Lance J. Schuster, ISB No. 5404
BEARD ST. CLAIR GAFFNEY PA
955 Pier View Drive
Idaho Falls, ID 83402
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: lance@beardstclair.com
Attorneys for Petitioners

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' MEMORANDUM IN SUPPORT OF PETITION TO RECONSIDER

COMES NOW the Petitioners, Michael and Lori Beer, and submit the following memorandum in support of their petition to reconsider.

PROCEDURAL STATUS

On May 15, 2023, an Order Denying Petition for Delivery Call was issued in the above-entitled matter (Preliminary Order). The Preliminary Order is a preliminary order pursuant to Rule 730 of the Rules of Procedure, IDAPA 37.01.01.730, and denies the Petitioners' call to curtail pumping from the LRPOA Upper Well. The Petitioners bring this petition to reconsider pursuant to the provisions of Idaho Code § 65-5423.

ARGUMENT

The Petitioners, Michael and Lori Beer (Beers), have alleged in their water delivery call that they have been materially harmed by the development and uncontrolled pumping of a well (Upper Well) by Lava Ranch Property Owners Association (LRPOA). The Upper Well is located less than ½ mile from the springs on the Beers' property, and directly upslope of their springs in the same drainage. In addition, the Upper Well lies on an unnamed fault that intersects with the Smith Canyon fault, which in turn runs down and forms Smith Canyon.

The Beers contend that the Preliminary Order erroneously denies the petition for a delivery call as it improperly shifts the burden to the Petitioners to prove that they have been harmed by the LRPOA Upper Well. As a matter of law, the burden is on the junior appropriator 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). The burden of proof does not fall on the Petitioners to prove that they will be injured.

In addition, the Preliminary Order denies the petition for a delivery call, but fails to address or clarify how much water, if any, may be pumped by LRPOA from the Upper Well. LRPOA already has a permit for a Lower Well (Permit No. 29-14401), but it has no such permit for the Upper Well, Prelim. Order 6, and this decision fails to address LRPOA's legal basis and parameters for the use of the Upper Well.

1. Preliminary Order

The Preliminary Order makes findings of fact, discusses governing law and evaluation criteria, and then conducts an analysis of the case. However, without any reference to authority, the Preliminary Order states that the sequence of considerations "that must occur before granting a petition for delivery call" include:

1) Determining an area of common ground water supply (ACGWS),

2) Establishing a hydrologic connection between the senior surface or ground water right and the junior ground water right alleged to cause injury,
3) Determining material injury to the senior surface or ground water right, and
4) Evaluating whether the call is futile.

Prelim. Order 11.

The Preliminary Order further states that "determining an ACGWS is a threshold prerequisite for conjunctive administration." Prelim. Order 11. The Preliminary Order then finds "insufficient data to determine an ACGWS between the Petitioners' Spring and the Respondent's Upper Well." Prelim. Order 13.

While determining an ACGWS is a requirement of administering a water delivery call within an organized water district, IDAPA 37.03.11.040.01, in an unorganized water district there is only the requirement that a description be included in the petition. IDAPA 37.03.11.030.01(d). The Petitioners' Amended Petition included a description of the area having "a common ground water supply within which petitioner desires junior-priority ground water diversion and use to be regulated." IDAPA 37.03.11.30.01(d). The Department uses that information to "give such general notice by publication or news release as will advise ground water users with the petitioned area of the matter." IDAPA 37.03.11.30.02.

It is not a prerequisite that Petitioners prove that the area described in the petition is in fact an ACGWS. There is no mandatory requirement that an ACGWS be determined, and Petitioners have argued that an ACGWS is not a statutory prerequisite to granting a delivery call. Idaho Code § 42-237a(g) (stating that director *may* establish an ACGWS); *Tappan v. Smith*, 92 Idaho 451, 458, 444 P.2d 412, 420 (1968) (granting injunction without first establishing an ACGWS); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973) (upholding injunction where there was ground water mining and no proven ACGWS); *Clear Springs Foods,*

Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011); *Idaho Ground Water Ass'n v. IDWR*, 160 Idaho 119, 369 P.3d 897 (2016) (upholding discretion of director to determine curtailment areas).

However, regardless of whether or not an ACGWS is required, the burden of proof is not on the Petitioners to establish an ACGWS. The burden of proof is on LRPOA to establish that its diversion is not harming the Beers' senior water rights.

a. Burden of Proof

The Idaho Supreme Court has addressed the initial burden on a Petitioner in the context of a water delivery call. The Court has stated:

> The rules require the petitioner, that is the senior water rights holder, to file a petition that by reason of diversion of water by junior prior ground water rights holder, the petitioner is suffering material injury. That is consistent with the statutory provision which requires a surface priority water right holder claiming injury by junior water right holders pumping from an aquifer to file a 'written statement under oath' setting forth 'the facts upon which [he] founds his belief that the use of his right is being adversely affected' by the pumping. I.C. § 42-237b.

American Falls Reservoir Dist. No. 2 v. IDWR, 143 Idaho 862, 877, 154 P.3d 433, 448 (2007). The Court further stated that "[t]he Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right to which he already has." *Id.* at 877-78, 448-49.

The Idaho Supreme Court has stated that after a petition for a delivery call is filed, the burden is then on the respondent. The Court 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 Irr. Dist., 153 Idaho at 520, 284 P.3d at 245 (2012) (quoting *Silkey v. Tiegs*, 54 Idaho 126, 128, 28 P.2d 1037, 1038 (1934)). As early as 1904, the Idaho Supreme Court 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 Irr. Dist.*, 153 Idaho 500, P.3d 225; *Moe*, 10 Idaho 302, 77 P. 645; *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. In short, the burden is on the holder of the junior water right to show that there is no material injury or affect to the holder of the senior water right, and to do so with *clear and convincing* evidence.

In applying Idaho's Rules for Conjunctive Management of Surface and Ground Water Resources (CM Rules), they should not "be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right." *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 878, 154 P.3d at 449. "Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call." *Id.*

The CM Rules further state that: "These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law." IDAPA 37.03.11.020.02. Because the CM Rules incorporate Idaho law by reference, "to the extent that the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are a part of the CM Rules." *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at

873, 154 P.3d at 444. In other words, the CM rules incorporate and embody the rules of law established by the Idaho Constitution, Idaho Statutes, and the Idaho Supreme Court.

In *American Falls Reservoir District No. 2*, the Court reviewed the correct analysis for a delivery call within the context of the CM Rules and Idaho Statutes. 143 Idaho 862, 154 P.3d 433.

First, the petitioner must file a petition alleging that by reason of the diversion of water by a junior water rights holder the petitioner is suffering material injury. *Id.* at 877. The petitioner must include the facts upon which the petitioner believes his rights are being adversely affected, and a description of his water rights. *Id.* Additional information must be provided by the petitioner, but only if the information is available to the petitioner. *Id.*

Second, once an initial determination is made that material injury is occurring or will occur, "the junior then bears the burden of proving that the call would be futile or challenge in some other constitutionally permissible way the senior's call." *Id.* at 878.

The term "burden of proof" may refer to one of two concepts. It may refer to: (1) the burden of producing sufficient evidence on a point to raise an issue, often known as the burden of production; or (2) the ultimate burden of persuasion that will be applied to the determination of issues by the trier of fact. *Idaho Trial Handbook*, § 10.1 (2d ed.); *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 468 P.2d 290 (1970) (discussing distinctions between burdens). In this case, the Petitioner bears the initial burden of production required by the CM Rules to file a petition alleging material injury and include other required information. IDAPA 37.03.11.030.01. The Respondent then bears the ultimate burden of persuasion and must prove by "clear and convincing evidence" that its use of the Upper Well will not injure prior appropriations. *A & B Irr. Dist.,* 153 Idaho at 520, 284 P.3d at 245.

For example, the Respondent could defeat the Beers' delivery call by showing by clear and convincing evidence that the Beers' spring is not in the same ACGWS as the LRPOA Upper Well, and that the call is therefore futile. However, neither Mike McVay nor Dr. Erick Powell could testify that the Beers' Springs and the LRPOA Upper Well were not in the same ACGWS. They both testified that they may, or may not be connected.

McVay testified in his October 3, 2022 Beer Delivery Call Analysis Memo:

> [T]he geology in the area suggest that the source of water for local wells and springs are fractures in the host rock and the location of Lot 182 and the [Upper Well], relative to each other, increase the probability that the spring and well are hydraulically connected. However, because hydraulic connection in fracture rock aquifers is due to fracture interconnectivity, it is also possible that the spring and the well are not connected, and discharge declines are the result of increased water use at a different location.

Ex. 519 at 10. Powell agreed with McVay and stated that he did not have enough information to conclude whether it was more probable that the spring and Upper Well were or were not connected.

The Respondent likewise did not meet the burden of proof to show by "clear and convincing" evidence that the LRPOA Well and the Beers' springs are not hydrologically connected and that a call would therefore be futile.

The Respondent has not met the burden of proof to show by "clear and convincing" evidence that the Beers' water rights are not being materially harmed by LRPOA's use of the Upper Well.

Lastly, the Respondent has not met the burden of proof to show by "clear and convincing" evidence that the Beers' delivery call is futile.

The Preliminary Order fails to acknowledge and recognize the Respondent's burden to show that it is not injuring the Beers' water rights. The CM Rules "should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right

which he already has." *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 877-88, 154 P.3d at 448-49. The Beers were not required to come to an administrative hearing and prove their case by clear and convincing evidence. They presented evidence showing that their spring has been declining year after year since the LRPOA Upper Well began use. They presented evidence showing that they are the owners of a decreed water right in their spring. They presented evidence of material harm in a decline in the output of their spring. It was then the burden of LRPOA to prove that its use of the Upper Well was not the cause of the failure of the Beers' spring, and to do so with "clear and convincing" evidence.

To the extent that the Preliminary Order indicates that the Beers were required to prove an ACGWS, the Preliminary Order is incongruous with Idaho law. To the extent that the Preliminary Order indicates that the Beers were required to prove a hydraulic connection, the Preliminary Order errs. To the extent that the Preliminary Order places a burden on the Beers to prove material harm, the Preliminary Order should be corrected.

Once the Beers filed their Petition, which included all of the required information, the burden of persuasion fell on LRPOA to prove by "clear and convincing" evidence that it was not affecting or materially harming the Beers. The constitutional protection afforded to the Beers requires that LRPOA meet its burden of persuasion to prove by "clear and convincing" evidence that the "prior appropriator would not be injured or affected by the diversion of a subsequent appropriator." *A & B Irr. Dist.*, 153 Idaho at 520, 284 P.3d at 245 (2012) (quoting *Silkey*, 54 Idaho at 128-29, 28 P.2d at 1038).

LRPOA's failure to present "clear and convincing" evidence that the LRPOA Upper Well is not affecting the Beers' spring is dispositive. The Director of IDWR must curtail the use of the Upper Well until or unless LRPOA demonstrates by "clear and convincing" evidence that it is not affecting or materially harming the Beers' spring. Idaho Code § 42-237a(g). Meanwhile,

LRPOA's use of the Upper Well must be curtailed in its entirety, and the Preliminary Order should be modified to so indicate.

2. Determination of Legal Basis and Parameters

An additional lapse with respect to the Preliminary Order is the failure to determine LRPOA's right to divert water from the Upper Well, and the permissible rates of diversion. The CM Rules allow the Director to determine priorities as between surrounding water rights, permissible rates of diversion, and volumes of diversion in response to a water delivery call. IDAPA 37.03.11.07.f.

LRPOA has received a permit to appropriate water from the Lower Well. Permit No. 29-14401. The permit allows LRPOA to appropriate ground water for domestic purposes at the rate of .04 cfs, with a limit of 6 acre feet per year. The permit is for use of all 470 lots in the Lava Ranch Subdivision.

LRPOA relies upon the domestic exception with respect to the Upper Well, and has withdrawn a previous application for a water permit. The Preliminary Order does not address how the use of the Upper Well will correlate with the domestic water permit that has already been given to LRPOA, and whether use of the Upper Well is allowed given an existing permit for domestic use at the Lower Well.

While the Petitioners believe that the use of the Upper Well should be curtailed in its entirety due to Respondent's failure to meet their burden of proof, the Preliminary Order currently does not address priorities, permissible rates of diversion, and volumes of diversion at the Upper Well, nor does it address what those figures are in light of LRPOA's existing domestic water right.

CONCLUSION

Based upon the Idaho Constitution, Idaho Statutes, and the CM Rules, the Petitioners respectfully request that the Preliminary Order be reconsidered. The Petitioners additionally request that the Director address the legal basis for the diversion of water from the Upper Well, and establish the parameters of that use.

DATED: May 26, 2023.

/s/ Lance J. Schuster
Lance J. Schuster
Beard St. Clair Gaffney PA
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing *Petitioners' Memorandum in Support of Petition to Reconsider* upon the following by email and U.S. Mail, to:

Mat Weaver, Hearing Officer
Idaho Department of Water Resources
322 E. Front St.
Boise, ID 83702
mathew.weaver@idwr.idaho.gov
sarah.tschohl@idwr.idaho.gov
file@idwr.idaho.gov

Travis Thompson
Marten Law
P.O. Box 63
Twin Falls, ID 83301
tthompson@martenlaw.com

Dated: May 26, 2023.

/s/ Lance J. Schuster
Lance J. Schuster
Beard St. Clair Gaffney PA
Attorneys for Petitioners