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DEPARTMENT OF
WATER RESOURCES

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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 PETITIONERS' POST-HEARING MEMORANDUM

COMES NOW the Petitioners, Mike and Lori Beer, and submits the following post-hearing memorandum of law and requests that the Respondent's use of the Upper Well in Lava Ranch Subdivision be curtailed pursuant to the Petitioners' Delivery Call.

FACTS PRESENTED AT TRIAL

Mike and Lori Beer presented written evidence and testimony at the October 18 – 19, 2022 hearing held in Pocatello, Idaho. A brief summary of the salient facts presented include:

1. Mike and Lori Beer own Lot 182 in Lava Ranch Subdivision. The Lava Ranch Subdivision is a rural subdivision located in the mountains south and west of Lava Hot Springs in Bannock County, Idaho. There are approximately 470 lots consisting of mainly five-acre

parcels. Lava Ranch Property Owners Association (abbreviated "LRPOA") is the homeowners' association for Lava Ranch Subdivision. (Ex. 13 Pg 1).

2. The Beers purchased their lot in 1998 (testimony, Lori Beer). They looked at several lots and decided to purchase their lot, paying a higher price for it because of a spring located on the property. From 1998-2005, which included two years of drought, the spring was investigated to ensure that the water supply was consistent and ample for their use (Ex. 502 Pg. 7). Following the purchase of their lot and investigation of the spring they built a cabin on the property, and developed the spring using a gravity fed system with a 1500 gallon cistern to collect water. (Ex. 502 Pg. 7). The system worked flawlessly and the spring provided enough water for their domestic use and the uses of family and visitors. The Beers use the water from the spring for domestic purposes including drinking, washing, cleaning, bathing, and irrigating plants and trees adjacent to the cabin. (Ex. 508 Pg. 18).

3. The Beers applied for a water right for their spring in 2006. Water Right No. 29-13740 (Ex. 501) was subsequently issued by the Idaho Department of Water Resources granting the Beers a water right for domestic use.

4. Some lot owners have built cabins like the Beers, and have developed springs or wells on their respective properties. Other property owners camp on their lots, and haul water to their property.

5. LRPOA has historically allowed lot owners to use a well on the North end of the subdivision near Lava Hot Springs. Property owners without a well or spring will often bring large containers and fill the container with several hundred gallons of water for use while on their property. This well is known as the "Lower Well."

6. In 2016, LRPOA developed a water system using an old well (Ex. 14) near the South intersection of Wolverine Pass Road and Smith Canyon Road (the "Upper Well").

LRPOA developed the Upper Well by installing a pump, water lines, and water tanks to hold water from the well. In 2017, property owners in Lava Ranch Subdivision began pumping unrestricted amounts of water from the Upper Well (Buckley, Bland Testimony).

7. The Upper Well is located in the same drainage as the Beers' Spring, and 0.427 of a mile directly uphill from the Beers' Spring. (Ex. 507 Pg. 2) (calculation based upon the latitude and longitude of the Beers' Spring and the Upper Well). The Upper Well sits on an unnamed fault that intersects with the Smith Canyon fault. (Ex. 503 Pg. 3).

8. Deer Creek also rises from a set of springs located between the Beers' Spring, and the Upper Well. (Ex. 503 Pg. 3).

9. Without a permit or any sort of water right LRPOA allowed the Upper Well and the Lower Well to be used by property owners in LRPOA. Many property owners began using the Upper Well as it was further up on the mountain, and a shorter distance from owners' lots. It was more "convenient" to use the Upper Well (Testimony Bland, Scott).

10. The Beers testified that in 2018 and 2019 they began to notice a marked decline in the output of their spring. In all prior years, the Beers' Spring produced a reliable and predictable source of water. They began investigating the cause of the decrease of flows and looked at climate change, improper installation of their collection and piping system, maintenance, and other causes. They concluded that the likely cause of the failure of their Spring was the increased withdrawals from the aquifer (Ex. 502 Pg. 14). The Beers' Spring no longer produces sufficient water for continuous domestic use.

11. At the request of IDWR the Beers took measurements of the outflows of their Spring, and of Deer Creek. Their data was compiled in a report (Ex. 503) that showed declining Spring flows through 2020 and 2021, and declining flows from Deer Creek. This data was

correlated with power records provided by LRPOA, and which showed Lot 182 Spring flow declined coincident with increases in pumping and use of the Upper Well. (Ex. 504 Pg. 8).

12. Mike McVay with the Idaho Water Resources Board reviewed the measurements and reports from the Beers and concluded that "[a]ll of the available information suggests that pumping from the LRPOA Well may be negatively impacting discharge from the Lot 182 Spring." (Ex. 506, p. 13). Erick Powell testified on behalf of LRPOA and recommended further testing to determine to what extent the LRPOA Upper Well and the Lot 182 Spring are hydrologically connected (Ex. 2, P. 12). Neither expert could testify with clear and convincing evidence that LRPOA's Upper Well was not injuring the Lot 182 Spring.

13. At trial, testimony was given by LRPOA Board Members: Thomas Bland regarding well construction details and Adrienne Buckley regarding well measurements. The measurement testimony showed that the Upper Well static head has dropped 6 feet from 2013 to 2022. This well information was requested by the IDWR in 2021 (Ex 520) and not provided until late in the hearing. Lack of timely response prevented analysis by any of the experts or use by the Beers when writing their report.

14. At trial, the Beers testified that the Upper Well was shut off for all of 2022, and that they measured an increase in the flows from their Spring, as well as an increase in flows in Deer Creek. (Ex. 508).

15. Dr. Justin Tobias's testimony was admitted into evidence (Ex. 509). He is the owner of property across the street from the Beers, and testified that he had seen his well run nearly dry as a result of "upstream activity." He testified that he anticipated hauling water to his property as a result.

16. Ken Bernt testified as to the wells that have been dug on property owned by his family that is on S. Smith Canyon Road directly across from the Beers' property. He testified

that a well on the property went dry sometime around the turn of the century, and a new well had to be dug near the Smith Canyon fault line in 2004. He expressed concern that "water pumping from the aquifer upstream…could lead to reduction of water in the Deer Creek aquifer, and impact wells down the entire Smith Canyon Fault." (Ex. 510).

17. Testimony from LRPOA demonstrated that at least 89 different property owners in Lava Ranch Subdivision pumped no less than 133,600 gallons from the Upper Well in 2021. (Ex. 16). Members of the Board of LRPOA (Bland & former member Scott) admitted that the Upper Well was a "convenience" that saved wear on the roads due to less travel by vehicles hauling water. However, any member of Lava Ranch Subdivision is allowed to pump and haul water from the Lower Well.

18. Respondents introduced testimony from some Lava Ranch Property Owners that have springs or wells on their respective properties. (E.g. Scotts, Ex. 20; Patterson, Ex. 23). Most of the testimony from other Lava Ranch property owners was for lots that were located in a different drainage and miles away from the Beers' property. Gary Forgeon, whose property (Lot 7) sits at the top of Smith Canyon, testified that the water level in his well has been dropping every year, and that he has had to drill his well deeper. (Ex. 24).

ARGUMENT

The withdrawal of water from the Upper Well by members of the Lava Ranch Property Owners Association violates Idaho law. It violates Idaho law because the withdrawal of water from the Upper Well cannot be ruled out as the cause of injury to the Beers' prior appropriation of water. It is LRPOA's burden to prove by "clear and convincing evidence" that its use of the Upper Well will not injure prior appropriations. *A&B Irr. Dist. V. IDWR,* 153 Idaho 500, 520, 284 P.3d 225, 245 (2012). LRPOA has not met this burden.

Instead, it appears that use of the LRPOA Upper Well has diminished flows in Deer Creek, it has greatly reduced flows from the Beers' Spring, and it has likely impacted every well user in the Smith Canyon drainage. IDWR should therefore curtail all use of the Upper Well.

I. Domestic Water is Subject to Regulation.

Idaho Courts have recognized that pursuant to the Idaho Constitution, all waters of the State, including waters of all-natural springs and lakes, are the property of the State. *Short v. Priasewater*, 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 the state." Idaho Code § 42-101. In addition, all water is subject to the "regulations and control" of the state, whether it is used for domestic uses, agriculture, manufacturing, mining, or industry. Idaho Const. Art. 15, §1 and § 3.

Idaho lawmakers have required a water right for most uses. Idaho Code § 42-201(2) states that "[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." Idaho Code § 42-201(2). While some exceptions exist (e.g. fire fighting), there is no exception for a water right for domestic uses.

Water for domestic uses must be acquired by the "application, permit, and license procedure," Idaho Code § 42-103, or by drilling a well for domestic purposes, followed by the "withdrawal and use" of ground water. Idaho Code § 42-227. Whether by permit and license, or by withdrawal and use, a water user must have a water right to legally use water.

LRPOA originally filed an application for a water right permit on the Upper Well, but then on May 26, 2022 withdrew its application for Permit No. 29-14402. LRPOA now relies upon the withdrawal and use domestic exemption in Idaho Code §§ 42-227 and 42-211 as the basis for its claim to use water from the Upper Well.

No matter how a water right is acquired, it is still subject to the administration and regulation of the Idaho Department of Water Resources, including the Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11) These rules ("CM Rules") "acknowledge all elements of the prior appropriation doctrine as established by Idaho law." CM Rule 20.02. The CM Rules further authorize the Director to curtail junior water rights, or require mitigation:

> [I]f diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.
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> CM Rule 20.04.

The CM Rules further prohibit delivery calls against any ground water right used for domestic purposes; provided, that the holder of a water right for domestic or stock watering use may make a delivery call against the holders of other domestic or stock watering rights, where the holder of such right is suffering material injury. CM 20.11. The Beers' water right is a domestic water right, and the delivery call is against another domestic water right. It is therefore allowed under the CM Rules.

The Idaho Constitution, the Idaho Code, and the CM Rules all demonstrate that water used for domestic purposes is subject to the regulation of the State of Idaho. The domestic water rights claimed by LRPOA are properly subject to the delivery call filed by the Beers.

II. LRPOA has the Burden of Proving that it will not Injure Prior Appropriations.

A delivery call for water within areas of the State not in an organized water district are initiated by filing a petition with the Director of the Department of Water Resources. CM Rules 30.01. The petition must contain information about the Petitioners' water right, the water diversion or delivery system, and the beneficial use being made of the water. CM Rules 30.01.a.

The petition must also contain information about the respondents who are alleged to be causing material injury to the rights of the petitioners. CM Rules 30.01.b.

The Petitioners, Mike and Lori Beer, filed their Petition for Delivery Call on February 5, 2021. A hearing was held in Pocatello, Idaho on October 18 and 19, 2022.

At that hearing the Beers testified that after twelve (12) years of uninterrupted flows, they saw a significant drop in the outflow of the Spring on their property beginning in 2018. The drop in flows corresponded with the development of the Upper Well, which is located less than ½ mile uphill from the Beers. The Beers' Spring, Deer Creek, and the Upper Well are all located in the Smith Canyon drainage. Smith Canyon is a geographically small drainage that is marked by several springs, some of which form the headwaters for Deer Creek. The Beers collected data on the flow of their Spring, and of Deer Creek. All of this data showed an overall decline in water flows from 2019 through 2022 both in the Beers' Spring, as well as Deer Creek.

It was also shown at the hearing that no less than 89 different LRPOA property owners had withdrawn water from the Upper Well in 2021. (Ex. 16). These property owners estimated the total volume of water that they had each withdrawn.

The Beers testified that these unrestricted, unmeasured, and unlimited withdrawals of water had materially harmed them as it impacted the flow of water from their Spring. They further presented empirical evidence in the form of years of measurements showing declines in their Spring, and in Deer Creek. (Ex. 502 - 504, Ex. 508, Ex. 513-519).

With this testimony, it was incumbent upon LRPOA to prove that its use of the Upper Well was not harming the Beers.

The Idaho Supreme Court, in interpreting both the Idaho Constitution and Idaho law, has stated that:

> [T]he first appropriator has the first right; and it would take more than a theory, and, in fact, *clear and convincing evidence* in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in its application.

A&B Irrig. Dist. V. IDWR, 153 Idaho 500, 520, 284 P.3d 225, 245 (2012); *quoting Silkey v. Tiegs*, 54 Idaho 126, 128, 28 P.2d 1037, 1038 (1934). As early as 1904, the Idaho Supreme Courts stated:

> So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that the claimant is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted. The subsequent appropriator who claims that such diversion will not injure the prior appropriator below him should be required to establish that fact by clear and convincing evidence.

Moe v. Harger, 10 Idaho 302, 307, 77 P. 645, 647 (1904).

The "clear and convincing" standard has been reiterated, and reaffirmed, by the Idaho Supreme Court on multiple occasions. *A&B Irrig. Dist v. IDWR, supra*, *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904); *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908); *Jackson v. Cowan*, 33 Idaho 525, 196 P. 216 (1921). All of these cases similarly state that a subsequent appropriator attempting to justify his diversion has the burden of proving that it will not injure prior appropriations. *Id.* In short, the burden is on the junior water right to show that there is no material injury to the senior water right, and to do so with clear and convincing evidence.

LRPOA failed to meet its burden at the hearing as it did not present any clear and convincing evidence that its diversion of water from the Upper Well had not, and would not injure the Beers' prior appropriation of water.

Neither of the experts who testified at the hearing could say that the withdrawals from the Upper Well were not injuring the Beers. McVay testified that "pumping from the LRPOA Well may be negatively impacting discharge from the Lot 182 Spring." (Ex. 506, P. 13). Erick Powell, who has never been to Smith Canyon or the LRPOA Upper Well, stated that "[t]here is a

large degree of uncertainly associated with this water call." (Ex. 2, P. 4). He was unable to testify that the pumping from the Upper Well was not impacting Deer Creek or the Beers' Spring.

Dr. Justin Tobias, who is in Smith Canyon, testified that he had seen his well levels drop in the last few years to the point where he was unable to get water. (Ex. 509). Ken Bernt has had multiple wells on his property, two of which have gone dry. (Ex. 510). With the exception of one property owner (Forgeon), all of the testimony from other Lava Ranch property owners was for lots that were located in a different drainage, and miles away from the Beers' property. Gary Forgeon, the owner of Lot 7, testified that he had to redrill his well from 265 feet to 555 feet after he saw declining water levels. (Ex. 24). He has testified that every year the water level in his well has dropped. (Ex. 24).

This evidence all suggests that there is a declining supply of water in the Smith Canyon drainage, and that pumping by 89 additional property owners from the Upper Well is overtaxing the aquifer. IDWR data shows 17 wells within the Smith Creek drainage. (Ex. 505). In addition to the wells there are several properties, like the Beers 'property, that are reliant upon springs for domestic water. In total, there may be 20 – 25 domestic users of water in the drainage. Adding another 89 known users of water nearly quadruples the domestic demand upon the aquifer in Smith Canyon!

This evidence, in combination with the Beers' measurements, all suggests that there is an impact upon the Beers' water rights, as well as every other water right in Smith Canyon, by the addition of the Upper Well, and the 89 additional water users pumping from the well. All of the evidence suggests that there is a material injury to the Beers' water rights. There is no evidence that has been submitted that the LRPOA Upper Well is not injuring the Beers, and certainly no

evidence that meets the clear and convincing standard required by Idaho law. *A&B Irrig. Dist. v. IDWR, supra.*

As a result, the Director should curtail all use of the LRPOA Upper Well.

III. Establishment of an area of Common Ground Water Supply is Discretionary.

The topography of Smith Canyon indicates that it is a small drainage. (Ex. 505, P. 4). At best, the Canyon is two miles long and ½ mile wide. (Ex. 506, P. 2). Water drains to the North down Deer Creek, and collects in a small pond at the mouth of the Canyon. The physical characteristics of the Canyon demonstrate that there is a small area in which to collect water. There has not been a determination as to whether Smith Canyon is an area of a common ground water supply, but it is an incontrovertibly small geographic area.

Idaho law allows for the Director to establish an area with a "common ground water supply." Idaho Code § 42-237a.g. The statute recognizes that the Director has discretion and may establish an area of common ground water supply. The statute states:

> To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he *may establish* a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided.

Idaho Code §42-237a.g.(emphasis added). Establishment of an area of common ground water supply is not required by statute. It is discretionary, and it is typically done to assist the Director in administering water rights.

Idaho Courts have reviewed similar statutes that use the word "may." The Idaho Supreme Court has stated that "[w]hen used in a statute, the word 'may 'is permissive rather than the imperative or mandatory meaning of 'must 'or 'shall.'" *Rife v. Long,* 127 Idaho 841, 848, 908 P.2d 143, 150 (1995).

Since it is discretionary, the Director may decide whether or not to establish an area of common ground water supply. However, it is not mandatory that such an area first be established before curtailing ground water pumping.

In *Tappan v. Smith*, 92 Idaho 451, 458, 444 P.2d 412, 420 (1968), the Idaho Supreme Court reviewed an injunction against ground water pumping under the Ground Water Act. The Court held that evidence of a "dangerous depletion of the underground water supply in the area of the wells in question" was sufficient to sustain the injunction under Idaho Code § 42-237a.g and other provisions of the Ground Water Act. *Id.* at 458, 444 P.2d at 419. The Court did not require that an area of common ground water supply first be established.

Later, in *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973), the Idaho Supreme Court addressed the statutory prohibition on "ground water mining." The Court upheld an injunction because the senior water right holders showed that the junior water right holders were violating the ground water mining prohibition. *Id* at 583-85, 513 P.2d 635-37. The Court again did not require that an area of common ground water supply first be proven prior to an injunction being issued.

More recently the Idaho Supreme Court has upheld the Director's discretion to determine curtailment areas in delivery calls by senior surface water users against junior ground water users pumping water from the Eastern Snake Plain Aquifer. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011); *IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897 (2016). Neither the *Clear Springs* case, nor the *IGWA* case stand for the proposition that establishment of an area of a common ground water supply is required outside of an organized water district. (The CM Rules do require establishment of a common ground water supply in an organized water district a prerequisite to a delivery call). Instead, these two cases demonstrate that an area of common ground water supply is not a prerequisite for curtailment under the prior

appropriation doctrine, nor a restriction on the Director's ability to determine an appropriate curtailment area.

In this case, there has been no determination of an area of a common ground water supply in Smith Canyon, or in the Lava Ranch Subdivision. But the facts of this case demonstrate that an area of common ground water supply is not a sensible necessity. The facts show that:

A. Smith Canyon is geographically small, and entirely recharged by snow melt and other precipitation events.

B. Deer Creek, the Beers' Spring, and wells in Smith Canyon are all fed by a fractured rock aquifer that is "not typically very productive." (Ex. 506, P.3).

C. There is a history of wells going dry, (Ex. 509 Tobias, Ex. 510 Bernt), and well levels declining in the Smith Canyon drainage. (Ex. 24 Forgeon).

D. Declines in spring discharges are "likely not due to climate," but could be exacerbated by dryer conditions. (Ex. 506, P.12).

E. The Beers' Spring, the springs giving rise to Deer Creek, and the LRPOA Upper Well are all less than ½ mile from each other. (Ex. 507).

These facts all suggest that the Beers' Spring is located in an area where there is a "dangerous depletion of the underground water supply." *Tappan, supra.* There is sufficient information regarding the groundwater that the only conclusion that can be reached is that Smith Canyon has a limited and finite amount of groundwater, and that groundwater appears to be declining. It therefore becomes incumbent under the prior appropriation doctrine for LRPOA to prove by clear and convincing evidence its diversion and use of groundwater from the Upper Well will not injure prior appropriations, including the Beers' Spring.

LRPOA has failed to prove its case, and the use of groundwater from the Upper Well should be curtailed.

IV. Section 42-237a.g sets the standard for curtailment.

While the CM Rules discuss "material injury" as the basis for a water call, the Idaho Code actually states that the Director can curtail ground water use if withdrawals "would affect" the "present or future use" of any senior water right, or if withdrawing water exceeds the "anticipated average rate of future natural recharge." Idaho Code § 42-237a.g. The plain reading of this statute would indicate that the Director need not make a finding of "material injury," but may curtail ground water use even if a finding is made that withdrawals "would affect" a senior water right.

Under either a "material injury" or an "affect" standard, LRPOA has failed to meet its burden. LRPOA has not shown that its withdrawals of water would not materially injure or affect the Beers' Spring. Under either standard, the burden is on Respondents to show by clear and convincing evidence that Respondent's use of groundwater from the Upper Well will not injure prior appropriations, including the Beers' Spring. *A&B Irrig. Dist v. IDWR, supra.*

CONCLUSION

Based upon the Beers' Petition for Delivery Call, and the unrebutted evidence of material injury, and ongoing affect to the Beers' Spring, the Beers respectfully request that all use of the Upper Well be curtailed.

DATED: November 18, 2022.

/s/ Lance J. Schuster
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing *Petitioners' Post-Hearing Memorandum* upon the following by electronic mail, to:

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