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DEPARTMENT OF
WATER RESOURCES

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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

SUN VALLEY COMPANY'S MOTION TO
MODIFY/WITHDRAW "REQUEST FOR
STAFF MEMORANDA" AND MAY 20, 2015
"REQUEST FOR ADDITIONAL
INFORMATION"

I. MOTION

The Sun Valley Company (“Sun Valley”), through its counsel of record and pursuant to Rule 260 of the Rules of Procedure of the Idaho Department of Water Resources, hereby moves the Director to modify or withdraw the May 20, 2015 “Request for Additional Information” (the “Department’s Discovery Requests”) and the June 12, 2015 “Request for Staff Memoranda” (the “Memoranda Requests”) (collectively, the “Requests”), each issued by Director Gary Spackman.

II. ARGUMENT

Sun Valley objects to the use of the technical staff of the Idaho Department of Water Resources (“Department”) in these contested case proceedings in the manner described by the Department’s Discovery Requests from Director Gary Spackman to Joseph James, counsel for the Petitioners,¹ and the Memoranda Requests to Department staff.

Both the Department’s Discovery Requests and the Memoranda Requests fail to comply with the Idaho Department of Water Resources’ Rules of Procedure, IDAPA 37.01.01 (“Procedural Rules”) and the Idaho Department of Water Resources’ Rules for Conjunctive Management (“CMRs”). Consequently, the Requests violate Sun Valley’s due process rights under those rules, the Idaho Administrative Procedures Act, the Idaho Constitution and the U.S. Constitution.

¹ For ease of reference, Sun Valley uses the terms “Petitioners” and “Respondents” throughout this motion, but Sun Valley does not believe either term applies. The terms only accurately describe the parties in a validly-initiated contested case proceeding. *See* Sun Valley Company’s Motion to Dismiss Contested Case Proceedings, filed June 25, 2015.

A. The Department's Discovery Requests

On May 20, 2015, Department Director Gary Spackman executed the Department's Discovery Requests and stated, in the cover letter to Joseph James:

I stated at the conference that the Department would submit a letter to you seeking additional information about the Association members' diversion and use of water. Consistent with that statement, I respectfully submit the Information Request attached to this letter. Your responses and submittal of additional information will assist me in determining whether the holders of senior water rights are suffering material injury and using water efficiently and without waste as required by the Department's Conjunctive Management Rules.

Department's Discovery Requests, Cover Letter.

Then, the Department's Discovery Requests state:

Pursuant to Rule 42 of the Department's *Rules for Conjunctive Management of Surface Water and Ground Water Resources* ("CM Rules"), when a delivery call is made, the Director must determine whether the holders of senior water rights are suffering material injury and using water efficiently and without waste. The Department is collecting information related to the senior surface water rights in these two delivery call proceedings to aid in that determination.

Id. at 1.

The Department's Discovery Requests then present sixteen (16) separate questions, many with subparts, asking for all of the information the Department deems relevant to the Director's anticipated future determination of "whether the holders of senior water rights are suffering material injury and using water efficiently and without waste." *See id.* at 1-3.

B. The Director's Memoranda Requests

On June 12, 2015, Director Spackman issued the Memoranda Requests to Tim Luke and Sean Vincent, Department staff, and identified the legal basis for his action. Director Spackman stated:

The following is a request for staff memoranda pursuant to Rule 602 of the Idaho Department of Water Resources' ("Department") Rules of Procedure (IDAPA 37.01.01).

Rule 600 of the Rules of Procedure authorizes the presiding officer to use the Department's "experience, technical competence and specialized knowledge" in the evaluation of evidence in a contested case proceeding.

Rule 602 of the Rules of Procedure allows the presiding officer to take official notice of technical or scientific facts within the Department's specialized knowledge, including agency staff memoranda and data, in a contested case proceeding.

Memoranda Requests at 1.

Director Spackman then described the factual circumstances that apparently justified the Memoranda Requests. In that discussion there is no mention of the Department's Discovery Requests. However, the information requested from the Petitioners in the Department's Discovery Requests will be used by Director Spackman "in determining whether the holders of senior water rights are suffering material injury and using water efficiently and without waste as required by the Department's Conjunctive Management Rules." *See* Department's Discovery Requests, Cover Letter.

The Memoranda Requests further specify as follows:

THEREFORE, to assist the Director and the participants involved in this contested case proceeding, the Director requests that Department staff review data and information in the possession of the Department, and prepare staff memoranda regarding the above-captioned matter, which could include, without limitation:

[A series of multiple-part tasks, related to the factual findings the Director must make in resolving the contested case proceedings, and that must necessarily rely in almost all instances upon the additional information requested in the Department's Discovery Requests from the senior water right owners, are listed.]

(Bracketed paragraph added.)

Director Spackman then states:

Any such staff memoranda shall be submitted to the presiding officer on or before August 21, 2015, and also served upon the parties to this matter. The Director will require attendance of staff participating in writing staff memoranda for examination at any hearing set in this matter pursuant to IDAPA 37.01.01.201 and 602.

Memoranda Requests at 4.

C. The Relevant Procedural Rules Do Not Support The Department's Approach

Director Spackman cites Rule 600 and Rule 602 of the Department's Procedural Rules in the Memoranda Requests. However, such rules, the Procedural Rules in general, as well as fundamental requirements of due process, preclude the gathering and use of information by Department staff in the manner contemplated by the Requests.

Rule 600 and Rule 602 must be read in context and with precision. Both rules follow Procedural Rules 550 through 566, which rules set forth the bulk of the procedures adopted by the Department to govern the conduct of contested case *hearings*.² It is of particular importance to clarify that the presiding officer takes evidence at hearings. *See, e.g.*, IDAPA 37.01.01.555 (“*[b]efore taking evidence* the presiding officer will call the hearing to order . . .”) (emphasis added); IDAPA 37.01.01.557 (describing the process by which parties to a contested case may stipulate to facts, and confirming that a process for the presentation of “evidence” and argument must be afforded to the parties); *see also* IDAPA 37.01.01.157 (“*Subject to Rules 558, 560, and 600*, all parties and agency staff may appear *at hearing or argument*, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate *in hearings or arguments*.”) (emphasis added); IDAPA 37.01.01.514 (even facts

² Adherence to the Procedural Rules is mandatory. *See* IDAPA 37.01.01.001.02 (“the rules of procedure *shall* govern contested case proceedings . . .”). (Emphasis added.)

disclosed at a prehearing conference are not part of the record). In this context, Rule 600 and Rule 602 can be properly analyzed.

Rule 600 states:

Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer *at hearing* is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of *taking testimony* invalidates any order. The presiding officer, with or without objection, may exclude *evidence* that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any *evidentiary* privilege provided by statute or recognized in the courts of Idaho. All other *evidence* may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. *The agency's experience, technical competence and specialized knowledge may be used in the evaluation of evidence.*

IDAPA 37.01.01.600 (emphasis added).

The Department's Procedural Rules do not expressly define "evidence," "hearing" or "testimony." Consequently, other authority must be utilized to clarify the meaning of these terms. Black's Law Dictionary, eighth revised edition, defines evidence as "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact." BLACK'S LAW DICTIONARY (8th ed.) at 595. "Testimony" connotes sworn statements, typically presented under oath and, at a trial or hearing, subject to cross-examination. *See id.* at 1514; IDAPA 37.01.01.559 ("*All* testimony presented in formal hearings will be given under oath.") (emphasis added). Finally, a hearing is the forum for the "full disclosure of all relevant facts and issues, including such cross-examination as may be necessary," affording "all parties the opportunity to respond and present evidence and argument on all issues involved." IDAHO CODE § 67-5242. Clearly, the provisions of Rule 600 contemplate the presentation of "evidence," including "testimony" under oath, at a "hearing"

where parties have the opportunity to object and otherwise make their record, not an informal fact-finding process outside the scope of such a hearing.

Director Spackman also cites Rule 602 in the Memoranda Requests. Rule 602 states:

Official notice may be taken of any facts that could be judicially noticed in the courts of Idaho and of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified of the specific facts or material noticed and the source of the material noticed, including any staff memoranda and data. Notice that official notice will be taken should be provided either before or during the hearing and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed. Parties must be given an opportunity to contest and rebut the facts or material officially noticed. When the presiding officer proposes to notice agency staff memoranda or agency staff reports, responsible staff employees or agents shall be made available for cross-examination if any party timely requests their availability.

IDAPA 37.01.01.602.

The plain language of the Procedural Rules is clear, and will be interpreted accordingly by the courts of Idaho. *See, e.g., Mallonee v. State*, 139 Idaho 615, 619, 84 P.3d 551, 555 (2004) ("A rule or regulation of a public administrative body ordinarily has the same force and effect of law and is an integral part of the statute under which it is made just as though it were prescribed in terms therein. The same principles of construction that apply to statutes apply to rules and regulations promulgated by an administrative body."). The Requests improperly deviate from the procedural due process protections established by the Procedural Rules and are contrary to the language of Rule 600 and Rule 602. Consequently, the Department's actions violate Sun Valley's rights under the Idaho Administrative Procedures Act, the Idaho Constitution and the U.S. Constitution.

Put simply, the purpose of the contested case hearings in the above-captioned matters is the presentation of *evidence* relating to the Petitioners' alleged material injury. At a minimum, the Petitioners bear the initial burden of showing material injury at such hearings. *See* Twin Falls County Case No. CV-2010382, Memorandum Decision and Order on Petitions for Judicial Review, at 38 (Sept. 26, 2014). The parties, not the Department, gather and present information, and each such party bears its respective burden by presenting information, via testimony or documents, that may be admitted by the Director as *evidence*, subject to objection and cross-examination as necessary. *See* IDAPA 37.01.01.600-606. The Director's role is to oversee proper development of a record and to consider admitted evidence presented by the parties at hearing. *See* IDAPA 37.01.01.600. Department staff's role is to evaluate *evidence*, only after it is admitted at hearing, as the Director's technical advisor. *See id.* Department staff should not engage in the gathering, assembly, and organization of information on behalf of the Petitioners. Nor should the Department engage in the analysis or evaluation of such information, before it is actually admitted as evidence in the hearing record.

1. The Department Should Not Engage In The Gathering, Assembly, And Organization Of Information For The Petitioners

The Department should not conduct discovery by gathering, assembling, and organizing information for and from the Petitioners. At the outset, the Petitioners were obligated to provide all information related to material injury to the Department and the Respondents as part of their petition when they made their delivery call, which they failed to do. *See* Sun Valley Company's Motion to Dismiss, filed June 25, 2015. Thereafter, upon an appropriate order from the Director, the Petitioners and Respondents are each subject to discovery and depositions. *See* IDAPA 37.01.01.521. Such discovery allows the parties to gather evidence to submit for the Director's consideration in a contested administrative hearing and for the consequent

development of a record. Neither the Procedural Rules nor the Idaho Rules of Civil Procedure governing the discovery process thereunder contemplate contemporaneous discovery by the Director or Department staff without the attendant statutory authority therefor. *See* IDAPA 37.01.01.520-532; I.R.C.P. 26-37. Neither the Director, nor the Department, is a party. IDAPA 37.01.01.150.

Furthermore, Rule 600 specifically addresses the role of Department staff as it relates to evidence in a contested case proceeding. It states that “[t]he agency’s experience, technical competence and specialized knowledge may be used in *evaluation of evidence*.” IDAPA 37.01.01.600 (emphasis added). The Procedural Rules do not contemplate the gathering, compilation, or organization of factual information from the parties by Department staff before that information becomes evidence. The proper role of the Department staff in this proceeding, if any, is, upon the Director’s request, to evaluate the evidence that has been gathered, compiled, organized, and presented *by the parties at a hearing* and properly admitted, as evidence, into the hearing record by the Director.

The gathering, compilation, and organization of information from the Petitioners by Department staff (instead of the parties themselves) in this case risks an incomplete evaluation of the facts, or worse, the development of a bias in favor of the information collected from the Petitioners by Department staff. For example, Department staff might informally visit the properties of the Petitioners, informally meet with the Petitioners or tour the properties with a knowledgeable person, ask questions staff deems relevant, neglect to ask questions that arguably should be asked or fail to ensure complete answers by the Petitioners, observe and take notes about what staff deems relevant, assemble information provided by the Petitioners, and organize the presentation of such information for Department staff’s use or, ultimately, the Director’s use.

In doing so, Department staff will be collecting and generating information, analyses, and impressions that may form the basis of its eventual “evaluation of evidence” in accordance with Rule 600.

Sources of this information, however, may not ever become part of the hearing record for any number of reasons. And such actions improperly insert the Department staff into the role of a special assistant to the Petitioners. Under Rule 600 and fundamental due process requirements, Petitioners must provide the “evidence” to the presiding officer in a “hearing” and allow the Respondents to object to admissibility and subject it to cross-examination if the evidence is testimony. Then, but only through the truth sieve of the hearing process, the “agency’s experience, technical competence and specialized knowledge may be used in evaluation of evidence.” IDAPA 37.01.01.600.

In light of the potential importance, and utility of Department staff’s specialized expertise to the Director’s ultimate resolution of these matters, the risks weigh heavily in favor of strict adherence to the Procedural Rules. Again, such risks include, but are not necessarily limited to: (i) information beyond the scope of hearing evidence forming the basis of any staff memoranda employing Department staff’s specialized knowledge and expertise, and (ii) Sun Valley or any other possible Respondents not having a full and fair opportunity to observe and pose legitimate evidentiary objections to the information gathered by Department staff, to ensure completeness and accuracy, during any informal meetings or discussions involving Petitioners and Department staff.

Importantly, Department staff is conducting all of the foregoing gathering, assembly, and organization of information without adequate notice to, or participation by, Sun Valley. After issuance of the Department’s Discovery Requests and prior to the Memoranda

Requests, Sun Valley voiced its due process concerns about this anticipated use of Department staff during the Pre-Hearing Conference. *See* Partial Transcript of June 3, 2015 Pre-Hearing Conference at 14-16, Exhibit A to the Affidavit of Counsel. The concerns were dismissed and appropriate procedural protections rejected.³ *See id.* at 16. Under the plain language of Rule 600, however, Department staff has no authority to conduct this investigation of, and organization of, facts to assist the Petitioners in this contested case proceeding. Such actions are not “evaluation of evidence.” IDAPA 37.01.01.600.

The purpose of this motion is not to preclude Department staff from evaluating *evidence*. The purpose of this motion is to preclude the Department from gathering, compiling and organizing *facts, information, and observations from and for the Petitioners that may or may not ultimately be evidence* admitted in the appropriate forum before the Director. The Petitioners and the Respondents, respectively, are responsible for that process during the course of discovery and the presentation of their respective cases at a contested case hearing. As he properly recognized, the Director is responsible for admitting and considering evidence at such hearing and deciding the ultimate issues in the case. *See* Partial Transcript of June 3, 2015 Pre-Hearing Conference at 17, Exhibit A to the Affidavit of Counsel (“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.”) (emphasis added). Department

³ The Director suggested that providing such protections was “too onerous.” Sun Valley questions whether it would really be too onerous if there was only one petitioner, as opposed to 39 petitioners. Surely a process that would allow adequate protections for junior ground water holders during the gathering of information could be maintained in such a circumstance. Again, by virtue of the Petitioners’ inappropriate “coalition” approach, and in light of the complexity of this water delivery call, the Petitioners have effectively reduced or removed certain protections to which Sun Valley and other ground water users would otherwise be entitled in the name of efficiency and the Director’s concerns over undue burden.

staff, should the Director find it useful, would be responsible for evaluating the *admitted evidence* using the Department staff's experience, technical competence, and specialized knowledge. Employing Department staff, before the hearing, to collect data and information from the Petitioners is not contemplated by the Procedural Rules and prejudices the rights of Sun Valley and all potential Respondents (who do not, as the proceedings presently dictate, receive the benefit of reliance upon the Department to aid in the collection and preparation of their evidence).

Sun Valley respectfully requests that the Director require Department staff to immediately cease any information gathering from the Petitioners and allow the development of the record to occur in accordance with the Procedural Rules, via discovery, motion practice and a hearing where all parties have the opportunity to present testimony and information that ultimately may be admitted as evidence.

2. The Department Should Not Engage In The Analysis Or Evaluation Of Information Obtained From The Petitioners Before Such Information Is Actually Admitted As Evidence In The Hearing Record

The approach currently underway substantially prejudices Sun Valley's rights by using Department staff to conduct "evidence" gathering, assembly, and organization for the benefit of the Petitioners, and without Sun Valley's participation. Then, under the Memoranda Requests, the Department staff will proceed to discuss, analyze, and evaluate "responses and submittal of additional information" by the Petitioners to "assist" the Director "in determining whether the holders of senior water rights are suffering material injury and using water efficiently and without waste as required by the Department's Conjunctive Management Rules." See Department's Discovery Requests; Memoranda Requests at 3 (Surface Water Delivery Systems ¶¶ 1-4; Hydrology, Hydrogeology and Hydrologic Data ¶¶ 3-4); *see also* Partial

Transcript of June 3, 2015 Pre-Hearing Conference at 19, Exhibit A to the Affidavit of Counsel (the technical memoranda will “lay[] out the opinions of Department technical staff related to those relationships”). Use of Department staff in this one-sided evaluative process is highly prejudicial, violates Sun Valley’s due process rights, and directly conflicts with the protections of the Idaho Administrative Procedures Act. If this process continues in the present form, Department staff’s objectivity and neutrality will vanish and a final decision by the Director that relies upon, or considers staff evaluation, will prove fatally compromised.

In other words, by virtue of Department staff’s use of information it gathers directly from the Petitioners for the preparation of technical memoranda that may be officially noticed under Rule 602, such actions constitute the offering and taking of evidence by the Director outside the scope of a formal contested case hearing. That is an unjust result and deprives Sun Valley of the procedural protections contemplated by the Department’s Procedural Rules and due process of law.

Furthermore, contrary to the language of the Memoranda Requests, at this stage of a contested case proceeding, Rule 602 *does not* “allow the presiding officer to take official notice of technical or scientific facts within the Department’s specialized knowledge, including staff memoranda and data” Particularly here, where the “staff memoranda and data” do not even exist, there is nothing in Rule 602 that allows this approach.

The authority of the presiding officer to “take official notice” is restricted by the first sentence of Rule 602. It proscribes the type of information that may be used by the presiding officer in taking “official notice” in a contested case proceeding. This language reads:

Official notice may be taken of any facts that could be judicially noticed in the courts of Idaho and of generally recognized technical or scientific facts within the agency’s specialized knowledge.

IDAPA 37.01.01.602; *see also* IDAHO CODE § 67-5251(4).

The standards for judicial notice in Idaho courts are set forth in Idaho Rule of Evidence 201 and the appellate cases construing this rule. Other than certain facts that may have been addressed in the SRBA, very little information set forth in the Requests could satisfy the standards for judicial notice in Idaho courts. Consequently, aside from certain adjudicated elements of the Petitioners' water rights, that judicial notice provision of Rule 602 does not apply here.

Turning to the second provision of Rule 602's first sentence, it allows "[o]fficial notice" to "be taken of any facts . . . of generally recognized technical or scientific facts within the agency's specialized knowledge." Such language identifies the type of "facts" that may be officially noticed. Moreover, the language contemplates that the "generally recognized technical or scientific facts" already exist, *see id.* ("*within the agency's specialized knowledge*"), and are not generated by Department staff in a one-sided fact gathering and subsequent "evidence" evaluation process that produces new staff memoranda prior to the hearing officer receiving any "evidence." Any contrary interpretation ignores the restrictive phrase "generally recognized."

It is self-evident that most of the facts to be gathered from the Petitioners and assembled, organized, and evaluated by the Department staff will not consist of "generally recognized technical or scientific facts within the agency's specialized knowledge." Only if the information meets this specific criteria can the presiding officer take "official notice" of the items. Moreover, the "evaluation of evidence" by the Department staff, using Rule 600's language, cannot justify taking "official notice" of the staff memoranda requested in the Memoranda Requests.

Quite simply, the requested staff memoranda will be the culminating result of a major fact gathering and analysis project, undertaken outside the scope of a contested case hearing, that performs tasks and bears burdens properly performed and borne by the Petitioners. In essence, the staff memoranda will constitute expert reports, based upon facts and information collected from the Petitioners, without the truth sieve of a contested hearing. The expert reports will be generated by the very agency charged with objectivity and the duty to provide due process protections to all parties in this contested case. Assuming the Director elects to consider the contemplated staff memoranda as part of the hearing record, proceeding in this fashion fatally compromises the validity of any final decision by the Director.

Instead of proceeding in this fashion, the information provided by the Petitioners in response to the Department's Discovery Requests should be shared with the Respondents and no staff memoranda should be developed at this stage of the contested case proceeding. Utilizing the discovery process, the parties should proceed to develop the information that will ultimately be presented in the contested case hearing. The presiding officer then may request that the "agency's experience, technical competence and specialized knowledge [] be used in the evaluation of the evidence" under Rule 600, but the evaluation must be an **evaluation of evidence** and not information independently procured by Department staff. Such approach preserves the objectivity of Department staff in its role as the Director's technical advisor, and avoids substantial prejudice to the rights of Sun Valley.


III. CONCLUSION

The Department and the Director should stop, take a step back, and modify the present approach in this contested case proceeding, as suggested above. Procedural due process is essential. The integrity of this proceeding and the validity of any final decision in this matter

are at risk. Disregard of fundamental rights of Sun Valley cannot continue. Haste is no justification for ignoring the procedural protections required under the law.

DATED this 1st day of July, 2015.

MOFFATT, THOMAS, BARRETT, ROCK &
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of July, 2015, I caused a true and correct copy of the foregoing **SUN VALLEY COMPANY'S MOTION TO MODIFY/ WITHDRAW "REQUEST FOR STAFF MEMORANDA" AND MAY 20, 2015 "REQUEST FOR ADDITIONAL INFORMATION"** to be served by U.S. Mail and addressed to the following:

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

SMOKEY DOME LLC
PO BOX 333
FAIRFIELD ID 83327

SOUTH COVE VENTURES LLC
PO BOX 333
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STARWEATHER OWNERS ASSN INC
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STEVEN C FUNK
90 FREEDOM LOOP
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SV RANCH LLC
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THOMAS & AMY MISTICK
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37-B GROUNDWATER GROUP
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