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DEPARTMENT OF
WATER RESOURCES

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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 MOTION TO DISMISS DELIVERY
CALL AS AGAINST STATUTORY EXEMPT
DOMESTIC WELL USE**

COMES NOW, Respondent LAVA RANCH PROPERTY OWNERS ASSOCIATION, INC. ("LRPOA" or "Association"), by and through its counsel of record, BARKER ROSHOLT & SIMPSON LLP, and pursuant to IDAPA 37.01.01.220 hereby moves the hearing officer for an order dismissing the Petitioners' delivery call as applied to the Association's statutory exempt domestic well and use. The bases for this motion are set forth as follows:

FACTUAL BACKGROUND

LRPOA is a non-profit homeowners association organized pursuant to Idaho law. LRPOA represents 420 members that own 470 lots within the Lava Ranch Subdivision in Bannock County, Idaho. About 70 homeowners have their own domestic wells within the subdivision, however many members do not have access to potable water on their respective

properties. Landowners without a domestic well must fill personal tanks to haul potable water to their property for use in a cabin, a recreational vehicle, or other dwelling means. LRPOA historically solely provided water to its members through a well located in the SESE, Section 7, Township 10S, Range 38E, Bannock County. This well is locally known as the “Lower Well.”¹ In approximately 2016, LRPOA installed a water line from another well located in NWNE, Section 19, Township 10S, Range 38E, Bannock County that is used to pump water to the upper holding tanks. This well is locally known as the “Upper Well.” The additional well helps satisfy increased demand, particularly during the summer months and on weekends.

In the summer of 2021 it was discovered that the Association did not hold any water rights to either well. In response to a cease and desist letter from IDWR, the Association limited water use in the Upper Well and obtained a water bank rental for use in the Lower Well. *See generally*, Letters and Emails; Exs. A, B, and C. The Association also filed two separate applications for permit (Lower Well – 29-14401; Upper Well – 29-14402). The applications were protested by the Petitioners. The Petitioners withdrew their protest to application for permit no. 29-14401 and IDWR issued a permit on December 16, 2021. LRPOA recently filed a notice of withdrawal of application for permit no. 29-14402 on May 26, 2022.

Petitioners filed a water right delivery call on February 11, 2021. Petitioners requested IDWR to curtail the Association’s use of the Upper Well. Petitioners later filed an amended petition on February 22, 2022 identifying a proposed area of common ground water supply. IDWR published notice of the proceeding and the hearing officer set a hearing for September 20-21, 2022. *See Scheduling Order, Third Notice of Continued Prehearing Conference, and Notice of Hearing* (May 2, 2022).

¹ The Lower Well and its water right no. 29-14401 are not subject to this proceeding as the well is located outside of the Petitioners’ proposed area of common ground water supply. *See Amended Petition* (Feb. 20, 2022); Ex. A.

Pursuant to the scheduling order, dispositive motions must be filed on or before July 19, 2022. LRPOA is filing this motion to dismiss as a dispositive motion as to the statutory exempt domestic use of the Upper Well for the benefit of its members.

ARGUMENT

I. There is No Basis to Process a Delivery Call Under the CM Rules Against LRPOA's Statutory Exempt Domestic Water Use.

Idaho law provides that the “excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be subject to the permit requirement under section 42-229, Idaho Code.” See I.C. § 42-227. However, the statute also provides that “[r]ights to ground water for such use may be acquired by withdrawal and use.” See *id.* (emphasis added). Pursuant to the statute, a person or entity can drill a well for domestic purposes without applying for a water right permit. The statute further allows, but does not require, a person to obtain a water right by withdrawal and use. Compare *State v. Munden*, 169 Idaho 818, 504 P.3d 354, 371-72 (2022) (“The word *shall*, when used in a statute, is mandatory”). An example would be obtaining a water right decree in a general adjudication where de-minimis stock and domestic water rights may be decreed. Accordingly, obtaining a ground water right is not required for a use that meets the “domestic” purpose definition under Idaho Code § 42-111.²

Idaho Code § 42-111 defines “domestic” purposes as follows:

- (a) The use of water for homes, organization camps, public campground, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or
- (b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

² There are thousands of examples of exempt domestic wells across the State of Idaho that do not have associated water rights.

(2) For purposes of the sections listed in subsection (1) of this section, domestic purposes or domestic uses shall not include water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b) of this section.

I.C. § 42-111.

The Department administers water rights through water districts and watermasters. *See* I.C. § 42-601 et seq. There is no statute that authorizes administration of exempt domestic water uses that do not have associated water rights (i.e. permit, license, or decree). Likewise, there is no active water district that administers groundwater within the area of the Lava Ranch Subdivision. Consequently, the Petitioners filed a water right delivery call pursuant to Rule 30 of the Department's Conjunctive Management Rules ("CM Rules") (IDAPA 37.03.11 et seq.).

The CM Rules prescribe procedures for responding to a delivery call "made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." CM Rule 01 (emphasis added). On their face, the scope of the CM Rules only apply to those that hold a surface or ground water right. *See Memorandum Decision* at 8-9 (*Basin 33 Water Users v. IDWR*, Ada County Dist. Ct., Fourth Jud. Dist., Case No. CV01-20-8069, Nov. 6, 2020) ("The Court finds the language of Rule 1 to be plain. Under its terms, the CM Rules are limited in scope to prescribing the basis and procedure for responding to delivery calls made by the holder of a senior surface or ground water right against the holder of a junior ground water right in an area having a common ground water supply."). The rules expressly define a "water right" as "[t]he legal right to divert and use or to protect in place the public waters of the state of Idaho where such right is evidenced by a decree, a permit or license issued by the Department, a beneficial or constitutional use right or a right based on federal law." CM Rule 010.25 (emphasis added). Accordingly, to be subject to a

delivery call under the CM Rules, a person must hold either a “decree, permit, license, . . . beneficial or constitutional use right, or a right based on federal law.” The CM Rules plainly do not apply to exempt statutory domestic uses.

Finally, the CM Rules provide certain exemptions for domestic and stockwater ground water rights from delivery calls:

11. Domestic and Stock Watering Ground Water Rights Exempt.

A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in Section 42-1401(A)(12), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stockwatering rights, where the holder of such right is suffering material injury.

CM Rule 20.11 (underline added).

The Director has consistently applied the above provision to completely exempt domestic and stock water rights from delivery calls filed across the Eastern Snake Plain Aquifer (ESPA). The exemption basically furthers the state policy to provide humans and livestock access to water. The Idaho Supreme Court upheld the exemption as facially constitutional, reasoning a senior water right holder could pursue a takings claim. *See AFRD#2 v. IDWR*, 143 Idaho 862, 881, 154 P.3d 433, 452 (2007). Although the rule does not prohibit calls between competing domestic or stockwater rights, it does not address statutory exempt domestic uses. Stated another way, the CM Rules do not provide for the conjunctive administration of statutory exempt domestic uses. If the Legislature has exempted certain uses from a water right requirement, it makes no sense to claim such uses are somehow subject to water right administration.

In this case LRPOA has elected to divert water from the Upper Well pursuant to the exempt domestic use set forth in I.C. § 42-111(1)(b). Accordingly, the Association may divert

and use up to 0.04 cfs and 2,500 gallons per day for potable water use within its 470-lot place of use. The diversion and efficient storage of such water in the upper tanks provides vital access to water for the Association's members using their property, mostly in the summer months. The Petitioners, as members of the Association, are also entitled to receive potable water from the Upper Well. In other words, use of surface water under water right no. 29-13730 is not the Petitioners' sole source of water. Since Petitioners have the right to access and use the Association's wells, they are not solely reliant upon the spring source for water.

Since LRPOA plans to utilize the exempt statutory use under section 42-111(1)(b), it does not hold a "water right" to the Upper Well that is subject to water right administration, including conjunctive administration under the CM Rules. Therefore, the Director does not have authority to curtail the Upper Well, provided the use meets the statutory limitation of 0.04 cfs and 2,500 gallons per day. Where the CM Rules only apply only to conjunctive administration of "water rights," there is no basis to regulate the Upper Well in response to the Petitioners' water right delivery call.

The above reasoning is consistent with Eastern Regional Director James Cefalo's letter to the Association last summer, where he noted the following:

In Idaho, certain water uses are exempt from needing a recorded water right. For example, Sections 42-227 and 42-111, Idaho Code, establish an exemption for water diverted from a ground water well for domestic purposes. According to Sections 42-111(1)(b) and 42-111(2), in order to qualify for the domestic exemption, the diversion of ground water for domestic use at a multiple ownership subdivision cannot exceed a diversion rate of 0.04 cfs (18 gallons per minute) and a daily diversion volume of 2,500 gallons. Section 42-111(3) states that multiple exempt uses cannot be combined or stacked together to satisfy a water use that would otherwise require a water right. Multiple wells being used to supply water for a common domestic use must be evaluated together. The two systems operated by LRPOA represent a common domestic use within the Lava Ranch subdivision.

James Cefalo June 3, 2021 Letter at 2 (Ex. A).

LRPOA was instructed to cease and desist the operation of the Upper and Lower Wells “unless the system infrastructure is modified to ensure the individual and aggregate use will not exceed the limits set by Section 42-111(1)(b).” *See id.* Since LRPOA’s combined diversion from the Upper and Lower Wells exceeded the limit, IDWR required the Association to limit the use accordingly. LRPOA restricted use of the Upper Well to the limits of section 42-111(1)(b) and obtained a water right bank rental for use of the Lower Well during the 2021 season, which was approved by IDWR. *See Travis L. Thompson June 10, 2021 Letter to James Cefalo* (Ex. B); and follow up email correspondence (Ex. C). Since that time, LRPOA obtained water right permit no. 29-14401 for use of the Lower Well, hence the statutory exempt domestic use now only applies to the Upper Well. Since the Upper Well can be used within the exempt domestic limits of section 42-111(1)(b), it follows that the use cannot be administered and curtailed through conjunctive management.

Moreover, this reasoning is further supported by the Director’s recent decision establishing a moratorium in the Big Wood River Ground Water Management Area. In that order the Director observed:

However, the Director currently lacks the explicit authority to restrict the appropriation of ground water by the drilling of individual domestic wells. Idaho Code § 42-227 exempts the drilling of wells for domestic purposes, as defined in Idaho Code § 42-111(1), from “the permit requirement under section 42-229, Idaho Code.” Idaho Code § 42-229 prescribes “the application and permit and license procedure” as the method of appropriating ground water.

Idaho Code § 42-1805 grants the Director limited authority to prohibit appropriation of water. The Director is only authorized to “suspend the issuance or further action on *permits or applications*” Idaho Code § 42-1805 (emphasis added). Because the drilling of wells for domestic purposes is exempt from the application permit and licensing procedures, the Director does not have the explicit authority to issue a moratorium order that prohibits appropriation of water for qualifying for exempt domestic ground water uses under Idaho Code § 42-111(1).

Order Establishing Moratorium at 7 (May 17, 2022).

If IDWR cannot prohibit new exempt domestic uses in an aquifer approaching a critical condition, it follows that it cannot administer the same uses through conjunctive management. Indeed, where CM Rule 20.11 expressly exempts domestic water rights from curtailment, the same reasoning and policy applies to exempt statutory domestic uses. Allowing continued de minimis domestic use is clearly a health and safety issue for LRPOA's members that do not otherwise have access to water. Although the Lower Well provides a certain amount of water, use of the Upper Well ensures additional water storage and water reliability for all members that do not have their own domestic well.

Finally, dismissing the current delivery call as against the Association's exempt domestic Upper Well use is consistent with state policy to make the maximum and best use of available water resources. See *IGWA v. IDWR*, 160 Idaho 119, 369 P.3d 897, 909 (2016) ("The policy of beneficial use serving as a limit on the prior appropriation doctrine dovetails with the prescription in CMR 20.03 that '[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water.'"). Curtailing a de minimis exempt domestic use that is beneficial to hundreds in favor of a spring use for two people is not reasonable or good policy in this unique instance.

In this case, the Upper Well helps supply potable water to hundreds of lot owners that do not otherwise have access to water. It is clearly a health and safety issue for landowners to have access to potable water to make use of their property. The Petitioners are likewise entitled to use this water. In other words, the exempt domestic use assists all parties involved, it is not picking "winners" or "losers." By filing a delivery call against their neighbors, the Petitioners are seeking to prohibit exempt domestic ground water use by hundreds in favor of only two people

using water from a spring resource under their own water right. Such a result conflicts with reasonable beneficial use under Idaho law.

CONCLUSION

LRPOA's use of groundwater from the Upper Well is a defined statutory exempt domestic water use. Nothing in statute or the CM Rules authorizes the Director to administer exempt domestic uses that are not defined by a "water right." Since LRPOA is not a holder of a ground water right that is subject to Petitioners' delivery call, the Hearing Officer should dismiss the Petitioner's delivery call as against the Association's use of water from the Upper Well pursuant to the limits in Idaho Code § 42-111(1)(b).

LRPOA requests oral argument on this motion.

Dated this 7th day of July, 2022.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

Attorneys for Lava Ranch Property Owners Assn.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 2022, I served a true and correct copy of the foregoing LRPOA'S MOTION TO DISMISS DELIVERY CALL AS AGAINST STATUTORY EXEMPT DOMESTIC USE:

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

Mat Weaver, Hearing Officer
Idaho Department of Water Resources
State Office
322 E. Front St.
Boise, Idaho 83702-0098
matthew.weaver@idwr.idaho.gov
sarah.tschohl@idwr.idaho.gov
file@idwr.idaho.gov

Lance Schuster
Beard St. Clair Gaffney PA
955 Pier View Dr.
Idaho Falls, Idaho 83402
lance@beardstclair.com

Attorneys for Petitioners Mike & Lori Beer



Travis L. Thompson

Exhibit A



State of Idaho

DEPARTMENT OF WATER RESOURCES

Eastern Region • 900 N Skyline Drive, Suite A • Idaho Falls ID 83402-1718

Phone: (208) 525-7161 • Fax: (208) 525-7177

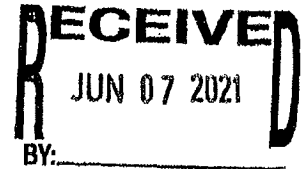
Website: idwr.idaho.gov • Email: easterninfo@idwr.idaho.gov

BRAD LITTLE
Governor

GARY SPACKMAN
Director

June 3, 2021

Lava Ranch Property Owners Association
PO Box 131
Lava Hot Springs, ID 83246



RE: Summary of Investigation / Cease and Desist Order

Dear Water User:

In February 2021, Mike and Lori Beer filed a delivery call with the Idaho Department of Water Resources (IDWR), asserting that a well owned and operated by Lava Ranch Property Owners Association (LRPOA) was reducing the flow from a spring on the Beer property, which supplies water for domestic use under water right 29-13740. As part of that delivery call, IDWR conducted three site visits to the Lava Ranch subdivision. This letter is intended to summarize the data collected during the site visits and to clarify the statutory limits on the use of the LRPOA wells.

LRPOA owns and operates two ground water wells within the boundaries of the Lava Ranch subdivision. Each well supplies water to a separate community pump and distribution station. The lower station is located near the LRPOA pond and pavilion on the north side of the subdivision. The upper station is located on a hill top at the south end of the subdivision. Many of the cabin lots in the Lava Ranch subdivision have no direct connection to water. In order to satisfy water needs at their lots, property owners fill up portable tanks at the LRPOA community pump stations and transport the water to their individual lots.

The lower station supplies water directly to a single distribution line when the pump is turned on. No water is stored at the lower station. On May 19, 2021, Blake Jordan from IDWR conducted a flow measurement of the lower station. The pump delivered 20.5 gallons per minute (0.05 cfs) to the distribution line.

On April 30, 2021, I conducted a preliminary investigation of the upper system. I evaluated the key components of the system and confirmed that the system had not yet been turned on in 2021. On May 29, 2021, I met with Matt Groll, Tom Bland and Scott (?) to inspect the upper system. The well at the upper system is equipped with a 2 hp pump. Water from the well is pumped approximately 600 feet uphill to two storage tanks at the end of High Country Road. Each tank can hold at least 1,500 gallons. Together, the tanks have a storage capacity of at least 3,000 gallons. During the inspection, I was able to access the end of the pipe from the well to the tanks. With the system operating, I conducted a measurement of the inflow from the well. The tanks

were filling at a rate of 3.3 gallons per minute. Based on the measured rate of flow, it would take at least 15 hours to fill the tanks. An additional 2 hp pump supplies water from the tanks to two distribution hoses.

In Idaho, certain water uses are exempt from needing a recorded water right. For example, Sections 42-227 and 42-111, Idaho Code, establish an exemption for water diverted from a ground water well for domestic purposes. According to Sections 42-111(1)(b) and 42-111(2), in order to qualify for the domestic exemption, the diversion of ground water for domestic use at a multiple ownership subdivision cannot exceed a diversion rate of 0.04 cfs (18 gallons per minute) and a daily diversion volume of 2,500 gallons. Section 42-111(3) states that multiple exempt uses cannot be combined or stacked together to satisfy a water use that would otherwise require a water right. Multiple wells being used to supply water for a common domestic use must be evaluated together. The two systems operated by LRPOA represent a common domestic use within the Lava Ranch subdivision.

In combination, the two LRPOA systems divert more than 18 gallons per minute and 2,500 gallons per day from ground water. The lower system, by itself, delivers 20.5 gallons per minute (0.05 cfs). It takes more than 2,500 gallons to fill the storage tanks on the upper system. According to the LRPOA president, Matt Groll, on a busy summer weekend, the storage tanks are emptied and refilled at least once per day. When the tanks are empty, the upper system automatically refills the tanks in less than 24 hours. The volume diverted at the lower site is not known. It appears, however, that the lower site is used by more patrons than the upper site because of ease of access. Therefore, on a busy summer weekend, the volume pumped at the lower station likely exceeds 2,500 gallons per day.

The current combined diversion and use of water at the upper and lower systems exceeds the limits set forth in Section 42-111(1)(b). Consequently, the diversion and use of water from the LRPOA wells requires a recorded water right.

You are hereby instructed to cease and desist the operation of the upper and lower systems unless the system infrastructure is modified to ensure the individual and aggregate use will not exceed the limits set by Section 42-111(1)(b). This would include deciding how much of the 2,500 gpd volume limit to assign to the upper system and how much to assign to the lower system and restricting the pump diversion rates. **The upper and lower systems must be shut off and locked by LRPOA by June 15, 2021.** Enforcement staff from the Idaho Falls office will conduct an inspection after June 15th to confirm that the systems are shut off and locked.

If LRPOA wants to continue to operate the systems as they are currently configured, then LRPOA must either acquire a new water right to authorize the existing use or transfer an existing water right to the property. The Application for Permit and Application for Transfer forms can be found on IDWR's website. Please feel free to contact me if you have questions about the application process.

The Idaho Water Resource Board operates a Water Supply Bank, which allows unused water rights to be leased to the bank and rented by other water users in the area for short-term use. The Water Supply Bank may be a short-term solution for authorizing the existing diversion at the lower system. Given the injury concerns raised in the delivery call, it is unclear whether water rights could be moved to the upper system through the Water Supply Bank. Please contact your attorney or the Water Supply Bank staff to determine whether there are ground water rights available to rent in the Upper Portneuf River drainage.

I recognize that the board members are volunteers and appreciate them taking the time to meet with me to investigate the system. It is clear from my conversations with the board members that LRPOA did not intend to circumvent the law and were not fully aware of the rate and volume limits on domestic use when the systems were constructed. However, failure to limit the combined use of the water systems to the limits described above could subject LRPOA to a formal enforcement action and associated monetary penalties. If the upper system is shut off and locked by June 15th, no immediate action is required under the delivery call filed by the Beers. IDWR will hold off on scheduling a conference for the delivery call until LRPOA determines how it plans to address the unauthorized use at the upper system. Please feel free to contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'J Cefalo', written in a cursive style.

James Cefalo

Cc: Matt Groll, President LRPOA (3286 N 1730 E, North Logan, UT 84341)
Travis Thompson (163 2nd Avenue West, Twin Falls, ID 83301)
Lance Schuster (955 Pier View Drive, Idaho Falls, ID 83402)
Garrick Baxter (322 East Front Street, Boise, ID 83702-7371)

Exhibit B



Barker Rosholt
& Simpson LLP

Michael A. Short

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Boise

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(1937-2019)

June 10, 2021

VIA EMAIL & U.S. MAIL

James Cefalo
Idaho Department of Water Resources
Eastern Region
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402

Re: Summary of Investigation / Cease and Desist Order

Dear Mr. Cefalo:

I am writing on behalf of our client Lava Ranch Property Owners Association ("LRPOA") in response to your *Summary of Investigation/Cease and Desist Order* letter ("*Letter*") of June 3, 2021, addressed to LRPOA. LRPOA reserves all rights under applicable law and whether the *Letter* was sent in compliance with statutory requirements. It's my understanding my client has not received the letter by certified mail. Any timeframes that apply are hereby reserved accordingly.

Without waiving any rights, LRPOA requests a compliance conference pursuant to Idaho Code §§ 42-351(3) and 42-1701B(3-4) and will present a proposal for remedying the alleged violations specified in the *Letter* and a plan for future compliance. It is my understanding that a water bank rental may be possible for 2021 and LRPOA intends to file an application for permit as well. As I am currently involved in an administrative hearing scheduled by the Director for two weeks I cannot schedule that at this time, but will as soon as the hearing concludes. I also have a meeting with IDWR in Moscow on June 16th and will be unavailable that day.

The wells supply water to residences for domestic use within the subdivision. It is the only source of water. Idaho Code § 42-111 creates a domestic exemption to the recorded water right requirement if diversion rates do not exceed 0.04 cfs and daily diversion volume does not exceed 2,500 gallons per day.

Idaho Department of Water Resources ("IDWR") however, identifies two wells operated by LRPOA, the use of which together exceed the domestic exemption. Specifically, LRPOA maintains a "lower system" which diverts at a rate of 0.05 cfs, and an "upper system" which has

the capacity to fill a 3,000-gallon storage system at least once a day, with an automatic refill feature.

Proposed Remedy and Plan for Compliance

The *Letter* instructs LRPOA to shut-off and lock both upper and lower systems, but also that if the upper system is shut-off and locked by June 15, 2021, no further immediate action is required. LRPOA proposes to remedy its violation and assure future compliance by pursuing three separate actions.

First, by June 15, 2021, LRPOA intends to install a timer on its upper system limiting pumping to a twelve (12.5) hours period that will reduce the upper system's diversion to less than 2,500 gallons per day.¹ The timer will be locked to prevent tampering, and inspection by the State is welcome, as needed. Use of the upper system will therefore be in compliance with the domestic exemption. Additionally, on June 15, 2021, LRPOA will shut-off and lock the lower system until such time as a water bank rental or a permanent permit can be secured. These actions will bring LRPOA domestic use within the exemption rate of 2,500 gallons per day.

Second, by June 15, 2021, LRPOA will submit an application to the water bank for the remainder of 2021 in order to cover the water usage and diversion of the upper and lower system.

Third, by June 15, 2021, LRPOA will submit an application permit for permanent water right to cover its use and diversion of water for both upper and lower systems. This will ensure that LRPOA remains in compliance with Idaho law in the future.

Consent Order

Pursuant to Idaho Code § 42-1701B(4), LRPOA submits the above-described action plan and requests IDWR formalize this agreement for compliance with a consent order following a compliance conference. LRPOA believes that this plan is the most expedient way to bring itself into compliance with Idaho law, protect against possible damage to other water right holders, and provide for future compliance in years to come.

LRPOA hopes to resolve this matter expediently and fairly. I look forward to discussing the matter further and coming to a quick resolution and compliance plan.

¹ The *Letter* estimates that the upper system can fill its tanks at a rate of 3.3 gallons per minute, over a limited 12-hour pumping period, the upper system will only pump approximately 2,475 gallons a day.



Mr. James Cefalo (IDWR)
June 10, 2021
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Sincerely,

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

cc: Garrick Baxter, IDWR Deputy Attorney General
Matt Groll, LRPOA
Lance Schuster



Barker Rosholt
& Simpson LLP

Exhibit C

Travis Thompson

From: Travis Thompson
Sent: Tuesday, June 15, 2021 12:47 PM
To: Cefalo, James
Cc: Michael A. Short; 'mattgroll@gmail.com'; 'lance@beardstclair.com'; Baxter, Garrick; Jessica Nielsen; Whitney, Rob
Subject: RE: Lava Hot Springs Property Association

James,

Thanks, I have confirmed with LRPOA and the timing has been installed and tested. Given the domestic needs of the homeowners they intend to turn it back on Friday. We are in the process of filing applications for permit as well.

Please advise of any questions and we understand you will be in contact regarding the delivery call filing.

Thanks

Travis

From: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Sent: Tuesday, June 15, 2021 9:55 AM
To: Travis Thompson <tlr@idahowaters.com>
Cc: Michael A. Short <mas@idahowaters.com>; 'mattgroll@gmail.com' <mattgroll@gmail.com>; 'lance@beardstclair.com' <lance@beardstclair.com>; Baxter, Garrick <Garrick.Baxter@idwr.idaho.gov>; Jessica Nielsen <jf@idahowaters.com>; Whitney, Rob <Rob.Whitney@idwr.idaho.gov>
Subject: RE: Lava Hot Springs Property Association

Travis,

Thank you for responding so quickly to my letter of June 3, 2021. My letter was not intended to be a Notice of Violation under Idaho Code, Section 42-1701B. Often, when the Department discovers a water use that is inconsistent with recorded water rights, we first send a letter to the water user, summarizing the information available to the Department and asking the water user to bring his water use into compliance with existing water rights or water law. If the warning letter is ignored or the unauthorized use continues, the Department will then initiate a Notice of Violation under Section 42-1701B. This informal process of addressing unauthorized uses is described in the Compliance and Enforcement page on the Department's website.

Because the Department has not yet initiated a Notice of Violation under Section 42-1701B, there is no need for a compliance conference at this point. Your response letter identifies steps that LRPOA will take before June 15th to bring its water use into compliance with Idaho Code Section 42-111(1)(b). LRPOA proposes to shut off the lower system entirely until a Water Supply Bank rental or a water permit can be secured. Further, LRPOA proposes to install an automatic timer on the upper system, restricting the upper system to 12.5 hours of operation per day. The Department confirmed that the upper system draws 3.3 gallons per minute. Limiting the upper system to 12.5 hours per day will keep the daily diversion volume under 2,500 gallons per day. In the coming days, we will confirm that the lower system is locked and will schedule a time to meet with representatives of LRPOA to confirm that the timer system on the upper system is installed and functioning properly. Assuming the timer on the upper system operates as intended, LRPOA's proposal will remedy the unauthorized water use. Continued use of the upper system, however, means that the delivery call filed by the Beers cannot be suspended. I will contact the parties shortly to outline the next steps in the delivery call proceedings.

James Cefalo
Regional Manager
IDWR Eastern Region
(208) 525-7161

From: Jessica Nielsen [<mailto:jf@idahowaters.com>]

Sent: Thursday, June 10, 2021 4:20 PM

To: Cefalo, James <James.Cefalo@idwr.idaho.gov>

Cc: Travis Thompson <tlr@idahowaters.com>; Michael A. Short <mas@idahowaters.com>; 'mattgroll@gmail.com' <mattgroll@gmail.com>; 'lance@beardstclair.com' <lance@beardstclair.com>; Baxter, Garrick <Garrick.Baxter@idwr.idaho.gov>

Subject: Lava Hot Springs Property Association

Dear Mr. Cefalo,

Attached, please find a copy of the letter to you from Travis Thompson in response to the Summary of Investigation / Cease and Desist Order.

Thank you,

Jess Nielsen

Barker Rosholt & Simpson LLP

163 2nd Avenue West

P.O. Box 63

Twin Falls, Idaho 83303-0063

Office: (208) 733-0700

Fax: (208) 735-2444

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