

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

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

Docket No. CM-DC-2017-001

**ORDER DISMISSING PETITION
FOR ADMINISTRATION**

BACKGROUND

On March 6, 2017, the Big Wood & Little Wood Water Users Association (“Association”) filed a *Petition for Administration* (“Petition”) with the Idaho Department of Resources (“Department”). The Association petitions the Director (“Director”) of the Department for an order directing administration of its members surface water rights and hydrologically connected ground water rights in accordance with the prior appropriation doctrine and the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) (“CM Rules”). *Id.* at 1.

On March 24, 2017, Sun Valley Company (“SVC”) filed an *Answer to Petition for Administration*. On March 24, 2017, SVC also filed a *Motion for Leave to Conduct Discovery* requesting the Director issue an order authorizing discovery. On March 31, 2017, the Director issued a *Notice of Prehearing Conference; Order Authorizing Discovery* scheduling a prehearing conference in the matter for May 11, 2017, and authorizing the parties to engage in and conduct discovery.

On April 5, 2017, the Department received *Galena Ground Water District’s Petition to Intervene*. On April 18, 2017, the Department received *South Valley Ground Water District’s Petition to Intervene*. On April 27, 2017, the Director issued an order granting Galena Ground Water District’s and South Valley Ground Water District’s petitions to intervene.

On April 11, 2017, SVC filed *Sun Valley Company’s First Set of Discovery Requests to the Big Wood & Little Wood Water Users Association and Its Members*. On May 3, 2017, the Association filed *Petitioner’s Motion for Protective Order* (“Motion”). The Association asserts it has “standing” to file the Petition “seeking an order from the Director directing the administration of certain surface water rights and hydrologically connected ground water rights.” *Motion* at 2. The Association asserts it “is a party to” this contested case but that the “individual members of the Association are not parties” *Id.* The Association states that SVC’s “discovery requests are not only directed to the Association, but specifically propounded upon

the Association's members." *Id.* at 3. The Association also states that SVC's "discovery requests treat the [Association] and the non-party members of the Association interchangeably." *Id.* The Association asserts it "is unable to respond to the requests as propounded to non-party members, and to require them to do so would cause an undue burden and expense." *Id.* The Association requests the Director "issue an order protecting [the Association] from undue burden or expense and directing that [the Association] not be required to respond to" SVC's discovery requests. *Id.* at 1.

On May 8, 2017, South Valley Ground Water District filed a *Motion to Dismiss or in the Alternative Motion to Stay* asserting the Petition should be dismissed for the Association's failure to submit information required by CM Rule 30. Galena Ground Water District, the City of Bellevue, SVC, the City of Hailey, Dean R. Rogers Inc., the City of Ketchum, and James Speck on behalf of multiple Respondents separately filed joinders in South Valley Ground Water District's motion to dismiss or stay.

The Department held the prehearing conference on May 11, 2017.

On May 12, 2017, SVC filed a *Response to Petitioner's Motion for Protective Order/Motion to Dismiss* ("SVC's Motion to Dismiss"). SVC asserts the Petition "must be dismissed" because the Association does not hold any water rights and the Association does not have "standing to pursue a delivery call on behalf of its" members who the Association asserts "are not parties." *SVC's Motion to Dismiss* at 2-5. James Speck filed a joinder in support of SVC's Response on behalf of multiple Respondents.

On May 22, 2017, the Association filed *Petitioner's Response to South Valley Ground Water District's Motion to Dismiss or in the Alternative Motion to Stay*.¹ On May 30, 2017, the Department received *Petitioner's Response to Sun Valley Company's Motion to Dismiss* ("Association's Response").

ANALYSIS

The various motions filed by the parties raise several issues, including the following:

1. Does the Association have standing to collectively call for the delivery of water authorized by senior priority water rights held individually by the members of the Association?
2. Was sufficient information submitted by the Association with its Petition to satisfy the pleading requirements of Rule 30 of the CM Rules?
3. If recognized as a party having standing, can the Association assert that it is the sole conduit through which all discovery requests will be served, insulating its members from direct service of discovery, and assuming sole responsibility for responding to any discovery requests related to its members and water rights held by its members?

¹ On May 26, 2017, South Valley Ground Water District filed *South Valley Ground Water District's Reply in Support of its Motion to Dismiss or in the Alternative Motion to Stay* ("Reply"). On May 31, 2017, the Department received SVC's *Joinder in Reply in Support of Motion to Dismiss* joining the Reply. The Department's Rules of Procedure 270.02 and 565 authorize a party opposing a motion or prehearing motion respectively to file an answer within fourteen days of the filing of the motion. IDAPA 37.01.01.270.02 & 565. The Department's Rules of Procedure do not authorize the filing of replies or joinders in replies.

Standing of the Association

Both the Association and SVC rely on *Beach Lateral Water Users Association v. Harrison*, 142 Idaho 600, 130 P3d 1138 (2006) to support their respective, but conflicting, positions about whether the Association has standing to call for delivery of its members' senior priority water rights. Quoting *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), the *Beach* decision established three tests for determining "associational standing":

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

The Association asserts, and SVC does not contest, that the water right holder members of the Association would have standing to sue in their own right (factor a). The Association also asserts, and SVC does not contest, that the interests the Association seeks to protect are germane to the organization's purpose (factor b).

SVC argues, however, that the claim, or claims, asserted by the Association in the Petition, require the participation of the individual members of the Association in the contested case (factor c). *SVC's Motion to Dismiss* at 3. In contrast, the Association argues its Petition seeks a form of prospective relief, and consequently, does not require the direct participation of its members because the "benefits will likely be shared by the association's members without any need for individualized findings of injury" *Association's Response* at 3 (quoting *Beach Lateral Water Users Ass'n*, 142 Idaho at 604, 130 P.3d at 1142).

Rule 30.01 of the CM Rules expressly states: "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" for delivery call. IDAPA 37.03.11.030.01 (emphasis added).

Rule 30.01 of the CM Rules also states:

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 or more junior-priority ground water rights, the petitioner shall file with the Director a petition containing, at least, the following . . . :

- 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 (a-d).

Rule 42 of the CM Rules requires that the Director determine “whether the holders of water rights are suffering material injury and using water efficiently and without waste.” IDAPA 37.03.11.042.01. Rule 42 sets forth factors “the Director may consider” in reaching this determination, including “[t]he effort or expense of the holder of the water right to divert water from the source” and “[t]he extent to which the requirements of the holder of a senior-priority water right could be met with the user’s existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices” or “alternate reasonable means of diversion or alternate points of diversion.” IDAPA 37.03.11.042.01(b, g-h).

Accordingly, Rules 30 and 42 of the CM Rules require submittal of information unique to each petitioner, including the water rights alleged to be injured, the water diversion and delivery system conveying water to each petitioner, a description of the beneficial use by each petitioner, the expense to each petitioner to divert water, and whether the petitioner could meet its needs using existing facilities more efficiently or using alternate means of diversion or points of diversion.

Landowners who are members of the Association irrigate with water from one to several water sources. These various sources of water are uniquely diverted and delivered to each of the landowners. The Director must analyze each member’s combination of water sources, and each member’s unique delivery systems and water use operations to determine whether there is material injury to each senior priority water right.

The *Beach* Court also quoted *Bear Lake Educ. Assoc. v. Sch. Dist. 33*, 116 Idaho 443, 448 776 P.2d 452, 457 (1989):

[S]o long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the case, the association may be an appropriate representative of its members, entitled to invoke the court’s jurisdiction.

Again, CM Rule 30 expressly states the water right holder must file the petition for delivery call. IDAPA 37.03.11.030.01. The water right holder must submit information about the holder’s water rights, water sources, points of diversion, delivery systems, and beneficial use for the Director to determine whether the senior priority water rights have been materially injured. The claim and relief sought requires the individual participation of each party claiming material injury who is indispensable to proper resolution of the case.

Because the individual water right holders who are members of the Association are indispensable to proper resolution of this contested case, the holders of the individual senior priority water rights must petition for delivery of their water rights. The Association does not have standing to petition for delivery of its members' senior priority water rights and to seek a general remedy for all the senior priority water right holders.

The Petition filed by the Association should be dismissed. *See In re Jerome Cty. Bd. of Comm'rs*, 153 Idaho 298, 308, 281 P.3d 1076, 1086 (2012) (explaining that a person must have standing to invoke a court's jurisdiction).

Sufficiency of Information Submitted, Motion for Protective Order

Dismissal of the Petition moots all other motions pending before the Director. The issue of the sufficiency of information submitted with the Petition raised by South Valley Ground Water District's *Motion to Dismiss or in the Alternative Motion to Stay* and the Association's motion for protective order from discovery will not be addressed.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the *Petition for Administration*, filed by the Big Wood & Little Wood Water Users Association, is DISMISSED, without prejudice.

DATED this 7th day of June 2017.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of June 2017, I served a true and correct copy of the foregoing document to all parties listed on the Big Wood & Little Wood 2017 Delivery Call Certificate of Service List posted on the Department's website at <https://idwr.idaho.gov/legal-actions/delivery-call-actions/BWLW.html> updated May 30, 2017, by U.S. mail, postage prepaid.



Kimi White