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Attorneys for Respondents

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

SUN VALLEY COMPANY, a Wyoming  
corporation,

Petitioner,

vs.

GARY SPACKMAN in his official capacity as  
the Director of the Idaho Department of Water  
Resources; and the IDAHO DEPARTMENT OF  
WATER RESOURCES,

Respondents,

and

CITY OF KETCHUM, CITY OF FAIRFIELD,  
WATER DISTRICT 37-B GROUNDWATER  
GROUP, BIG WOOD & LITTLE WOOD

**Case No. CV-WA-2015-14500**

**RESPONSE TO MOTION FOR  
LEAVE TO PRESENT EVIDENCE  
AND CONDUCT DISCOVERY**

**RESPONSE TO MOTION FOR LEAVE TO PRESENT EVIDENCE AND CONDUCT  
DISCOVERY – Page 1**

WATER USERS ASSOCIATION, SOUTH VALLEY GROUND WATER DISTRICT, ANIMAL SHELTER OF WOOD RIVER VALLEY, DENNIS J. CARD and MAUREEN E. MCCANTY, EDWARD A LAWSON, FLYING HEART RANCH II SUBDIVISION OWNERS ASSOCIATION, INC., HELIOS DEVELOPMENT, LLC, SOUTHERN COMFORT HOMEOWNER'S ASSOCIATION, THE VILLAGE GREEN AT THE VALLEY CLUB HOMEOWNERS ASSOCIATION, INC., AIRPORT WEST BUSINESS PARK OWNERS ASSN INC., ANNE L. WINGATE TRUST, AQUARIUS SAW LLC, ASPEN HOLLOW HOMEOWNERS, DON R. and JUDY H. ATKINSON, BARRIE FAMILY PARTNERS, BELLEVUE FARMS LANDOWNERS ASSN, BLAINE COUNTY RECREATION DISTRICT, BLAINE COUNTY SCHOOL DISTRICT #61, HENRY and JANNE BURDICK, LYNN H. CAMPION, CLEAR CREEK LLC, CLIFFSIDE HOMEOWNERS ASSN INC, THE COMMUNITY SCHOOL INC, JAMES P. and JOAN CONGER, DANIEL T. MANOOGIAN REVOCABLE TRUST, DONNA F. TUTTLE TRUST, DAN S. FAIRMAN MD and MELYNDA KIM STANDLEE FAIRMAN, JAMES K. and SANDRA D. FIGGE, FLOWERS BENCH LLC, ELIZABETH K. GRAY, R. THOMAS GOODRICH and REBECCA LEA PATTON, GREENHORN OWNERS ASSN INC, GRIFFIN RANCH HOMEOWNERS ASSN and GRIFFIN RANCH PUD SUBDIVISION HOMEOWNERS ASSN INC, GULCH TRUST, IDAHO RANCH LLC, THE JONES TRUST, LOUISA JANE H. JUDGE, RALPH R. LAPHAM, LAURA L. LUCERE, CHARLES L. MATTHIESEN, MID VALLEY WATER CO LLC, MARGO PECK, PIONEER RESIDENTIAL & RECREATIONAL PROPERTIES LLC, RALPH W. & KANDI L. GIRTON 1999 REVOCABLE TRUST, RED CLIFFS HOMEOWNERS ASSOCIATION, F. ALFREDO REGO, RESTATED MC MAHAN 1986 REVOCABLE TRUST, RHYTHM RANCH HOMEOWNERS ASSN, RIVER

ROCK RANCH LP, ROBERT ROHE, MARION R. and ROBERT M. ROSENTHAL, SAGE WILLOW LLC, SALIGAO LLC, KIRIL SOKOLOFF, STONEGATE HOMEOWNERS ASSN INC, SANDOR and TERI SZOMBATHY, THE BARKER LIVING TRUST, CAROL BURDZY THIELEN, TOBY B. LAMBERT LIVING TRUST, VERNON IRREVOCABLE TRUST, CHARLES & COLLEEN WEAVER, THOMAS W. WEISEL, MATS AND SONYA WILANDER, MICHAEL E. WILLARD, LINDA D. WOODCOCK, STARLITE HOMEOWNERS ASSOCIATION, GOLDEN EAGLE RANCH HOMEOWNERS ASSN INC, TIMBERVIEW TERRACE HOMEOWNERS ASSN, and HEATHERLANDS HOMEOWNERS ASSOCIATION INC.,

Intervenors.

IN THE MATTER OF DISTRIBUTION OF  
WATER TO WATER RIGHTS HELD BY  
MEMBERS OF THE BIG WOOD & LITTLE  
WOOD WATER USERS ASSOCIATION  
DIVERTING FROM THE BIG WOOD AND  
LITTLE WOOD RIVERS

COME NOW, Respondents, by and through their counsel of record and file this *Response to Motion for Leave to Present Evidence and Conduct Discovery* in response to the December 8, 2015, *Motion for Leave to (1) Present Additional Evidence; and (2) Conduct Limited Discovery* (“Motion”) and *Memorandum in Support of Motion for Leave to (1) Present Additional Evidence; and (2) Conduct Limited Discovery* (“Memorandum”) filed by Sun Valley Company (“SVC”).

## BACKGROUND

On February 24, 2015, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) received two conjunctive management water delivery call letters from counsel for members of the Big Wood & Little Wood Water Users Association (“Association”). *BW CM-DC-2015-001* at 1-5; *LW CM-DC-2015-002* at 1-5.<sup>1</sup> The letters allege senior surface water users on the Big and Little Wood Rivers are being injured by water users diverting ground water connected to the Big and Little Wood Rivers. The letters request the Director regulate junior ground water users consistent with the prior appropriation doctrine. The letters constitute delivery calls pursuant to Rule 10.04 of the Department’s *Rules for Conjunctive Management of Surface and Ground Water Resources* (“CM Rules”). IDAPA 37.03.11. Thus, the Director initiated a new contested case proceeding for each delivery call.

On June 25, 2015, SVC filed a *Motion to Dismiss Contested Case Proceedings* (“Motion to Dismiss”). SVC argued, among other things, the Big and Little Wood Delivery Calls should be dismissed because the Association’s letters do not include all information required of a petition set forth in CM Rule 30. *BW CM-DC-2015-001* at 388-95.

On July 22, 2015, the Director issued an *Order Denying Sun Valley Company’s Motion to Dismiss* (“Sun Valley Order”). The Director explained that CM Rule 30 applies “where a delivery call is filed by the holders of senior-priority surface or ground water rights against ‘holders of junior-priority ground water rights within areas of the state *not in organized water districts.*’” *BW CM-DC-2015-001* at 890 (emphasis in original). The Director concluded that, because “[t]he Big and Little Wood Delivery Calls are against junior-priority ground water rights

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<sup>1</sup> The record on appeal includes filings in the Big Wood Delivery Call matter in a folder labeled BW CM-DC-2015-001, filings in the Little Wood Delivery Call matter in a folder labeled LW CM-DC-2015-002, and documents as a result of the Court’s November 16, 2015, *Order Granting Motion to Augment* in a folder labeled Supp AR Lodged w-DC. Citations to the record herein are consistent with these labels.

*in organized water districts,”* CM Rule 40 is applicable to the delivery calls, not CM Rule 30. *Id.* (emphasis in original).

On August 6, 2015, SVC filed a *Motion for Review of Interlocutory Order* (“Motion to Revise”) requesting the Director revise the Sun Valley Order to grant the Motion to Dismiss. SVC raised a new argument that, “[i]n these proceedings, no ‘area of common ground water supply’ has yet been designated. And, because no designation has been made, no action has been taken to ‘incorporat(e) such water rights into existing water districts,’ as specified in CM Rule 20.06.” *BW CM-DC-2015-001* at 970. In other words, SVC argued that CM Rule 20.06 requires the Director follow a fixed two-step process in responding to the Big and Little Wood Delivery Calls: (1) establish an area of common ground water supply, and (2) incorporate the water rights at issue into water districts before proceeding with the delivery calls pursuant to CM Rule 40.

SVC filed a *Petition for Judicial Review* (“Petition”) on August 19, 2015. The Petition states that SVC seeks judicial review of the Sun Valley Order “for the reasons set forth in the [Motion to Dismiss] and [Motion to Revise].” *Petition* at 4. Thereafter, the Respondents, SVC, and certain other parties entered discussions regarding the propriety of the Petition given the Sun Valley Order was an interlocutory, not final, order of the Department. Following these discussions, a *Stipulation* was filed in the above-captioned matter on September 18, 2015.

In the *Stipulation*, the signatories agreed “that expedited judicial review of the issues raised” by the Motion to Dismiss “is in the interests of administrative and judicial economy.” *Stipulation* at 5. SVC and other parties agreed to file a motion requesting the Director designate the Sun Valley Order as a final order (“Motion to Designate”). *Id.* at 5. The signatories also agreed that, “[w]ithin twenty-one (21) days of the filing of the settled records, the parties will

take appropriate steps to augment the records before the District Court with the Motion to Designate” and the Director’s order designating the Sun Valley Order as a final order subject to judicial review (“Designation Order”). *Id.* at 5-6. The signatories also acknowledged the Director had “taken no action to rescind, alter or amend” the Sun Valley Order in response to the Motion to Revise. *Id.* at 4. The signatories agreed that, if the Director took any action in response to the Motion to Revise, the parties would seek to augment the record in the above-captioned matter with any such action in accordance with Idaho Rule of Civil Procedure 84(l). *Id.* at 6.

On September 25, 2015, SVC and other parties filed the Motion to Designate requesting the Director designate the Sun Valley Order as a final order pursuant to the Department’s Rules of Procedure 710 and 750. *Supp AR Lodged w-DC* at 72. The Director issued the Designation Order on October 15, 2015. *Id.* at 71-74. The Director issued an *Order Denying Motion to Revise Interlocutory Order* (“Order Denying Motion to Revise”) on October 16, 2015. *Id.* at 84-88. SVC filed an *Amended Petition for Judicial Review* on October 26, 2015.

In the Order Denying Motion to Revise, the Director addressed the new argument raised by SVC that the Director must follow a fixed two-step process before proceeding with the Big and Little Wood delivery calls pursuant to CM Rule 40. The Director determined that, consistent with CM Rule 20.06, “[t]he area of common ground water supply for the Big and Little Wood Delivery Calls is a factual question that can be answered using the framework of CM Rule 40 based upon information presented at hearing and applying the definition set forth in CM Rule 10.01.” *Supp AR Lodged w-DC* at 85. The Director also determined the “fixed two-step process for delivery calls” advocated for by SVC “where water rights are put into water districts only after an area of common ground water is designated is not tenable.” *Id.* at 86. This is because

“[t]hroughout much of Idaho, water districts have been created and water rights incorporated into the districts.” *Id.* With respect to the Big and Little Wood Delivery Calls, the Director stated that “current information demonstrates the water rights at issue in the Big and Little Wood Delivery Calls are already in water districts.” *Id.* The Director cited three sources to support this statement. The Director cited the August 31, 2015, *IDWR Staff Memo Re: Surface Water Delivery Systems* (“Luke Memo”) for one reason only: to demonstrate the Association’s senior surface water rights are in Water District 37. *Id.* The Director cited information in the August 28, 2015, *IDWR Staff Memo Re: Hydrology, Hydrogeology, and Hydrologic Data* indicating “the junior-priority ground water right diversions that impact flow in water sources for the [Association’s] senior surface water rights are diverted from the Wood River Valley aquifer system and the Camas Prairie aquifer system.” *Id.* The Director cited a 2013 Preliminary Order of the Department explaining that ground water rights in the Wood River Valley aquifer system are in Water District 37 and ground water rights in the Camas Prairie aquifer system are in Water District 37B. *Id.*

Consistent with the *Stipulation*, on October 28, 2015, the Respondents timely filed a *Motion to Augment the Record* (“Motion to Augment”) with several documents including the Order Denying Motion to Revise. In response, SVC objected to the Director’s reference to Department staff memoranda in the Order Denying Motion to Revise. *Joint Response to Motion to Augment the Record* at 5. The Court granted the Motion to Augment on November 16, 2015, as well as a request by SVC for additional time to further amend its petition for judicial review. *Order Granting Motion to Augment* at 7.

SVC filed a *Second Amended Petition for Judicial Review* (“Second Petition”) on December 3, 2015, seeking to expand the Court’s review beyond issues addressed by the

Director in the Sun Valley Order and the Order Denying Motion to Revise. Specifically, the Second Petition states that SVC now seeks judicial review of “site views without affording notice and the opportunity to participate to all interested parties, the Director’s Request for Staff Memoranda, the Sun Valley Order, the Staff Memoranda Order and the Order Denying Motion to Revise.” *Second Petition* at 10.

On December 8, 2015, SVC filed its Motion and Memorandum alleging that “procedural irregularities” occurred related to preparation of the Luke Memo. *Motion* at 3-4; *Memorandum* at 9-10. SVC asks the Court to grant SVC leave to conduct “limited written discovery” to obtain “evidence” of these alleged procedural irregularities and asserts such evidence “is material and relates to the validity of the agency action that is the subject of this Court’s review.” *Memorandum* at 12-13.

### **ARGUMENT**

SVC filed its Motion pursuant to Idaho Code § 67-5276, which states, in relevant part:

(1) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:

(a) there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.

(b) there were alleged irregularities in procedure before the agency, the court may take proof on the matter.

Again, SVC alleges that “procedural irregularities” occurred related to preparation of the Luke Memo and asks the Court to grant SVC leave to conduct discovery to obtain “evidence” of these alleged procedural irregularities asserting such evidence “is material and relates to the validity of the agency action that is the subject of this Court’s review.” *Memorandum* at 12-13.



First, Idaho Code § 67-5276 does not authorize SVC to seek the Court's leave to conduct discovery. The plain language of the statute only allows the Court to "remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding" or to "take proof on the matter." Idaho Code § 67-5276(1)(a) & (b). SVC cannot use Idaho Code § 67-5276 to gain the Court's authorization to conduct discovery.

Second, any evidence of alleged procedural irregularities related to preparation of the Luke Memo is immaterial and unrelated to the agency action that is the subject of the Court's review on appeal. While SVC states it now seeks judicial review of the Director's request for staff memoranda, the Director's interlocutory order denying SVC's motion to withdraw that request, and site visits conducted in preparation of the Luke Memo, SVC also admits the Court only has jurisdiction to review the Sun Valley Order "because it is a final order in a contested case. *See* Idaho Code § 67-5270(3); IDAPA 37.01.01.740." *Second Petition* at 10-11. The Sun Valley Order is a final appealable order because the Director issued the Designation Order consistent with the *Stipulation* and in response to the Motion to Designate filed pursuant to the Department's Rules of Procedure 710 and 750. *Supp AR Lodged w-DC* at 71-74. Rule 710 allows the agency to "by order decide some of the issues presented in a proceeding and provide in that order that its decision on those issues is final and subject to review by reconsideration or appeal." IDAPA 37.01.01.710. The Director has not issued any order designating the request for staff memoranda or the interlocutory order denying SVC's motion to withdraw that request as final orders subject to review on appeal. In addition, the Director only cited information in the Luke Memo in the Order Denying Motion to Revise to demonstrate the Association's senior surface water rights are in Water District 37. The cited information is not in any way related to site visits conducted in preparation of the Luke Memo. In sum, the propriety of agency action

related to the request for staff memoranda, the interlocutory order denying SVC's motion to withdraw that request, and preparation of the Luke Memo is not properly before the Court for review. Instead, the agency action that is the subject of the Court's review is the Director's decision to proceed with the Big and Little Wood Delivery Calls pursuant to CM Rule 40 rather than CM Rule 30 and following the fixed two-step process advocated for by SVC. *See BW CM-DC-2015-001* at 890-92; *See Supp AR Lodged w-DC* at 84-87. Because Idaho Code § 67-5276 does not authorize SVC to conduct discovery and any evidence of alleged procedural irregularities related to preparation of the Luke Memo is immaterial and unrelated to the agency action that is the subject of the Court's review on appeal, the Court should deny SVC's request to conduct discovery to obtain and present such evidence to the Court.


Further, SVC is incorrect to assert the Director made "findings of fact" in the Order Denying Motion to Revise based upon Department staff memoranda that "broadened the scope and nature of the instant appeal." *See Memorandum* at 5-6. The Director only referenced staff memoranda in the Order Denying Motion to Revise to support the statement that "the water rights at issue in the Big and Little Wood Delivery Calls are already in water districts" and demonstrate why the fixed two-step process advocated for by SVC is untenable. *Supp AR Lodged w-DC* at 86. The Director made that same statement in the Sun Valley Order wherein the Director determined the applicable rule in the underlying delivery call matters is CM Rule 40, not CM Rule 30. *BW CM-DC-2015-001* at 890 ("The Big and Little Wood Delivery Calls are against junior-priority ground water rights *in organized water districts*." (emphasis in original)). The Director's citation to staff memoranda in the Order Denying Motion to Revise does not broaden the scope of appeal.

Based upon and consistent with the foregoing, the Respondents respectfully request the Court enter an order denying the Motion.

DATED this 16<sup>th</sup> day of December 2015.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16<sup>th</sup> day of December 2015, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

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