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DEPARTMENT OF  
WATER RESOURCES

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF PETITION FOR  
ADMINISTRATION BY BIG WOOD &  
LITTLE WOOD WATER USERS  
ASSOCIATIONS

)  
 ) **Docket No. CM-DC-2017-001**  
 )  
 ) **MOTION TO DISMISS OR IN THE**  
 ) **ALTERNATIVE MOTION TO STAY**  
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This Motion to Dismiss or in the Alternative Motion to Stay is brought by the South Valley Ground Water District. The basis for these alternative motions is set forth below.

The South Valley Ground Water District is a ground water district organized under the laws of the State of Idaho. I.C. § 42-5201 et seq. South Valley GWD was formed in anticipation of and to respond to the Big Wood and Little Wood Water Users Association's ("Association") demand for priority administration filed in Water District 37 contained in a letter to the Director dated February 23, 2015 ("2015 Proceeding"). South Valley GWD represents the interests of ground water users located primarily in the Triangle area of Blaine County. Its members are within the area that the Association asserts is an area of common ground water supply that allegedly affects their surface water rights. The Association now asserts a new demand for

priority administration of water rights in Basin 37, in a Petition filed with the Department on or about March 6, 2017 (“2017 Petition”).

### **PRIOR PROCEEDINGS**

The 2015 proceeding was initiated by a letter from the Association’s counsel to the Director. The Director informed various ground water users of this demand for administration, and advised them that he would treat the request for administration as a delivery call under the Conjunctive Management Rules. The Director established two separate case proceedings, one for the Little Wood and one for the Big Wood. IDWR Docket Nos. CM-DC-2015-105 and CM-DC-2015-002. Sun Valley Company moved to dismiss the delivery calls for failure to comply with the Conjunctive Management Rules. The Director denied Sun Valley Company’s motion holding that the calls were governed by Rule 40 of the Conjunctive Management Rules. A Motion for Reconsideration was filed and denied. Sun Valley Company filed a Petition for Judicial Review with the district court by stipulation, and that petition was amended twice. The second amended petition was heard by the district court in March 2016.

In April 2016, the district court held that the Association had not complied with the Conjunctive Management Rules and that Rule 30 of the Conjunctive Management Rules rather than Rule 40 applied to the circumstances existing in Basin 37. The court explained that there must be determination of the area of common ground water supply before the Director could process the Association’s delivery call. The court held that the authority to process and determine the area of common ground water supply existed under Rule 30, but not under Rule 40 because Rule 40 presupposed that such a determination had already been made. The court held that the seniors had failed to satisfy both the filing and service requirements of Rule 30 to the prejudice of the substantial rights of the parties objecting to the proceeding. The court vacated

the Director's order denying Sun Valley Company's Motion to Dismiss and remanded to the Department.

After the time period for appeal had expired, the case was remanded to the Director, and on June 22, 2016, the Director dismissed the 2015 proceedings.

### **CURRENT 2017 PROCEEDING**

On March 6, 2017, the Association filed a Petition for Administration with the Department. The Association asserts that its Petition is brought pursuant to Rules 30 and 41 of the Conjunctive Management Rules. IDAPA 37.03.11.030 and 37.03.11.041. The Petition was only 2-1/2 pages. It alleges, in a conclusory fashion, material injury without describing the basis for that material injury. The Petition purports to be supported by Exhibits A-F. Exhibits A and B appear to comply with the requirement of IDAPA 37.03.11.030.01.a, describing the water rights of the petitioners (although that assumption may not be current in light of the grounds asserted in the Association's May 3, 2017 Motion for Protective Order). Exhibit C purports to describe the area of common ground water supply as required by 37.03.11.030.01.d.<sup>1</sup> Exhibit D to the Petition lists the names and water right number of the ground water users alleged to be causing material injury, purporting to comply with IDAPA 37.03.11.030.01.b, although the Petition does not allege that the Association made a reasonable determination or search of public records to support that list of ground water users.

Exhibit E is a copy of a model run dated December 9, 2016. Exhibit F is a list of studies which the Association asserts "may contain information" supporting its claim of material injury. Petition, p. 2. In other words, the Association merely pointed the water users to information in the hands of the Director or the USGS. Most of these materials were assembled by the Director

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<sup>1</sup> As explained by the district court in the 2015 proceeding, a Rule 30 proceeding is the mechanism for determining an area of common ground water supply. That determination has not yet been made.

during the 2015 proceeding. Some of the information referenced in the 2017 Petition includes materials supplied by the Association in response to requests from the Director. That information was in large part incomplete, and according to the Association was still “in the process of being assembled.” The Association has made no attempt to update the incomplete information supplied during the 2015 proceeding. It merely refers to the information that the Association supplied two years ago, which was admittedly incomplete.

### **LEGAL AUTHORITY FOR DISMISSAL OR STAY**

Rule 30 of the Conjunctive Management Rules is clear and unambiguous. IDAPA 37.03.11.30.01.c, requires a petitioner to provide “all information, measurements, data or study results available to the petitioner to support the claim of material injury.” The rule does not allow the Association to supply only some of the information which supports the Petition, nor does it allow them to dribble in information about their water use and crop use. There is no excuse for the Association’s failure to provide and serve the parties with updated information from the incomplete information provided in 2015. Indeed, in the 2015 delivery call the Association was ordered to respond to Sun Valley Company’s discovery requests and provide additional information. That order granting Sun Valley’s Motion to Compel was issued following the Association’s incomplete response to request for information from the Director. As far as the South Valley GWD is aware, it has never received, nor has the Association ever provided, the additional information sought by Sun Valley Company in its prior requests for discovery.

The district court made it clear in the 2015 proceeding that one of the significant deficiencies in the 2015 proceeding was the failure of the Rule 40 process to provide the parties who might be subject to the delivery call with sufficient notice of the nature of the claims being

asserted. Therefore, the court required the Association to comply with Rule 30 if it wished to proceed. In response, it appears that the Association simply put together a list of reference materials and submitted it hoping that the Director would find that sufficient. However, the Association has still failed to meet its burden of providing all information in its possession which relates to the claim of material injury. The nature of the use of the water by the persons making delivery calls is an important element of making a determination of material injury. Rule 42 of the Conjunctive Management Rules requires the Director to consider an extensive list of factors when a claimant has asserted a material injury, including:

- a) The amount of water available in the source;
- b) The effort or expense of the holder in diverting the water;
- c) The quantity of water, timing of water availability and cost to the senior of diverting the water;
- d) Rate of diversion, acreage, annual volume, system diversion and conveyance efficiency and methods of irrigation;
- e) The amount of water diverted compared to the rights;
- f) Presence of measuring and recording devices; and
- g) Diversion and conveyance efficiency and conservation practices.

IDAPA 37.03.11.042.a-g. Thus, “the Director shall consider whether the petitioner making a delivery call is suffering material injury to a senior priority water right and is diverting and using water without waste, and in a manner consistent with the goal of using water efficiency and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42.” *Rangen, Inc. v. IDWR*, 160 Idaho 119, 127, 369 P.3d 897, 909 (2016).

Many, if not all, factors the Director must consider are in the hands of the persons petitioning for a delivery call, as those factors include a searching examination of the senior’s use and conveyance system. See *Order, In the Matter of Distribution of Water to Various Water*

*Rights Held by or for the Benefit of A&B Irrigation District, et al.*, p. 31, ¶ 38a-j (February 14, 2005).

Yet, the material provided by the callers does not provide adequate information from which the South Valley GWD and its members can make a determination as to the claim of material injury. The law is clear, the callers must provide “all” information supporting their claims. Having failed to do so, the Petition should be dismissed. In the alternative, the Association’s Petition should be stayed by the Director until the Association provides all information about its members’ water use, crop use, water deliveries and other water supplies over the past fifteen (15) years. *Id.* In the absence of that information, the delivery call proceedings cannot move ahead.

The Association has now made it clear that it does not intend to comply and provide the parties or the Department with relevant information. *See Petitioner’s Motion for Protective Order* (May 3, 2017). Since the Association, as Petitioner, isn’t interested in complying with Rule 30 or its discovery obligations, the Petition should be dismissed or at least stayed until they do comply.

DATED this 8<sup>th</sup> day of May, 2017.

**BARKER ROSHOLT & SIMPSON LLP**



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8<sup>th</sup> day of May, 2017, I served true and correct copies of the foregoing upon the following by the method indicated:

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