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DEPARTMENT OF
WATER RESOURCES

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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 TO PETITIONERS' PETITION TO RECONSIDER ORDER DENYING PETITION FOR DELIVERY CALL**

COMES NOW, Respondent LAVA RANCH PROPERTY OWNERS ASSOCIATION, INC. ("LRPOA" or "Association"), by and through its counsel of record, MARTEN LAW LLP, and hereby files this response to the *Petitioners' Petition to Reconsider Order Denying Petition for Delivery Call* ("*Petition*"). Petitioners have requested the Hearing Officer to reconsider the *Order Denying Petition for Delivery Call* ("*Order*") for various reasons. LRPOA opposes the petition for reconsideration and requests the Hearing Officer deny the petition accordingly.

First, the Petitioners do not offer any new facts or evidence that was not already considered by the Hearing Officer. As such, the petition should be denied. Next, Petitioners argue that the burden of proof was misapplied and ask the Hearing Officer to address the Association's use of the Upper Well, which is beyond the scope of this proceeding. The Association respectfully request the Hearing Officer to deny the petition.

ARGUMENT

I. An Area of Common Ground Water Supply is Necessary to Show Hydraulic Connectivity for Purposes of Conjunctive Administration.

Rule 30 of the Department's Conjunctive Management Rules ("CM Rules") (IDAPA 37.03.11 et seq.) governs the Petitioners' delivery call in this proceeding. Pursuant to Rule 30, Petitioners were required to submit information including a "description of the area having a common ground water supply. . ." CM Rule 30.01.d (emphasis added). The Petitioners did not submit information that would define an area of common ground water supply (ACGWS), but instead described an area by topographic geography only. *See Amended Petition*; *Order* at 11. A general description of the surface topography does not define the boundaries of a common aquifer, hence the Petitioners failed to meet the Rule's standard. Stated another way, the Petitioners did not establish an ACGWS or submit sufficient information for the Director to make the determination. *See also*, CM Rule 31. Therefore, the Hearing Officer properly denied the delivery call.

Notably, Petitioners did not submit any technical reports or peer reviewed hydrologic studies that established an area of common ground water supply in the Smith Canyon area. Instead, they admit there is considerable uncertainty about the lack of hydraulic connectivity between the Upper Well and the spring. *See Petition* at 7 ("they both testified that they may, or may not be connected"). The Hearing Officer summed up the lack of scientific evidence as follows:

> [I]t is also possible for springs and wells to be in proximity but not completed in the same fractured rock aquifer and therefore not connected. The Petitioners' Spring and the Upper Well may be in different fractured rock aquifers. McVay Test. It is also possible for wells and recharge zones in other drainages to connect to fractured rock aquifers in the Deer Creek Drainage.

See Order at 12.

The testimony and reports of the two hydrologic experts were inconclusive at best. Consequently, the Hearing Officer correctly found that there was insufficient evidence to define the aquifer source of the Upper Well and determine whether or not it is hydraulically connected to the subject spring for purposes of administration. *See Order* at 12-13. Without a defined area of common ground water, the Petitioners did not meet the Rule 30 standard (i.e. area "having").

The Petitioners misconstrue the rule and erroneously argue there was no mandatory requirement "that an ACGWS be determined." *Petition* at 3. The Hearing Officer relied upon precedent from the district court that described the importance of an "area of common ground water supply" and its necessity for proper conjunctive administration. *See Order* at 11. Without that determination, the scope of ground water rights that might be affecting area surface water sources is unknown. Without a defined ACGWS there was no basis to administer the Association's well to the exclusion of others in the area. As such, the Hearing Officer properly denied the Petitioners' delivery call and the petition for reconsideration should be denied accordingly.

II. The Burden of Proof was Not Applicable Without a Defined ACGWS and Finding of Material Injury.

The Petitioners argue the Order should be reconsidered on the basis that the Hearing Officer misapplied the burden of proof. *See generally Petition* at 4-9. However, the cases cited by Petitioners are distinguishable and the respective burden of proof was not at issue since there is no defined ACGWS that would require conjunctive administration of the Association's Upper Well together with the subject spring that supplies the Petitioners' domestic water right.

First, the cases relied upon by Petitioners all concerned a common water source or defined area of common ground water supply. *See Moe v. Harger*, 10 Idaho 302 (1904) (Big Lost River, common surface water source); *AFRD#2 v. IDWR*, 143 Idaho 862 (2007) (ESPA,

ACGWS defined by CM Rule 50); *A&B Irr. Dist. v. Spackman*, 153 Idaho 500 (ESPA, ACGWS defined by CM Rule 50). As noted, once the initial determination of material injury was found in those cases, "the junior then bears the burden of proving the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call."[1] 143 Idaho at 878.

Unlike those cases, here the parties never progressed to that point where the Association or other juniors carried the burden to show a defense since there is no defined ACGWS and no finding of material injury. The Petitioners' argument skips this critical point about a common source and its implications for administration. As there is no finding of an ACGWS there is no basis to determine material injury that would cause the Association to carry any burden to prove any defenses. The Petitioners wrongly claim that they only had to file a petition alleging material injury that would satisfy the CM Rules. To the contrary, Rules 30 and 31 specify the importance of showing or determining an ACGWS prior to conjunctive administration of affected junior ground water rights.

As the burden of proof is only relevant with water rights diverting from the same water source or ACGWS, there is no basis to reconsider the denial of the Petitioners' delivery call. The Hearing Officer properly denied the call and issues relating to material injury and any defenses thereto were unnecessary to decide.

III. The Association's Use of the Upper Well.

Petitioners also ask the Hearing Officer "to determine LRPOA's right to divert water from the Upper Well, and the permissible rates of diversion." *Petition* at 9. The request goes beyond the scope of reconsideration and well beyond the scope of the Department's CM Rules.

[1] There is no finding of "material injury" in this case and the Association reserves all rights with respect to that issue. Petitioners erroneously claim that the standard was "material harm in a decline in the output of their spring" as the standard. *See Petition* at 8. The standard was not harm to the water source, but whether the beneficial use of their water right was materially injured.

The petition is essentially a request for an administrative water right adjudication beyond IDWR's jurisdiction. *See e.g.* I.C. § 42-1401 et sq. The status of the Association's use of the Upper Well is defined by statute. *See* I.C. § 42-111(1)(b) (0.04 cfs / 2,500 gpd). The Legislature has excepted that use from the mandatory permitting statute. *See* I.C. § 42-227. There is no basis to "correlate" that use with the Association's separate domestic water right permit 29-14401.

Moreover, the requirement to file a water right claim in the Snake River Basin Adjudication (SRBA) is defined by the court's orders regarding deferred de-minimus domestic and stockwater water rights. The United States recently filed a motion to have all of those claims adjudicated by the Court. *See Motion* (Nov. 15, 2021). That process is currently stayed by the Special Master through the end of 2023. *See Stay Order* (Subcase No. 00-92095, Nov. 8, 2022). As such, the Hearing Officer should deny the Petitioners' request to adjudicate the Association's domestic use from the Upper Well through this administrative proceeding.

CONCLUSION

The Association submits the Hearing Officer properly denied the Petitioners' delivery call and that there is no basis to reconsider that decision. The Association respectfully requests the Hearing Officer deny the petition accordingly.

Dated this 13th day of June, 2023.

MARTEN LAW LLP

/s/ Travis L. Thompson
Travis L. Thompson

Attorneys for Lava Ranch Property Owners Assn.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2023, I served a true and correct copy of the foregoing LRPOA'S RESPONSE TO PETITIONERS' PETITION TO RECONSIDER ORDER DENYING DELIVERY CALL:

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

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