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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 **LRPOA'S REPLY IN SUPPORT OF MOTION TO DISMISS DELIVERY CALL AS AGAINST STATUTORY EXEMPT DOMESTIC WELL USE**

COMES NOW, Respondent LAVA RANCH PROPERTY OWNERS ASSOCIATION, INC. ("LRPOA" or "Association"), by and through its counsel of record, BARKER ROSHOLT & SIMPSON LLP, and hereby files this reply brief in support of its motion to dismiss the Petitioners' delivery call as applied to the Association's statutory exempt domestic well and use.

The reply addresses points raised by the Petitioners in their *Memorandum in Support of Objection to LRPOA's Motion to Dismiss Delivery Call* (hereinafter "*Response*") filed on July 20, 2022. For the reasons set forth below, the Association respectfully requests the Hearing Officer to grant its motion and dismiss Petitioners' delivery call as a matter of law.

DISPUTED FACTS

The Petitioners offer a series of alleged "undisputed facts" in support of their response without evidentiary support. *See generally, Response* at 1-4. Petitioners also make the unsupported factual claim that the Upper Well is only a "convenience" and not a necessity for the Association's members. *See id.* at 5. LRPOA disputes these allegations but submits they are immaterial for purposes of the legal issue presented in the motion to dismiss. LRPOA reserves the right to contest any and all factual allegations at hearing in the event this matter is not dismissed. If the Association's motion is granted, the alleged facts and any dispute pertaining thereto will be moot.

ARGUMENT

Notably, the Petitioners do not address the Association's core argument that the applicable Idaho statutes and regulations do not provide for the Department's administration of exempt domestic uses.[1] The CM Rules were promulgated pursuant to I.C. § 42-603, part of Idaho's water distribution chapter. The water distribution statutes and implementing CM Rules only provide for the administration of defined water rights, not exempt domestic uses. Since the Legislature has not yet authorized the administration of exempt domestic uses by IDWR, this matter should be dismissed as a matter of law. As an agency of limited statutory authority, IDWR cannot administer exempt domestic uses not represented by a recorded water right, without express legislative authorization. *See In re Idaho Workers Compensation Board*, 167 Idaho 13, 20 (2020) ("State agencies in Idaho have no inherent authority. . . . Thus, agencies have no authority outside of what the Legislature specifically grants to them").

[1] IDWR regulates the drilling of domestic wells. *See* I.C. §§ 42-235, 238. However, there is no statute regarding the administration of exempt domestic uses not defined by a water right. Certain domestic uses are "specifically excepted" and are not subject to water right administration under Idaho's Ground Water Act. *See* I.C. § 42-227; 229 ("unless specifically excepted herefrom. . .").

Whereas the Petitioners have expressly invoked the CM Rules for water right administration by filing a formal water delivery call, the Director cannot exceed his authority and administer exempt domestic uses where the rules do not apply. *See e.g., Memorandum Decision* at 5-7 (*Eden's Gate LLC v. IDWR*, Case No. CV14-21-10116, Canyon Cty Dist. Ct., Third Jud. Dist., June 9, 2022). Again, the scope of the CM Rules does not allow for delivery calls against exempt domestic uses, only against defined ground water rights. *See* CM Rule 10.25. Since LRPOA does not hold a decree, permit, license or constitutional use water right to the Upper Well, there is no basis for IDWR to administer its exempt domestic use under the CM Rules. *See id.*

Although Petitioners do not directly address this issue, they do oppose the Association's motion on three primary theories: 1) that LRPOA seeks to illegally stack domestic water rights; 2) that the constitution makes all water subject to IDWR rules; and 3) the Director can curtail the Association's Upper Well pursuant to general statutory authority. Each of these points are addressed below.

I. LRPOA is Entitled to One Exempt Domestic Use Under I.C. § 42-111(b).

Petitioners mischaracterize what LRPOA is requesting through its motion. *See Response* at 4-7. Petitioners mistakenly assert that the Association is trying to exercise multiple domestic exemptions prohibited by I.C. § 42-111(2) and (3). In this sense Petitioners misconstrue what the Association seeks and already holds.

First, the Association holds water right permit no. 29-14401 for its Lower Well. The permit was issued by IDWR. The permit for the Lower Well does not prohibit the Association from claiming an exempt domestic use for its Upper Well. Although LRPOA was limited to a single domestic use for both wells last summer, that restriction no longer applies since the

Association now has a water right permit for the Lower Well. With the permit covering the Lower Well's use, the Association is free to exercise the single exempt use for its Upper Well. LRPOA is not asserting multiple domestic exemptions under the law, or what Petitioners call unlawful "stacking." *See Response* at 6-7 ("LRPOA is not entitled to have multiple wells, each with their own domestic exception").

Instead, the Association is exercising what the domestic purposes statute expressly authorizes, a single exempt use.

Idaho Code § 42-111 defines "domestic" purposes as follows:

> (a) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.
>
> (2) For purposes of the sections listed in subsection (1) of this section, domestic purposes or domestic uses shall not include water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b) of this section.

I.C. § 42-111 (emphasis added).

The statute plainly allows one exempt domestic use for multiple ownership subdivisions provided the use "meets the diversion rate and volume limitations set forth in subsection (1)(b)." *Id.* In other words, if the use out of the Upper Well is limited to 0.04 cfs and 2,500 gallons per day, that water can be diverted and used by the Association for its multiple ownership subdivision. The Lower Well permit has nothing to do with this evaluation as it is a separate water right permit. *See also*, Ex. A to *Motion to Dismiss*. Notably, IDWR allowed the exempt domestic use last summer provided both wells were limited to the statutory diversion rate and volume. *See id.*

Although the Association seeks to use both a permit and an exempt domestic use at separate wells, that is specifically allowed by the statutes *See generally,* I.C. § 42-111, 201, 227. Further, it is not uncommon for homeowner associations to hold multiple water rights for multi-ownership developments. *See e.g.* (Valley Club Owners Assn Inc. 37-8613A, 37-8810; Sage Springs Homeowners Assn. Inc. 37-8673, 37-8900; M&B Investments LLC 25-14163, 25-14379). Accordingly, there is nothing that prohibits an association from holding a water right at one well and an exempt domestic use (that meets the statutory restriction) at another well.

In sum, the Association's proposed use of a water right permit at the Lower Well and a statutory exempt use at the Upper Well is allowed by Idaho law and does not constitute unlawful "stacking" of domestic water use. As such, the Petitioners' argument should be rejected.

II. The Constitution Does Not Require or Authorize IDWR to Administer Exempt Domestic Uses.

The Idaho Constitution declares public waters to be subject to appropriation and "subject to the regulations and control of the state in the manner prescribed by law." Idaho Const. Art. 15, § 1 (emphasis added). Petitioners gloss over this key phrase in arguing that IDWR has authority to administer exempt domestic uses. Although Petitioners generally assert IDWR can administer exempt domestic uses, they provide no specific citation for that authority. *See Response* at 9 ("IDWR has the legal authority to regulate the use of domestic wells, and to order curtailment of a domestic well"). Where the Legislature has specifically authorized exempt domestic uses without obtaining a water right, there is no counterpart statute or rule that gives IDWR authority to administer those uses like defined water rights.[2] In other words, the

[2] To the extent Petitioners claim that the CM Rules provide that authority in Rule 20.11, that rule specifically states "water right," not exempt domestic uses pursuant to statute. Moreover, to the extent Petitioners claim this rule enlarges IDWR's authority beyond what is specified by statute, such an argument fails under Idaho law. *See Roeder Holdings, LLC v. Board of Equalization of Ada County*, 136 Idaho 809, 813 (2011) (abrogated on other grounds).

Legislature has not authorized administration of exempt domestic uses by either statute or through approval of any administrative rule. Without such statutory authority, IDWR and its Director cannot administer these uses like they would water rights within an organized water district.[3]

Similarly, while IDWR has authority over the "appropriation" of water in Chapter 2, Title 42, Idaho Code, nothing in that chapter requires a user to obtain a water right for an exempt domestic use. In other words, if you have a well that is excepted from the permitting process, and your use meets the limits in section 42-111(1), there is nothing that folds that use into water right administration, either under Chapter 6 or the CM Rules. Just the opposite, section 42-229 states that excepted water rights are not subject to administration under the Ground Water Act. *See* I.C. § 42-229 ("But the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act"). The Petitioners' generalized arguments about IDWR's oversight fail to acknowledge the specifics of the statutes and rules involved.

Petitioners also rely upon section 42-201(7) in support of their argument. *See Response* at 8. That statute merely identifies IDWR as the sole governmental authority regarding the "appropriation" or permitting and licensing of water rights in the state. No other agency or local government can grant a water right in the state of Idaho. The cited statute says nothing about the administration of water rights. That is not surprising since Chapter 6, Title 42 and the CM Rules cover that authority, including specifically for conjunctive administration.

[3] Petitioners mistakenly claim that the Association claims that "IDWR has no authority over domestic wells." *Response* at 8. Again, the Association recognizes that IDWR regulates the drilling of domestic wells, but that regulation is not the same as water right administration.

Petitioners claim that an exempt domestic use is a water right subject to administration. *See Response* at 10. However, the statute is permissive by stating that a right "may" be acquired. In that sense, if a person seeks to obtain a water right decree, such use could be claimed in an adjudication or through a permit as well. LRPOA does not have a decreed domestic water right for the Upper Well and it withdrew the previously filed application for permit no. 29-14402. Consequently, the exempt domestic use of 0.04 cfs / 2,500 gallons per day is not an established water right that can be administered.

The Petitioners' reliance upon *Parker v. Wallentine*, 103 Idaho 506 (1982), is inapplicable since the domestic user in that case sought injunctive relief against a junior irrigation water right. The case concerned the equitable powers of a district court, not water right administration authority by a watermaster or IDWR. *See* 103 Idaho at 507-08 ("Parker filed suit and obtained a temporary restraining order prohibiting operation of the pump"). This is not a case where the Petitioners have filed an action in district court seeking injunctive relief. Instead, Petitioners have invoked IDWR's authority under the CM Rules. IDWR's authority is limited by statute and cannot be exceeded in such circumstances.

Moreover, Petitioners erroneously assert that an exempt domestic use is a *de facto* constitutional use appropriation. Whereas a beneficial use or constitutional use water right to groundwater could be acquired before the mandatory permit statute took effect, the Association's exempt water use does not fall into this category of water rights. *See* I.C. § 42-229. Further, although the holder of an exempt domestic use may file a claim in an adjudication to obtain a decreed right, such a filing is not mandatory.[4] *See* I.C. § 42-227 ("Rights to ground water for such domestic purposes may be acquired by withdrawal and use"). If an exempt domestic user

[4] However, the issue of deferred de-minimis domestic and stockwater right claims and what is required to be filed and when is currently pending in mediation in the SRBA. *See generally Subcase No. 00-92095*.

does not obtain a decree, there is no statutory or regulatory basis for IDWR to administer that water right. That is the case here with the Association's Upper Well.

Further, this is not a case of the Association seeking water that has already been appropriated by the Petitioners. *See Response* at 10-11. The Petitioners rely upon *Cantlin v. Carter*, 88 Idaho 179 (1964), to argue that the Association has no right to appropriate exempt domestic groundwater, therefore the Upper Well should be curtailed. However, *Cantlin* involved a contested surface water right application and permit, not an exempt domestic use of groundwater. *See* 88 Idaho at 182. The Department cancelled the permit on the basis that "the source of water filed on is appropriated water and decreed to other parties in this case . . ." *Id.* (emphasis added). The Court confirmed that the junior had to "show a supply of unappropriated water" before any permit could ripen into a vested right to use the water. *See id.* at 187. That is not the case here. The Petitioners have not appropriated all the groundwater in the area of the Upper Well. There is no moratorium prohibiting exempt domestic uses of groundwater. Indeed, the Director recognizes he cannot prohibit such exempt domestic uses, even in designated groundwater management areas. *See e.g., Order Establishing Moratorium* at 7 (Big Wood GWMA, May 17, 2022). Accordingly, contrary to the Petitioners' argument, the use of exempt domestic water is not "just like any other water right" and is not subject to water right administration, including conjunctive administration under the CM Rules.

Finally, the Director's general statutory authorities do not change the above analysis and result. Petitioners cite to sections 42-351 and 42-1805 for the claim that the Director can curtail the Association's exempt domestic use. *See Response* at 12. However, section 42-351 only concerns those who divert or use water without a "valid water right" or those that divert or use water "not in conformance with a valid water right." As explained above, the Association's

exempt domestic use is authorized by statute. Section 42-351 is not an alternative conjunctive administration statute as Petitioners' argument implies. In addition, section 42-1805 sets out "additional duties" of the Director. The cited paragraph (9) relates to the Director's right to seek relief in the district court for anyone violating the law or an administrative or judicial order. That is not the case here as this proceeding concerns the Petitioners' delivery call under the CM Rules, not a judicial enforcement action by the Director against anyone. In summary, the statutes cited by Petitioners have no bearing on the issue identified in the motion to dismiss.

CONCLUSION

LRPOA's use of groundwater from the Upper Well is an exempt statutory domestic water use. LRPOA is seeking to exercise a single exempt use within the limits of section 42-111(b). The use is expressly permitted by section 42-111(2).

Nothing in the water distribution statutes or the CM Rules authorize the Director to administer exempt domestic uses that are not defined by a "water right." Since LRPOA is not a holder of a ground water right that is subject to Petitioners' delivery call, the Hearing Officer should dismiss the Petitioner's delivery call as against the Association's use of water from the Upper Well pursuant to the limits in Idaho Code § 42-111(1)(b).

Dated this 1st day of August, 2022.

BARKER ROSHOLT & SIMPSON LLP

Travis L. Thompson

Attorneys for Lava Ranch Property Owners Assn.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2022, I served a true and correct copy of the foregoing LRPOA'S REPLY IN SUPPORT OF MOTION TO DISMISS:

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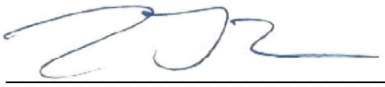

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