

MAY 26 2017

DEPARTMENT OF
WATER RESOURCES

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

)	
)	Docket No. CM-DC-2017-001
IN THE MATTER OF PETITION FOR)	
ADMINISTRATION BY BIG WOOD &)	SOUTH VALLEY GROUND
LITTLE WOOD WATER USERS)	WATER DISTRICT'S REPLY IN
ASSOCIATIONS)	SUPPORT OF ITS MOTION TO
)	DISMISS OR IN THE
)	ALTERNATIVE MOTION TO STAY

On May 8, 2017, South Valley Ground Water District ("South Valley") filed its Motion to Dismiss the March 6, 2017, Petition filed by the Big Wood and Little Wood Water Users Association. This motion was joined by a large number of water users and entities that appear subject to this new 2017 Petition. South Valley's motion asserted that the Petition failed to meet the requirements of Rule 30 because it merely, and in a conclusory fashion, alleged material injury without describing the basis for a material injury. In addition, under Rule 30 of the Conjunctive Management Rules, the petitioner is required to provide "all information, measurements, data or study results available to the petitioner to support the claim of material injury." IDAPA 37.03.11.030.01.c. "All" information necessary to support such a claim was not provided. The motion also noted that the Petitioners may not have adequately complied with

**SOUTH VALLEY GROUND WATER DISTRICT'S REPLY IN SUPPORT OF ITS
MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO STAY**

Rule 30.01.a, in light of the grounds asserted by the Association in its May 3, 2017, Motion for Protective Order.

With respect to subpart “c” of Rule 30.010, South Valley demonstrated that information about water use of the individual water users had never been adequately provided, and certainly that not “all” of the information available to support a claim of material injury has ever been supplied. Moreover, none of the elements necessary to show material injury under Rule 42.a-g have been supplied by the Petitioners. IDAPA 37.03.11.042.a-g.

On May 22, 2017, the Petitioners served a response to South Valley’s Motion to Dismiss or in the Alternative Motion to Stay. The Association’s response asserts that South Valley has “conceded” that the pleading requirements of subpart “a” of Rule 30 have been met. As noted above, South Valley made no such concession because of the position taken by the Association that it has no interest in or ability to obtain information about the water rights of its various members. This inexorably leads to the conclusion that the Association also has not complied with subpart “a.” It is clear that the Association’s water rights are not impaired, as it has none.

With respect to subpart “c” of Rule 30, the Association asserts that it has provided all information “in its possession” which supported the Association’s claim. *Response*, p. 3. However, the Association’s response here, and its Motion for Protective Order, both make clear that the Association has not filed a petition on behalf of the individual water users as South Valley assumed the Association was doing. Rather, the Petition seemingly is brought on its own behalf. It has to be making the claim of injury on its own behalf because it asserts it has no interest in and no ability to obtain information about the water rights that are listed in the Petition. In essence, the Association is claiming that it is a stranger to the water rights that it asserts are suffering material injury.

The Association next asserts that Rule 42.a-g does not create a pleading requirement, but rather provides a list of factors for the material injury determination. Rule 30 lists the pleading requirements, not Rule 42. However, Rule 42's list of factors describes what is relevant to a petition. Rule 30 requires the petitioner to provide "all" information available to support the claim of material injury. Certainly, the information relevant to determining material injury is information necessary to support the claim of material injury. So while Rule 42 does not create an independent pleading requirement, it informs the users of what information they are required to supply to meet the requirements of Rule 30.01.c. The Association quibbles with the use of the word "relating" to material injury. To be clear, Rule 30.01.c requires "all information, measurements, data or study results available to the petitioner to **support** the claim of material injury." (**Emphasis added**). Apparently, the Association believes that its members' actual water use does not support its claim of material injury. Without evidence of the actual impairment to water use under the rights, the Association cannot support a claim of material injury and the Petition should be dismissed on those grounds.

Rule 30.01.a requires the petitioner to provide information "available" to the petitioner. The Association merely says that they have produced information "in its possession." They do not contend, and cannot seriously contend, that the information about the various members of the Association is not "available" to the Association. They simply claim that they have not gone out and obtained it yet. One would think that such an effort would have been made before a petition for delivery call was filed on behalf of those water users. Since it has not, the Petition should be dismissed for the Association's failure to obtain information "available" to it to support the claim of material injury.

If the Director allows the Association to assert that the information referenced in its Petition is “all” the information available to support the claim as the Association argues, then the Association should be precluded from introducing any evidence in support of their claim of material injury other than what has been produced. In other words, if the Association asserts that what it has referenced in the Petition is all that is necessary to support the claim of material injury, then that is all the Association can be allowed to introduce to support their claim.

The reference to the information that the Director required the Surface Water Coalition members in the A&B Call to provide was offered as evidence of the type of information that is necessary to support a claim of material injury. Since the Department has made it clear that this type of information was required more than ten years ago, the Association should have been assembling that information in preparation for its delivery call, which has been in the works for years.

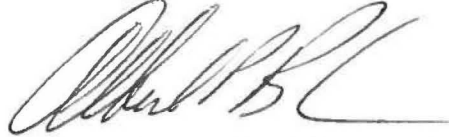
This is not just a matter of dispute over discovery, there is a matter of fundamental due process as noted by the district court in the decision remanding the 2015 delivery call. It is essential that everyone subject to the delivery call be provided notice with the nature of the claims being made. Under Rule 30.01.c, that includes “all” information that supports the claim of material injury. That information is lacking, was not supplied to persons potentially affected, and so notice to the parties potentially subject to the delivery call is also lacking.

Finally, the Association asserts that it be given additional time to amend its Petition rather than having the Petition dismissed. This is a *de facto* admission that the Association has the ability to obtain the necessary information to support the claims of material injury from its members to keep the delivery call Petition alive. This admission suggests that the information necessary to support the claim of material injury is readily “available,” and that this proceeding

should not continue until that available information is provided. Three months have passed since the Petition was filed, and still the necessary information is not available. The Association should not be allowed to hide the ball from people potentially subject to the impact of this call, compressing the time necessary to prepare and still maintain a February hearing date. If the Director chooses to allow an amended filing rather than dismissal, the clock on preparation for the hearing, and the hearing itself, should not start to run until that available information to support the claim of material injury is provided.

DATED this 26th day of May, 2017.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in dark ink, appearing to read 'Albert P. Barker', is written over a horizontal line.

Albert P. Barker

Attorneys for South Valley Ground Water District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of May, 2017, I served true and correct copies of the foregoing upon the following by the method indicated:

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