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DEPARTMENT OF
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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

**IN THE MATTERS OF THE BIG WOOD
RIVER AND LITTLE WOOD RIVER
DELIVERY CALLS**

**Docket Nos. CM-DC-2015-001
CM DC-2015-002**

**JOINT RESPONSE IN OPPOSITION
TO PETITIONERS' MOTION FOR
ENLARGEMENT OF TIME**

COME NOW the City of Bellevue ("Bellevue"), the City of Hailey ("Hailey"), and the Sun Valley Company ("SVC") by and through their respective attorneys of record, pursuant to Rule 270.02 of the *Rules of Procedure of the Idaho Department of Water Resources*, IDAPA 37.01.01 *et seq.* ("Procedural Rules"), and file this *Joint Response in Opposition to Petitioners' Motion for Enlargement of Time*. As will be set forth below, Petitioners' *Motion for Enlargement of Time* should be denied because it was not timely filed.

I. INTRODUCTION

The Big Wood & Little Wood Water Users Association (collectively referred to herein as “Petitioners”) sent letters to the Director of the Idaho Department of Water Resources (“Director” or “IDWR”) on February 23, 2015, alleging material injury, caused by junior-priority ground water pumping, seeking administration under the Department’s *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 *et seq.* (“CM Rules”). On March 12, 2015, Petitioners filed their *First Amended Petition for Administration of Water Rights Under the Prior Appropriation Doctrine* (IDAPA 37.01.01.305), for purposes of adding information to the February 23, 2015 letters sent to the Director. On June 22, 2015, Petitioners filed a *Motion to Allow Amendment to the Pleadings* (IDAPA 37.01.01.305) (“Motion to Allow”). To date, no amendments have been filed by Petitioners pursuant to the Motion to Allow; consequently, it is unknown what Petitioners are presently seeking in the delivery calls. Despite not fully articulating their claims and the basis for them, Petitioners have continually pushed the Director for an expedited hearing. This prejudices the due process rights of the junior-priority ground water users, such as Bellevue, Hailey, and SVC.

Believing that Petitioners are still seeking curtailment of junior-priority water rights, and wanting to understand the bases of the calls and to narrow the issues to be tried at the tentative January 11, 2016 hearing,¹ the following legal steps have been taken by Bellevue, Hailey, and SVC:

- May 19, 2015 –SVC propounded discovery upon Petitioners;²

¹ To date, a hearing schedule has not been entered by the Director. In a letter dated, June 11, 2015, the Director “asked the parties to reserve the dates of **January 11-22, 2016**, for a hearing in the contested cases. I will execute an official notice of hearing and serve the notice at a later date.” Bold in original.

² On June 2, 2015, Petitioners moved the Director for a protective order against SVC’s discovery requests. On June 16, 2015, SVC opposed the motion. On July 2, 2015, the Director denied Petitioners’ motion for protective order. *Order Denying Motion for Protective Order; Scheduling Order* (July 2, 2015). Despite the Director’s denial of Petitioners’ motion for protective order, and Petitioners’ insistence that its delivery calls be expedited, Petitioners

- June 25, 2015 – SVC filed its *Motion to Dismiss Contested Case Proceedings*;
- June 26, 2015 – Hailey and Bellevue filed their *Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls*; and
- June 26, 2015 – Bellevue and Hailey filed their *Joint Motion to Modify Request for Staff Memorandum*.

Emphasis added (collectively, the motions filed by Bellevue, Hailey, and SVC on June 25, 2015 and June 26, 2015 will be referred to as “the *June 25 & 26 Motions*.”).

On July 15, 2015, Petitioners filed a *Motion for Enlargement of Time (IDAPA 37.01.01.270.02)* (“*Motion for Enlargement of Time*”). Because the *Motion for Enlargement of Time* was filed well after the fourteen-day response time governed by IDWR’s Rules of Procedure for responding to motions, IDAPA 37.01.01.270, and because Bellevue, Hailey, and SVC are prejudiced thereby, the *Motion for Enlargement of Time* must be denied.

II. ARGUMENT

A. Petitioners’ Motion for Enlargement of Time is Untimely and Must be Denied

When the *June 25 & 26 Motions* were filed, Petitioners had “fourteen (14) days” in which to answer:

270. ANSWERS – DEFINED – FORM AND CONTENTS – TIME FOR FILING

All pleadings responding to the allegations or requests of applications or claims or appeals, complaints, petitions, or motions are called “answers.”

01. Answers to Pleadings Other than Motions. Answers to applications, claims, appeals, complaints, or petitions when required to be filed by provision of statute, rule, or order must be filed and served on all parties or record within twenty-one (21) days after service of the pleading being answered

have yet to respond to SVC’s discovery. On July 16, 2015, SVC filed a *Motion to Compel* with IDWR, indicating the “responses are a month overdue. Because of the condensed time-frame for these proceedings and the large number of water rights at issue, Sun Valley does not have the luxury of allowing discovery . . . to continue to go unanswered, and is left with no recourse except to bring the matter before the Director.” *Sun Valley Company’s Motion to Compel* at 3.

02. Answers to Motions. Answers to motions may be filed by persons or parties who are the object of a motion or by parties opposing a motion within fourteen (14) days of the filing of the motion.

IDAPA 37.01.01.270 (emphasis added).

Consequently, Petitioners' answers were required to be served and filed by July 9, 2015, and July 10, 2015, respectively. There can be no doubt Petitioners understood they were responding to "motions" within the meaning of IDAPA 37.01.01.270.02, as the caption in Petitioner's *Motion for Enlargement of Time* expressly cited "*IDAPA 37.01.01.270.02.*" *Motion for Enlargement of Time* at 1 (italics in original). Because the *Motion for Enlargement of Time* was not filed until July 15, 2015 – twenty (20) days after SVC's *Motion to Dismiss Contested Case Proceedings* motion, and nineteen (19) days after the Bellevue and Hailey's *Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls* and *Joint Motion to Modify Request for Staff Memorandum* – Petitioners are untimely and the requested relief must be denied by the Director.

B. Petitioners' Motion for Enlargement of Time Fails to Show Good Cause and Must be Denied

In addition to being untimely, and providing no answers to the *June 25 & 26 Motions*, Petitioners requested an extension of time to answer:

The Petitioners hereby request the Director issue an order allowing Petitioners to file answers to the above stated motions no later than July 31, 2015.

In support thereof, Petitioner's [sic] state that multiple motions and joinders by multiple parties were filed in a short period of time. The subject motions were supported by points of authority and/or supporting memorandums. A couple of the parties joining in, or responding to, the subject motions have put forth additional argument or authority. Petitioners require additional time to appropriately respond to the above stated motions and the requested relief should not substantially delay entry of the Director's decision.

Motion for Enlargement of Time at 2 (emphasis added).

IDAPA 37.01.01.270.02 allows extensions of time to be requested based on a showing of “good cause” for needing additional time to answer: “The time to file an answer to a motion may be enlarged or shortened by the presiding office upon a showing of good cause by a party.”

IDAPA 37.01.01.270.02. Even if the *Motion for Enlargement of Time* was timely, which it was not, the Motion is devoid of any good cause.

While never using the words “cause” or “good cause,” the only purported reason advanced by Petitioners for an enlargement of time were joinders that allegedly “put forth additional argument or authority.” *Motion for Enlargement of Time* at 2. The position is without merit. IDWR Rule of Procedure 210 allows parties to “adopt or join any other party’s pleading.” IDAPA 37.01.01.210. Joinders must be filed within “fourteen (14) days” of the motion that is being adopted: “Unless otherwise provided by the presiding officer upon a showing of good cause by a party, when a motion has been filed, all parties joining in, answering to or responding to the motion(s) will have fourteen (14) days from the time of filing the motion in which to respond.” IDAPA 37.01.01.565. Like Procedural Rule 270.02, Rule 565 makes clear that the time to file a document to a motion – this expressly includes joinders and answers – is “fourteen (14) days.” IDAPA 37.01.01.270.02; IDAPA 37.01.01.565. In this case, timely joinders to the motions were filed by: James P. Speck, Esq., on behalf of his clients; the City of Ketchum; the City of Fairfield; AF 2014 Trust & Smith and Paen Trusts; and Water District 37-B Groundwater Group (“*WD37-B Joinder*”).

With the exception of the *WD37B Joinder*, each joinder states very simply, in a few sentences or less, which party is joining which motion. See e.g. *Joinder in and Support of Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Call* (July 1, 2015), filed by James P. Speck, Esq., on behalf of his clients (“The Respondents listed on Attachment A, by

and through their attorney of record . . . pursuant to IDAPA 37.01.01.210, hereby join in and fully support the Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls filed herein by Respondents, City of Bellevue and City of Hailey.”). As to the *WD37-B Joinder*, the document is three pages long, but does nothing more than provide some context as to who the members of WD37-B are,³ and why they decided to join the cities of Hailey and Bellevue in their *Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls*.

There is no substance in joinders that requires an answer. That is why joinders share the same fourteen-day filing deadline under IDWR’s Procedural Rules as answers and responses. IDAPA 37.01.01.565. The only documents Petitioners were required to answer were the *June 25 & 26 Motions*. The joinders do not provide any cause, let alone good cause, for granting Petitioners’ untimely *Motion for Enlargement of Time*.

C. Petitioners’ Actions in these Proceedings Belie the Claimed Exigency and Prejudice the Junior-Priority Ground Water Users who are Invested in Protecting their Water Rights from Curtailment

From the beginning, Petitioners have asserted that pumping by junior-priority ground water users causes material injury to their members’ senior-priority surface water rights, yet have done nothing more than claim material injury because their members are not receiving the sum total of their surface water rights. Without more, Petitioners’ delivery calls cannot stand: “As this Court concluded previously, the total combined decreed quantity of the natural flow and storage rights can exceed the amount of water necessary to satisfy in-season demands Simply put, pursuant to these factors a finding of material injury requires more than shortfalls to

³ This can be understood, because simultaneous with the July 10, 2015 filing of the *WD37-B Joinder*, counsel for the WD37-B members entered a *Notice of Appearance* in the contested cases. Until July 10, 2015, the WD37-B members had not been represented by counsel, and had not articulated their interests.

the decreed or licensed quantity of the senior right.” *Order on Petition for Judicial Review*, Case No. 2008-551, p. 26 (Fifth Jud. Dist. July 24, 2009).

Apparently presupposing that the Director will find material injury due to the perceived shortfall, Petitioners have consistently demanded an evidentiary hearing be held in 2015, so as to have a curtailment order in place before the start of the 2016 irrigation season. While not agreeing to set a hearing in 2015, the Director has tentatively set an evidentiary hearing to commence on January 11, 2016. In their *Motion for Enlargement of Time*, Petitioner claims “the requested relief should not substantially delay entry of the Director’s decision.” *Motion for Enlargement of Time* at 2.

While Petitioners may not be concerned about a delay in the Director’s decision – and in fact may be using delay as a tactic to prevent junior-priority ground water users from understanding the merits of the delivery calls – Petitioners do not bear the burden of defending against the delivery calls by clear and convincing evidence. *In re Distribution of Water to Various Water Rights Held by or for Ben. of A&B Irr. Dist.*, 155 Idaho 640, 653, 315 P.3d 828, 841 (2013) (defenses to delivery calls must be established by clear and convincing evidence). With the evidentiary hearing tentatively scheduled to commence on January 11, 2016, each missed deadline by Petitioners substantially prejudices junior-priority ground water users’ ability to prepare their defenses.

Prejudice to junior-priority ground water users is apparent in Petitioners’ non-answers to every substantive request and motion made by Bellevue, Hailey, and SVC.⁴ In response to

⁴ Another example of Petitioners’ inability to provide any substance to their delivery calls is seen in Petitioners’ non-response to the Director’s May 20, 2015 letter requesting additional information from Petitioners. Bellevue, Hailey, and SVC have articulated their own problems with the Director’s June 12, 2015 *Request for Staff Memoranda*. Compare *Joint Motion to Modify Request for Staff Memorandum* (June 26, 2015) with *Sun Valley Company’s Motion to Modify/Withdraw “Request for Staff Memoranda” and May 20, 2015 “Request for Additional*

SVC's May 19, 2015 *First Set of Discovery Requests to the Big Wood and Little Wood Water Users Association and its Members*, Petitioners, on June 2, 2015, moved the Director for a protective order. *Petitioners' Motion for Scheduling Order and Motion for Protective Order*. The irony of wanting an expedited hearing, yet moving for a protective order, was not lost on the Director, as he denied the motion. *Order Denying Motion for Protective Order* (July 2, 2015). Nevertheless, Petitioners have still not answered SVC's discovery.

Now, as shown in the untimely *Motion for Enlargement of Time*, Petitioners have again prevented junior-priority ground water users from understanding the merits of the claims, and continue to demonstrate their lack of understanding of the seriousness of these proceedings. Bellevue, Hailey, and SVC, on the other hand, appreciate the seriousness of invoking the CM Rules and the jurisdiction of IDWR, and they have retained experienced water counsel, and hydrology experts at significant expense to defend their rights. Bellevue, Hailey, and SVC are invested in ensuring the contested cases proceed to a timely and orderly conclusion. Granting Petitioners' requested enlargement of time to respond to the pending motions thwarts this goal.

Petitioners either have no information supporting its claims of material injury, or are purposefully withholding information in an attempt to prevent junior-priority ground water users from developing a defense to the delivery calls in time for the tentative January 11, 2016 evidentiary hearing.⁵ Under either rationale, Petitioners' claimed exigency and need for an expedited hearing schedule is baseless.

III. CONCLUSION

Information" (July 1, 2015). To date, based on communication with counsel for IDWR, Petitioners have not provided any information in response to the Director's request.

⁵ Under these circumstances, it is difficult to conceive how a fair hearing for junior ground water users could be held as early as the tentative hearing date.

Based on the foregoing, Bellevue, Hailey, and SVC respectfully request that the Director enter an order: (1) denying Petitioners' *Motion for Enlargement of Time* as untimely; and (2) order Petitioners foreclosed from filing answers to SVC's June 25, 2015 *Motion to Dismiss Contested Case Proceedings*, Hailey and Bellevue's June 26, 2015 *Joint Motion to Designate ACGWS by Rulemaking and to Dismiss Delivery Calls*, and Bellevue and Hailey's June 26, 2015 *Joint Motion to Modify Request for Staff Memorandum*.

DATED this 22nd day of July, 2015.

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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:

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