



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

March 7, 2016

Fritz X. Haemmerle
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P.O. Box 1800
Hailey, ID 83333

RE: Rotarun Application for Permit 37-22951

Dear Fritz:

This letter is in response to your letter to the Idaho Department of Water Resources ("Department") dated January 15, 2016, regarding Rotarun's Amended Application for Permit 37-22951 ("Application").

Your letter starts by commenting on recent notes authored by Department employee Shelley Keen. The notes represent Mr. Keen's thoughts on the application of the domestic definition to various scenarios. The notes were a personal effort by Mr. Keen to memorialize ongoing discussions among Department staff regarding the domestic definition and its application. The notes were not intended to be a definitive statement of the Department's interpretation of the domestic definition, nor were they intended to establish an official position of the Department on the issues discussed therein.

Your letter also questions the Department's application of the domestic definition to Rotarun's Application. Your letter outlines some of the Application's history but additional discussion is warranted. On May 27, 2015, the Department received the Application, which proposes to divert 0.09 cfs of ground water to a lined storage pond at Rotarun's facility with an associated diversion from the pond of up to 0.3 cfs for commercial purposes (snowmaking) during the winter months. *Narrative in Support of Application for Water Right Permit with Mitigation for Rotarun Ski Club Inc.* ("Narrative"), at 1 (May 6, 2015). The Application seeks 8.0 acre-feet annually for commercial storage and commercial from storage. *Application* at 1. Rotarun will require 8.0 acre-feet annually for the commercial snowmaking. *Narrative* at 2. But Rotarun also states it will need more than 8.0 acre-feet in the first year to fill the pond and then

in subsequent years to maintain the pond for fire protection storage purposes during the non-snowmaking times of the year. Rotarun suggests it is entitled to use Idaho's domestic exemption statute to provide this additional volume of water. Rotarun states the "first fill of the pond (2.4 acre feet) will be provided by up to 13,000 gallons per day under 42-111a, of which, [Rotarun] has been determined to qualify by IDWR." *Id.* at 2. Rotarun also proposes to "maintain a full pool in the pond during non-snowmaking times of the year...through a domestic exemption as the Club has been determined to be an organization under 42-111a by IDWR in a 2008 order." *Id.* at 1.

Rotarun does not intend to develop or rely on a well of its own for the project. Rotarun proposes to divert the 0.09 cfs of water for commercial snowmaking from existing wells owned by Sage Springs Homeowners Association ("HOA"). *Id.* Rotarun also proposes to divert water from the HOA wells for the exempt domestic use. *Id.* The HOA currently delivers water from these wells to its homeowners pursuant to water right 37-8673 and permit 37-8900. *Amended Final Order, In the Matter of Application for Drilling Permit in the Name of Rotarun Ski Club, Inc., Numbered 849072 ("Amended Final Order"),* at 5 (Nov. 25, 2008). These water rights authorize use of ground water on the 20 lots of Sage Spring Subdivision but do not appear to authorize the use of ground water at Rotarun. *Id.*

On October 20, 2015, the Department submitted a draft permit approval to Rotarun for review and comment. The draft permit provides 8.0 acre-feet for commercial use, but condition 7 provides that the 8.0 acre-feet must also be applied to the initial fill and to maintain the pond during the non-snowmaking times of the year. The Department conditioned the water right in this fashion because Idaho Code does not allow Rotarun to develop a new domestic exempt water right in the manner proposed by Rotarun for the initial fill of the pond and to maintain the pond during the non-snowmaking times of the year. Idaho Code § 42-227 provides, in relevant part:

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

Idaho Code § 42-111(a) provides, in relevant part, that the phrase "domestic purposes" or "domestic uses" means:

(a) The use of water for homes, organization camps, public campgrounds, 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, ...

Idaho Code § 42-111(a)(emphasis added).

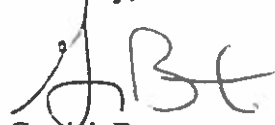
The Department previously concluded that Rotarun is an organizational camp and approved a well drilling permit for Rotarun to drill a domestic well. *Amended Final Order* at 7. But it is the Department's understanding that Rotarun did not drill the proposed well and did not develop the proposed domestic water right. The Narrative suggests Rotarun is hoping to develop

both the application for permit for new commercial snowmaking use and a new exempt domestic water right at the same time and through the same wells that are already being used for other HOA purposes. Idaho Code §§ 42-227 and 42-111 together state, the excavation and opening of a well and the withdrawal of water therefrom for an organization camp and for any purpose in connection therewith shall not be subject to the application for permit requirements so long as the total use is not in excess of 13,000 gpd. Applying these statutory definitions to the facts presented here, there appears to be a number of barriers to Rotarun establishing a new exempt domestic water right in the manner proposed. First, the HOA wells are already in existence and were not excavated and opened for the purpose of withdrawing water for domestic purposes as defined in Idaho Code § 42-111(a). Second, Rotarun cannot develop a new exempt domestic water right in the manner proposed because Rotarun is proposing to use existing HOA wells that already divert in excess of 13,000 gpd. Even if Rotarun was going to develop and use its own well for this project, Rotarun would still not be able to rely on the domestic exemption for the first fill and to maintain the pond during the non-snowmaking times of the year because the total use for the organization camp would exceed 13,000 gpd. The Department is required to apply the plain language of a statute when construing the statute. *Idaho Dep't of Health & Welfare v. Doe*, 151 Idaho 300, 305, 256 P.3d 708, 713 (2011). The plain language of Idaho Code §§ 42-111 and 42-227 is clear. To establish an exempt domestic water right, the wells must be excavated and opened for the purpose of withdrawing water for domestic purposes within the volumetric limits of Idaho Code § 42-111(a). The Department must look to the *total use* and if it is over 13,000 gpd, the use does not qualify for the domestic exemption.

The Department's position is consistent with a previous position taken involving Rotarun. It is my understanding that a few years ago, Dr. Charles Brockway proposed the idea that the snow making could be split into two components: (1) the consumptive component of snow making covered by an exemption and (2) a new non-consumptive water diversion covered by a permit. This proposal was rejected by the Department because the total use of snow making relied on the exemption. The present filing before the Department is similar.

Your letter also includes a number of hypothetical scenarios involving the application of the domestic exemption to homes with irrigation. These hypothetical scenarios are not relevant to the Rotarun Application as they present a different set of facts. At this point, the Department is willing to proceed with the Rotarun application approval as drafted. Please let me know how you would like to proceed. If you have questions please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Baxter", written over a horizontal line.

Garrick Baxter
Deputy Attorney General

cc: Jeff Peppersack, Shelley Keen – IDWR State Office
Allen Merritt, IDWR Southern Regional Office