

Coalition for Positive Rural Impact
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IDWR / NORTH

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR	)	REQUEST FOR NEW
AMENDMENT FOR PERMIT NO	)	AMENDMENT APPLICATION
95-9045 BLACK ROCK UTILITIES INC.	)	AND REQUEST FOR ORDER
	)	IMPLEMENTATION AND
	)	COMPLIANCE

Based upon applicants *Submission of Updated Information Regarding Water Features and Request for Clarification* dated October 9, 2008 and applicants letter dated August 28, 2008 and *PURPOSED CONDITIONS OF APPROVAL FOR WATER RIGHT NO 95-9045*, the protestants; Coalition for Positive Rural Impact, "Coalition" respectfully request an order requiring the applicant, Black Rock Utilities, to file a new amendment request, including public notification, based on significant changes and modifications to the original amendment application. Consequently, the applicant be required to withdraw their application for amendment No. 74780. Additionally, the applicant be required to comply with the Preliminary Order, ("Order") which became final on June 18, 2007 and implement the requirements and conditions contained in the Order.

This request is based on the applicant's letter dated August 28, 2008 and *PURPOSED CONDITIONS OF APPROVAL FOR WATER RIGHT NO 95-9045*, ("Purposed Conditions") which contains a revised set of conditions for approval. The original application purposes replacing condition 4, the addition of a new condition 13 and eliminating conditions 5 and 14. Conditions 1, 2, 3, 6, 7, 9, 10, 12 and 13 are specifically addressed as to remain unchanged. In the revised Purposed Conditions number 3 is modified, number 7/8 is modified and condition 10/11 is modified. Additionally, a new condition number 13 has been added: *The aesthetic storage use under this right also includes use for fish and wildlife and recreation purposes*. The revised Purposed Conditions are significant changes and modifications from the original application and should require a new amendment application.

Furthermore, the stocking of fish has already occurred without the Purposed Condition number 13 in effect. On January 21, 2008 the State of Idaho Department of Fish and Game received an APPLICATION FOR PRIVATE POND PERMIT [copy attached] for: *stocking fish at irrigation pond at the Southwest corner of Loffs Bay Road and Road B*. On the application, the discharge flow is listed as spring runoff and the discharge flow as an intermittent stream. The water source is listed as Lake Coeur d' Alene. The permit was issued on May 12, 2008. The application states in 36-706 3b): *Such a park or pond permit must be had for each and every location*.

In a conference held at the Kootenai Environmental Alliance office on October 15, 2008, the Protestants Barry Rosenberg, and Jai Nelson met with Kyle Capps of Black Rock Utilities. During the meeting the issue of the stocking of fish at Black Rock North was addressed. During the discussion Mr. Capps stated: *"Kootenai Camp and the irrigation pond both have fish in them....[ponds] 1 and 3....since this spring, before we opened the Kootenai Camp."*

The applicants have recently submitted a *Submission of Updated Information Regarding Water Features and Request for Clarification* dated October 9, 2008 ("Clarification"), which significantly alters, modifies, and changes information documented on Amendment Application 74780 as well as provides significant new information NOT documented on Amendment Application 74780.

As part of the Preliminary Order, ("Order") which became final on June 18, 2007, an Amendment of Permit was issued on July 27, 2007, which describes the Place of Use as sections 8, 9, 16 and 17. In the Order's Findings of Fact number 3, the Place of Use is referred to as "Black Rock North Development." In the Findings of Fact number 5, the Place of Use is referred to as "the Club at Black Rock." In the *Clarification* document the Club at Black Rock and Black Rock North is modified to the "Development" which is now to include the addition of The Ridge at Black Rock Bay Homes now referred to as The Estates at Black Rock. This expansion is NOT referred to on the original application. The applicants "place of use" information on the application compared to modifications documented in the *Clarification* document are significant changes, which should require a new amendment application.

Furthermore, the *Clarification* document contains numerous exhibit documents which are changed and modified including Exhibit A (Original Map), now titled Exhibit B (Updated Map), Exhibit C (Changes to Period and Nature of Use), Exhibit D (Changes in Place of Use), these Places of Use are shown without “*Totals*” in comparison to the existing permit, Exhibit E (Changes to Explanation and Proposed Conditions) and Exhibit F (Changes to Spreadsheet). The revised *Clarification* exhibits are significant changes and modifications from the original application and should require a new amendment application.

Per their *Clarification* Black Rock’s new position and request is to be granted flexibility and an “expanding municipal service area.” Exhibit A to Submission (Original Map) page 5 of 12 states ...”Of course, this is an expanding municipal service area, and the depiction here simply shows the area to be served or anticipated to be served by Black Rock.”

Black Rock states their intention is to commingle aesthetic, storage and municipal rights. Additionally, Black Rock representatives have stated and documented the storage of water in the Black Rock North Development greater than 6.5 acre-feet and the commingling of storm water, effluent, aesthetic, fire protection and storage water without an approved water right or plan approved by IDWR. This is in violation of Condition 4 of the Order. Furthermore, three of the ponds were filled in direct violation of Condition 5 the Order.

Condition 4 of the Order states that the storage of water under the right is limited to 5.0 acre-feet for irrigation. A documented storage volume of greater than 4,235,814 gallons specifically utilized for irrigation has violated condition 4.

The pond filling, commingling and storage includes Black Rock North Pond #1 Irrigation Lake with a volume of 18,830,288 gallons, Lake #2 with a volume of 4,235,814 gallons and Kootenai Lake with a volume of 9,263,774 gallons. Per an October 10, 2008 memo [see **Exhibit 1: Memo From Kyle Capps to Barry Rosenberg: BRN Pond Fill Dates** attached] to Barry Rosenberg with the Kootenai Environmental Alliance sent from Kyle Capps of Black Rock Utilities, the ponds were filled on the following dates:

1. Pond 1 (Irrigation pond) August 3, 2007
2. Pond 2 (Lake #2) September 3, 2007
3. Pond 3 (Kootenai Lake) October 24, 2007

This document also states: *Also, pond 2 was drained this fall (2008) into pond 1 and the water used for irrigation, so that pond 2 can hold effluent water to be applied to a portion of the golf course, That effluent filling began on October 8, 2008, and we will begin land application from this pond to the golf course the end of next week.*

This information contradicts itself as it states pond 2 was drained into pond 1 this fall (2008) however, the document clearly states pond 1 was already filled over a year prior to this action.

In a conference held at the Kootenai Environmental Alliance office on October 15, 2008, the Protestants Barry Rosenberg, and Jai Nelson met with Kyle Capps of Black Rock Utilities. During the meeting the issue of the use of irrigation water and the filled ponds 1, 2 and 3 at Black Rock North was addressed. During the discussion Mr. Capps stated:

"We're putting in a temporary pump system tomorrow to directly use that [effluent] water in our main line and irrigate part of the golf course with effluent with fall. ... All three [ponds 1, 2 and 3] were filled with lake water, my only qualification is that since then we've taken lake number 2 drained the irrigation, the lake water into the irrigation pond to use for irrigation and refilled that pond with effluent water. ... The way I understand the department looks at water, it doesn't matter if its storm water or not. If that ponds full I need a water right for the water in it. And I kinda got on Chris Meyer about that and he said well that's the law, sorry, that's the way [IDWR] you know they would look at it, cuz I asked him, I mean this things in the bottom of the Kootenai Lake which was half full and I said; So I need a water right for the storm water that filled that thing half way because I put water on top of it? He said the way the department looks at it if you're impounding water, you need a water right."

Per a letter written by the Protestant to the Department on July 16, 2008 RE: REQUEST FOR ORDER IMPLEMENTATION & COMPLIANCE REGARDING WATER PERMIT 95-9045, AMENDMENT 72669 and previously filed with Discovery in this proceedings, *"immediate regulatory compliance action regarding the requirements of this order"* was requested by the Idaho Department of Water Resources (IDWR), as the

governing body to preserve and protect Idaho's public water resources. An article from the North Idaho Business Journal, dated July 15, 2008, was attached to this letter to illustrate Black Rock's noncompliance with the order. Furthermore, a site visit to Black Rock and Black Rock North was requested to review compliance and implementation of the order. The Protestants as well as staff from the Kootenai Environmental Alliance were requested to be included as members of the site visit team. IDWR did not respond to the requests or the documented issues.

Based on violations of the Order the applicant should be required to comply with the Preliminary Order, ("Order"), implement the requirements and conditions contained in the Order and IDWR take appropriate action for the illegal diversion and storage of water per Idaho Statute 42-351 with appropriate penalties per Idaho Statute 42-1701b.

Dated this 4th day of November 2008.

Jai Nelson, Coalition Spokesperson