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Attorneys for Lava Ranch Property Owners Assn.

**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 RESPONSE IN OPPOSITION TO
PETITIONERS' MOTION TO EXCLUDE
EXPERT WITNESS**

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 responds to the Petitioners' *Motion to Exclude Expert Witness*.

ARGUMENT

In compliance with the scheduling order in this case the Association provided its potential expert witness list on July 29, 2022, identifying Dr. Erick Powell as a potential witness in this case. Petitioners, on the other hand, identified no potential experts and did not file an opening report in support of their delivery call. Instead, Petitioners filed their motion to exclude Dr. Powell from testifying on August 31, 2022, because he "failed to provide any information regarding the opinions that Dr. Powell may provide at the hearing in this matter." *Motion* at 1.

The deadline for expert reports only pertained to opening reports. Dr. Powell had not formulated any opinions as of July 29, 2022, and still has not as of the filing of this response. Although Dr. Powell may prepare and submit a rebuttal report by the deadline identified in the *Revised Scheduling Order*, September 23, 2022, that does not mean the Hearing Officer should exclude him from testifying at the hearing.

IDWR's rules provide that "evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development." IDAPA 37.01.01.600. Petitioners' request violates this rule and should therefore be denied. Moreover, Petitioners have identified potential witnesses Michael Beer and Mike McVay. *See Petitioners' Witness & Exhibit List* (Sept. 7, 2022). It is unknown at this time if Petitioners intend to offer these witnesses as "expert witnesses." If so, Petitioners' have blatantly violated the scheduling order by submitting a report over a month past the required deadline (*August 30, 2022 Surface Water and Spring Flow Measurements et al.*). If any sanctions are imposed in this matter then Petitioners should be held to the same standard and that report and testimony should be excluded as well. At a minimum, if this report is taken into evidence then the Association should be granted an additional three (3) weeks to respond as provided by the scheduling order.

The Association is entitled to offer Dr. Powell as an expert witness in this matter. Whether Dr. Powell submits a rebuttal report or offer any opinions is still an outstanding question at this time. Just because the Association did not file an opening expert report does not mean that Dr. Powell should be excluded from testifying in this case. Whereas Petitioners have not identified any expert witnesses, but have instead listed certain individuals as "lay witnesses," it is unknown whether the Petitioners will attempt to offer them as experts in this case.

At a minimum, the Petitioners cannot “play fast and loose” with the rules and schedule and then attempt to use the same to exclude the Association’s witnesses and opinions. Equity and tenets of estoppel demand otherwise. For these reasons the Hearing Officer should deny the motion.

Dated this 14th day of September, 2022.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

Attorneys for Lava Ranch Property Owners Assn.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2022, I served a true and correct copy of the foregoing LRPOA'S RESPONSE IN OPPOSITION TO PETITIONERS' MOTION TO EXCLUDE EXPERT WITNESS:

By U.S. Mail and Email to the following:

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