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**IDAHO DEPARTMENT OF WATER RESOURCES  
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

MEMORANDUM IN SUPPORT OF  
OBJECTION TO LRPOA'S MOTION  
TO DISMISS DELIVERY CALL

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Michael Beer and Lori Beer, by and through their attorney, Lance J. Schuster of the firm Beard St. Clair Gaffney PA, object to LRPOA's Motion to Dismiss Delivery Call as Against Statutory Exempt Domestic Well Use. Defendants submit this Memorandum in Support of their Objection.

**UNDISPUTED FACTS**

1. Petitioners are the owners of certain real property located at 13714 South Smith Canyon, Lava Hot Springs, Idaho ("Beer Property"). The Beer Property is located in the Lava Ranch Subdivision (Lot 182) of Bannock County, Idaho. The property is not in an organized ground-water district.

2. Located on the Beer Property is an artesian spring that has dependably and reliably produced predictable quantities of water in all seasons of the year. Diversion of water from the artesian spring is accomplished with a collection pipe that diverts water from the spring to a cistern. From the cistern, a pump and pressure tank deliver water to a cabin on the Beer Property.

3. Adjacent property owners also have springs and seeps on their properties, some of which have been developed for domestic uses. All of these springs and seeps collectively form the headwaters of Deer Creek.

4. Petitioners have a decreed water right issued in 2006 as Water Right No. 29-13740. This water right is for domestic use in the amount of .04 cfs. The Petitioners use their water for beneficial domestic uses including drinking, bathing and other domestic uses.

5. Petitioners have, in fact, used the water from the artesian spring for domestic use on the Beer Property.

6. LRPOA is the homeowner's association for the Lava Ranch Subdivision, a subdivision located in Bannock County, Idaho consisting of 470 lots. Some lot owners have their own domestic well, and other lot owners bring water to their lots when they use the lots. Some lots have no development, and lot owners use their property by simply parking recreational vehicles or trailers on their lots.

7. LRPOA has historically owned and operated a well on the north end of the subdivision near Lava Hot Springs. This well is located at the lower elevation of the development, and conveniently is located near the "entrance" where most lot owners access the subdivision. This well is known as the "Lower Well."

8. In 2016, LRPOA developed a water system using an old stock well near the south intersection of Wolverine Pass Road and Smith Canyon Road. LRPOA developed the well by

installing a pump, water lines, and water tanks to hold water from the well. This well is locally known as the “Upper Well.” The water system is uphill from the Petitioners’ artesian spring, and since its development any member of the Lava Ranch Property Owner’s Association has been allowed to draw unlimited amounts of water from the holding tanks.

9. LRPOA did not install a meter or way to measure the amount of water being drawn from the Upper Well. In the Summer of 2017, the Petitioners began to see a decline in flows from their artesian spring. By August 2019, there was insufficient water from the spring for Petitioners to maintain water in their cistern. Other adjacent property owners, who also have artesian springs on their properties, have noticed decreases in the water flows.

10. Petitioners filed a delivery call on February 11, 2021 and requested that IDWR curtail LRPOA’s use of the Upper Well. Petitioners have filed an amended petition which identifies a proposed area of common ground water supply. Both the Upper Well, and Petitioner’s spring, are located within the area of common ground water supply identified by Petitioners.

11. Following the filing of the Petition for Delivery Call it was discovered by LRPOA that it did not have water rights for the Lower Well or the Upper Well. LRPOA filed applications with IDWR requesting a permit for both the Lower Well (29-14401) and the Upper Well (29-14402). Michael and Lori Beer filed protests to both applications.

12. On December 9, 2021, LRPOA and the Beers entered into an agreement whereby the Beers agreed to withdraw their protest to the Lower Well application, in exchange for LRPOA not using the Upper Well during the pendency of the dispute regarding the Upper Well. The Beers withdrew their protest for the Lower Well. On May 26, 2022, LRPOA withdrew its application for a water permit for the Upper Well, but has now moved to dismiss the delivery call

filed by the Beers arguing that its domestic use of the Upper Well is exempt from regulation and curtailment by IDWR.

13. Petitioners have alleged that in their delivery call that their water rights are being materially injured by the excessive, unmeasured, unpermitted, and unlicensed pumping of water by LRPOA from the Upper Well system developed near Wolverine Pass Road and Smith Canyon Road.

14. LRPOA has been given a permit for the Lower Well and its use for “domestic” purposes. The permit allows all 470 lot owners in the Lava Ranch Subdivision to fill portable water containers at the Lower Well and use the water for domestic purposes on their respective properties. LRPOA desires to use also the Upper Well for domestic purposes for all 470 lot owners in the Lava Ranch Subdivision.

### **ARGUMENT**

LRPOA’s motion to dismiss is a misguided attempt to avoid Idaho law and the prior appropriation doctrine embodied in the Idaho Constitution. LRPOA seeks to illegally stack domestic water rights in the Lava Ranch Subdivision. LRPOA also erroneously argues that the Idaho Department of Water Resources has no authority to regulate domestic water use in the State of Idaho. The fact that LRPOA may use water for domestic purposes without a permit does not absolve IDWR of its authority to curtail LRPOA’s use of the Upper Well for domestic purposes.

#### **1. LRPOA attempts to Illegally Stack Domestic Water.**

Idaho law allows for the excavation and opening of wells and the withdrawal of water therefrom for “domestic” purposes to be accomplished without first obtaining a permit. Idaho Code § 42-227. Rights to ground water for such domestic purposes “are acquired by withdrawal and use.” *Id.* The term “domestic use” is defined to mean the use of water for homes,

organization camps, public campground, livestock, or any other purposes in connection thereof not in excess of thirteen thousand (13,000) gallons per day. Idaho Code § 42-111(a). Any other use is allowed so long as it does not exceed twenty-five hundred (2,500) gallons per day. Idaho Code § 42-111(b).

Notwithstanding the domestic exception, Idaho law restricts the “stacking” of domestic water rights for multiple ownership subdivisions and multiple ownership business developments. Idaho Code § 42-211(2). A multiple ownership subdivision is not allowed to stack multiple domestic use water rights. *Id.*

LRPOA has historically used the Lower Well<sup>1</sup> at the north end of the subdivision for supplying water to lot owners. The Lower Wells sits at the entrance to the subdivision. Most lot owners access the subdivision by traveling on Highway 30, and before entering Lava Hot Springs, turning south toward Lava Ranch. Many lot owners bring portable water containers and fill-up their containers at the Lower Well before heading up the mountain to their respective lots.

The Upper Well was developed in 2016 by the LRPOA. The Upper Well was developed as a convenience to the members of LRPOA who own lots on the south end of the development, which is higher in elevation. All lot owners have had use and enjoyment of the Lower Well. The Upper Well is a convenience, but not a necessity for lot owners in LRPOA as all members have historically had use of the Lower Well.

As a result of this delivery call action it was discovered that LRPOA did not have a water right for either the Lower Well or the Upper Well. LRPOA filed applications with IDWR requesting a permit for both the Lower Well (29-14401) and the Upper Well (29-14402).

Michael and Lori Beer filed protests to both applications.

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<sup>1</sup> The terms “Lower Well” and “Upper Well” stem from the fact that the Lower Well is lower in elevation than the Upper Well.

On December 9, 2021, LRPOA and the Beers entered into an agreement whereby the Beers agreed to withdraw their protest to the Lower Well application, in exchange for LRPOA not using the Upper Well during the pendency of the dispute regarding the Upper Well. On May 26, 2022, LRPOA withdrew its application for a water permit for the Upper Well, but has now moved to dismiss the delivery call filed by the Beers arguing that its domestic use of the Upper Well is exempt from regulation and curtailment by IDWR.

LRPOA has stated its intention to use the Upper Well in reliance upon the domestic exemption in Idaho Code §§ 42-227 and 42-111. (LRPOA's Motion to Dismiss p. 5). However, LRPOA's use of the Upper well would be in addition to the use of the Lower Well. The Lower Well has been granted a permit by IDWR for "domestic" use of the Lower Well in the amount of .04 cfs, and an annual volume of 6 acre feet of water. Conditions of approval include: "3. Domestic use is for a pump station to fill portable water containers with water for culinary use at 470 lots and does not include lawn, garden, landscape or other type of irrigation."

The place of use for the Lower Well is the 470 lots in the Lava Ranch Subdivision. The place of use for the Upper Well is the 470 lots in the Lava Ranch Subdivision. LRPOA wishes to have a domestic water right for the Lower Well for the use of 470 lots, and to have an exempt domestic water right for the Upper Well for 470 lots. LRPOA wishes to "stack" the domestic use of water and drink from two straws. It wants to withdraw water from both the Upper Well and the Lower Well, each at .04 cfs, each for domestic purposes, and each for the same 470 lots.

Idaho Code § 42-111(3) specifically prohibits the stacking of domestic water rights stating that:

Multiple water rights for domestic uses or domestic purposes, as defined in this section, shall not be established or exercised in a manner to satisfy a single combined water use or purpose that would not itself come within the definition of a domestic use or purpose under this section.

The stated purpose of this prohibition is to:

[P]rohibit the delivery and use of water, under a combination of domestic purposes or domestic uses as defined in this section, to provide a supply of water for a use that does not meet the exemption of section 42-227, Idaho Code, and is required to comply with the mandatory application and permit process.”

Idaho Code § 42-111(3).

LRPOA is allowed one domestic use of water. It has applied for a water permit for the Lower Well. That water permit is for a “domestic” use. It is not allowed to use additional wells, each having their own domestic use exception. While individual lot owners might choose to dig their own domestic well, and do so without a permit, LRPOA is not entitled to have multiple wells, each with their own domestic exception.

LRPOA’s attempt to use the Upper Well as another source of domestic water is an attempt to illegally “stack” domestic water rights. LRPOA already has a permit for domestic water at the Lower Well. It is not entitled construct, dig, improve, excavate, or otherwise open multiple new wells for the 470 lots with the Lava Ranch Subdivision.

IDWR should deny the Motion to Dismiss and issue an order prohibiting LRPOA from any use of the Upper Well as it already has a permit for domestic water at the Lower Well, and use of the Upper Well by LRPOA, or any other well in Lava Ranch, is an illegal effort to stack domestic water rights.

## **2. The Idaho Constitution Declares all Waters Subject to the Regulations and Control of the State.**

The Idaho Constitution was adopted on August 6, 1889 in Boise, Idaho, and ratified by the people in November 1889. On July 3, 1890 it was approved by Congress and Idaho was admitted to the Union. The Idaho Constitution became the law of the land.

Included in the State Constitution is Article 15, which governs water rights.

Article 15, § 1 states:

Use of waters a public use – The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law.

Idaho Courts have interpreted this provision of the Idaho Constitution to mean that all waters of the State, including waters of all natural springs and lakes, are the property of the State. *Short v. Praisewater*, 35 Idaho 691, 208 P.844 (1922). The Idaho Code codifies this principal by stating that “[a]ll the waters of the state...are declared to be the property of state.” Idaho Code § 42-101.

Importantly, the Idaho Constitution states that all water is subject to the “regulations and control” of the State. Idaho Const. Art. 15, § 1. There is no exception for waters appropriated for domestic use.

The Idaho legislature has further stated that the Idaho Department of Water Resources has exclusive authority over the appropriation of public surface and ground waters of the state. Idaho Code § 42-201(7). No other agency, department, county, city, municipal corporation or other division of the state has authority to prohibit, restrict, or regulate the appropriation of water. *Id.* All appropriations of water are subject to the purview and oversight of the Idaho Department of Water Resources.

**A. Diversions of Water for Domestic Use are an Appropriation.**

All diversions of water, whether for domestic use, agriculture, mining, manufacturing, or any other use, are an appropriation of water. LRPOA mistakenly argues that IDWR has no authority over domestic wells since domestic wells do not require a permit. However, the exemption for wells for domestic uses does not strip IDWR of authority to “prohibit, restrict, or



regulate the appropriation of water.” *Id.* IDWR has the legal authority to regulate the use of domestic wells, and to order curtailment of a domestic well.

Notwithstanding the permit exemption for a domestic well, the domestic use exception still requires the diversion and beneficial use of the water in order to acquire a water right. Idaho Code § 42-227 states that: “Rights to ground water for such domestic purposes may be acquired by withdrawal and use. In other words, a water right (albeit permitless) is acquired by the withdrawal and use of water for domestic purposes. No water right is acquired just by excavating a well. Water must be withdrawn and put to beneficial use before a water right is acquired.

New appropriations of water in Idaho have historically been made in one of two ways. *Parke v. Bell*, 97 Idaho 67, 69, 539 P.2d 995, 997 (1975). The “statutory method” required applying for a permit under the provisions of Title 42 of the Idaho Code. *See, e.g. Lemmon v. Hardy*, 95 Idaho 778 519 P.3d 1168 (1974). The “constitutional method” of appropriation required diverting water and putting it to beneficial use. *See, e.g. Olson v. Bedke*, 97 Idaho 825, 829-30, 555 P.2d 156, 160-61 (1976); *Sandpoint Water & Light Co. v. Panhandle Dev. Co.*, 11 Idaho 405, 413, 83 P.347, 349 (1905). A “constitutional appropriation” was historically made pursuant to the authority granted by the Idaho Constitution. *State of Idaho v. U.S.*, 134 Idaho 106, 996 P.2d 806 (1999).

Idaho law today states that the right to the use of “unappropriated” waters of rivers, streams, lakes, springs, and of subterranean waters or other sources within the state shall be acquired only by appropriation under the application, permit and license procedure, unless excepted under Title 42. Idaho Code § 42-103. While the “statutory method” is the only method recognized today for obtaining a new permitted water right, the diversion and application of water for a domestic use does not require a permit.

The provisions of Idaho Code § 42-227 allowing for drilling and use of wells for domestic purpose is consistent with the Idaho Constitution. The opening and excavation of a well for domestic purposes is a *de facto* constitutional appropriation. Just like the long-recognized “constitutional method” of appropriation, a domestic well user must divert water and put it to beneficial use. Section 227 states that water must be “withdrawn” and “used” in order to acquire a water right. Idaho law requires that no water right is acquired until and unless the water is “appropriated.” Idaho Code § 42-227.

Importantly, the provisions of Section 227 state that as a result of withdrawal and use a person acquires “[r]ights to groundwater.” A person who withdraws and uses water pursuant to the exemption has an actual water right under Idaho law. *Parker v. Wallentine*, 103 Idaho 506, 512, 650 P.2d 648, 654 (1982), (overruled on other grounds.).

The priority date of a domestic water right that is exempt under Idaho Code § 42-226 is the date that the water is appropriated, i.e. the date the water is first withdrawn and put to beneficial use. Just like any other water right, the appropriation of water under Idaho Code § 42-226 is an appropriation that is subject to all of the rules and regulation of the Idaho Department of Water Resources.

The Idaho Constitution and Idaho Statutes make clear that all waters, including appropriations made under the domestic use exemption, are subject to the rules and regulations of the Idaho Department of Water Resources.

### **3. Use of the Upper Well can be Curtailed by IDWR.**

The Idaho Constitution grants to the people of Idaho the right to divert and appropriate the “unappropriated” waters of the state, subject to “priority of appropriations.” Idaho Const. Art. XV, § 3. However, it is a fundamental concept that, under the Idaho Constitution, water

which has already been appropriated by another person is not subject to appropriation. *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964), *citing* Idaho Cost. Art. 15, §§ 3, 4, 5.

Notwithstanding any statutory language requiring a permit, or making an exemption for a permit for a well excavated for “domestic use,” any appropriation of water is subject to the fundamental Constitutional requirement that the water not already have been appropriated. *Id.* A subsequent appropriator attempting to justify his diversion has the burden of providing that it will not injure prior appropriations. *Cantlin v. Carter*, 88 Idaho 179, 186, 397 P.2d 761, 765–66 (1964); *citing Moe v. Harger*, 10 Idaho 302, 77 P. 645; *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568; *Jackson v. Cowan*, 33 Idaho 525, 196 P. 216; *Silkey v. Tiegs*, 54 Idaho 126, 28 P.2d 1037.

In this case, notwithstanding the fact that LRPOA’s Upper Well may be used for exempt domestic purposes, it is still subject to the Constitutional prohibition on taking water that is already appropriated. The Beers have a valid, existing water right for the spring on their property. The water right was issued in 2006 as water right number 29-13740. The Beers’ water right has priority over whatever water right LRPOA may have under the domestic use exemption as LRPOA only developed and began using the Upper Well in 2016. The Beers’ are entitled to the use and enjoyment of their water right without interference or material harm from LRPOA.

**A. Idaho Statutes and the CM Rules authorize the Director to limit use.**

Both Idaho statutes as well as the Conjunctive Management Rules specifically authorize the Director of IDWR to manage and curtail all uses of water, including domestic uses.

Chapter 2 of Title 42 states that it is “the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state.” Idaho Code § 42-231. There is no distinction made for ground water that is appropriated with a permit, or ground water appropriated without a permit.

Idaho Code § 42-351 states that the director of the department of water resources has the authority to direct a person to “cease and desist the activity or activities alleged to be in violation of applicable law or any existing water right.” Again, there is no limitation on water rights acquired by permit, or water rights acquired by appropriation pursuant to Idaho Code § 42-227.

Additional duties of the director include the ability to:

[S]eek a preliminary or permanent injunction, or both, or a temporary restraining order restraining any person from violating or attempting to violate (a) those provisions of law relating to all aspects of the appropriation of water, distribution of water, headgates and measuring devices; or (b) the administrative or judicial orders entered in accordance with the provisions of law.

Idaho Code § 42-1805(9).

It is a narrow and inconsistent view with Idaho law that the Director of IDWR has no authority over domestic wells simply because those wells can be excavated and opened without a permit.

Indeed, the CM rules specifically recognize and authorize the regulation of exempt domestic water rights. IDAPA 37.03.11.020.11 states:

**Domestic and Stock Water Ground Water Rights Exempt.** A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in Section 42-1401A(11), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stock watering rights, where the holder of such right is suffering material injury. (emphasis added).

The CM rules specifically allow for the holder of a domestic water right to make a delivery call against the holder of a domestic water right. *Id.* As stated earlier, a person with an exempt domestic well has domestic water right – just not a water right that is required to be permitted. *Parker v. Wallentine*, 103 Idaho 506, 512, 650 P.2d 648, 654 (1982), (overruled on

other grounds.). As such, the director has authority under the CM rules to regulate, limit, and curtail an exempt domestic water right.

To rule otherwise is to ignore the constitutional, statutory, and regulatory authority given to the director of the Idaho Department of Water Resources who has “exclusive authority over the appropriation of the public surface and ground waters of the state.” Idaho Code § 42-201(8). The director’s authority is not limited to permitted uses, but also to all illegal, exempt, unpermitted or otherwise unlicensed uses of water.

### **CONCLUSION**

LRPOA’s motion to dismiss ignores Idaho law and the prior appropriation doctrine embodied in the Idaho Constitution. LRPOA seeks to illegally stack domestic water rights in the Lava Ranch Subdivision. LRPOA also erroneously argues that the Idaho Department of Water Resources has no authority to regulate domestic water use in the State of Idaho. The Director of IDWR has exclusive authority over all waters of the State, and that authority includes the authority to curtail the use of a domestic well.

For these reasons, the Motion to Dismiss filed by LRPOA must be denied.

DATED: July 20, 2022.

/s/ Lance J. Schuster

Lance J. Schuster

BEARD ST. CLAIR GAFFNEY PA

Attorneys for Petitioners

**CERTIFICATE OF SERVICE**

I hereby certify that on July 20, 2022, I served the foregoing *Memorandum in Support of Objection to LRPOA's Motion to Dismiss Delivery Call* upon the following by U.S. Mail or

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