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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 THE)	Case No. CM-DC-2017-001
PETITION FOR ADMINISTRATION)	
BY BIG WOOD & LITTLE WOOD)	PETITIONER'S RESPONSE TO SOUTH
WATER USERS ASSOCIATION)	VALLEY GROUND WATER DISTRICT'S
)	MOTION TO DISMISS OR IN THE
)	ALTERNATIVE MOTION TO STAY
)	(IDAPA 37.01.01.565)

COMES NOW, Petitioner, the Big Wood & Little Wood Water Users Association, ("Association") by and through its attorney, Joseph F. James, of Brown & James, and hereby responds to South Valley Ground Water District's Motion to Dismiss or in the Alternative Motion to Stay ("Motion").

INTRODUCTION

The Association filed a Petition for Administration on March 6, 2017. On March 24, 2017, Sun Valley Company filed a Motion for Leave to Conduct Discovery. The Director issued a Notice of Prehearing Conference; Order Authorizing Discovery, on March 31, 2017. The prehearing conference was held on May 11, 2017. Sun Valley Company's First Set of Discovery Requests to Big Wood & Little Wood Water Users Association and its Members was served on April 11, 2017. The South Valley Ground Water District ("SVGWD") filed a Petition to Intervene on April 18, 2017. The director granted SVGWD's motion on April 27, 2017. Petitioner's Motion for Protective Order was filed on May 3, 2017. On May 8, 2017, SVGWD filed a Motion to Dismiss or in the Alternative Motion to Stay. The City of Bellevue, the Galena Ground Water District, Dean R. Rogers, Inc., the City of Ketchum, and the City of Hailey have joined in the Motion to Dismiss or in the Alternative Motion to Stay. Sun Valley Company has joined in the Motion to Dismiss.

PETITIONER'S RESPONSE TO SVGWD'S
MOTION TO DISMISS OR IN THE
ALTERNATIVE MOTION TO STAY

ANALYSIS

The South Valley Ground Water District ("SVGWD") argues that the Association's pending Delivery Call should be dismissed or stayed for failure to comply with Rule 30 of the Conjunctive Management Rules of Surface and Ground Water Resources ("CM Rules"). The SVGWD appears to make a two pronged argument. First, that the Association has failed to meet the pleading requirements of Rule 30 of the CM Rules, focusing primarily on CM Rule 30.01.c. Second, that the Association does not intend to comply with certain discovery obligations.

Compliance with Rule 30 of CM Rules

Rule 30 of the CM Rules provides in part as follows:

1. **Delivery Call (Petition).** When a delivery call is made by the holder of a surface or ground water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) the petitioner is suffering material injury, the petitioner shall file with the Director a petition in writing containing, at least, the following in addition to the information required by IDAPA 37.01.01, "Rules of Procedure of the Department of Water Resources," Rule 230:

a. A description of the water rights of the petitioner including a listing of the decree, license, permit, claim or other documentation of such right, the water diversion and delivery system being used by petitioner and the beneficial use being made of the water.

b. The names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of public records.

c. All information, measurements, data or study results available to the petitioner to support the claim of material injury.

d. A description of the area having a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated.

IDAPA 37.03.11.030.01.

The SVGWD concedes that the pleading requirements of CM Rule 30.01.a have been met, and states: "Exhibits A and B [of the Petition] appear to comply with the requirement of IDAPA 37.03.11.030.01.a, describing the water rights of the petitioners." *Motion* pg. 3. Also the SVGWD does not specifically challenge the sufficiency of the Association's petition as to the pleading requirements of CM Rule 30.01.b and CM Rule 30.01.d. *Id.* The SVGWD does claim that the pleading requirements of CM Rule 30.01.c were not met. *Id.*

The Association addressed the requirements of CM Rule 30.01.c, in its Petition for Administration. The Association provided all information in its possession at the time of filing its Petition for Administration which supported its claim. In its motion, SVGWD appears to claim that the pleading requirements of CM Rule 30.01.c require the Association to provide all information which may be submitted or introduced at the hearing on the contested case, or which may support any affirmative defense claimed by a respondent. As stated in its motion, SVGWD asserts that CM Rule 30 requires the Association to provide all information which “relates to the claim of material injury.” *Motion* pg. 5 (emphasis added). The Association can find no authority supporting this position.

The SVGWD cites to CM Rule 37.03.11.042.a-g. *Id.* However, this rule does not create a pleading requirement, but rather provides a list of factors to be considered in determining material injury. See IDAPA 37.03.11.042.a-g. The SVGWD also cites to *Rangen, Inc. v. IDWR*. *Motion* pg. 5. In *Rangen, Inc. v. IDWR*, the Idaho Supreme Court quoted CM Rule 40.03 which addresses issues to be considered by the Director in determining whether water rights will be regulated pursuant to a delivery call made by senior surface water users against junior groundwater rights in an organized water district. *Rangen, Inc. v. IDWR*, 160 Idaho 119-20, 127, 369 P.3d 897, 909-10 (2016). The Supreme Court recognized the Director has some discretion to balance countervailing considerations in a delivery call, such as the absolute right to use a decreed water right and an obligation not to waste it. *Id.* *Rangen, Inc. v. IDWR* does not create a pleading standard.

Likewise, the Director’s *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.*, (February 14, 2005), does not create a pleading standard. On January 14, 2005, a coalition of irrigation districts and canal companies (“Surface Water Coalition”) filed a letter with the Department seeking administration of water rights in Water District No. 120 pursuant to CM Rule 40. On the same day, the Surface Water Coalition filed a petition with the Department seeking administration of certain water rights located outside an organized water district, a portion of which were located within a ground water management area, pursuant to CM Rules 30 and 41. Based upon the Surface Water Coalition’s letter, the Surface Water Coalition’s petition, as well as a petition to intervene by the Idaho Ground Water Coalition, the Director concluded that members of the Surface Water Coalition would likely suffer material injury during the 2005 irrigation season. *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.*, pp. 1 & 30, (February 14, 2005).

However, the extent of the likely injury could not be determined, in part due to the Department's inability to project the amount of water that would be available to the members of the Surface Water Coalition prior to April 1, 2005. *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. 30*, (February 14, 2005). In order to make a determination of the likely extent of the material injury, the Director requested that the Surface Water Coalition provide certain information regarding its delivery call as soon after April 1, 2005 as practical. *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*, (February 14, 2005).

The Association has met the pleading requirements of CM Rule 30. Additional information as to material injury can be obtained through discovery and the further development of the record. Any determination of material injury and reasonableness of diversion by the Director should be based upon a fully developed record and evidence admitted at hearing.

Compliance with Discovery Obligations

SVGWD asserts that the Association does not intend to comply with discovery requirements and therefore its Petition should be dismissed. *Motion* pg. 6. SVGWD misstates the record. Sun Valley Company filed a Motion for Leave to Conduct Discovery on March 24, 2017. The Association neither objected to, nor sought protection from, the request for an order authorizing discovery. On March 28, 2017, the Director granted Sun Valley Company's motion and entered its Order Authorizing Discovery. On April 11, 2017, Sun Valley Company served the Association with its first set of discovery requests. The Association timely filed a Motion for Protective Order. The Association did not attempt to stop the discovery process as a whole, or otherwise show any intent not to meet its discovery obligations. Rather, the Association sought protection from Sun Valley Company's discovery requests, which were not only directed to the Association, but specifically propounded upon each individual member of the Association. The Association's Motion for Protective Order is presently before the Director and the Association will comply with the Director's decision.

If the Association's Pleadings Are Deemed to Be Insufficient, the Association Should Be Given an Opportunity to Amend

Rule 305 of the Department's Rules of Procedure provides in part as follows:

The presiding officer may allow any pleading to be amended or corrected or any omission to be supplied. Pleadings will be liberally construed, and defects that do not affect substantial rights of the parties will be disregarded.


IDAPA 37.01.01.305. The Association has met the pleading requirements of CM Rule 30. However, if the Director deems the Association's pleading to be insufficient, the Association should be granted an opportunity to amend pursuant to Rule 305 of the Department's Rules of Procedure.

CONCLUSION

For the reasons stated above, the Association requests SVGWD's Motion to Dismiss or in the Alternative Motion to Stay be denied.

DATED this 22nd day of May, 2017.

BROWN & JAMES



Joseph F. James

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of May, 2017, I served the foregoing Petitioner's Response to South Valley Ground Water District's Motion to Dismiss or in the Alternative Motion to Stay upon the following persons by depositing in the United States Mail, properly addressed, postage prepaid.

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