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DEPT OF WATER RESOURCES
SOUTHERN REGION

IDWR Southern Region
c/o Allen Merritt
650 Addison Ave. W, Suite 500
Twin Falls, ID 83301-5858

Re: *Rotarun Permit No. 80078*

Dear Allen:

The purpose of this letter is to address Rotarun's Application 80078 ("Application") for snow-making. Specifically, the purpose of this letter is to respond to Shelley Keen's Memorandum dated November 9, 2015, entitled, "Filling ponds with exempt domestic ground water rights." I respectfully disagree with Mr. Keen's analysis. The Department's current administrative interpretation is unconstitutional, arbitrary, capricious and results in a violation of equal protection.

The Permit originally filed by Rotarun contemplated that Rotarun could use its domestic right to satisfy a part of the mitigation for snow-making. Under the Application as originally approved by the Department for publication, Rotarun could have made snow on 15 acres. Thereafter, in the very late stages of approving Rotarun's Application, the Department changed its mind and determined that the domestic right could not be used for mitigation, resulting in Rotarun being able to make snow on 10.4 acres. Oddly, the Department seems to have concluded that if Rotarun had a "long-standing" use of its domestic right, then Rotarun would have been able to utilize the domestic right for mitigation, and Rotarun would have been able to make snow on the full 15 acres, as planned.

I believe it's important to emphasize that these are novel interpretations, put forth just within the last month or two, and are entirely at odds with IDWR's long-standing interpretations and practice. To my knowledge, IDWR has always interpreted Idaho Code Section 42-111(1)(a) according to the law's plain language: an owner who qualifies for the exemption (homes, organization camps, public campgrounds, livestock) has the right to use water up to 13,000 gpd for these uses and any other purpose therewith including irrigation of up to 0.5 acres, period. Any use beyond this had to be covered with some other water right, transferred to the property or used in some approved mitigation plan. There has never been any wholesale annulment of the domestic exemption just because some nebulously-defined "project" or "development"

exceeds the exemption limits. The absurd interpretation of the Department is best summarized by reviewing the following scenarios:

SCENARIO 1

An owner is building a new home, and plans to irrigate 0.5 acres of irrigation. IDWR has affirmed that 42-111(1)(a) can be used to supply the home and the irrigation from a well. If that same owner builds a home and plans to irrigate 0.6 acres of irrigation, IDWR believes that the entire domestic exemption is disallowed because 0.6 exceeds 0.5. He would have to obtain a water right for his home, his irrigation, and any other use. The owner would not be allowed to simply use his statutory domestic exemption and add to it a 0.1-acre irrigation right transferred to his land. He would have to find an irrigation right for the entire 0.6 acres.

SCENARIO 2

The same owner builds his house and starts irrigating 0.50 acres under 42-111(1)(a). A year later, he transfers in a 1-acre irrigation right. IDWR says that in this case the pre-existing or "longstanding" use would be allowed to continue, so in this case the owner could irrigate 1.5 acres. IDWR has not defined how long the domestic exemption must have been used to qualify as "longstanding".

SCENARIO 3

The same owner finds a 1-acre irrigation right, but this time transfers it to his property at the same time as he is building the house. IDWR appears to be saying that in this case he is limited to 1 acre because the "proposed development" exceeds 0.5 acres. Somehow the domestic exemption got nullified because the owner decided to transfer in the 1-acre right at the same time he was building the house.

SCENARIO 4

The same owner has a groundwater irrigation right for 1.0 acres and has used it to irrigate a pasture for many years, with no residence on the property. Then when he goes to build his house next to the pasture, serving it from the same well, IDWR appears to be saying that he could not enjoy the benefit of 42-111(1)(a) for 0.5 acres around his house because now the whole "development" exceeds 0.5 acres.

SCENARIO 5

Same situation as Scenario 4, but the owner plans to locate the home 500 feet from the pasture on land owned by his brother. Is this still a "development" or could he now enjoy the 0.5-acre 42-111(1)(a) exemption? What if the home were 1000 feet away? What if it was directly adjacent to the pasture but the owner drills a new well? IDWR has no answer for any of these. It is impossible for IDWR to define what a "proposed development" is.

SCENARIO 6

The same owner is building a new home, and plans to irrigate 0.5 acres and to fill and maintain an adjacent aesthetic pond. IDWR has affirmed his right to do this under 42-111(1)(a). But if this same owner plans to irrigate 0.6 acres, IDWR says he has no domestic exemption at all for any of the irrigation or the pond or the home. He would have to find an existing water right to cover everything.

SCENARIO 7

The same owner is building a new home, and plans to irrigate 0.5 acres and serve his pond. However, the pond is large enough such that the evaporation plus the home and irrigation use exceeds 13,000 gpd. IDWR is saying that he has zero domestic exemption, including for the home, irrigation, or pond, and would have to find a water right for the entire project.

In all of the scenarios, the use of the domestic exemption is dependent on whether or not the use had been "long-established" before the subsequent irrigation components or users of water were introduced. There are several different problems with this policy. First, Section 42-111(a) does not allow the creation of two different classes of users. The attempt to create different classes, when there are none in the statute, would constitute an arbitrary and capricious action by the Department. "An action is capricious if it was done without a rational basis. It is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *American Lung Ass'n of Idaho/Nevada v. State, Department of Agriculture*, 142 Idaho 544, 130 P.3d 1062 (2006), citing *Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 536 P.2d 729 (1975).

This creation of classes denies Rotarun its right to equal protection. There are "long-standing" users, presumably then "short-standing users," and users who have not yet developed their projects, which involve domestic uses. The "long-standing" users get to benefit from Section 42-111(a) in the development of their properties. We have

no idea how "short-term" users are treated. Those that have a new project proposing over one-half acres of irrigation do not get to benefit from Section 42-111(a). "The majority of Idaho cases ... state that the equal protection guarantees of the federal and Idaho Constitutions are substantially equivalent. The principle underlying the equal protection clauses of both the Idaho and United States Constitutions is that all persons in like circumstances should receive the same benefits and burdens of the law." *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013). Under any level of scrutiny, this disparate treatment and creation of classes would not survive because the distinction is wholly irrational, as set forth in the possible scenarios outlined in this letter. Simply articulating the different classes is bizarre. The irrational nature of the distinction is further evidenced because creation of the classes leads to absurd results. Any determination that leads to irrational and absurd results is disfavored. See e.g., *Jasso v. Camas County*, 151 Idaho 790, 264 P.3d 897 (2011).

It is hard to discern any rationality to the Department's new policy. However, it might be that the Department is recognizing the "long-standing" domestic uses because to do otherwise would deprive the "long-standing" users their property rights. As we all know, water rights are real property rights and, therefore, have all the protections of real property rights. *Anderson v. Cummings*, 81 Idaho 327, 340 P.2d 1111 (1959). To the extent that the "long-standing" uses are recognized, the Department is placed in an impossible situation: continue the unequal treatment to prevent a taking of the "long-standing" user's property rights; or recognize the "long-standing" user's property rights and deprive Rotarun its right to equal protection.

The easiest way out for the Department is to simply allow Rotarun Application to proceed, and allow Rotarun its ability to use the domestic right for mitigation. Please advise. Thank you.

Sincerely,

HAEMMERLE LAW, P.L.L.C.

A handwritten signature in black ink, appearing to read "Fritz X. Haemmerle", written over a horizontal line.

Fritz X. Haemmerle

FXH: fxh
cc: client

Charles G. Brockway, Brockway Engineering
Garrick Baxter, Deputy Attorney General
Shelly Keen, IDWR