall include:

1. The name and post-office address of the claimant.
2. A description of the water right claimed by the claimant, with amount of water, date of priority, mode of acquisition, and place of use of said right, if said right is for irrigation, a legal description of the lands to which such right is appurtenant.
3. A similar description of the respondent's water right so far as is known to the claimant.
4. A detailed statement in concise language of the facts upon which the claimant founds his belief that the use of his right is being adversely affected.

Upon receipt of such statement, if the director of the department of water resources deems the statement sufficient and meets the above requirements, the director of the department of water resources shall issue a notice setting the matter

for hearing *before a local ground water board*, constituted and formed as in this act provided.

(emphasis added). SVC asserts the Big and Little Wood Delivery Calls should be dismissed because Petitioners' letters do not contain a "written statement under oath" setting forth information required by Idaho Code § 42-237b.

The plain language of Idaho Code § 42-237b demonstrates Petitioners were not required to execute a written statement under oath to initiate the Big and Little Wood Delivery Calls. The statute states that a claimant *may* make a written statement under oath. Here, Petitioners did not file their letters to initiate delivery call proceedings pursuant to Idaho Code § 42-237b, but rather demanded the Director instruct "the Watermaster for Water District No. 37 to administer Petitioners' surface water rights, and hydrologically connected to ground water rights within the district in accordance with the prior appropriation doctrine." This is not a request for the Director to set the matter for hearing *before a local ground water board*. Instead, the Petitioners' letters initiated the Big and Little Wood Delivery Calls under CM Rule 40 that addresses delivery calls against junior-priority ground water users "in an organized water district." IDAPA 37.03.11.040.01. Accordingly, the specific pleading requirements set forth in Idaho Code § 42-237b do not apply and are not a basis to dismiss the Big and Little Wood Delivery Calls.

Compliance with the CM Rules and Department's Rules of Procedure

SVC argues the Big and Little Wood Delivery Calls should be dismissed because the Petitioners' letters do not include all information required of a petition set forth in CM Rule 30. *Motion* at 6-11. However, CM Rule 30 applies only where a delivery call is filed by the holders of senior-priority surface or ground water rights against "holders of junior priority ground water rights within areas of the state *not in organized water districts*." IDAPA 37.03.11.030 (emphasis added). The Big and Little Wood Delivery Calls are against junior-priority ground water rights *in organized water districts*. Therefore, the applicable rule is CM Rule 40 that addresses delivery calls against junior-priority ground water users "in an organized water district." IDAPA 37.03.11.040.01. SVC's arguments regarding the failure of Petitioners' letters to comply with requirements in CM Rule 30 are therefore irrelevant in these proceedings and not a basis to dismiss the Big and Little Wood Delivery Calls.

SVC also argues the Big and Little Wood Delivery Calls should be dismissed because the Petitioners' letters do not include all information set forth in Rule 230 of the Department's Rules of Procedure. *Motion* at 5-6. Rule 230 lists general requirements of petitions, including that they should "[f]ully state facts upon which they are based" and "[s]tate the name of the person petitioned against (the respondent), if any." IDAPA 37.01.01.230.02 (a) &(d). The more specific requirement for initiating a delivery call under CM Rule 40 is that the holder of a senior-priority water right must allege "that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury. . . ." IDAPA 37.03.11.040.01. It is well recognized that a specific rule controls over a more general rule when there is conflict between the two. *See Ausman v. State*, 124 Idaho 839, 842, 864 P.2d

1126, 1129 (1993). Accordingly, Petitioners' letters must only meet the specific pleading requirement set forth in CM Rule 40 to properly initiate the Big and Little Wood Delivery Calls.

With respect to the Big Wood Delivery Call, Petitioners' letter states:

[The Petitioners] are entitled to delivery of water from the Big Wood River below Magic Dam. All the [Petitioners'] surface water rights listed in Exhibit "A" are all located in Water District 37, and are hydrologically connected to ground water rights in the Wood River Valley aquifer system.

...

Due to the failure of the [Department] to administer the subject water rights under the prior appropriation doctrine, the Petitioners have suffered from premature curtailment of delivery of their surface water rights, along with the accompanying material injury. Any future delay in the requested administration will result in further injury. Accordingly, Petitioners hereby demand that you direct the Watermaster for Water District No. 37 to administer Petitioners' surface water rights, and hydrologically connected to ground water rights within the district in accordance with the prior appropriation doctrine.

The Petitioners' letter regarding the Little Wood Delivery Call states:

[The Petitioners] are entitled to delivery of water from the Little Wood River below its confluence with Silver Creek. All the [Petitioners'] surface water rights listed in Exhibit "A" are all located in Water District 37, and are hydrologically connected to ground water rights in the Wood River Valley aquifer system.

...

Due to the failure of the [Department] to administer the subject water rights under the prior appropriation doctrine, the Petitioners have suffered from premature curtailment of delivery of their surface water rights, along with the accompanying material injury. Any future delay in the requested administration will result in further injury. Accordingly, Petitioners hereby demand that you direct the Watermaster for Water District No. 37 to administer Petitioners' surface water rights, and hydrologically connected to ground water rights within the district in accordance with the prior appropriation doctrine.

The above-quoted statements meet the specific requirement for initiating the Big and Little Wood Delivery Calls under CM Rule 40 that the calling party must allege "that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury. . . ." IDAPA 37.03.11.040.01.

SVC takes particular issue with the failure of Petitioners' letters to comply with Rule 230's requirement that a petition "[s]tate the name of the person petitioned against (the respondent), if any." SVC asserts this failure "shifted to the Department the burden of

identifying and providing notice to Respondents, effectively asking the Department to draw prejudicial conclusions about potential causation and hydrological connection." *Motion* at 8.

Even if Rule 230 applied to petitions filed to initiate CM Rule 40 delivery calls, the Department's Rule of Procedure Rule 52 instructs that "this chapter will be liberally construed to secure just, speedy and economical determination of all issues presented to the agency. Unless prohibited by statute, the agency may permit deviation from these rules when it finds that compliance with them is impracticable, unnecessary or not in the public interest." IDAPA 37.01.01.052.

It is unnecessary to require petitioners filing CM Rule 40 delivery calls to identify each person petitioned against. Again, CM Rule 40 delivery calls are against junior-priority ground water rights "in an organized water district." IDAPA 37.03.11.040.01. Watermasters for water districts, upon appointment by the Director, "shall be responsible for distribution of water within said water district." Idaho Code § 42-605(3). Watermasters make annual reports to the Department including the total amount of water delivered by the watermaster during the preceding year, the amount delivered to each water user, records of stream flow the watermaster used or made in distributing water supplies, and other information requested by the Director "deemed necessary in assuring proper distribution of water supplies within the district." Idaho Code § 42-606. The water rights at issue in the Big and Little Wood Delivery Calls have been defined through partial decrees entered in the Snake River Basin Adjudication. The watermaster is to distribute water according to those decrees. *See* Idaho Code § 42-607. In sum, the watermaster in a water district already possesses the names and water right information of junior-priority ground water users that may be subject to a delivery call by senior users within that district. It is unnecessary for the Director to require a petition for a CM Rule 40 delivery call to list each junior-priority ground water user petitioned against. The Big and Little Wood Delivery Calls will not be dismissed for Petitioners' failure to list in the delivery call letters the name of each junior-priority ground water user petitioned against. In addition, the Department has not drawn any conclusions "about potential causation and hydrological connection" in these delivery call proceedings as SVC asserts. Those determinations are for the Director upon a fully developed record and evidence admitted at hearing.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that SVC's Motion to Dismiss is DENIED.

DATED this 22nd day of July 2015.


GARY SPACKMAN
Director

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:

BIG WOOD WATER USERS ASSN
LITTLE WOOD WATER USERS ASSN
C/O JOSEPH F. JAMES
BROWN & JAMES
130 FOURTH AVENUE WEST
GOODING ID 83330
joe@brownjameslaw.com
dana@brownjameslaw.com

SOUTH VALLEY GROUNDWATER
DISTRICT
C/O ALBERT BARKER
BARKER ROSHOLT & SIMPSON LLP
PO BOX 2139
BOISE ID 83701-2139
apb@idahowaters.com
sle@idahowaters.com

HAILEY CEMETERY MAINTENCE DIST
JACOB & RUTH BLOOM
C/O PATRICK D BROWN
PATRICK D BROWN PC
PO BOX 125
TWIN FALLS ID 83303
pat@pblaw.co

IDAHO GROUND WATER APPROPRIATORS
INC
C/O RANDALL C BUDGE
THOMAS J BUDGE
JOSEPH G BALLSTAEDT
RACINE OLSON
PO BOX 1391
POCATELLO ID 83204-1391
rcb@racinelaw.net
tjb@racinelaw.net
jgb@racinelaw.net

CITY OF FAIRFIELD
CITY OF KETCHUM
C/O SUSAN E BUXTON
CHERESE D MCLAIN
MOORE SMITH BUXTON & TURCKE
950 W BANNOCK ST STE 520
BOISE ID 83702
seb@msbtlaw.com
cdm@msbtlaw.com

SINCLAIR OIL CORPORATION DBA SUN
VALLEY COMPANY
C/O SCOTT L CAMPBELL
MATTHEW J MCGEE
MOFFATT THOMAS
PO BOX 829
BOISE ID 83701-0829
slc@moffatt.com

CITY OF HAILEY
VALLEY CLUB INC
C/O MICHAEL C CREAMER
MICHAEL P LAWRENCE
GIVENS PURLSEY LLP
PO BOX 2720
BOISE ID 83701-2720
mcc@givenspursley.com
mpl@givenspursley.com
lisahughes@givenspursley.com
lorigibson@givenspursley.com

STROM RANCHES INC
DENNIS STROM
C/O S BRYCE FARRIS
SAWTOOTH LAW OFFICES PLLC
PO BOX 7985
BOISE ID 83707-7985
bryce@sawtoothlaw.com

AF 2014 TRUST
GEOFFREY SMITH LLC
MARIANA S PAEN TRUST
C/O FRITZ HAEMMERLE
HAEMMERLE & HAMMERLE PLLC
PO BOX 1800
HAILEY ID 83333
fxh@haemlaw.com

ANIMAL SHELTER OF WOOD RIVER
VALLEY
DENNIS J CARD & MAUREEN M MCCANTY
EDWARD A LAWSON
FLYING HEART RANCH II SUBDIVISION
OWNERS ASSN
HELIOS DEVELOPMENT LLC
SOUTHERN COMFORT HOMEOWNERS
ASSN
THE VILLAGE GREEN VCHOA
C/O JAMES R LASKI
HEATHER O'LEARY
LAWSON LASKI CLARK & POGUE PLLC
PO BOX 3310
KETCHUM ID 83340
heo@lawsonlaski.com
jrl@lawsonlaski.com

WATER DISTRICT 37-B GROUNDWATER
GROUP
C/O DYLAN B LAWRENCE
VARIN WARDWELL LLC
PO BOX 1676
BOISE ID 83701-1676
dylanlawrence@varinwardwell.com

IDAHO FOUNDATION FOR PARKS AND
LANDS INC
C/O CHAS MCDEVITT
MCDEVITT & MILLER LLP
PO BOX 2564
BOISE ID 83701
chas@mcdevitt-miller.com

C/O EILEEN MCDEVITT
732 FALLS VIEW DR
TWIN FALLS ID 83301
emcdevitt1@msn.com

CITY OF BELLEVUE
MICHELLE WOLF
C/O CANDICE MCHUGH
CHRIS BROMLEY
MCHUGH BROMLEY PLLC
380 S 4TH STREET STE 103
BOISE ID 83702
cmchugh@mchughbromley.com
cbromley@mchughbromley.com

ECCLES FLYING HAT RANCH LLC
ECCLES WINDOW ROCK RANCH LLC
HOLLY FARMS LTD
J EVAN ROBERTSON
SUN VALLEY WATER & SEWER DISTRICT
C/O J EVAN ROBERTSON
ROBERTSON & SLETTE PLLC
PO BOX 1906
TWIN FALLS ID 83303-1906
erobertson@rsidaholaw.com

IDAHO POWER COMPANY
C/O JOHN K SIMPSON
BARKER ROSHOLT & SIMPSON LLP
PO BOX 2139
BOISE ID 83701-2139
jks@idahowaters.com
jlw@idahowaters.com

AIRPORT WEST BUSINESS PARK OWNERS
ASSN INC
AQUARIUS SAW LLC
ASPEN HOLLOW HOMEOWNERS ASSN
(ALLAN PATZER & WILLIAM
LEHMAN)
B LAMBERT TRUST (TOBY B LAMBERT)
BARBER FAMILY ASSOCIATES LP
BARRIE FAMILY PARTNERS
BELLEUE FARMS LANDOWNERS ASSN
INC
BLAINE COUNTY RECREATION DISTRICT
BLAINE COUNTY SCHOOL DIST NO. 61
CAROL BURDZY THIELEN
CHANEY CREEK RANCH LLC
CHARLES & COLLEEN WEAVER
CHARLES L MATTHIESEN
CLEAR CREEK LLC
CLIFFSIDE HOMEOWNERS ASSN INC
COMMUNITY SCHOOL (JANEL L
GODDARD)
DAN S FAIRMAN MD & MELYNDA KIM
STANDLEE FAIRMAN
DEER CREEK FARM (LYNN CAMPION)
DON R & JUDY H ATKINSON
DONNA F TUTTLE TRUST
ELIZABETH K GRAY
F ALFREDO REGO
FLOWERS BENCH LLC
GOLDEN EAGLE RANCH HOA INC
GREENHORN HOMEOWNERS ASSN
(JEFFREY T SEELY)
GRIFFIN RANCH PUD SUBDIVISION HOA
(CHERI HICKS)
GRIFFIN RANCH SUBDIVISION HOA
(CHERI HICKS)
GULCH TRUST (TERESA L MASON)
HEATHERLANDS HOMEOWNERS ASSN
HENRY & JANNE BURDICK
IDAHO RANCH LLC
JAMES K & SANDRA FIGGE
JAMES P & JOAN CONGER
KIRIL SOKOLOFF
LAURA L LUCERE
LINDA WOODCOCK
LOUISA JANE H JUDGE
MARGO PECK
MARION R & ROBERT M ROSENTHAL
MATS & SONYA WILANDER
MICHAEL E WILLARD
MID-VALLEY WATER CO LLC
PIONEER RESIDENTIAL & RECREATIONAL
PROPERTIES LLC
R THOMAS GOODRICH & REBECCA LEA
PATTON

RALPH R LAPHAM
RED CLIFFS HOMEOWNERS ASSOCIATION
REDCLIFF PARTNERS LP (RANNEY E
DRAPER)
RHYTHM RANCH HOMEOWNERS ASSN
RIVER ROCK RANCH LP (SHEILA WITMER)
ROBERT ROHE
SAGEWILLOW LLC
SALIGAO LLC
SANDOR & TERI SZOMBATHY
SCI PROPERTIES LLC (BRENDA A LEVINE)
STARLITE HOMEOWNERS ASSN
STONEGATE HOMEOWNERS ASSN LLC
THE ANNE L WINGATE TRUST
THE BARKER LIVING TRUST
THE DANIEL T MONOOGIAN REVOCABLE
TRUST
THE JONES TRUST
THE RALPH W & KANDI L GIRTON 1999
REVOCABLE TRUST
THE RESTATED MCMAHAN 1986
REVOCABLE TRUST
THE VERNON IRREVOCABLE TRUST
THOMAS W WEISEL
TIMBERVIEW TERRACE HOA INC
WEBB LANDSCAPE INC (MARK PALMER)
C/O JAMES P SPECK
SPECK & AANESTAD
PO BOX 987
KETCHUM ID 83340
jim@speckandaanestad.com

DEAN R ROGERS INC (DEAN R ROGERS III)
C/O LAIRD B STONE
STEPHAN KVANVIG STONE & TRAINOR
PO BOX 83
TWIN FALLS ID 83303-0083
sk&t@idaho-law.com

CATHERINE S DAWSON REVOCABLE
TRUST
DEER CREEK RANCH INC
ROBERT L BAKER REVOCABLE TRUST
SYRINGA RANCH LLC
C/O TRAVIS L THOMPSON
BARKER RSHOLT & SIMPSON LLP
195 RIVER VISTA PL STE 204
TWIN FALLS ID 83301-3029
lit@idahowaters.com

ANTHONY & JUDY D ANGELO
PO BOX 3267
KETCHUM ID 83340
judydangelore@gmail.com

BARBARA CALL
PO BOX 4
ROSS CA 94957
barbcall@sbcglobal.net

BERNARD I FRIEDLANDER PHD
116 VALLEY CLUB DRIVE
HAILEY ID 83333

BLUEGROUSE RIDGE HOA
C/O BRIAN MCCOY
PO BOX 3510
KETCHUM ID 83340
brian@seabrd.net

BRIAN L SMITH & DIANE STEFFEY-SMITH
PO BOX 629
BELLEVUE ID 83313
brianlamarsmith@me.com

BRITTA S HUBBARD
PO BOX 1167
KETCHUM ID 83340
brittahubbard@gmail.com

BRUCE & KAREN TRUXAL
PO BOX 431
BELLEVUE ID 83313
bruxal@powereng.com

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
berman.dlb@gmail.com

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
hrinker@rinkercompany.com

HARRY S RINKER
PO BOX 7250
NEWPORT BEACH CA 92658
toni@rinkercompany.com

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

INNOVATIVE MITIGATION SOLUTIONS
LLC
2918 N EL RANCHO PL
BOISE ID 83704

JAMES D WHITE
PO BOX 367
BELLEVUE ID 83313
jdwhite@q.com

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
kensangha@gmail.com

KEVIN D LAKEY
WATER DISTRICT 37
107 W 1ST
SHOSHONE ID 83352
watermanager@cablone.net

LAWRENCE SCHOEN
18351 US HWY 20
BELLEVUE ID 83313

LUBOFF SENAVSKY &
CHARLES TIMOTHY FLOYD
PO BOX 1240
EAGLE ID 83616
bsfloyd@mac.com

MARLYS J SCHMIDT
10901 HWY 75
BELLEVUE ID 83313
mjschmidt49@msn.com

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
zsewell@gmail.com

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
WATER DISTRICT 37B
PO BOX 591
FAIRFIELD ID 83327
waterdistrict37b@outlook.com

SAGE SPRINGS HOMEOWNERS ASSN INC
PO BOX 254
KETCHUM ID 83340

SILVER SAGE OWNERS ASSN INC
C/O CAROL'S 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
camascreek@hughes.net

THOMAS & AMY MISTICK
149 ASPEN LAKES DR
HAILEY ID 83333

USDA FOREST SERVICE
ATTN JAMIE GOUGH
324 25TH ST
OGDEN UT 84401
jgough@fs.fed.us

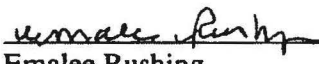
VALLEY CLUB OWNERS ASSN INC
PO BOX 254
KETCHUM ID 83340

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

WOOD RIVER LAND TRUST
119 E BULLION ST
HAILEY ID 83333

COURTESY COPY TO:

ED REAGAN
COURIER NEWS
PO BOX 339
FAIRFIELD ID 83327
news@highway46.org


Emalee Rushing
Administrative Assistant