

**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
EXCLUDE EXPERT WITNESS**

BACKGROUND

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

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* on February 22, 2022.

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, in accordance with 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 29, 2022, LRPOA 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.

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 requests the hearing officer exclude Dr. Powell from testifying. *Id.* at 2. In response, the LRPOA timely filed its *Response in Opposition to Petitioners’ Motion to Exclude Witness* (“Response”) on September 14, 2022.

ANALYSIS

Having reviewed the parties' filings and for the following reasons, the hearing officer denies Petitioners' Motion to Exclude.

Before a hearing, the presiding hearing officer *may* require parties to exchange expert witness reports. IDAPA 37.01.01.412, .526. The Scheduling Order did not require parties to submit expert reports. The Scheduling Order set a July 29, 2022 “[d]eadline for 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. The July 29 deadline did not compel parties to submit expert reports, rather, it simply established the final day for the parties to submit expert reports and file lists of expert witnesses if they planned to rely on either at hearing.

Neither Petitioners nor LRPOA filed expert reports by the July 29 deadline. As of July 29, only LRPOA had filed an expert witness list—solely consisting of Dr. Powell. Petitioners argue that because LRPOA did not file an expert report they have “no information as to what opinions, if any, Dr. Powell may have with respect to [the delivery call],” and since they were provided “no information with which to engage a rebuttal expert witness” Dr. Powell should be excluded from testifying. *Motion to Exclude* at 2.

The Petitioners' arguments are not compelling. Nothing in the Rules of Procedure or the Scheduling Order compels the parties to prepare expert reports or to provide a summary of their expert witness opinions before the hearing. Dr. Powell was timely identified by LRPOA as a potential expert witness. LRPOA's notice of his standing as an expert witness contained his curriculum vitae describing, in detail, his academic and professional experience in “hydrologic and hydraulic engineering design tasks, including: groundwater modeling, well design, well construction, well testing, water rights, water right transfers...stream channel evaluation...and potable water demand.” LRPOA's Expert Witness List Ex. A, at 1. Identifying Dr. Powell and producing his curriculum vitae was sufficient to comply with the Rules of Procedure and the Scheduling Order. Furthermore, Dr. Powell's curriculum vitae contained sufficient “information” for Petitioners to determine whether to engage a rebuttal expert witness or not.

As stated in LRPOA's Response, Rule 600 of the Rules of Procedure directs the hearing officer to admit evidence to assist the parties' development of a record, not exclude evidence to frustrate that development. *See Response* at 2. Admitting Dr. Powell as an expert witness and allowing his testimony will further the development of the record in this matter and excluding his participation would frustrate that development. Furthermore, the Rules of Procedure state any evidence “may be admitted if it is of a type commonly relied upon by a prudent person in the conduct of their affairs,” IDAPA 37.01.01.600, and Dr. Powell's expert testimony would clearly meet this standard.

Accordingly, Petitioners' Motion to Exclude should be denied.

ORDER

IT IS HEREBY ORDERED that Petitioners' *Motion to Exclude Expert Witness* filed on August 31, 2022, is **DENIED**.

IT IS FURTHER ORDERED that this is an interlocutory order pursuant to Rule 710 of the Rules of Procedure (IDAPA 37.01.01.710).

DATED this 5th day of October 2022.

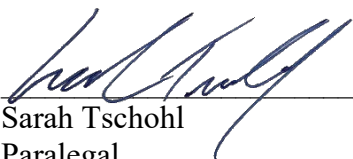


MAT WEAVER
Deputy Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 5th day of October 2022, I caused to be served a true and correct copy of the foregoing *Order Denying Motion to Exclude Expert Witness*, 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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<p>Thomas Bland tomb1127@outlook.com</p> <p><i>Former Board Member, LRPOA</i></p>	<p><input 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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