

**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 MOTION TO
DISMISS**

BACKGROUND

On February 11, 2021, the Idaho Department of Water Resources (“Department”) received a *Petition for Delivery Call* filed by Michael and Lori Beer (“Petitioners”). The *Petition for Delivery Call* requested administration of ground water use by the Lava Ranch Property Owners Association, Inc. (“LRPOA”) to deliver water to the Beers’ water right number 29-13740.

The Department held a prehearing conference on January 31, 2022, during which Petitioners agreed to amend the Petition to describe an “area of common ground water supply” (“ACGWS”) consistent with Rule 30.01.d. (IDAPA 37.03.11.030.01.d) of the Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”). Petitioners filed their *Amended Petition for Delivery Call* on February 22, 2022 (“Petition”). On April 14, 2022, the Department held a second continued prehearing conference.

Following the April 14 conference, the Department issued a *Scheduling Order, Third Notice of Continued Prehearing Conference, and Notice of Hearing* (“Scheduling Order”). Among other things, the Scheduling Order set a deadline of July 19, 2022, for the filing of dispositive motions.

LRPOA filed *LRPOA’s Motion to Dismiss Delivery Call as Against Statutory Exempt Domestic Well Use* on July 7, 2022 (“Motion to Dismiss”). Petitioners filed their *Memorandum in Support of Objection to LRPOA’s Motion to Dismiss Delivery Call* on July 27, 2022. LRPOA filed *LRPOA’s Reply in Support of Motion to Dismiss Delivery Call as Against Statutory Exempt Domestic Well Use* on August 1, 2022.¹

The Department reviewed the parties’ filings. For the following reasons, the Department denies the Motion to Dismiss.

ANALYSIS

Only water rights are subject to administration under the CM Rules.

¹ The parties have waived any timeliness objection to these filings through a series of emails that are in the Department’s record for this proceeding.

Rule 20.01 of the CM Rules states:

These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply

IDAPA 37.03.11.020.01 (underscoring added).

Rule 20.11 of the CM Rules states:

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 stockwatering rights, where the holder of such right is suffering material injury.

IDAPA 37.03.20.11 (underscoring added).

LRPOA argues in its Motion to Dismiss that it is immune from Petitioners' delivery call as a matter of statutory interpretation because its water use is exempt from the water right permit process and that its use is not pursuant to a "water right":

LRPOA's use of groundwater from the Upper Well is a defined statutory exempt domestic water use. Nothing in statute or the CM Rules authorizes 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).

Motion to Dismiss at 9.

LRPOA's arguments fundamentally misunderstand the structure of the Idaho water code. The majority of water uses must be authorized by a water right: "[n]o person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists." I.C. § 42-201(2). That section then lists the few uses for which a water right is not required, such as fire fighting, forest dust abatement, immediate cleanup or removal of hazardous substances or petroleum, treatment and disposal of sewage and stormwater, and incidental canal or conduit hydropower generation. I.C. § 42-201(3), (8), (9). Tellingly, domestic use of water as defined in Idaho Code § 42-111 is not included in that list. A water user must have a water right to divert water for domestic purposes.

How a water user establishes a water right for domestic purposes is governed by Idaho Code § 42-103, which states:

The right to the use of the unappropriated waters of rivers, streams lakes, springs, and of subterranean water or other sources within this state shall hereafter be acquired only by appropriation under the application, permit and license procedure as provided for in this title, unless hereinafter in this title excepted.

I.C. § 42-103 (underscoring added).

Certain limited domestic uses are one use excepted from the mandatory application, permit and licensing procedure. I.C. §§ 42-111, 42-229. Domestic users may apply for and receive a water right permit from the Department, but that is not the only way to establish a water right. “Rights to ground water for such domestic purposes may be acquired by withdrawal and use.” I.C. § 42-227. The withdrawal and domestic use of ground water creates a beneficial use water right.²

Either method of acquiring a domestic water right is permissible. The permissive term “may” used in Idaho Code § 42-227 refers to the choice water users have in how they will obtain their water right—by permit and license or by withdrawal and use—not whether they “may” proceed without a water right at all. Whichever method the domestic user chooses, the result is a ground water right for domestic use subject to the CM Rules.³ Accordingly, LRPOA is subject to a delivery call under the CM Rules.

LRPOA’s remaining subsidiary arguments in the Motion to Dismiss are simply offered in support of LRPOA’s primary argument that its exempt water use is not subject to a water right and, therefore, not subject to administration under the CM Rules. The arguments do not provide an independent basis for the Motion to Dismiss. Because the primary argument supporting the Motion to Dismiss is contrary to law, there is no need to address LRPOA’s subsidiary arguments. They are rejected without further discussion.⁴

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. LRPOA’s domestic water use must occur pursuant to a water right subject to administration by the Department with all other water rights, including through the application of the CM Rules. LRPOA’s Motion to Dismiss should be denied.

² See e.g., *Nielson v. Parker*, 19 Idaho 727, 730-731 (1911) (discussing the statutory method of obtaining a surface water right and the beneficial use method by diverting water and applying water to use).

³ Instream livestock water use is similarly excepted from the mandatory requirement that the use obtain a water right through the mandatory permit system. Rights for livestock use may be established under the diversion and application to beneficial use method of appropriation. See I.C. § 42-113(2).

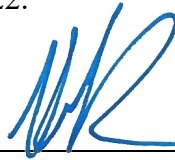
⁴ LRPOA’s argument that curtailing its water use is not reasonable or good water right policy, *Motion to Dismiss* at 8, raises an entirely separate issue that is not relevant to resolving the statutory analysis that forms the basis of the Motion to Dismiss.

ORDER

The Motion to Dismiss filed by LRPOA in this matter on July 7, 2022, is **DENIED**.

This is an interlocutory order Pursuant to Rule 710 (IDAPA 37.01.01.710).

DATED this 8th day of September 2022.

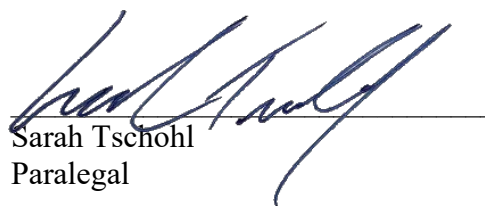


MAT WEAVER
Deputy Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 8th day of September 2022, I caused to be served a true and correct copy of the foregoing *Order Denying Motion to Dismiss*, by the method indicated below, upon the following:

<p>Lance J. Schuster BEARD ST. CLAIR GAFFNEY PA 955 Pier View Dr. Idaho Falls, ID 83402 lance@beardstclair.com</p> <p><i>Attorney for Petitioners</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
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