BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE WATER RIGHTS OF: MICHAEL BEER AND LORI BEER AND WATER RIGHT NO. 29-13740	Docket No. CM-DC-2021-001 **ORDER DENYING PETITION FOR DELIVERY CALL**

BACKGROUND AND PROCEDURAL HISTORY

On February 11, 2021, Michael and Lori Beer ("Petitioners") filed with the Idaho Department of Water Resources ("Department") a *Petition for Delivery Call* ("Petition"). The petition requested the administration of ground water use by the Lava Ranch Property Owners Association, Inc. ("Respondent") to deliver water to the Beers' water right, 29-13740. The Petition described the water rights of the Petitioners and the water rights of the ground water users whom they alleged were causing material injury to their rights. The Petitioners subsequently submitted documents to the Department on July 19 and 28, 2021, summarizing information, measurements, and data they claimed supported their Petition.

On January 31, 2022, the Department held a prehearing conference. During the conference, Petitioners agreed to amend their *Petition for Delivery Call* to describe an "area of common ground water supply" ("ACGWS") consistent with Rule 30.01.d. of the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11). Petitioners filed their *Amended Petition for Delivery Call* ("Amended Petition") on February 22, 2022.

The Amended Petition included the description of an area of common ground water supply ("ACGWS"). The Amended Petition described the ACGWS as follows: "The ridge lines east and west of Deer Creek along Smith Canyon forming the east and west boundary of the area. The area north of Lot 182, Lava Ranch Phase 3, Bannock County, Idaho as the north boundary. Pine Loop Road to the south forming the southern boundary of the area." The Amended Petition also included Exhibit A illustrating the ACGWS.

On April 14, 2022, the Department held a second continued prehearing conference, at which time the parties established and agreed to the contested case hearing schedule. Following the April 14 conference, the Department issued a *Scheduling Order, Third Notice of Continued Prehearing Conference, and Notice of Hearing* ("Scheduling Order") on May 2, 2022, under Rule 412 of the Rules of Procedure of the Idaho Department of Water Resources ("Rules of Procedure"). *See* IDAPA 37.01.01.412. Among other things, the Scheduling Order set a deadline of July 29, 2022, for the "parties to submit expert reports and file a list of expert witnesses they intend to rely upon at the hearing, including names, addresses, phone numbers, and updated curricula vitarum." *Scheduling Order* at 1.

On July 7, 2022, the Respondent filed *Motion to Dismiss Delivery Call as Against Statutory Exempt Well Use* ("Motion to Dismiss"). Petitioners filed their *Memorandum in*

Support of Objection to LRPOA's Motion to Dismiss Delivery Call on July 27, 2022. The Respondent filed *LRPOA's Reply in Support of Motion to Dismiss Delivery Call Against Statutory Exempt Domestic Well Use* on August 1, 2022. On September 8, 2022, the Hearing Office issued an interlocutory *Order Denying Motion to Dismiss* because the Idaho water code only excepts domestic ground water uses meeting the definition of Idaho Code § 42-111 from the mandatory permitting and licensing process, not the requirement of having a water right, which in turn subjects them to administration by the Department with all other water rights.

On July 29, 2022, the Respondent timely filed its *LRPOA's Expert Witness List*, identifying one expert witness—Erick Powell, Ph. d., P.E. The filing included Dr. Powell's curriculum vitae but did not include an expert report.

In August of 2022, the parties mutually agreed to partially revise the scheduling order and delay the hearing in this matter by approximately four weeks.

On the basis that no expert report was disclosed, Petitioners filed on August 31, 2022, a *Motion to Exclude Expert Witness* ("Motion to Exclude"). *Motion to Exclude* at 1. Petitioners' Motion to Exclude requested that the hearing officer exclude Dr. Powell from testifying. *Id*. at 2. In response, the Respondent timely filed its *Response in Opposition to Petitioners' Motion to Exclude Witness* ("Response") on September 14, 2022. On October 5, 2022, the hearing officer issued an *Order Denying the Motion to Exclude Expert Witnesses*.

On October 18-19, 2022, the Department held a hearing in Pocatello, Idaho, to take testimony and evidence connected with the *Petition for Delivery Call*.[1] The Department's Deputy Director, Mat Weaver, served as the hearing officer for the Department.

At the hearing, Mr. Lance Schuster represented the Petitioners, and Mr. Travis Thompson represented the Respondent. Both parties introduced testimonial evidence or documentary evidence into the administrative record.

At the hearing, the Petitioners called Michael Beer, Michael McVay, Lori Beer, and Gary Haskett to testify. Also, during the hearing, the Petitioners entered Exhibits 501–520 into the record.

At the hearing, the Respondent called Dr. Erick Powell, Adrienne Buckley, James Patterson, Thomas Bland, Harry Scott, and Maxine Scott to testify. Also, during the hearing, the Respondent entered exhibits 1–9, 11–21, and 23 into the record.

At the hearing, consistent with Rule 602 of the Department's Rules of Procedure (IDAPA 37.01.01.602), the hearing officer took official notice of the Department's scanned file for water right no. 29-13740, all Department Administrative Memoranda, and any Department records regarding water use by the Petitioners or the Respondent.

[1] The hearing was digitally recorded. The Department delivered copies of the recordings to the parties and can be obtained by the Department upon request. The Hearing Recording was not transcribed or otherwise reproduced or altered.

Following the hearing, the Petitioners and the Respondent each timely filed post-hearing memoranda on November 18, 2022.

After carefully considering the evidence in the administrative record, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

Lava Ranch Subdivision and the Lava Ranch Property Owners Association

1. The Lava Ranch Subdivision ("Subdivision") is located approximately five miles southwest of Lava Hot Springs, Idaho, in Township 10 South, Range 38 East, Boise Meridian. Ex. 512 at 1.

2. The Subdivision is a 470-lot single-family residential subdivision. Ex. 19.

3. Petitioners own Lot 182 in Phase 3 of the Lava Ranch Subdivision ("Lot 182"). The Department's scanned file for Water Right no. 29-13740 [hereinafter, "WR 29-13740 Scanned File"].

4. The Lava Ranch Property Owner's Association ("LRPOA") is the entity charged with constructing, operating, and maintaining two community wells, water tanks, roads, and open space within the Lava Ranch Subdivision. Buckley Test.; Bland Test.; H. Scott Test.

History of Water Use by Beers

5. The Petitioners purchased lot 182 in 1998. M. Beer Test. They selected their lot due to its direct access to a spring water supply that existed on the lot ("Petitioners' Spring"). *Id.* They built a cabin on their lot in 2006, and since then, the spring has been the source of domestic water for the cabin. *Id.*

6. The Petitioners applied for a water right permit to use the spring on their property on May 8, 2006, and perfected it into licensed water right no. 29-13740. The Department issued the water right on November 10, 2011, with a May 8, 2006, priority date. *WR 29-13740 Scanned File*. Water right no. 29-13740 authorizes the diversion of 0.04 cubic feet per second ("CFS") or 18 gallons per minute ("GPM") of spring water for domestic use associated with one home. *Id*. The water right's point of diversion and place of use are on Lot 182. *Id*. The water right limits the authorized use of water to 13,000 gallons per day and irrigation of land not to exceed 1/2 acre. *Id*.

7. Petitioners described their domestic use to include use in the cabin for drinking, cooking, cleaning, and irrigation of select plants. M. Beer Test. The spring provides clean potable water. *Id*. Historically, overflow of water from the cistern has sustained a small wetlands area, which the Petitioners consider an amenity to their property. They described the water used to establish and maintain the wetland area as a valuable part of their use of the spring. *Id*.

8. Since 2017, declines in spring flow on Lot 182 have affected and limited the Petitioners' use of water from the spring. M. Beer Test.; L. Beer Test. Declines in spring flows have eliminated their irrigation of wetlands, have reduced the number of guests they can host at the cabin, and have reduced the number of consecutive days they can live at the cabin without importing water. M. Beer Test.; L. Beer Test.

Petitioners' Source of Water and Diversion Works

9. Petitioners developed the spring on Lot 182 in 2006. M. Beer Test. Through construction undertaken in 2006, water is captured at the spring and piped into a 1,500-gallon cistern. Ex. 502 at 7. Water flows through a 1.5-inch pipe from the spring collection point to the cistern via gravity. *Id.* A valved spigot is installed on the cistern feed line, which the Petitioners use to drain the cistern or measure in-flow to the cistern. *Id* at 8. An electrical well pump located in the cistern pumps water to the cabin via a pressurized piped connection. *Id* at 8–9. The cistern also has an overflow connection, allowing water to spill from the cistern when it is full. *Id* at 8.

Petitioners' Spring Flow Measurements

10. The Petitioners have measured flow from their spring dating back to their purchase of Lot 182 in 1998 and have never measured flow from the spring equal to the licensed diversion rate of 0.04 CFS (18 GPM). M. Beer Test.

11. From 1998 to 2005, before the installation of the current spring water collection and delivery system, the Petitioners measured spring flows seasonally each year with a graduated gallon container and stopwatch. Ex. 503 at 6. During this period, the Petitioners measured flows between 0.25–0.67 GPM. However, there are no measurement records from this period. *Id*.

12. Immediately following the installation of the current collection and delivery system in 2006, the Petitioners twice observed that the 1,500-gallon cistern took "just over two days to fill" at a rate of approximately 0.52 GPM. Ex. 503 at 7. However, there are no measurement records from this period. *Id.*

13. From August 8, 2019, to August 21, 2022, the Petitioners measured and recorded flow at the valved spigot upstream of the cistern with a graduated one-quart container and stopwatch. Ex. 508 at 16–19. During this time, measured flow ranged from 390 gallons per day ("GPD") in June 2020 to 22 GPD in July 2021. Ex. 518 at 3, 5. From September 2020 to August 2022, flows ranged from 120 GPD to 22 GPD. *Id* at 3, 5, 6.

14. Based on the Petitioners' data, spring flows increased from October 2019 to June 2020 and declined rapidly from June to October 2020. Discharge continued to decline from October 2020 to June 2021. Ex. 519 at 3. Discharge increased from October 2021 to June 2022, but at a rate 79% less than in 2019–2020. *Id.*

15. The Petitioners corrected their reported measurement data to account for the magnitude of water measured and the frequency of measurements. Ex. 508 at 17. The Petitioners estimated the accuracy of their reported measurement data was +/- 0.02 GPM. Ex. 519 at 4.

16. From October 2020 to August 2022, the average change between consecutive spring measurements by the Petitioners is 0.01 GPM. Ex. 519 at 4. As a result of the unclear measurement and correction methods, it is difficult to attribute spring discharge changes with specific causes. *Id*.

Deer Creek and Precipitation Measurements

17. Deer Creek rises on Lot 186 of Phase 3 of the Lava Ranch Subdivision. Ex. 512 at 3. Deer creek generally flows from south to north across Phase 3 of the Lava Ranch Subdivision, paralleling Smith Canyon Road. *Id* at 2. Deer Creek flows from south to north across Lot 182 along the west property line. *Id.* at 4.

18. In combination, springs on lots 182, 183, 184, 185, and 186 flow to Deer Creek and constitute the headwaters of the creek. Ex. 508 at 22. Flow in Deer Creek is comprised of spring flow, precipitation, and snow melt. *Id.*

19. In November 2022, the Petitioners installed a V-notch weir on Deer Creek at the upstream boundary (south property line) of lot 182. Ex. 508 at 22. The weir location measures flow from springs on lots 184, 185, and 186. *Id.*

20. From November 2020 to August 2022, the Petitioners combined measurements of flow from their spring and at the weir to estimate Deer Creek flow rates. *Id.* They don't regularly measure spring flows on Lot 183. *Id.*

21. From November 2020 to August 2022, the Petitioners' estimated Deer Creek flows ranged from one (1) to 540 GPM. Ex. 513 at 1; Ex. 514 at 2.

22. The Petitioners collected intermittent precipitation data at a precipitation gage near Lot 182. Ex. 508 at 8. The Petitioners measured precipitation no more frequently than weekly, and so it is possible that some precipitation was not measured due to evaporation or overtopping of the gage. *Id* at 9.

23. The respondent collected precipitation data and reported monthly amounts for water years 2015, 2016, 2020, 2021, and 2022. *Id* at Table 1. The Respondent did not report data for water years in which their measurements were incomplete, which included 2017, 2018, and 2019. *Id.*

24. Annual precipitation for water years 2015, 2016, 2020, 2021, and 2022 were 21.00, 23.50, 18.38, 22.50, and 25.75 inches, respectively. *Id.*

Respondent's Use of Water

25. The Respondent owns two wells. The first well ("Lower Well") is located on the 43.16-acre Common Open Space Lot J in Phase 3 of the Lava Ranch Subdivision. Ex. 512 at 9. The second well ("Upper Well") is located on the 30.02-acre Common Open Space Lot B in Phase 1 of the Lava Ranch Subdivision. Ex. 3; Ex. 511 at 4.

26. The Respondent is authorized to divert ground water from the Lower Well for domestic purposes pursuant to licensed water right 29-14401 with a priority date of July 21, 2021. *The Department's scanned file for Water Right no. 29-14401* [hereinafter, "WR 29-14401 Scanned File"]. Water right 29-14401 describes the use of water as "domestic use for a pump station to fill potable water containers with water for culinary use at 470 lots within the Lava Ranch Subdivision." *Id.; License and Supporting Documents* at 1. The place of use of the water right is "within the Lava Ranch Subdivision." *WR 29-14401 Scanned File*; *License and Supporting Documents* at 1.

27. The Respondent filed an application for water right permit to use ground water from the Upper Well ("Upper Well Application") for domestic purposes on July 21, 2021. *Department's scanned file for Water Right no. 29-14402* [hereinafter, "WR 29-14402 Scanned File"]. The Upper Well Application described the proposed use of water as "domestic use for households." *Id.*; *Application for Permit* at 2. The Upper Well Application further described the proposed domestic use as "[a]ll domestic uses for homeowners with [sic] the subdivision." *WR 29-14402 Scanned File*; *Application for Permit* at 2.

28. The Petitioner's protested the Upper Well Application on August 23, 2021. *WR 29-14402 Scanned File, Notice of Protest* at 1.

29. The Respondent withdrew its Upper Well Application on May 26, 2022. *WR 29-14402 Scanned File, Notice of Withdrawal of Application for Permit* at 1.

30. LRPOA members began using water from the Upper Well in June 2016. Buckley Test.

31. On June 15, 2021, the Department limited the Respondent's combined use of ground water at their Lower Well and Upper Wells to 2,500 GPD in combination. Ex. 15 at 2. In June of 2021, the Respondent reconfigured its Upper Well to limit daily diversions to 2,500 GPD. Bland Test.

32. In 2021, the Respondent reported turning on the Upper Well on May 23 and turning it off on October 31. Ex. 519 at 9.

33. The Upper Well was not pumped again after October 31, 2021. Ex. 508 at 11.

34. For 2021, the Respondent estimated that they diverted 78,262 gallons at their Lower Well and 133,600 gallons at their Upper Well. Ex. 16 at 1.

Respondent's Upper Well

35. The Upper Well was drilled in September 1977. Ex. 24 at 1.

36. There is no well log record for the Upper Well; therefore, the depth and lithology of the producing zone for this well are unknown. Ex. 506 at 13.

37. An electrical pump in the Upper Well pumps water into two 1,700-gallon storage tanks. Ex. 4–14. The storage tanks are plumbed together and regulated by a float switch. Ex. 14. A second electrical pump is in the tanks, and individual water users can operate it to pump water from the storage tanks into their individual water storage containers. *Id.*

38. No water measurement meters are installed on the Upper Well or the connected storage tank dispensary system. Buckley Test. Power records are the only continuous evidence of water use from the Respondent's wells. *Id.*

39. There are separate electrical meters for the Lower Well pump, Upper Well pump, and the pump that dispenses water from the Upper Well storage tanks. Buckley Test. However, the Respondent receives a single monthly power bill for all three meters. *Id.* It is possible to isolate the power used by the pump in the Upper Well from the monthly power bill records.

40. The Respondent's monthly bills contain the beginning and ending dates of the monthly billing period as well as the amount of power used during the period. Ex. 519 at 7. The billing periods represent the total power used from the previous month but not the beginning and ending of pumping periods at the Upper Well. *Id.*

41. Power usage data generally indicates water use at the Lower and Upper wells over time, but pumping at the Upper Well cannot be directly correlated to discrete discharge measurements at the Petitioners' Spring. Ex. 519 at 7.

42. The Respondent submitted monthly power use data for the period June 2016 to June 2021. Ex. 504 at 2. Annual power use from 2016 to 2021 was 894, 1668, 2176, 1685, 2394, and 1080 kilowatt-hours ("KWH"), respectively. *Id.* Reported power use data for 2016 and 2021 represented partial-year use. *Id.*

43. The static water level in the Upper Well was 16 feet below the top of the well casing in 2016, but no record of this measurement exists. Buckley Test.

44. The static water level in the Upper Well was measured at 21 feet below the top of the well casing on July 25, 2015. Ex. 17 at 2.

45. The static water level in the Upper Well was measured at 22.17 feet on October 4, 2022. Ex. 18 at 1.

Hydrologic Connection between the Upper Well and the Petitioners' Spring

46. Tectonic movement shatters rocks near faults, increasing fracture density. Ex. 506 at 3. Higher fracture density near faults increases groundwater storage and transmission. *Id.* The Smith Canyon Fault and an unnamed east-west trending fault intersect near Lot 182. *Id* at 3, 4. The presence of springs on and near Lot 182 is likely related to the intersection of these faults. *Id.*

47. Fractured rock aquifers store and convey groundwater in fractures, and aquifer productivity is related to fracture size, length, density, and interconnection. Ex. 506 at 3. Most of the wells surrounding Lot 182 obtain cold groundwater from fractured rock. *Id.* The Petitioners' Spring discharges from fractured rock. *Id.*

48. Twelve wells, including the Upper Well, are located east of the Smith Canyon Fault within one (1) mile of Lot 182. Ex. 506 at 4, 6. It is possible that these twelve wells are hydraulically connected to the Petitioners' Spring on Lot 182. *Id* at 6.

GOVERNING LAW AND EVALUATION CRITERIA

Idaho Code, Title 42, Chapter 6 – Distribution of Water Among Appropriators

Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

> The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

The Idaho Constitution provides that "[p]riority of appropriation shall give the better right as between those using the water" of the State. Idaho Const. Art. XV, § 3. "As between appropriators, the first in time is first in right." I.C. § 42-106.

Idaho Code § 42-603 grants the Director authority to adopt rules governing water distribution and provides as follows:

> The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.

> Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

It is the duty of a watermaster, acting under the supervision of the Director, to distribute water from the public water supplies within a water district among those holding rights to the use of the water in accordance with the respective priority of the rights, subject to applicable Idaho law, including applicable rules promulgated pursuant to the Idaho Administrative Procedures Act. *See* Idaho Code §§ 42-602, -607.

IDAPA 37.03.11 – Rules for Conjunctive Management of Surface and Ground Water Resources

In accordance with Section 42-603 and chapter 52, title 65, Idaho Code, the Department adopted rules regarding the conjunctive management of surface and ground water, effective October 7, 1994. IDAPA 37.03.11 [hereinafter, "CM Rules"].

The CM Rules prescribe procedures for responding to a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply. IDAPA 37.03.11.001.

The CM Rules define an area of common ground water supply as follows:

> A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights.

IDAPA 37.03.11.10.01.

CM Rule 30 governs responses to calls for water delivery in an unorganized water district or with no ground water regulation. IDAPA 37.03.11.030. CM Rule 30 requires a petitioner filing a delivery call against one or more junior-priority ground water rights to file a petition in writing with the Director, containing the following information:

> 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 (Respondent) 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 the petitioner desires junior-priority ground water diversion and use to be regulated.

IDAPA 37.03.11.30.01.a–d.

When a petitioner files a delivery call under CM Rule 30, in addition to a petition for delivery call, the Department may also consider it a petition to modify an existing water district, create a new water district, or designate a ground water management area. IDAPA 37.03.11.30.04–06.

Following consideration of a contested case conducted under the Department's Rules of Procedure in response to a petition filed under CM Rule 30, the Director may, by order, take any or all the actions outlined in Rule 30.07, titled "Order". IDAPA 37.03.11.30.07. Possible actions include "deny[ing] the petition in whole or in part" and "grant[ing] the petition in whole or in part or upon condition." *Id.*

ANALYSIS

This case concerns a delivery call filed by the Petitioners pursuant to CM Rule 30. The call involves a remote area within Basin 29 not located within a governing water district,[2] groundwater management area, or other administrative area regulated by the Department. As a result, the call is governed by CM Rule 30 – Responses to Calls for Water Delivery in an Unorganized Water District or with no Ground Water Regulation.

The Petitioners argue that the Respondent's use of its Upper Well violates Idaho Law because water withdrawal from the well "cannot be ruled out as the cause of injury to the Petitioners' prior appropriation of water." Pet'rs' Post-Hr'g Mem. at 5. They further argue that (1) domestic water use is subject to regulation, (2) the junior water user has the burden of proving their use will not injure prior appropriations, (3) the establishment of an ACGWS is discretionary and not necessary for curtailment, and (4) merely establishing an effect of junior water use on senior water use, and not determining material injury, is the standard for curtailing junior ground water use.

The Respondent argues the delivery call petition should be denied because (1) the Department lacks jurisdiction to manage beneficial use water rights conjunctively,[3] (2) the

[2] The Lava Ranch Subdivision resides partially in Water District 29 and 29H. The Petitioners' Spring and the LRPOA's Lower and Upper Wells are located within Water District 29. Currently, Water District 29 excludes the administration of ground water rights.

[3] The Hearing Officer considered and ruled on this argument in his September 8, 2023, *Order Denying Motion to Dismiss* and will not revisit his analysis of this argument in this order. In the order, the hearing officer ruled that the Respondent's domestic water use from the Upper Well "must occur pursuant to a water right subject to

Petitioners have failed to establish a hydrologic connection between their spring and the Upper Well, (3) the Petitioners have failed to provide a sufficient technical basis to establish an ACGWS which is a required precondition for conjunctive administration and (4) the Petitioners have failed to establish a material injury.

The sequence of considerations that must occur before granting a petition for delivery call and subsequently curtailing junior priority ground water rights include (1) determining an ACGWS, (2) establishing a hydrologic connection between the senior surface or ground water right and the junior ground water right alleged to cause injury, (3) determining material injury to the senior surface or ground water right, and (4) evaluating whether the call is futile.

Determination of an Area of Common Ground Water Supply

In this case, the ACGWS is the ground water source within which the diversion and use of ground water (i.e., pumping the Upper Well) affects water flow in a surface water source (i.e., Petitioners' Spring).

In its Post Hearing Memorandum, the Respondent argues that "the determination of an area of common ground water supply is a threshold prerequisite for conjunctive administration." LRPOA's Post-Hr'g Mem. at 8. Conversely, the Petitioners argue that "statute recognizes that the Director has discretion and may establish an [ACGWS]" but that "[e]stablishment of an [ACGWS] is not required by statute." Pet'rs' Post-Hr'g Mem. at 11. The Petitioners argue that establishing an ACGWS is discretionary "and is typically done to assist the Director in administering water rights." *Id.*

The courts have determined an ACGWS is "critical in a surface to ground water call" as its "boundary defines the world of water users whose rights may be affected by the call." *See* Mem. of Decision and Order at 9, *Sun Valley Company v. Gary Spackman*, No. CV-WA-2015-14500 (Ada Cnty Dist. Ct. Idaho Apr. 22, 2016) [hereinafter, "Sun Valley Order"]. In his Sun Valley Order, Judge Wildman further noted that "determining the applicable [ACGWS] is the single most important factor relevant to the proper and orderly processing of a call involving the conjunctive management of surface and ground water." *Id.*

In this case, the hearing officer agrees with the Respondent that determining an ACGWS is a threshold prerequisite for conjunctive administration.

In their Amended Petition, the Petitioners described an ACGWS, which was effectively Smith Canyon as defined by its topography, bounded by divides to the west and east, by Pine Loop Road to the south, and by the boundary of Phase 3 of the Lava Ranch Subdivision to the north. The Respondent argues that the Petitioners identified an ACGWS based upon "a general topographic description only, not based upon documented groundwater hydrology." LRPOA's Post-Hr'g Mem. at 8. The Respondent further argues that the Petitioners' failure to base the ACGWS in documented groundwater hydrology is "fatal to their [delivery call] case" as it is not

administration by the Department with all other water rights, including through the application of the CM Rules." *Order Denying Motion to Dismiss* at 3.

"based upon the scope of any defined aquifer and no qualified witness provided testimony in support of [their] proposed area." *Id.*

Analysis by the Petitioners, the Petitioners' expert witness Michael McVay ("McVay"), and the Respondent's expert witness, Dr. Erick Powell ("Powell"), agreed that faulting has occurred in Smith Canyon in and around the points of diversion of water use relevant to this case. Ex. 506 at 3 – 6. Ex. 2 at 2 – 3. They further agreed that this faulting likely resulted in the development of fractured rock aquifers, which are the sources of much of the water used in the area. *Id.*

McVay and Powell concur that the Petitioners' Spring, other springs in the area, and most of the wells in the area likely receive water from fractured rock aquifers. However, there was insufficient evidence to establish the aquifer source of the Upper Well due to its age and the lack of well logs describing its construction and production zone. McVay Test.; Powell Test.

Fractured rock aquifers convey groundwater in fractures, and aquifer productivity is limited by the fractures' size, length, density, and interconnection. Although proximity generally matters, and the closer features are to each other, the more likely they are connected, it is also possible for springs and wells to be in proximity but not completed in the same fractured rock aquifer and therefore not connected. The Petitioners' Spring and the Upper Well may be in different fractured rock aquifers. McVay Test. It is also possible for wells and recharge zones in other drainages to connect to fractured rock aquifers in the Deer Creek Drainage. *Id.*

McVay summarized his uncertainty in the Conclusions and Recommendations section of his October 3, 2022, Beer Delivery Call Analysis Memo:

> "[T]he geology in the area suggest that the source of water for local wells and springs are fractures in the host rock and the locations of Lot 182 and the [Upper Well], relative to each other, increase the probability that the spring and well are hydraulically connected. However, because hydraulic connection in fracture rock aquifers is due to fracture interconnectivity, it is also possible that the spring and the well are not connected, and discharge declines are the result of increased water use at a different location."

Ex. 519 at 10.

Powell agreed with most of McVay's conclusions regarding the hydrologic connectivity of the Petitioners' Spring and the Upper Well. Powell Test. He agreed with McVay that the Petitioners' Spring may not be connected to the Upper Well. *Id.* Powell acknowledged that some of the data supported a hydrologic connection but emphasized that other hydrologic data refuted a connection and suggested this might indicate that the Petitioners' Spring and Upper Well do not share the same fractured rock aquifer. *Id.* He did not have enough information to conclude whether it was more probable that the spring and Upper Well were or were not connected. *Id.*

McVay testified that he did not evaluate, before the hearing, the existence or extents of an ACGWS or have an opinion as to what it should be concerning the delivery call. McVay Test.

When questioned on this topic, McVay discussed what technical analysis might be used to evaluate and determine an ACGWS. To determine whether an ACGWS existed in the future, McVay stated that you would need to reliably measure flows at the Petitioners' Spring and Deer Creek and water levels in the Upper Well and other wells. *Id.* He also recommended analyzing the hydraulic connection between the Petitioners' Spring, the Upper Well, and other nearby wells by performing pump tests and analyzing water chemistry at each location. *Id.* He also said it would be important to establish where the recharge zones to the fractured rock aquifer underlying Lot 182 occur. *Id.* McVay also testified that you would need to collect precipitation, evapotranspiration, and consumptive use data covering multiple years to evaluate the reasonably anticipated average rate of future natural recharge. *Id.* Almost none of the data and analysis McVay referenced exists at this time.

Powell testified that it is premature to establish an ACGWS for this delivery call because there are still too many unknowns regarding the hydrologic conditions and connectivity of the area. Powell Test. Powell generally agreed with McVay's assessment of what data and other information are needed to establish an ACGWS and reasonably anticipated average rate of future natural recharge. *Id.*

Based on the analysis above, the hearing officer finds insufficient data to determine an ACGWS between the Petitioners' Spring and the Respondent's Upper Well. Furthermore, there is inadequate data to determine whether an ACGWS exists between other springs and wells around the Petitioners' Spring.

Establishment of a Hydrologic Connection

In order for a junior ground water right to affect a senior ground or surface water right, a physical or hydrologic connection must exist between the water sources and points of diversion supplying each water use.

To evaluate the possible hydrologic connectivity between their spring and the Upper Well, the Petitioners collected spring flow, Deer Creek flow, and precipitation data. They also compared it to power usage data at the Respondent's Upper Well. The Petitioners used reasonable methods to collect hydrologic data but are not experts in water measurement or hydrologic data collection and analysis.

The Petitioners measured and reported spring discharge on Lot 182 from August 2019 to August 2022. The frequency of their hand measurements was roughly weekly, but there are instances of less and more frequent measurements. Ex. 518. The Petitioners measured and reported Deer Creek flow near Lot 182 from November 2020 to August 2022. The frequency of their weir measurement was roughly weekly, but there are instances of less and more frequent measurements. Ex. 514; Ex. 515. Further complicating the analysis is the fact that measurements of spring flow and Deer Creek flow only sometimes occurred on the same day.

The Petitioners measured precipitation from October 2014 to September 2022. They never measured precipitation more frequently than weekly and reported data gaps in three of the five water years for which they reported data. Ex. 508 at 8, 9.

The Petitioners' testimony and measurements establish that their spring has generally declined when they have owned Lot 182. However, it is difficult to draw conclusions other than a general decline in the Petitioners' Spring from the data they collected and reported. One would expect a relationship between Lot 182 spring flows, Deer Creek, flows, and precipitation. Sometimes, it appears there is a relationship in the data[4] but other times, it appears no relationship is evident.[5] This could be due partly to their methods, measurement errors, infrequency in data collection, or inconsistent measurement events and periods between the data sets. Overall, the Petitioners' hydrologic data is interesting but insufficient to confidently draw conclusions.

Unfortunately, no flow meters on the Upper Well document when and how much water was diverted from the well. The Respondent submitted power usage data for their Upper Well from June 2016 to June 2021 and testified that it had not been used since October 2021. Power usage data can serve as a proxy for water measurement and use, but the data is problematic. For instance, the power usage data is reported in monthly increments, so you cannot relate it to individual pumping periods. In McVay's words, "power usage data give a general indication of use over time, but well-pumping cannot be directly correlated to discrete spring-discharge measurements." Ex. 519 at 7.

Still, of all the collected, reported, and analyzed data, Lot 182 spring flow measurements and Upper Well power usage records are the most useful in evaluating hydrologic connectivity. The Petitioners, McVay, and Powell, spent time analyzing or testifying to the relationship between the two data sets. If the Petitioners' Spring and the Upper Well were hydrologically connected by sharing a common fractured rock aquifer, you would expect the pumping of the well to impact spring flows in a regular and observable way. Conversely, you would expect a cessation of pumping in the well to impact the springs in a regular and observable way. In this regard, however, the data bare out mixed results.

From August 2019 to October 2020, the initiation, duration, and cessation of pumping correlated to decreased and increased spring flows, suggesting that pumping the Upper Well impacted the springs. However, from November 2020 to August 2022, the initiation, duration, and cessation of pumping did not correlate to decreased or increased spring flows.

Ultimately the data is inconclusive at best or, at worst, dispositive of a physical connection. The two experts in this contested case agreed that the data does not prove a hydrologic connection exists. McVay testified, [I]dentification of a definitive connection between the [Petitioners'] spring and the [Upper Well] cannot be made" due to insufficient information regarding the fractured rock aquifers, the Upper Well, and the Petitioners' Spring. Ex. 516 at 13; Ex. 519 at 11. Similarly, Powell testified, that he had "not seen any definitive

[4] For example, the Petitioners' expert witness McVay notes that similarities in the Petitioners' Spring flow and Deer Creek flow measurements indicate that the two sources are hydraulically connected. Ex. 519 at 7.

[5] For example, the Petitioners' expert witness McVay notes that there does not appear to be a correlation in comparing the Petitioners' Spring flow and monthly precipitation data although a relationship would be expected to exist. Ex. 519 at 5.

scientific evidence that concludes that the Lot 182 spring is [hydrologically] connected to the [Upper Well]." Ex. 2 at 10.

Similar to evaluating and defining an ACGWS, McVay identified actions that would assist in determining whether a hydrologic connection exists, which included continued spring flow measurements, measuring discharge and water levels at the Upper Well and other nearby wells, and water chemistry analysis. Ex. 519 at 11. Ultimately, McVay and Powell concurred that more and better data is needed to determine whether a hydrologic connection exists. McVay Test.; Powell Test.

At the hearing, the Petitioners questioned McVay and Powell as to whether pumping the Upper Well might have permanently impacted their spring, thus explaining why a relationship between spring flow and pumping is not clearly observable after October 2020. However, the hearing officer is not persuaded by this line of reasoning. At the hearing, some witnesses testified to fluctuations in spring or well conditions that they believed were correlated to annual changes in precipitation. Patterson Test.; Bland Test.; H. Scott Test. While other witnesses testified to observing temporary or permanent declines in spring or well conditions in other basins in the subdivision. Buckley Test.; Haskett Test. To this point, McVay could not determine a hydrologic connection because important information is missing, such as the use of other nearby wells, the record of existing data is too short, incomplete, or error-prone to draw conclusions, and there is uncertainty in the extent of the fractured rock aquifer that supplies the Petitioners' Spring. Ex. 519 at 11. The hearing officer concludes there is simply too much uncertainty in the existing data and too much missing relevant data to determine that the Petitioners' Spring and the Upper Well are hydrologically connected, resulting in temporary or permanent impacts to the spring from pumping.

Based on the analysis above, the hearing officer finds insufficient data to determine a hydrologic connection between the Petitioner's Spring and the Respondent's Upper Well. Furthermore, there is inadequate data to determine whether other nearby wells are hydrologically connected to the Petitioners' Spring.

Establishment of Material Injury and Evaluation of Delivery Call Futility

Conjunctive administration involves the collective administration of ground and surface water rights by priority. Conjunctive administration can result in the curtailment of junior ground and surface water rights found to materially injure senior water rights when the curtailment of those junior rights would not result in a futile call. As a result, before curtailing junior water rights, material injury must first be established. Also, before curtailing junior water rights, it must be determined that their curtailment would not be futile. Or, put more plainly, the Department can only curtail juniors if their curtailment *would* result in water being made available to the senior in a reasonable time and in a manner that *would not* waste the water resource.

In the case of this delivery call, because the evidence in the record fails to establish an ACGWS or a hydrologic connection between the Petitioner's Spring and the Respondent's Upper Well, the issues of material injury and delivery call futility are do not apply, and are not

addressed by this decision. Without proof of hydrologic connectivity between the Petitioners' Spring and the Upper Well, the Department has no basis for conjunctively administering the two water uses.

ORDER

IT IS HEREBY ORDERED that the Petitioner's call to curtail pumping from the LRPOA Upper Well, is **DENIED**.

IT IS FURTHER ORDERED that this is a preliminary order pursuant to Rule 730 of the Rules of Procedure (IDAPA 37.01.01.730).

DATED this 15th day of May 2023.

MAT WEAVER
Deputy Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 15th day of May 2023, I caused to be served a true and correct copy of the foregoing *Order Denying Petition for Delivery Call*, by the method indicated below, upon the following:

Lance J. Schuster BEARD ST. CLAIR GAFFNEY PA 955 Pier View Dr. Idaho Falls, ID 83402 lance@beardstclair.com *Attorney for Petitioners*	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Michael A. Short Travis L. Thompson BARKER ROSHOLT & SIMPSON LLP P.O. Box 63 Twin Falls, ID 83303-0063 mas@idahowaters.com tlt@idahowaters.com *Attorneys for LRPOA*	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Michael and Lori Beer idbeer@me.com *Petitioners*	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Matt Groll mattgroll@gmail.com *President, LRPOA*	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Thomas Bland tomb1127@outlook.com *Former Board Member, LRPOA*	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email

Sarah Tschohl
Paralegal

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rule of Procedure 53.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

> Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
>
> (a) The petition for reconsideration is disposed of; or
> (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.