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DEPARTMENT OF
WATER RESOURCES

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

In the Matter of Application to Amend Water
Permit No. 95-9045 in the Name of the Black
Rock Utilities (Application No. 74780)

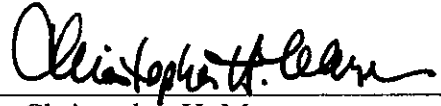
JANUARY 27, 2009
HEARING TRANSCRIPT

Applicant Black Rock Utilities, Inc. ("Black Rock") submits the following informal transcript of the hearing conducted by the Hearing Officer in Coeur d'Alene on January 27, 2009. This is not an official transcript. It was prepared by in-house staff of counsel for Black Rock, and every effort has been made to make it as accurate as possible. It is submitted for the benefit and convenience of the parties and the Hearing Officer.

DATED this 23rd day of February, 2009.

Respectfully submitted,

GIVENS PURSLEY LLP

By 
Christopher H. Meyer

Speaker	Testimony
Spackman	We are recording this at the time and place that has been designated for a hearing regarding protest against an application for amendment filed by Black Rock Utilities, Inc. The Application for Amendment seeks to amend permit to appropriate water number 95-9045 and specifically to add some uses or to change the nature of use of a portion of the permit. This is a second application for amendment of permit number 95-9045 and the application has been filed by... or has been protested by Jai Nelson. We have discussed some preliminary matters prior to going on record and before speaking about some of those, my name is Gary Spackman, for the record, I am the Hearing Officer today. Assisting me is Keith Franklin with the Department and now for the record, Mr. Meyer if you would introduce yourself.
Meyer	Yes, your Honor. My name is Christopher Meyer with Givens Pursley. I represent the Applicant, Black Rock Utilities, Inc.
Spackman	OK. Thank you, and Ms. Nelson?
Nelson	I'm Jai Nelson. I am the Protestant.
Spackman	OK. Thank you. We have talked about the admission of evidence into the record and the parties have stipulated that Black Rock Utilities' proposed exhibits marked as exhibits BR1 – BR61 are received into evidence with a couple of convictions. One is that Ms. Nelson wants the opportunity to review those documents as they are offered to ensure that she has previously seen them. I think that was the stipulation, right Ms. Nelson?
Nelson	Yes.
Spackman	And the second condition is the Hearing Officer wants to ensure that if the documents are not referred to or made a part of the interwoven testimony, that those particular exhibits be excluded unless the applicants specifically wants those to be considered and explains why it should be. So, Mr. Meyer, my understanding is that at the end of the presentation of evidence that you will tell me which of those exhibits then are not part of the record and then we will specifically exclude them. But right now, they are in the record and we will pull them out at the end if that is ok?
Meyer	That is very good your Honor.
Spackman	OK. We also agreed that the Protestant's exhibits probably will also be admitted into the record by stipulation. There is a question about the first one, but I wanted to give Ms. Nelson an opportunity to look through the ones that have been marked and determine whether she wants to mark them that way or whether you want to mark them with alpha characters Ms. Nelson. It is up to you.
Nelson	That's fine...however.
Spackman	OK, we will discuss that later, right. We talked about the order of presentation of testimony and we've talked about a few nuances in the way witnesses are called. We have determined, Mr. Meyer, that you can move forward and call your first witness and if you will do so you may precede with that. By the way, are there any other things we need to talk about? Opening statements?
Meyer	Well, yes your Honor, I do have a few preliminaries that I would prefer to do on the record if I may.
Spackman	OK, very good.

Meyer	First, just to recapture in a little bit more detail the discussion we had off the record with respect to the scope of the hearing today. I don't want to reargue that but just make certain we have a record that the applicant noted...basically renewed its objection to a broad, local public interest evaluation, and in particular objected to having to produce testimony and respond to testimony and evidence with respect to the waste water management issues, water that derives from a separate municipal water right, not the one in question today and also storm water management issues which are derived from storm water rather than the water right involved today and to the extent that either of those are proper...that the Department's role ought to be limited to determining whether it is possible for the Applicant to comply and to impose a condition. But that request was denied and accordingly, we will be presenting a broad scope of evidence on those issues and I just want the record to reflect that we haven't waived that objection by introducing that evidence.
Spackman	So noted.
Meyer	The other issue that I thought would be useful to address on the record is the issue of who the Protestant is. Black Rock filed a motion to dismiss the Coalition for Positive Rural Impact which was denied by you on November 19 and you have substituted Ms. Nelson as the Protestant. The record, I think, should reflect that to date, Ms. Nelson has not filed a protest. There is no protest in her name and moreover, she has continued to file pleadings and all of the pleadings that she has filed since your order have been in the name of the Coalition for Positive Rural Impact signed by Jai Nelson as spokesman for an organization, that by her own admission in the deposition and by your own ruling, does not exist. And so it appears to be that the person that is appearing here today as a protestant is doing so inconsistent with your ruling and I think it is important to have some clarity on that. It may appear to be a technical issue but I think it is a technical issue that goes to the jurisdiction of the Department in conducting this contested case and it one that is also important because I think anyone appearing before you... it needs to be clear that they are subject to sanctions and it also needs to be clear who the proper parties would be in the event of an appeal. So we... for the record renew our motion to dismiss this Applicant and, in any event, ask for some clarity as to who the person is that is sitting at the protestant's table and in what role she is appearing today.
Spackman	A response, Ms. Nelson?
Nelson	Well, I think there is already a history because I protested the first permit under that same name and there was no issue whatsoever during that entire process. So I did this one in the same format and in the first protest, I included a petition with quite a few names on it of community members so this time I didn't feel that was necessary to redo that but I am here as Jai Nelson today.
Spackman	OK. So with respect to the renewal of your motion, Mr. Meyer, I will again deny the motion. I think there is some question in looking at the protest itself or the name of the protestant on the protest document states [illegible] that the Coalition. It was signed individually by Jai Nelson. She is participating in the protest and I won't deny her the opportunity to participate here today. My ruling was that she was appearing individually and the reason for that was because I didn't see any indication of an organization that had sufficient formality for her to appear representative of. I didn't see that there was a membership list, I didn't see that there was any documents that organized, I didn't see that there was any registration and consequently, it appeared Ms. Nelson being with the

	organization was something that perhaps you yourself wanted to have. There were other people who were busy but there were really no members of the organization. I didn't see that and it was born out by information contained in the deposition that Mr. Meyer took. So, you are here representing yourself today as an individual protestant and that's my ruling. Other matters we need to talk about Mr. Meyer?
Meyer	The only other matter that I have is the issue of discovery and we have a motion for discovery sanctions. The Protestant did eventually provide some additional discovery responses but did not provide any information as to our questions about who their lay and expert witnesses are other than to identify them. We asked for information describing what the nature of the testimony would be and that has never been provided and that is what I said earlier while we were off the record that there is some linkage to the issue of June Bergquist because we have been informed by Ms. Bergquist that she would be here only to authenticate documents and we now have learned from the Protestant that she intends to get into other matters. We can guess as to what those are but we think it's really not appropriate that the Protestant has failed to provide that information particularly in light of your order in which you said you shall provide this and if you don't you will be subject to sanctions.
Spackman	Ms. Nelson?
Nelson	I did identify my witnesses and the Applicant itself, in their documentation, says that they did identify their expert witnesses as well and give a brief description but they also said they could call any expert witness and bring anyone else to this hearing. So, kind of a blanket statement that they could pull in anyone else without giving me even their name. So I wasn't trying to withhold anything... I just followed your order and gave the expert witness information.
Spackman	Mr. Meyer, I will delay a ruling on that particular motion until we get to the presentation of her evidence, and then based on what Ms. Bergquist is testifying to then I will entertain objections to the presentation. if you feel it is inappropriate either in terms of relevancy or in terms of the fact that the nature of her testimony was not disclosed to you or to Black Rock prior to the hearing.
Meyer	May I just have a continuing objection on that? I really don't... can't imagine that I am going to have anything further to add to it?
Spackman	Sure.
Meyer	I have explained that we asked for that and we did not receive it.
Spackman	Sure. You can object but on the other hand I think there ought to be an opportunity during testimony for you to raise that. I don't want you to be or feel that you have been denied that.
Meyer	Very good. And the same, I assume, would go for any other witnesses lay or expert that the Protestant may call?
Spackman	That's correct.
Nelson	May I add something to that.
Spackman	Sure.
Nelson	I guess, per your order, it was 10 interrogatories and so I also explained in the information I provided in my response was that I had answered 10 per the order.
Meyer	May I respond your Honor?
Spackman	Sure.
Meyer	We explained in writing to the Protestant that we submitted only 9 interrogatories. We did

	not exceed the number of 10.
Spackman	Well, I don't want to grovel in that at this point and time it seems we could spend another hour or two on that particular matter and not get to the heart of what we need to discuss today and I want to get there.
Meyer	I'm ready to start your Honor.
Spackman	If in the presentation of her case in chief, Mr. Meyer, if there are particular portions which you think are either not relevant or are outside what was disclosed earlier, then I want to give you the opportunity to specifically object to it. OK? Alright, other matters? You want to make an opening statement?
Meyer	No, I think in light of how much we need to cover today, I think we can get our story told through the witnesses.
Spackman	First witness?
Meyer	Your Honor, Black Rock calls Scott King.
Spackman	Mr. King could you raise your right hand? Do swear to tell the truth, the whole truth and nothing but the truth?
King	I do.
Spackman	Thank you. And I always tell Mr. King to show up with his vast <i>[unintelligible]</i>
Meyer	Has that been a problem in the past?
Spackman	Oh no. It's just that I have been acquainted with him over the years. I like to goad. Make him relax in this situation. I want witnesses to feel as relaxed as they can.
Meyer	Well, we have done our best to get him relaxed.
Spackman	Alright.
Meyer	Would you state your name and address for the record Mr. King?
King	Scott Neal King. Address is 300 E. Mallard Drive, Boise, Idaho.
Meyer	Where are you employed?
King	SPF Water Engineering.
Meyer	Would you turn to Black Rock 49? That is a copy of your resume. We don't want to unduly burden the record with an exposition of your track record and experience but I think it is appropriate for the record, particularly in the event of an appeal, God forbid, that we have a good record as to the extent of your experience and training and educational background so will you give us a brief overview of what work you have done in the area of water rights and how you arrived at your current position?
King	OK. Education background – I have a bachelors of science in general engineering from ISU and a masters of science in civil engineering from the U of I. I began employment with the Department of Water Resources in 1990 and continued for approximately 14 years working with the Department of Water Resources from a field agent examining water rights for licensing to working in the energy division of energy conservation and a number of years in the adjudication bureau as a technical engineer particularly in that capacity, reviewing claims to water rights and the adjudication. Particular more contested or complex type of claims to water rights, particularly also making recommendations on claims out of Basin #2 which is a portion of the Snake River and Basin #63. I worked in the water distribution section and at that time I was supervised by Mr. Spackman and we established a water measurement program on the eastern Snake plain aquifer where we were in charge of measuring ground water divisions and comparing those diversions with water rights and looking at hundreds and hundreds of water rights and the quantities of waters that were being diverted under those water rights. Working with water masters and

	water districts and helping them distribute water within the districts according to the water rights. Sometimes safety of dams program...inspecting the dams for safety issues. While I was at the Department of Water Resources I completed a masters of science in civil engineering with the U of I in hydraulic research program in Boise studying largely open channel flow and hydrology. After Department of Water Resources... a little bit of time working for EHI, Inc. a subsidiary of <i>[Unintelligible]</i> Hydraulic Institute in modeling water... surface water primarily, rain fall runoff and open channel flow modeling. And then, more recently, the last four years working with SPF Water Engineering where I have had an extensive experience filing applications for new permits, new transfers, amendments of permit, changes in water rights, water bank applications we at SPF in total have approximately about 100 years of water rights experience between about 7 of us that work quite a bit in water rights. So, water rights has been a huge part of my career.
Meyer	How about municipal water rights in particular? What experience do you have in dealing with water rights for municipal providers?
King	We have several clients, a number of clients with municipal water rights and that's one of the aspects that SPF Water Engineering is focused on is municipal water rights and assisting getting municipal water rights, acquiring and appropriating municipals water rights or changing them as needed. So significant experience with municipal water rights.
Meyer	Does that include municipal water rights that are held by private parties...developers?
King	Yes it does.
Meyer	I would move that this expert be recognized as qualified to give expert testimony in the area of water rights and in particular municipal water rights.
Spackman	I think it sufficiently thick Mr. King.
Nelson	Put it on a scale?... <i>laughter</i>
Spackman	So recognized.
Meyer	I would ask you now Mr. King to turn to Exhibit BR53 for the record and for the Protestant, that is the original permit that was issued for this water right that is the subject of today's proceeding, 95-9045. Have I accurately identified that exhibit?
King	Yes you have. Permit issued on October 20, 2000.
Meyer	For what quantity and purposes was that water right issued?
King	This permit was issued for irrigation, 2.58 cfs and domestic 1.0 cfs with a total of 3.58 cfs.
Meyer	And how many acres of irrigation were authorized?
King	This permit lists 668 acres of irrigation.
Meyer	I would now like you to turn to Exhibit BR54 and identify that for the record.
King	BR54 is an application for amending the permit 95-9045.
Meyer	What was the purpose of this amendment application?
King	It appears the purpose of this application was to change the permit. Changing the nature of use to municipal. It lists irrigation also of 545 acres which is less than what was originally permitted.
Meyer	And did this application expand the place of use?
King	Yes, as I understand it this included new ground to the north of the original <i>[unintelligible due to paper shuffling near microphone]</i> identified as Black Rock North I believe?
Meyer	So with this amendment, if you will, roughly doubled the size of the development being served by the water right. It didn't ask for any additional water. Is that accurate?
King	No, in fact, it asked for fewer acres than were included under the original permit.

Meyer	And do you know how they were able to accomplish that?
King	My understanding is that the developer refined their goals for the project and identified that they would not need as many acres as originally applied for even though the area was much larger.
Meyer	I would like you now to turn to Black Rock 15. While you are doing that I will just identify it. This is the first amendment to permit and for the benefit of the Protestant, that is the document that was issued by the Department that approved the first application that we just looked at. Once you get there, would you please confirm for the record that I have accurately identified that?
King	Could you identify it once more because I was trying to find the volume?
Meyer	It is Black Rock 15.
King	OK. I found it now.
Meyer	OK. Is this the amendment of permit that was issued by the Department of Water Resources that approved the first application for amendment?
King	Yes it is. This is dated with an approval date of July 27, 2007.
Meyer	And what are the quantities of water that are authorized under this amendment of permit?
King	Quantities of water listed are municipal 2.5 cfs with an annual volume of 1,215 acre feet and irrigation of residual 123 acres. The rate of diversion of 2.46 cfs and an annual volume of 369 acre feet.
Meyer	The first permit that we looked at...that was Black Rock 53? Had 2.5 cfs for irrigation you told me and 1 cfs for domestic.
King	Yes.
Meyer	What happened to that domestic portion?
King	I understand that the Applicant voluntarily removed the 1.0 cfs of domestic in the amendment of the application for amendment of the permit.
Meyer	The portion of this amendment of permit which is described as irrigation of residual 123 acres. How much... what is the quantity of water associated with that?
King	Irrigation residual 123 acres...there's two quantities that are associated with that. 2.46 cfs is the rate of diversion and that a diversion rate of .02 cfs per acre. The annual volume is 369 acre feet which is an annual diversion volume of 3 acre feet per acre for each of the 123 acres.
Meyer	And I just want to make certain we have a clear record...what is your understanding of the basis for calling out this separate component residual, excuse me, irrigation residual acres?
King	My understanding is that the amendment of the permit reduced the number of total acres from 668 to 545 leaving 123 acres that were not necessarily removed from the permit and they were left as a residual 123 acres on this amendment to permit.
Meyer	Did this amendment of permit contain any conditions limiting the municipal use?
King	Yes, condition number 3 states that municipal use is limited to the irrigation of 545 acres and fire protection within a number of sections of the project area and it can also be used for construction within the Black Rock development during the two years of initial development.
Meyer	Do you know why those conditions were imposed?
King	I believe the condition was imposed because that is what the Applicant requested was the reduction in the number acres and be able to use this water for irrigation as well as fire protection and construction.

Meyer	Are you familiar with the stipulation that the Applicant entered into with KEA, the Kootenai Environmental Alliance?
King	Yes I am.
Meyer	Did this condition implement that stipulation?
King	As I understand it, yes.
Meyer	I would like you to turn to Black Rock 19.
King	OK.
Meyer	Would you identify that exhibit for the record?
King	This is an application for amending the permit 95-9045 it is dated April 10, 2008.
Meyer	Is this the current application that is the subject of today's hearing?
King	Yes it is.
Meyer	What is the purpose of this application?
King	This application seeks to primarily change the 123 acres of residual irrigation component that was left on the approved amended permit. Changing that to several different uses primarily associated with storage projects, water storage and ponds and water features.
Meyer	Would you step through each of the nature of use items listed under paragraph 2 and explain to the Hearing Officer why there are each of these and what the quantity is based on?
King	Certainly. There are 5 different nature of uses listed here. First and foremost, at the very top, 2.5 cfs and 1,215 acre feet for municipal use, I want to state at the very first that is the ultimate limit of this permit. None of the others that follow add to that one. So, the next one down, 2.46 cfs diversion to storage, that 2.46 is the quantity of water that was associated with the 123 acres of residual irrigation from the approved amendment prior. The next item, 209 acre feet for aesthetic storage, is the quantity of water that we have identified, seeking for aesthetic storage features at this project. The two items, 369 acre feet for municipal storage and 369 acre feet of municipal from storage is a component of the storage of which the 209 acre feet is part of and is included in so we have 209 acre feet of aesthetic storage that is included within 369 acre feet of municipal storage.
Meyer	Can you explain why those two numbers are different? Or maybe that was what you were about to do.
King	They are different because the difference between 369 acre feet and 209 acre feet is 160 acre feet is a refill and drain of the reservoirs or the storage facilities at Black Rock for the uses of municipal storage. So, we weren't seeking to store any more water but to create an opportunity so that some of the features could be used, drained and then refilled as needed throughout the year up to the limits of that 369 acre feet.
Meyer	What was your role in developing this application for amendment of a permit?
King	I worked on this application together with Kyle Capps and yourself and also Jeff Peppersack at the Department of Water Resources and taking the prior approved amended permit and seeking to change that residual irrigation component to cover the water storage features at the Black Rock project.
Meyer	Were your communications with Jeff Peppersack prior to the filing of the application?
King	Certainly, yes. You and I met with Jeff Peppersack, I believe, at least a couple of times prior to filing this application to help refine and discuss what the Department would expect to see on the application.
Meyer	Do you routinely meet with IDWR staff before filing applications?
King	Certainly, particularly when the applications become a little more complex and not so

	simple we frequently meet with IDWR staff to discuss the project and help lay out how an application should look to be in an approvable format for the Department.
Meyer	Did Jeff Peppersack or anyone else in the Department tell you that this application would be approved or was approvable?
King	Certainly not. Jeff nor anybody I have ever worked with at the Department has ever said up front that an application would be approved. They try to help us put it into a format that they can accept but not that they will necessarily will certainly approve. We know that there is a process that it must go through to be an approved application.
Meyer	Turning back to the 5 uses that are identified in that paragraph 2 that you just explained...
King	Yes.
Meyer	Based on everything we have been through in this proceeding, is there anything you would do differently in putting together this application for amendment?
King	Yes, there is something. I think what we would do is leave out the 3 rd item there, the 209 acre feet of aesthetic storage.
Meyer	And why would you do that?
King	I think we would do that because I think that is redundant with municipal storage and I think it was something that was not necessarily needed and has also left some confusion about the ability of Black Rock to have the flexibility to use its storage within its project as needed.
Meyer	So how did you end up making a mistake like this?
King	It's not a mistake. We worked with the Department of Water Resources and this is a learning process, this is not the most simple application that we have had. I have been working in water rights for many years, Jeff Peppersack has been working in water rights for many years and we know that we learn and this was a learning process and we have learned that we would have done things differently now that we did them when we made this application, but it wasn't a mistake.
Meyer	If I heard your testimony correctly, you said the 209 acre feet for aesthetic storage is unnecessary to call out. Did I hear you correctly?
King	Yes.
Meyer	Why is it unnecessary?
King	It is unnecessary because it is included within the 369 acre feet of municipal storage.
Meyer	Does municipal storage include aesthetic storage?
King	Yes, it does.
Meyer	And why do you say that?
King	I say that because a municipal water right provides for many, many uses, essentially any use as long as it is not a wasted use. Municipal authorizes many uses within the service boundary however the municipality chooses to use that water.
Meyer	You also said that identifying the aesthetic storage as a separate use has led to confusion. How has it led to confusion?
King	I think it has led to confusion because, as a municipal provider, Black Rock should have the ability to use its municipal water rights within its service boundary as it needs to and as we have listed it here it might have left some confusion that aesthetic features can only be located in a certain location and that there is not an ability to move them or add additional ones within the limits of the application as needed in the future.
Meyer	Are you just....is this just a wishful afterthought or does this application let us know that the Applicant had intended from the outset that these water features could be moved

	around?
King	Yeah...if we turn to page 5 of this application, the amended application you can see the very last sentence on exhibit B, it says this data is provided for information purposes to show the derivation of the overall volume. We clearly did not intend it to restrict Black Rock's ability to modify the location or the dimensions of any individual ponds or water features.
Meyer	Would you read into the record the second sentence? You read in the first one.
King	Oh ok. It is not intended to restrict Black Rock's ability to modify the location or dimensions of individual ponds or water features.
Meyer	I would like you to turn now to Black Rock 58.
King	OK.
Meyer	For the record this is a pleading which is already part of the record entitled: "Black Rock's Submission of Proposed Conditions" and these conditions were submitted subsequently to the stipulated withdrawal of KEA, the Kootenai Environmental Alliance. I would like you to look, Mr. King, at conditions 11 and 13. Condition 11 has a black line through the entire condition, is that correct?
King	There is a lined out condition 11 and there is a new condition 11.
Meyer	I would like you to look at the lined out condition of 11 and would you read into the record what it says underneath that black line?
King	The diversion and use water is subject to additional conditions and limitations agreed to by both KEA and the water right holder under a separate agreement to which the Department is not a party and which is independently enforceable by a court of law. A copy of the agreement shall be included in the Department water right file.
Meyer	Just to make certain that we have a clear record, what you read was condition 11 of the current amendment of permit. Is that your understanding?
King	That's my understanding, yes.
Meyer	And in this submission of proposed conditions, it was stricken in its entirety and there is a comment below that, what does it say?
King	Comment: this condition is obsolete and should be eliminated. KEA expressly agreed to its removal in paragraph 20 of the Stipulation for Conditional Withdraw of Protestant.
Meyer	So that means...or I should ask you. Is it your understanding that the effect of that is to allow this Hearing Officer and the Department to proceed forward without reference to that previously stipulation?
King	Yes, that is my understanding.
Meyer	And would you read new paragraph 13 on page 5?
King	13: The place of use for this water right shall be the municipal service area of the right holder.
Meyer	Now that is underlined in this, is that correct?
King	That's correct.
Meyer	Since this was essentially a redline of the original condition, this would be a new proposed condition?
King	Yes.
Meyer	And is that consistent with your testimony a few minutes earlier that the purpose of this application was to allow these water features to be moved within the place of use?
King	Yes it is.
Meyer	I would like you to look on page 6 which is the Certificate of Service. Was a copy of this

	sent to Barry Rosenberg for the Kootenai Environmental Alliance?
King	Yes.
Meyer	Is...I think we should be clear as the affect of your testimony here. Are you...when you have described this identification of the aesthetic storage in paragraph 2 of the pending application for amendment of permit...
King	Could you show me what exhibit you are on please?
Meyer	Oh, I'm sorry. We are back on Exhibit 19, Black Rock 19.
King	Thank you. OK.
Meyer	You described that as unnecessary. Are you seeking to amend the application on the stand?
King	No I am not seeking to amend the application on the stand. I believe that this is redundant and not necessary. The Department can choose to leave that element in there as a use or the Department can choose to leave it out as a nature of use. I leave that to the Department to make that decision.
Meyer	You have already made clear, correct me if I misstate your testimony but you have already made clear that you think the Department could take it out without it affecting the ability of the Applicant to achieve its goals. Is that correct?
King	That is correct.
Meyer	What if the Department left it in? Would that impair the...would that be ok?
King	As far as I understand it that would be ok for the Department to leave it in and would work fine for Black Rock.
Meyer	The bottom line I take from your testimony, tell me if I have this correct, is whether it is in or whether it is out the goal of Black Rock has been, and always has been, to allow these ponds and water features to be moved without going through a separate transfer proceeding?
King	Yes, that is correct. The goal of Black Rock has been to have the ability to move these as necessary within their development.
Meyer	Is that consistent, based on your experience with other municipal water rights, is that consistent with how municipal water rights are handled?
King	Very consistent. Municipal water rights, as I understand them, have the ability to use the water within their municipal boundaries as they so need to and to move and expand the municipal service boundary as needed.
Meyer	Can you think of any examples of water features that are served by municipal water rights?
King	Yes, yes. I can think of several. There is a water feature at City Hall in downtown Boise that, it is my understanding, is served by the municipal water provided by United Water. My neighbor has a little pond in his backyard that is served from the municipal water and I am sure there are many, many others I can think of. Subdivision entrance ways with water features that are served by municipal water provided by United Water or any other municipalities. So many.
Meyer	Are those water features called out on the water right held by the municipal provider?
King	No, not that I can think of. I am aware of some municipal storage water rights, and very few aesthetic water rights held by municipalities, but most all of these that I can think of, these smaller water features are not called out specifically as aesthetic storage on municipal water rights.
Meyer	Did I ask you to take a look some other municipal water rights to see how they are handled?

King	Yes you did.
Meyer	And what did you find? Was there a consistent pattern or was there some inconsistency?
King	What I did was I searched the Department's database for municipal storage uses and what I found was there are a number of municipal storage uses, some of which list the place of use for the storage and some of which do not list the place of use for the storage specifically. So, there is not necessarily consistency about...regarding whether the place of use for a municipal storage is listed.
Meyer	Was there any pattern at all as to those that did list a particular place of use?
King	Yes, there was a pattern. What I saw, from my look, was larger storage features would generally have a place of use listed. Quinn's Pond for example, was one of them where there was a place of use listed. I believe that was Quinn's Pond.
Meyer	What is Quinn's Pond?
King	Quinn's Pond is in Boise. It is one of the larger ponds next to the Boise River that recreationists use to paddle around in. I found that Park Center Pond, which is right outside my window in Boise, at my office, was once listed as a specific place of use but in the adjudication, it is now being recommended without a specific place of use but rather, within larger municipal boundary of the city of Boise or large boundary. I found several of them that the place of use was listed as a larger area. So it seemed like generally, if the ponds were smaller and dispersed, they were listed within a general larger place of use but if the water right was for one individual storage facility or on an on-stream storage then the place of use for that storage was listed specifically.
Meyer	Can you think of examples of substantial municipal storage features that are not identified specifically? You know, the tanks that hold storage water for United Water Idaho?
King	Certainly. At SPF Water Engineering we work for a number of public water supply entities, municipalities and other public water supplies and nearly all of those have water storage features for the potable water supply. Tanks, large tanks. In looking through the municipal storage water rights in there, I found what I think is only one city that actually includes a water right that lists that storage in the tank. I think that was the city of Nez Pierce. Other than that, I don't believe there were any of these that I identified or a rare few I should say, that listed municipal storage for their water storage tanks.
Meyer	Is it fair to say that there are countless small water features that are not identified at all within the water rights of municipal providers?
King	Certainly, yes.
Meyer	Can that be explained by the fact that they are exempt from having a separately listed storage component under the 24 hour fill rule?
King	I don't think so. I don't think that the 24 hour rule applies to this for a couple of reasons. First of all, my understanding of the 24 hour rule, which I don't believe I should say is really a rule, but more as a guideline or policy of the Department unless someone could correct me. I am not familiar that it is actually an IDAPA rule. But anyway...
Spackman	It is not.
King	OK. It is there to provide daily fluctuating functional storage and I will give an example. As a subdivision, where there might be high demands for irrigation at night when residents are trying to irrigate during the evening hours and not during the day time hours. So there is a huge fluctuation in the demand of a system. A small feature there that can fill and drain and fill and drain over a 24 hour period gives that subdivision the ability to have this fluctuating storage. So this 24 hour rule is thought of as a small storage facility to provide

	daily fluctuations. So that is one reason. Water needs to be diverted back out of these things. So if we have a pond where water just goes to a pond and it is an aesthetic feature and not taken back out of, I don't think the 24 hour would apply. Secondly, I believe that the rule is applicable to irrigation only, although the Department may or may not have made other... allowed that to be used in other situations.
Meyer	Just to give a concrete example, you mentioned the pond in front of City Hall in Boise. Water is not taken out of that water feature. I called it a pond perhaps, but you know, that fountain.
King	Yes.
Meyer	Water is not taken out of that for irrigation or any other purpose right?
King	Not that I am aware of. I suppose they drain it occasionally to clean it but I doubt that they use that as a storage feature for irrigation.
Meyer	So, your understanding of this informal 24 hour fill rule is that that would not be applicable to that kind of water feature?
King	I don't believe it would be.
Meyer	You worked for the Department for a number of years is that right?
King	Yes.
Meyer	Based on your experiences, does the Department have the resources to keep track of all of these water features?
King	During my time at the Department of Water Resources, it was a very difficult job to keep up with the elements and the items and the work load that we had in the first place so I would say that the Department generally, as I felt, could have used additional staffing in the first place. It was hard to keep up. Certainly not, the Department does not have the capacity, in my opinion, to keep track of individual aesthetic water storage features in municipalities, ponds in my neighbor's back yard or the one at City Hall. I think that would be a terribly inefficient use of the taxpayers' dollars.
Meyer	Would it never the less be appropriate to keep track of all of those for purposes of avoiding injury?
King	I cannot think so. No, not unless the law was changed and the legislature decided that that was an important element to keep track of for injury...I fail to see any need where it would be required to keep track of those for injury purposes.
Meyer	What about municipal storage that would be on-stream storage. Say a municipality built a dam or contracted for water in a dam. Are you suggesting that a municipal, the holder of that municipal storage ought to be able to move it up and down the river without going through a change proceeding?
King	No, no sir not at all. That is a very different situation where an on-stream storage, a dam, is a point of diversion and the Department must keep track of points of diversion. Whether it was a municipality or otherwise, the Department needs to know where those points of diversion are. In this case, we are talking about places of use and in general, my experience is, the Department keeps track of places of use for municipal water supplies within the general municipal boundary but the Department does not track how water is moved and changed within a municipal boundary. Rather the Department wants to know where that municipal boundary is so that they can track where the water is being used in that general area. In this case, the aesthetic water features and ponds at Black Rock are places of use and not points of diversion.
Meyer	I think we have covered this issue and I am ready to move on to some other issues, but can

	you think of anything else that the Hearing Officer needs to hear on this subject of fungible place of use?
King	No.
Meyer	Let's turn then to Black Rock 31.
King	OK.
Meyer	Just to let you know where we are going here, I have four exhibits listed 31, 50, 51 and 52 all of which deal with evapotranspiration calculations.
King	OK.
Meyer	I don't think we need to spend very much time on this and I in fact kind of defer to the Hearing Officer, to the extent that it would be helpful to have Mr. King step through his calculation of evapotranspiration to document why we came up with the numbers that we did. What that be useful for the record do you think? One of the reasons that I ask is that the Protestant has never made it an issue in this case and I have no reason to think that she will. But, obviously, the Hearing Officer has an independent duty to check our math and we would be happy to spend a few minutes on that if you would like.
Spackman	When writing the findings of fact and it seems to me that I need to be able to determine how these volumes are calculated. I am assuming that these volumes are related to the 160 acre feet with some admission to the 209...
King	These volumes would be within the 209.
Meyer	Would it be helpful...
King	Can I step back and mention again that the 209 and the 369, Mr. Hearing Officer, is that the 209 is the volume associated for the volume of the vessel of the ponds and evaporation and seepage. The difference between the 209 and 369 provides Black Rock multiple fills in their reservoirs for municipal uses limited to irrigation.
Spackman	OK.
King	So the volume of the ET is included within the 209.
Spackman	When you testified earlier, and you said the 160 was related to refill and drain, I might interpret refill and drain to mean refill for evaporation and drainage and seepage out of the pond.
King	OK.
Spackman	That's the way I was interpreting it. So I understand, I guess with greater clarity, what those terms mean. So the 209 also includes a component for evaporation?
King	Yes, and seepage.
Spackman	So I will still need to write something in the findings of fact that justifies those numbers. So, however, you want to bring that in, Mr. Meyer, is fine. Whether this particular exhibit explains it sufficiently...
Meyer	I think it would be useful...we are making pretty good time here so I think it would probably make sense to have us just step through those.
Spackman	Because even in our discussion here, it is clarifying what those numbers really represent. I didn't understand...
Meyer	If I may just state for the record, and hopefully I have captured this correctly and I ask the witness if I have a misunderstanding but to the extent that the ponds and water features serve no irrigation purpose, they are only for aesthetic purposes, 209 is all you would need and it would be sufficient to cover all of the evaporation and seepage.
King	Yes that is correct. I will say that two of the ponds are used for storage features for irrigation so water goes into the ponds and then back out of the ponds and if we separate

	the part that goes in and out for irrigation and just look at the water features themselves, 209 acre feet is associated with the ponds themselves. Filling the vessel or the volume of the pond, drainage, seepage, I should say seepage and evaporation losses.
Meyer	And are there circumstances that you could anticipate where it would be useful to Black Rock to have the ability to go beyond 209 toward and up to 369 for this fill and refill for the irrigation purposes?
King	Are you asking can Black Rock make use of the difference between the 209 and the 369?
Meyer	I am.
King	Yes. My understanding is yes, Black Rock does have the ability to make use of that, the two irrigation ponds provide significant storage volume and could be used and lowered, perhaps emptied over a period of several days and used for irrigation and refilled so if there might be a need for drain and refill beyond the 24 hour rule that is allowed for aesthetic features that we discussed earlier.
Meyer	At the time of proof, would it be your understanding that that would be quantified based on actual experience?
King	Yes, I would expect that Black Rock would probably need to keep track of how they used that additional volume if they expected the drain and the refill volumes to be included on their final licensed water right.
Meyer	But you would not expect that to occur at the time of permit?
King	No.
Meyer	Why don't we step through, briefly, these exhibits, again they are 31, 50, 51 and 52 and if the Hearing Officer would cut me some slack here, I would just like you to use those, in whatever order makes sense to you, to explain how you calculated evapotranspiration needs.
King	So we have 31 and 50, 51?
Meyer	50, 51 and 52.
King	OK, very good. We'll start then with 31.
Meyer	Would you identify that for the record?
King	Certainly. Exhibit 31 is my memo to file dated November 20, 2008 regarding ET Idaho Station Selection. And I will back off just a minute and say ET Idaho is a University of Idaho website where the U of I provides evaporation and consumptive use information for crops in Idaho as well as for open water evaporation. This memo documents my selection of a given station for calculating evaporation from the ponds. And what I say here, if we turn to the second page of that exhibit, there is a map that shows the location of Black Rock and its certainly situated within the location of three different climate stations, Coeur d'Alene ranger station, Plumber three west southwest and St. Maries. The U of I ET Idaho uses these weather stations and information collected from those to make calculations on ET, evapotranspiration. So, amongst these three stations, I selected the Coeur d'Alene station for several reasons. One, Coeur d'Alene station is closer but it is not that much closer compared to the other two stations but what is important here is the Coeur d'Alene station indicates a higher evapotranspiration from ponds than the other two stations and so I picked the conservative station. I would expect, actually that evaporation from the pond at Black Rock might be less and might be an average of those three that I selected but I selected the most conservative, highest evaporation station for my calculations.
Meyer	The other two were Plumber and St. Maries?
King	Correct.

Meyer	You may continue.
King	OK. Exhibit 50 is a number of screen shots or print screens from the ET Idaho website and so if one went to their website, we would see the very first page would be the home page or the front page of ET Idaho station. I will flip past that home page and I am going to turn to page 4 <i>[unintelligible due to paper shuffling near microphone]</i> ET Idaho evapotranspiration consumptive irrigation water requirements for the Coeur d'Alene Glen East Station.
Meyer	Just for a good record, you said 1E?
King	1E not one east, excuse me. On this, we can see it lists a number of crops and I have highlighted and circled one of those lists and although it is not a crop it is open water shallow systems, ponds and streams. So, next I would have clicked on that item, and if we go a few more pages back, three more pages, we will see Coeur d'Alene 1E NWSNOAA-101956 for open water shallow systems, ponds and streams. Here there is some text on the left and we see four different links or choices that we could make and the one I make is the one at the bottom that is highlighted, precipitation deficit and it is circled there on the lower left which is the appropriate one to use for calculating the consumptive water requirements for crops or for ponds. So I click on that one, and we turn two more pages and we come to a page, and this is what would show up. This is our actual data that we use. This one says that ET Idaho evapotranspiration and consumptive irrigation water requirements for Idaho, the Coeur d'Alene station open water shallow systems, ponds and streams precipitation deficit. And if we look across the first row, under the months, there are months January through December, mean monthly millimeters per day, we can see that some months have a negative value and some months have a positive value. And what this is calculating is precipitation comes into a pond and water evaporates from the pond. If precipitation exceeds evaporation, then it is showed as a negative value there. If evaporation exceeds precipitation it is shown as a positive value. So we can see that April, May, June, July, August, September and October are the months that positive evaporation, more evaporation than precipitation. So this is what I am call the make up components of evaporation from a pond.
Meyer	Mr. King, does this assume that there is zero seepage.
King	This has nothing to do with seepage.
Meyer	We will be getting to that but does this assume zero seepage.
King	It does not assume zero seepage or negative seepage or positive seepage. It just is not impacted by seepage whatsoever. What this is looking at is the free water surface on the water body and the amount of water that will evaporate from that surface in balance with the precipitation that will fall on that water surface.
Meyer	So it is basically just a mathematical... the difference between those two numbers?
King	Yes it is.
Meyer	You may continue and sorry for the interruption.
King	Quite alright. If we turn further we will see the same type of information for the Plumber station and the St. Maries stations and if we look through there we would see the evaporation from these other stations was less than under the Coeur d'Alene station and I wont go into that any further because I selected the Coeur d'Alene station again because it was a conservative approach with a higher rate of evaporation to make sure that we had a conservative application.

	And it that is ok, Mr. Spackman we will continue on to Exhibit 51.
Meyer	Did you want to explain why you have highlighted in yellow just the positive numbers?
King	Yes. The positive numbers represent those months when evaporation exceeds precipitation. Those are the months when water will need to be put into a pond to keep the level the same. To make it so the level doesn't drain from evaporation or drop. The negative numbers represent those months where precipitation exceeds evaporation and in those months we don't anticipate there would be a need to put water into the pond because the levels were dropping, the precipitation should keep levels adequate disregarding any infiltration or seepage from the pond. So I circled these months solely because those are the months where I am using the evaporation from those months in my calculation of total annual evaporation from the ponds or the quantity of water that would be needed to keep the ponds full, for evaporation purposes. So...
Meyer	So you did not offset with the negative numbers?
King	No sir.
Meyer	Again, that was a conservative assumption.
King	Shall we continue on to BR 51? Actually what I would like to do is go to BR 52 first if that is ok?
Meyer	Please.
Spackman	Just a moment. I just have a question. Ms. Nelson, are you following what these numbers are?
Nelson	I don't have them in front of me, but I am following without pulling out the documents.
Spackman	So do you need to have something so that you can follow what we are doing?
Nelson	I don't think so, he is going over...I am fine.
Spackman	OK. Because we could identify those as we go and have you mark your documents.
Nelson	Well, I have so many documents, we have spent a lot of time...again they were never marked with numbers....I brought them and I am going to go through all of that, and I don't want to spend the time doing that. I am ok...if I have a certain question I will either ask to view it or grab one of mine.
Spackman	Alright very good. Mr. Meyer?
Meyer	Mr. King, you were going to explain Exhibit BR 52.
King	Can we turn to BR 52 please? We will come back to BR 51. BR 52 is a table entitled ET Idaho Open Water Shallow Systems Ponds and Streams. This is something I created. There is actually three different tables within this one sheet showing information for the Coeur d'Alene weather stations, the Plumber weather station and the St. Maries station. The top row of each of these stations is the highlighted row from the previously information we were looking at showing all of the information from January to December. The negative values and positive values that we were just discussing. The next row is the days per month so I have listed the days in the month and then a monthly total, the third row or perhaps the fifth row in each one of those individual tables which is the daily millimeters per day times the number of days in the month. On the far right we see an annual make up volume in millimeters and in feet. That annual make up volume at the top we see is 430 millimeters? That is the sum of the positive values from that fifth row only and not the negative values. The negative values were excluded from that sum. 430 millimeters is equivalent to 1.41 feet simply divided by 25.4 and 12. So we see here highlighted Coeur d'Alene station has an annual makeup of 1.41 feet or acre feet per acre from open surface water ponds and streams evaporation. The Plumber station would

	indicated 1.23 feet and the St. Maries station 1.28 feet. Again the Plumber station and the St. Maries station at 1.23 and 1.28 are less than the Coeur d'Alene station at 1.41. So this is kind of a tabulation of the different stations and back to that earlier exhibit of selection of stations is why I selected the Coeur d'Alene station. Any questions on that exhibit? If not, we will go to BR 51. BR 51 I believe, and I would have to look back to see for sure, was included in the amended application we filed in April. If it wasn't, it would be very close to the table that was listed in that application. What this table lists, I should say it is entitled: "Black Rock Utilities Annual Pond Evaporation."
Meyer	Let me just interrupt. Let's look at BR 55 and see if it matches that document. I think that is what you had in mind wasn't it?
King	Let's see. No, it does not match BR 55.
Meyer	So does it match BR 28? BR 28, for the record, is the first submission of updated information.
King	Page 11 of that exhibit? No it does not match. Let's see...
Meyer	Which of these three would be most useful for your testimony?
King	Well the two that we just looked at on the submissions of additional information describe pond volumes in these exhibits but they don't list the annual evaporation. This exhibit 51 lists the annual evaporation from each individual pond. That's how this table is different from the other two.
Meyer	So this is...is this something we submitted to the Department previously or are we doing that for the first time today do you think?
King	We may not have. Which exhibit is our first submission which was our first application?
Meyer	The first one was BR 28.
Spackman	That's the first update what was the original application?
Meyer	Oh, I'm sorry. BR 19.
King	No it is not included in BR 19. This may very well maybe the first time we have submitted this to the Department.
Meyer	We are still allowed to do that, I just thought it would be helpful to have the record be clear as to where this came from.
King	I think this is the first time we have submitted this.
Spackman	Mr. Meyer, at this point, it is about a quarter to 11:00 and as I mentioned, I tend to push through in the morning but are there people who want to take a break at some point?
Meyer	I am happy to...I see Ms. Nelson would like to so...
Spackman	Is this an appropriate time?
Meyer	This would be just fine.
King	Should I finish this one?
Meyer	Why don't we finish ET and then move on.
Nelson	Can I object because then I believe what you are saying is I haven't seen this.
Meyer	No, I didn't mean that and I appreciate you asking that question. What I said sounded like that. What I really meant to say is that we had not submitted this in any of the pleadings or applications previously but it was exchanged as part of the exhibit exchange.
Nelson	Can you tell me which one it is in then? Is it in the second clarification?
Spackman	Want to break and then ...

Meyer	I can give you mine for now. Was that 51 or...
Nelson	51.
Meyer	Scott, why don't you do your best to explain what this document is and how it relates to the other versions that we have submitted.
King	Certainly. This one is the Black Rock Utilities annual pond evaporation based on ET Idaho. This is a table listing the ponds at Black Rock, numbered and identified by a name and we will see when we look at the other tables on the original application and the two following submittals that this very closely matches those other tables by listing the pond by name, lists surface area in square feet, surface area in acres, the volume in gallons of the individual ponds and the volume acre feet of those individual ponds. What is not shown on the other tables, on the other submissions, are the last two columns which is the annual evaporation rate in acre feet per acre which we can see is 1.41 for every single pond which is based again on BR 52, the Coeur d'Alene station make up water quantity for open water evaporation for ponds and streams of 1.41 acre feet per acre. And in the very last column, annual evaporation in acre feet and that last column is the multiplication of the annual evaporation rate 1.41 acre feet per acre times the surface area in acres. For example, in the very first row, the number 1 pond irrigation lake, you can see has 2.3 acres of surface area. 2.3 times 1.41, the evaporation rate, yields 3.26 acre feet of evaporation. So we would anticipate that pond number 1 would evaporate 3.26 acre feet in the average year. If we sum all of the ponds that are listed on this table, we get to the very bottom right hand corner and we can see that annual evaporation from all of the ponds listed here is 12.7 acre feet per year. So, in summary, this is my calculations on how much water ponds evaporate or the water ponds listed on this table.
Meyer	How does this fit back into the original, I shouldn't call it original, the most recent amended application for amendment of permit. Is that number reflected in the 209?
King	Yes it is. That number is reflected in the 209. I believe we rounded it to 13 for consistency and called it 13 acre feet of evaporation as part of the 209 acre feet total volume identified for aesthetic use.
Meyer	For the Hearing Officer's benefit, why don't we turn back to that and why don't you point out where that calculation is displayed in that application.
King	Back to 19?
Meyer	That would be 19. If I recall correctly, it is in the narrative at the end of the application.
King	Yes.
Nelson	Could we just identify 19 by a title please?
Meyer	Yes, that is the pending application for amendment of permit that is the subject of today's hearing.
King	I'd like to go to page 7 of 15 of that document. There are a number of bulleted items there. I will wait for the Hearing Officer to get to that page. If we look at the second bulleted item it quotes aesthetic storage (209 acre feet) includes 125 acre feet corresponding to the total volumetric capacity shown in Exhibit B for a total pond volume plus 13 acre feet for annual evaporation from pond surface at 1.41 acre feet per year per ET Idaho for 9.4 acres of surface water and 71 acre feet for pond seepage at .25 inches per day. There are no diversions from aesthetic storage. So, the 13 acre feet is included in the 209 as identified within that second bulleted item on page 7.

Meyer	Just for the benefit of the Hearing Officer and the Protestant, after the break, we will come back and step through the additional information submissions which have very minor changes to this paragraph.
Spackman	Is this a good time to break?
Meyer	I think this is a good time.
Spackman	OK. Let's break for ten minutes. We are recording again, Mr. Meyer?
Meyer	Very good. Mr. King, let's turn now to the two submissions of updated information that's Black Rock 28 and Black Rock 55. Let's look at 28 first. Can you just identify the document for the record?
King	Exhibit 28 – Black Rock's Submission of Updated Information Regarding Water Features and Request for Clarification. It appears to be a 12 page document dated October 9, 2008.
Meyer	And then would you do the same for Black Rock 55?
King	Black Rock 55 – Correction to Black Rock's Second Submission of Updated Information Regarding Water Features. This is a 14 page document dated January 6, 2009.
Meyer	Do you recall why a corrected version of this was submitted?
King	Yes. Black Rock 55, the corrected version was submitted because of two particular items on page 2, second paragraph, or excuse me, first paragraph, it is the very last sentence. The word "seepage" at the end of that sentence was "storage" incorrectly before so we corrected from storage to seepage. And, on page 9, there is a table in the middle of page 9 and that table failed to come through. There was a bad link in the Word document on the first version so the corrected version included that table.
Meyer	Is there any reason for us to have a discussion of the first submission or is all of that information also reflected in the second submission?
King	I don't see a need to review the first submission. The second submission superseded the first submission and replaced it.
Meyer	Why did Black Rock submit these two submissions with updated information?
King	Primarily because Black Rock had changed the location of some of the water features that were located in the original application and identified additional small water features, I believe in the second submission, identified those other water features so we were telling the whole story and presenting the most current plan that we had available for the water features on the project.
Meyer	Without going into precise detail, do you recall generally speaking what was addressed in the first submission and what was addressed in the second submission?
King	Yeah, in the first submission there were some changes of some of the pond locations and in the second submission, I think the primary change is identification of a number of small water features, mostly private, within the project and some others that were Black Rock and Black Rock North that were omitted from the first application and the first submission of additional information.
Meyer	And why was this information not provided in the original application?
King	In the original application, I would say, first of all, the changes were made, I understand that Black Rocks' changes in plans as to where some of the water features would be and also Black Rocks' identification that there were a number of small water features, largely in private residences, little ponds or streams in their back yards or front yards that they were not aware of that were actually connected to the irrigation system and at first understood them to be connected to the municipal water supply system. So those were included in the second submission.

Meyer	Let's look at exhibit A to this Black Rock 55, the second submission. Can you explain what exhibit A is? There is some text and then a map.
King	Yes, exhibit A is the original map that was attached to exhibit A of the original application for amendment for permit dated April 10, 2008. This map shows the point of diversion and the place of use for the various water uses that were identified in the application and we should note there is some handwriting here about the location of the point of diversion. I had originally identified it incorrectly and IDWR identified the correct location, so I believe this is IDWR's handwriting identifying the point of diversion issue on the map.
Meyer	Did the point of diversion change?
King	No, not to my understanding. I was unaware of the original location and I used some bad information when creating the map and then IDWR identified that error. No change to the point of diversion that I am aware of.
Meyer	Let's turn now to exhibit B, can you explain why we included that?
King	Exhibit B is an update to the exhibit A. We were providing a new map showing the locations of the point of diversion and the place of use for the uses under this water right. We can see, do you want me to describe the uses are there?
Meyer	Please.
King	We can see on this map there's in the bottom left, the legend, two different kinds of hatching that are identifying the places of use that are proposed to this application. There is a diagonal cross hatching that identifies the places of use for aesthetic storage and municipal from storage. And a circular, or little circles, identifying aesthetic and municipal storage and municipal from storage. So essentially, the whole place of use within the boundary is a municipal from storage location irrigation. Essentially is the municipal from storage and there are two ponds, two large primary ponds that are used for municipal storage where water comes back out of those ponds to be used for irrigation and those are the circular hatched areas. The cross hatched areas are all those areas where water could be used for municipal or aesthetic storage or if we want to call it municipal storage.
Meyer	Earlier on in your testimony today you explained that reflecting back on the original application, it might have made more sense not to call our aesthetic storage, especially. How would this map change if the Department implemented that?
King	If this changed, on this legend, we could replace the word aesthetic storage with municipal storage. So essentially, we would have municipal storage anywhere within the project. There are clearly still only two ponds where Black Rock puts water into storage facilities and pumps back out of them to serve the pressurized irrigation system. But really this whole map would be the circles outlining municipal storage...well no that is not correct. Um...the cross hatching would just be municipal storage and municipal from storage. The circle would be municipal storage...ah I have to back up one more time...
Meyer	Would it be clear to say that you would just color the map in the same...
King	In the same color, yeah. Municipal storage and municipal from storage.
Meyer	Let's turn to exhibit C and I will ask you to explain why that is included here.
King	Exhibit C is a list of the beneficial uses, the nature of uses sought under the changed application. We can see that this matches the original application except for the third row listing 208 acre feet of aesthetic storage with 209 crossed out. So we have identified that there is actually less storage that was sought for aesthetic storage under the second submission then under the original application.

Meyer	There is a footnote attached to that number 208. Why don't you just read that into the record.
King	Yes, the new footnote: "Although only 208 acre feet of water for aesthetic water features are identified on the ground at this date, Black Rock requests that the amendment be approved for the 209 acre feet described in the original application in order to accommodate any further minor adjustments by the time of licensing."
Meyer	So if the Department were to eliminate the aesthetic storage component on the basis that it was included within municipal storage, that whole line would come out along with the footnote, is that right?
King	That is my...yes, correct.
Meyer	The fact that you went from 209 to 208, is it fair to conclude that that demonstrates that the identification of all of these additional water features did not increase the overall quantity of water that would be supplied to those features?
King	No, you are exactly right. Black Rock refined its plans and excluded some ponds and added some additional ones and all of these additional miscellaneous water features. The total volume from... the new number was less than what was under the original calculations.
Meyer	Let's turn briefly to exhibit D. Can you also explain what this exhibit does and how it might change if the Department determined it would be appropriate to eliminate aesthetic storage as a separate component.
King	Exhibit D is a place of use table that identifies the places of use for aesthetic storage, municipal storage and municipal from storage. It is provided in an underline and line out formats so that we can see that there are additions and subtractions to some of the place of use within the additional core. We can see that aesthetic storage listed as a "J" identifier is included in all of the storage locations for which municipal from storage or "M" is also identified.
Meyer	So if the Department decided to eliminate aesthetic storage, how would this be changed?
King	I would say we would replace all of the "J"s aesthetic storage with "M"s for municipal storage. Or it could simply say that the "J" represented municipal storage.
Meyer	If the Hearing Officer would indulge me here, I could suggest that it would also be possible for the Department to simply identify all of these places of use by reference in textual language to the designated place of use for the municipal service area. Should we turn to exhibit E now?
King	OK.
Meyer	Can you explain what is going on in exhibit E?
King	Exhibit E provides the explanation to where the volume calculations resulted. And again, in underline and cross-out format so we can see what changed from the original application. Aesthetic storage identified as 208 acre feet as opposed to the 209 that was originally listed which includes 124 acre feet corresponding to the volumetric capacity shown in exhibit F, which is the next exhibit. For the total pond volume, 13 acre feet for annual evaporation and although the pond...we identified additional ponds that were out there and perhaps a little additional surface area, it didn't substantially change the expected total evaporation from all of the pond surfaces and that is at 429 millimeters per year which is equivalent to 1.4 acre per year. And also for 9.3 acres of total surface area. We can see that is a reduction from the original. There is some reduced surface area in the

	second submission then there was compared to the original application. And 71 acre feet for pond seepage at .25 inch per day for each acre of pond area. So we can see in that first bulleted item there was some significant additions to provide more clarity into what we were explaining and some reductions in the values there. We can see on the second bulleted item, municipal storage, there is one change there from 209 to 208 acre feet.
Meyer	Let me ask the Hearing Officer, is your document just in black and white and not in color? The page that you are looking at...from where I am sitting it looks like it is just in black and white.
Spackman	That should have been in color.
Meyer	Let me just suggest that we swap these two and make this the original. The one that we ought to submit as the exhibit ought to be the color one and obviously whoever put these books together took a little short cut and...
Spackman	Some of the colored material is almost unreadable.
King	Yeah, it is a little faint.
Spackman	It didn't copy well.
Meyer	We might as well switch both of them and if I...
Spackman	And are you able to follow Ms. Nelson?
Nelson	It is faded but I believe I know what they are doing.
Meyer	At the end of the day we will just switch the cover pages on these so that the original is properly identified. If you are through explaining exhibit E would you turn to exhibit F and explain that?
King	Exhibit F is a spreadsheet listing the ponds and it is a changed spreadsheet compared to the original application. We can see here that there are a number of ponds that have been excluded such as 5A, 5B, 6A and 6B and some that were added compared to the original such as 7A and 7B which I will call whole number 3 stream and whole number 3 catch pond. Towards the bottom there are two more that were added, number 15 main entrance water features and 16 club house water features. And the very last item, miscellaneous numerous small BR, BRN and private water features. So this table lists, as we were going over in the evapotranspiration table, it lists the surface area in square feet and acres, the volume and gallons and acre feet for each of the individual ponds. A depth of the ponds and a calculated average depth of the ponds also and then at the total at the bottom, we can see that the total surface area, for instance, all ponds 9.28 acres and the total volume is 123.66 acre feet.
Meyer	Looking at that last line labeled miscellaneous where it says numerous small BR and BRN and private features. What... can you explain what that means, what is BR and what is BRN and what are private features?
King	Below the table where you can see the key, BRN is Black Rock North and BR is Black Rock and these are different designated component of the development.
Meyer	Do BR and BRN do those refer to water features that are essentially owned by Black Rock Utilities?
King	Yes, that is my understanding.
Meyer	And so that contains some very small ones as well as the private features that are on individual lots.
King	Yes that is correct.
Meyer	And the sum of those is, can you read that number for the surface area?
King	Yes, some of the surface area on this is 0.29 acres and the volume is 0.36 acre feet.

Meyer	And we are talking about a small component here compared to the rest of the application.
King	Yes, very small when compared to the total.
Meyer	Should we turn to exhibit G now?
King	OK.
Meyer	Why don't you explain that exhibit...three pages.
King	The first page of exhibit G is some textual language explaining what the following two pages are. We have a spreadsheet of miscellaneous water features and this spreadsheet will turn to page 12 and 13. The spreadsheet of the other miscellaneous small water features that were identified by Kyle and Black Rock, Black Rock North development project. At the very, very top of this page, on 12, there is a summary. A summary of the total here so that that summary would match the summary or the totals that we would see on page 2. But this lists these individual ponds, the pond dimensions and stream dimensions. We have several categories here, we have cottages, entry landscape, club house entry, golf villages, cul de sac landscape, individual water features, irrigation cabins, and individual rock water features. I think nearly all of these are private water features. I think the first three items, entry landscape, the cottages, club house entry and golf villages cul de sac landscaping are Black Rock and Black Rock North home owners association or development owned portions of the project and the remainder are all private. <i>Sneeze</i>
Meyer	Gesundheit. Continue at your leisure.
King	OK. The sum of all of these, we have a total surface area of the ponds and the streams of 12,754 square feet which is equivalent to 0.29 acres and a total volume of 118,508 gallons or equivalent to 0.36 acre feet. That is shown in the summary at the top of the page.
Meyer	That is the top of page 12? Do you want to explain page 13?
King	Page 13 is a continuation of the table. Those are also individual water features so from page 12, page 13 is just a continuation of those individual lot water features with a grand total at the bottom of everything on page 12 and 13 and then those grand totals are again summarized at the top of page twelve.
Meyer	I don't have anything else on these additional information submissions. Does the Hearing Officer have any questions?
Spackman	I think the only question that I had was, Ms. Nelson, at one point in time you wanted to perhaps interject an objection related to some document and I wanted to give you a chance to visit that.
Nelson	OK. What did I do with it? OK, well, Mr. Meyer gave me his and you say this is contained within something else that I have already seen?
Meyer	Yes, that was included within, with the earlier exhibit exchange.
Nelson	Can you tell which one it is in?
Meyer	I can't off the top of my head.
Nelson	I don't recall seeing it, but I have, you know, the second clarification and the changes to the second so...
Meyer	Let me...
Nelson	I am not saying I haven't seen it, but I can't right off of the top of my head say tell you which one it is in.
Meyer	This document, if I recall the witness' testimony, provided some additional information that went beyond what was in the additional information submissions and it specifically addressed the calculation of evapotranspiration. If there is an objection from the witness to this document, then I would suggest that just read the document into the record.

Nelson	I don't have an objection, other than to the best of my knowledge I haven't seen it but...so if I can either have a copy or keep a copy...because the 12.7 correlates basically to the 13 but I wouldn't mind keeping a copy if I can.
Meyer	I would be delighted to provide that copy to you.
Spackman	So with that, the objection then I will determine as withdrawn.
Nelson	Yes.
Spackman	Thank you. Mr. Meyer.
Meyer	Let's turn now to the subject of the timing of the application. I draw your attention to Black Rock 15. That was the amendment of permit.
King	OK.
Meyer	Would you read condition 14 into the record?
King	OK. This is amendment to permit dated July 27, 2007. Was that condition 14?
Meyer	Yes sir.
Nelson	Um...
King	After the expiration of one year from the date of final approval of amendment #72669, the irrigation use identified separately from the municipal use authorized by the amendment shall be stricken from the permit unless the use has been changed or is the subject of a change application pending before the Department.
Meyer	Would you explain what you understood that condition to provide?
King	My understanding is that the amended permit included this residual irrigation component of 123 acres and that could stay on this amended permit for up to one year, providing the Applicant, the permit holder, an opportunity to change that portion to some other use within the purview of the Department as an amended application.
Meyer	And one year from the date of the permit, what would that be?
King	Well this amendment was dated July 27, 2007 so you could maybe say that it was July 27, 2008 could be one date.
Meyer	Now, turn your attention to Black Rock 19 which is the application for amendment of a permit which is the subject of today's proceeding.
King	Yes.
Meyer	When was it filed?
King	This application is signed April 10, 2008 and by the date stamp at the top of the application it was received by the Department on April 14, 2008.
Meyer	And is that within the one year time period?
King	Yes it is.
Meyer	...described in condition 14?
King	Yes it is.
Meyer	Let's go back to Black Rock 15, that is the amendment of permit. Would you read condition number 5 into the record?
King	Condition number 5: "The holder of this water right shall not store water in the Black Rock North development and must reduce its storage to 6.5 acre feet or less in the club at Black Rock unless it obtains or identifies other water rights it owns that authorize storage of water in the ponds. Furthermore, if water from other sources is co-mingled with water diverted from Coeur d'Alene Lake, the holder of the permit must develop a plan approved by IDWR that will ensure that no more than 6.5 acre feet of water from Coeur d'Alene Lake diverted under this right will be stored."

Meyer	Focusing on the language that said, "unless it obtains or identifies other water rights..." what was your understanding of the intent of that condition?
King	My understanding of this condition is it is providing notice to Black Rock that it will limit its storage to 6.5 acre feet unless it obtains or identifies other rights its owns that authorize storage from the ponds. Black Rock needs to find water rights authorizing storage for the ponds.
Meyer	I would like to turn your attention now to Black Rock number 14 which is the preliminary order which was issued in conjunction with this amendment of permit. For the record, it is dated June 4, 2007, signed by this Hearing Officer.
King	OK.
Meyer	On page 7, I would like you to read paragraphs 18, 19 and 20 into the record.
King	Paragraph 18: "Existing ponds in the club at Black Rock that do not store irrigation water or that exceed the storage recognized by the 24 hour fill policy, might have to be filled in if another source of water is not found..."
Meyer	Let me stop you there and then we will read in the other two. What was your understanding of the word "might" in that sentence?
King	My understanding is that the Department is telling Black Rock that they may need to fill in ponds if they do not find water rights authorizing storage in those ponds.
Meyer	Is it telling them that they need to fill them in at this time?
King	No, I do not believe so.
Meyer	Would you now read in condition number, or paragraph number 19?
King	Paragraph 19: "Approval of this application for amendment for permit should allow for a period of time for reconstruction of the existing ponds and delivery system or for changes to, or identification or, water rights that would authorize the storage in the existing club at Black Rock ponds and perhaps future storage in ponds purposed to be located within the Black Rock North development."
Meyer	Focusing on the words "identification of water rights" what is you understanding of that sentence?
King	My understanding is that Black Rock needs to identify water rights that authorize storage in the ponds and those water rights...yeah, needs to identify water rights that would authorize storage for the ponds.
Meyer	And focusing on the words "or perhaps future storage" what does that mean to you in terms of timing?
King	My understanding is this is saying that there are storage ponds there already and there may be additional ponds proposed for the future and that Black Rock needs to identify water rights for those ponds whether existing or created in the future.
Meyer	OK. Would you now read paragraph 20 for the record?
King	Paragraph 20: "The residual 123 acres that were not included on the application for amendment and the associated irrigation use should be left on the permit for a period of time allowed for reconstruction or water right identification change described above.
Meyer	Was it your understanding that the one year period of time described in the permit was the time period discussed here?
King	Yes, I do. It does not explicitly say one year but it does say for a period of time and that matches the other language.
Meyer	Did Black Rock file an application for a water bank rental?
King	Yes.

Meyer	And why did it do that?
King	Black Rock filed an application to rent water from the water bank to ensure it had identified water rights authorizing storage ponds for 2008.
Meyer	Was it necessary for Black Rock to do that?
King	I don't believe so. No, I don't believe so. I believe that the identification of rights that could be used or changed for storage took care of that. Renting the water provided, you might say, an over abundance of caution to ensure that there was authority to store water in those ponds.
Meyer	I would like you to turn now, unless there are any follow up questions on that from the Hearing Officer, to a discussion of Ms. Nelson's water rights and there are several exhibits beginning with Black Rock 38.
Spackman	I guess it find it amusing that Mr. King is being used as an expert to interpret the language of the decision on the permit. I guess I will just say that I am not sure that interpretation by Mr. King is the interpretation of the hearing officer and consequently I don't give his interpretation necessarily any credibility. He is not an expert to interpret the decision. So, that's fine, I am not taking necessarily issue with it at this point and time. But, I just make that comment for the record.
Meyer	Well, I appreciate that your Honor and if I may also explain that the purpose of the testimony was not to contradict the Hearing Officer's interpretation, obviously the Department and the Hearing Officer had something in mind when they wrote that. The purpose of the testimony was simply to demonstrate what we, what Black Rock understood that to mean. It may be that Black Rock misunderstood that language and should have read it in a different way. But we wanted the Hearing Officer to understand the good faith understanding that we operated under whether it was right or wrong.
Spackman	Well, in particular, for the record. I wasn't sure this was, would be part of the discussion but since you have raised it as part of the discussion it currently is a subject to explore. But in particular, when it talks about the identification of water rights, an authorized the particular use, the interpretation I have of a water right is one that is perfected and will authorize whatever use is made of that water and I guess I interpret from what Mr. King has testified to that Black Rock was saying or, at least after the fact, is now saying that the identification of that residual portion of the permit was sufficient to authorize their use and storage of water within the facility and I think that is a misinterpretation of the language because the permit did not, in fact, authorize that use. There is not a water right that was identified and authorized that use. The reason for the inclusion of the language is the Department did not nor the hearing officer did not know what water rights that Black Right have in addition to the ones that had been presented the previous year. And wanted to give Black Rock the opportunity to identify those rights that would authorize that use if those rights were in existence. But to identify that residual portion as a water right that then would excuse Black Rock from the very conditions that are contained in the permit, I don't know how Black Rock could reach that conclusion Mr. Meyer. But anyway, that is my interpretation of the order itself.
Meyer	Well, I thank you and it is readily apparent to Black Rock that Black Rock did reach a different interpretation and I can understand, and I fully appreciate your explanation of what was intended here. I can tell you, in good faith, that that misinterpretation was made by Black Rock and we want you to understand that it was not intentional, but it was the operating assumption that we went on for a period of less than a year until we filed that

	application and based on what you said, we were operating on a false understanding. We did hope to nevertheless, have the belt and suspenders of the water bank, and I trust that independently satisfies the obligation but you have indicated that this is not really a central portion of this proceeding and maybe we don't need to spend more time on it.
Spackman	Yeah, I did not intend to get in to gathering evidence about whether the use and storage by Black Rock during this period of time was appropriate or not and frankly I think my order said that it was not a part but it now, it seems to me, to have become a part to the extent we are talking about and I will allow some additional examination by Ms. Nelson on this subject.
Meyer	OK, well that is all we have on that subject.
Spackman	OK.
Meyer	Black Rock 38 is the next exhibit. Ms. Nelson, would it help for you if I gave you my notebook.
Nelson	If you give me some leniency, I do have all of these documents. I have been inundated with documents. If I could have a separate copy of, and because they aren't numbered, of number 15 and 14, that would be really helpful. And numbered and that...
Meyer	May I provide those to you at a break or would you like those now?
Nelson	No, at the next stop is fine and then I think I am ok so far.
Meyer	Just let us know if there is anything we can do to make this more efficient...
Nelson	Or I can shuffle through my box.
Meyer	Black Rock 38, can you explain what that document is?
King	Black Rock 38 is my search for active and inactive water rights listed on the Department of Water Resources' website under their on-line database for water rights held in township 48 North, 4 West, Section 5 and the Northwest of the Northwest quarter-quarter. This shows that the search didn't reveal any records in that location.
Meyer	Does that mean that Ms. Nelson has no water right?
King	No, it does not.
Meyer	What kind of water right might she still have that would not appear here?
King	When they have an unrecorded domestic water right under an exempt ground water appropriation.
Meyer	And how would you check for that?
King	You know, that is kind of difficult to check for. One might find a well drilling report showing a well log or a well at a location and adding the case that there might be a source of ground water, one would need to look further to see if there is actually a domestic use at that location. So, if there is a ground water diversion associated with a home or a domestic use under Idaho statutes than that could represent an unrecorded domestic water right.
Meyer	I would like you to turn to Black Rock 39 and tell us what that is.
King	Black Rock 39 is a listing of driller reports based on a search of the Department's on-line database for driller reports for wells located in Township 48 North, Range 4 West, Section 5. In the northwest of the northwest we can see that there are 5 well logs that are identified in that quarter-quarter track. Three of which list Jai Nelson as owner and two list Rich McKearn.
Meyer	Let's jump to Black Rock 1 in the first notebook.
King	OK.
Meyer	Would you identify that document for the record?
King	Black Rock 1 is a well driller's report for well tag number D0013059, a well constructed

	for Jai Nelson by H2O Well Service in 2000.
Meyer	Can you...what information about the well can you derive from this?
King	Well, let's see here. This was a domestic well constructed in a northwest, northwest quarter-quarter of Section 35, Township 48 North, Range 4 West. It was a new well constructed by air rotary. There was a seal placed from zero to eighteen feet with bentonite. There was a casing installed, 6 inch casing, from 2 to eighteen feet of quarter inch steel. The static water level was observed 70 feet below ground level. There was a well yield of ½ gallon per minute. It was tested by air lifting and then there was a lithologic log describing the lithology that were encountered by the well driller describing the well depth from zero to 635 feet primarily through granite. A couple of water bearing zones. The well constructed was started March 30, 2000 and completed April 4, 2000.
Meyer	Can you do the same for Black Rock 2?
King	Black Rock 2 is a well driller's report identified by well tag number D0013328. Owner is Jai Nelson, identified as well number 2. Same location, northwest, northwest of Section 5, 48 North, 4 West.
Meyer	Now, I happen to know that Black Rock 3 that we haven't turned to has the same well tag number, so why don't you read the permit number as well so we can distinguish this document.
King	Certainly. Permit number here is 765378. There is also identification here that this is well number 43. Well site is parcel number 38, Coeur d'Alene. A domestic well, a new well constructed by the air rotary method. A bentonite well seal from zero to eighteen feet. We have a four inch PVC liner from 5 feet above ground surface to 300 feet below ground and a 6 inch steel casing from 2 feet above ground surface to 18 feet below ground surface and I probably got to say here that that PVC liner is probably from 5 feet below ground surface based on the numbers that the driller provided. There are some perforations in the liner constructed with a Skill saw from 260 to 300 feet. 170 different perforations in the 4 inch PVC liner. The static water level is identified as 100 feet below ground surface. The well is test pumped at 5 gallons per minute at a pumping level of 300 feet for one hour, air lifting. Water temperature is listed as cold and the lithology describes the well constructed from zero to 300 feet in primarily granite. Completed depth of 300 feet, started June 22, 2000 and completed June 22, 2000. Again by H2O Wells Services. Firm number 448.
Meyer	Would you do the same for Black Rock 3?
King	Black Rock 3, well tag number D0013328 which, I believe is the same tag number as the prior exhibit. Well drilling permit number 766014 or also listed as 7...oh, that is the deepening. It looks like the original list on here was 76537. It looks the deepening permit was 766014. Owner Jai Nelson, well number 2. There is a well number identification number of 61. In the northwest, northwest of Section 5, 48 North, 5...4 West, excuse me. This was a domestic well that was deepened with an air rotary method and no listing of sealing or additional casings but it does identify perforations from 560 to 600 feet in a 7 inch diameter PVC liner. 160 perforations, the static water level is again listed at 100 feet. The well test identifies a yield of 5 gallons per minute air lifting. It does not identify a pumping level or time. Water temperature is listed as cold and the lithology log describes construction from 300 to 600 feet below ground through granite. Construction started on July 14, 2000 and was completed July 15, 2000. And again by H2O Well Services, Inc. Number 448 Firm.

Meyer	Ms. Nelson provided some supplemental discovery responses on January 12, earlier this month in which she provided a copy of the well log. Have you seen that?
King	Yes I have.
Meyer	Which one does it correspond to?
King	That corresponds with DR number 2.
Meyer	Did she provide either of the other well driller's reports?
King	No, not that I am aware of.
Meyer	Let's take a look at Black Rock 35. Could you identify and explain that document please?
King	Black Rock 35 is a table that I have created based on my inspection of those well logs and other information available from US GS quad maps. What this shows is...should I step through what it shows here? OK. There are a number of different rows on here and they are identified A, B, C, D, E, F, G, H on this table.
Meyer	Just for purposes of clarification there are just two wells listed here but we just looked at three well driller's reports. I think the record is clear but let's just make that crystal clear. Why is that?
King	Certainly. Well number 1 is the first driller's report identified by driller tag number D0013059 which was...
Nelson	Can I object to this exhibit because again I don't recall seeing this particular table. Unless it is within another document.
Spackman	Mr. Meyer
Meyer	Here is a copy.
Nelson	Is it within some other document?
Meyer	No that was a separate document that was included in the exhibit exchange.
Nelson	So it is attached to something.
Meyer	No it was just a separate document.
Nelson	It's just a separate single sheet.
Meyer	Separate single sheet.
Nelson	OK.
Meyer	Would you continue to explain that document?
Spackman	Just for a minute, Ms. Nelson, at any point and time if you want to spend time working through the documents that you have and marking them accordingly...
Nelson	It's a lot of documents, I am sure you are aware of that. So for me to go through...but I am fine you just go through and explain it now that I have it front of me. If that is alright?
Spackman	OK. Mr. Meyer.
Meyer	Mr. King, why don't you explain that table.
King	OK. Back to well number 1 identified by tag number D0013059 that well number 1 corresponds with Exhibit BR 1. The second well, well 2, identified by D0013328 driller tag number corresponds with Exhibits BR 2 and BR 3. Both of those describe that well number 2. Continuing down there are rows identified as A – H on this table. Row number A is the minimum expected ground surface elevation for wells constructed in 48 North, 4 West, Section 5, Northwest, Northwest. Based on my interpretation of the US GS topographic map 1:2400 scale and that in that particular quarter, about the lowest elevation that I would expect a well to be constructed was at an elevation of approximately 2,840 feet so that is listed as an elevation for both wells. The next item is B, static well water level below ground level for the driller's reports. So referring back to Exhibits BR 1, 2

	and 3 report static water levels below the ground level of 70 feet for well 1 and 100 feet for well 2. Number C, or item C, row C, minimum well water surface elevation. This is shown as A minus B, so if we want to do the math, it is the math from Row A minus or the elevation from Row A minus the water level listed in Row B to give us an elevation of the water table in these particular wells. 2,770 feet for well 1, 2,740 feet for well 2. I want to skip down to H at the very bottom of the table and identify a lake level per USGS quad map of 2,125 feet and that is based strictly on reading the USGS 1:2400 scale quad and identifying a lake level of 2,125 feet. Going back up to Row D, minimum aquifer level above Lake Coeur d'Alene and this is Rows C minus H. So this is the distance from the Lake to the water surface in the wells for both well 1 and 2 and that distance being 645 feet for well 1 and 615 feet for well 2.
Meyer	The record should show that the witness held his hands in the air during that testimony. Would you explain which one was higher and which was lower?
King	The one that is lower is the Lake and the one that is higher is the water level in the well for both well 1 and well 2. Row E, total well depth as reported on driller's reports in feet. Again, this goes to Exhibits BR 1, 2 and 3 where well 1 was identified as having a total depth of 635 feet and well 2 of 600 feet after the deepening of that. Row F, minimum well bottom elevation. Mathematically that is Row A minus Row E and this is identifying the elevation of the bottom of the well. So well 1, the bottom of the hole, would be at an elevation of approximately 2,205 feet and well 2 2,240 feet. Again, that is a minimum based on the quarter-quarter, Northwest, Northwest quarter-quarter of Section 5. Row G, minimum well bottom level, I should say we missed a word there, it should say... I will say what it says first. Minimum well bottom level Lake Coeur d'Alene F minus H. What it should say is Minimum well bottom level above Lake Coeur d'Alene F minus H. Again mathematically, this is Row F minus Row H for well 1 this 80 feet and for well 2 this is 115 feet and again using my hands in identifying, if the Lake is at level 2,125 feet, the bottom of the well hole for well 1 is 80 feet above the Lake and 115 feet above the lake for well number 2.
Meyer	What does this tell you about the potential for injury to Ms. Nelson's wells or water rights?
King	Well, what this tells me is that the bottom of the well and the water surface elevation in the well are both very much above the level of the lake so that if one were diverting from the lake, and potentially lowering the level in the lake, it would be a very, very low likelihood of impacting water levels in those wells from any diversions from the lake. Primarily because the water levels and the bottom of the well are both well above the lake level.
Meyer	If the lake level went down, what would happen to the water level in the aquifer?
King	I would expect that there would be no change in aquifer levels if the lake level went down. If there was any change it would be expected to be very, very, minor and insignificant. May I give an analogy? My analogy is, we have an aquifer that is at a higher level than the lake level and frequently, I look at this very much like a water fall and a stream. And if we have water falling over a waterfall or over the face of a dam to a stream below and we have pump out of the stream below. If we pump water out of the stream below, and just drain the stream, that does not cause water to run over that waterfall from above, any faster than it would have without pumping. And that is why a deduced that there would be a very, very low likelihood of pumping from the lake having any impact or effect on the aquifer level.
Meyer	Even if there were some impact, that is if there was some relationship, no matter how

	small between lowering the Lake level and lowering the static water level in the aquifer would that situation be aggravated by the application that is the subject of this hearing?
King	I do not believe so. I don't believe that this application for 2.5 cfs could cause a lowering of the Lake levels.
Meyer	Well, this application is not for 2.5 cfs it is to change an existing water right for 2.5 cfs.
King	Very good. Where this application is not purposing to divert any more water than was purposed prior, I don't see how the change would create any potential impact in Lake levels because we are not purposing in the change application to divert any additional water out of the lake.
Meyer	Just to summarize your testimony, based on all of the mathematical explanation that you provided and explaining how the application was put together, do you have a professional opinion as to whether this application, if approved, could result in injury to Ms. Nelson's water rights or any other water rights? Do you have that opinion?
King	I do have an opinion and I don't see how this application to change the permit would result in any injury to Ms. Nelson's water rights or any other water rights.
Meyer	Do you have a professional opinion as to whether this application would result in an enlargement of the existing amended permit?
King	No. I have an opinion, yes I do. My opinion is no that it would not result in an enlargement of the original amended permit.
Meyer	I would like to ask you the same question with respect to the local public interest but I want to qualify that because I understand that you have been qualified as an expert in water rights and municipal water rights but not as an expert in environmental management or regulation. So, I want to limit my question to your area of expertise. The preamble to the 2003 amendment to the local public interest statute that is applicable today describes the purpose of that amendment as being to authorize the Department of Water Resources to ensure that the public water resource is used efficiently and to its maximum utility. Focusing just on that aspect of the local public interest, do you have a professional opinion as to whether this application, if approved would be consistent with the local public interest?
King	I do have an opinion and my opinion is that this is in line with the local public interest with respect to those elements, this is a beneficial use of water in the State of Idaho.
Meyer	Are you familiar enough with the project and the application to have an opinion as to whether the project will efficiently utilize the public water resource?
King	Yes, I do have an opinion. My opinion is, based on my review of the documents and discussions with the client that this is a very efficient use of water and not a wasteful use of water. It seems to me that they have a very refined plan of providing irrigation on quite a number of acres without... with a very efficient quantity of water. Certainly, there are other water rights that use much more water per acre of irrigated water than what is purposed by these applications. For both irrigation and for pond use.
Meyer	I would like to turn to one final area before we conclude your testimony Mr. King, or at least the direct portion of your testimony.
Spackman	Mr. Meyer, and I want to be respectful of your examination. I do have one question about Exhibit 35. I can either come back to it again or ...
Meyer	I would welcome it now.
Spackman	OK. Because we are talking about this particular exhibit and the numbers that are contained therein, Mr. King I was unclear about how the first item was derived. The

	minimum inspected ground water surface elevation for wells constructed within that particular location and if you could explain to me again how you came up with that number because that number is the beginning of the entire computation.
King	It certainly is, yes. I would like to refer to Exhibit 56. Exhibit 56 is a map showing the place of use boundary on a topographic 1:2400 scale USGS map. This identifies townships and range 48 North, 4 West and also Section 5 is within this location here and I am referring to the upper left hand corner of the exhibit. The Northwest, Northwest quarter-quarter is up here and that Northwest, Northwest corridor is what is identified on the well driller's report.
Nelson	Can I object to this exhibit? That is inaccurate and that is not where my well is. If we can go to your Google Earth, or you know you had the little drawing that had a little arrow that said Jai Nelson's well. It is a satellite photo.
Meyer	Before we go there, did you find out some information about the inaccurate location, and I apologize, I intended to ask you that for testimony on that and I was about to get back to it but why don't you tell us what we know and then we will see where your objection goes.
King	So the well log describes the well in the northwest, northwest corridor and so I had looked at the topographic lines within this northwest, northwest and the lowest elevation that I could find was up in this northeast corner of the northwest, northwest. At approximately 2,840 feet, perhaps a little less than that, maybe 2,820 feet. That would be way, way, way in that the far, far northwest corner. So, my 2,840 feet based on the lowest elevation, or very close to where I would expect a well to be constructed in this location. Subsequently to that, very recently, I asked Kyle Capps, Kyle I don't see any homes in this location and he said well, that is because that is not where her well is at or her home is at. He understood her home to be further down in the northwest of the southwest of Section 5. And I will allow the Hearing Officer to...
Spackman	Let me just ask a question. Does that mean that the well driller's reports are wrong?
King	Yes, I believe so. And I would also add on that, we very frequently find that the well driller's incorrectly locate where they are constructing a well.
Spackman	Laughter...no...
King	And so, if we want to use the table listed on Exhibit 35, and go instead to the northwest of the southwest...
Meyer	By the way, when did you make this discovery?
King	Today is Wednesday, I believe that was Monday.
Nelson	Today is Tuesday.
King	Today is Tuesday so ok, it was Monday or potentially Friday. I am trying to remember exactly when it was - very recently. In this quarter, ok, back to Section 5 northwest of the southwest, and if that is the correct location, we might need to confirm that with Ms. Nelson later that the lowest elevation there...oh, here is what it was, I remember now. What I understand based on Kyle Capps' description is that Ms. Nelson's home is located in the northeast corner area of the southwest, or the northwest of the southwest and I am going to draw on this where I believe that location is and this may be correct and it may not. I am going to draw what I think is the location...
Meyer	I am going to ask you also to draw that in the official exhibit list that Mr. Spackman has because this one will just be for illustrative purposes.
Spackman	What number is that again, 56?
King	Yes. Section 5, northwest of the southwest in the northeast corner in approximately that

	location.
Meyer	Did you then after making this discovery, recalculate how that table would change?
King	Well, first I should say before I go there that inside that location, the elevation, the lower elevation is approximately 2,800 feet which is about 40 feet lower than the original approximation of the elevation based on the topographic map. So if we were going to return back to...which table was that? What was that table again?
Nelson	35.
King	35. We should take the top numbers of 2,840 feet and scratch those out and instead, replace it with 2,800 feet and do the math accordingly, and what we would see there is the minimum bottom of the well, as well as the aquifer elevation, those numbers should be decreased by approximately 40 feet. In the end, we find that the bottom of the well and that the elevation of the water surface in the wells, still remains very much above the level of the lake. And to answer your question, Mr. Meyer, yes, I did recalculate that and I have some tables that I prepared yesterday that I could offer as exhibits if you would so choose.
Meyer	We may want to do that, but why don't you just cut to the chase – what is the bottom line?
King	The bottom line is, although the elevation here looks to be a little lower, 40 feet, the well and the water level in the well is much above the lake and diversions from the lake are not expected to have any impact on creating a declining level in those wells.
Meyer	Your Honor, I think it would be useful to hear from the Protestant as to whether, on our second try, we have now correctly identified the location of her well and home.
Nelson	No, I guess I am still going to object to this because you are discussing the location of my residence and not the location of my well which is a significant distance from my home. Unfortunately.
Spackman	It may need to be the basis of an objection.
Nelson	And it is at a different, very distinct different elevation.
Meyer	Well, your Honor, we have done the best that we can do with the information that was provided. We requested this information in discovery. Ms. Nelson provided the location of her well in discovery. We based our evaluation on the information that she provided and we even went beyond that to correct what appeared to be an error. I don't think the Applicant can be expected to do more than that. If there is any further testimony contradicting this, I think it would prejudicial to my client. Furthermore, we asked in the deposition and in discovery whether the Applicant, excuse me, whether the Protestant would be providing information alleging injury to any individual specific water right and she expressly answered no she would not. She said that she had a generalized concern about potential injury in the future, but that she would present no evidence on individual water rights. I think we have gone above and beyond the call of duty to try to provide this information to the Department and I will object if there is any effort to contradict it.
Nelson	And I guess I would object to that statement because at the time that statement was made, I was appearing as the Coalition representing the community at large rather than Jai Nelson and now we are getting into narrowing it down to my specific wells. So, in light of the change of that direction, and obviously what I am presenting has changed as well.
Meyer	Your Honor, if may respond, this is exactly the difficulty and the frustration that the Applicant has with changing protestants like this.
Spackman	OK. Well, I don't think I would consider that as a basis for justification. I think what I need to do, based on the discussion here, is know where Jai Nelson's well is located and if she can locate that for us then I have some basis to evaluate the numbers themselves and

	whether they actually demonstrate that the water levels in the wells at this location or the bottom of the well are above an elevation the level of the lake. I think that we can get to that point. So, I guess at this point, Ms. Nelson, can you identify on the map where your well is located to the best of your ability? This is for illustrative purposes here.
Nelson	I could in conjunction with the Google Earth satellite photo.
Spackman	I don't know what that is.
Meyer	You are welcome to use any of these other exhibits.
King	Mr. Spackman is it Exhibit 34?
Spackman	It is not Google Earth, this is NAEF (?) 2006 imagery.
Nelson	OK. Satellite photo in color. Approximately right here, this is my driveway, my home is approximately right here and then you see this road? This road was specifically constructed to build my well which is right here. Actually, I take that back. It is actually right down here in this little clearing. So if you can correlate that to the...it is right in the clearing.
Spackman	Go ahead and make a larger circle or something like that
Nelson	How is that? So you can see, where my home is at here, my driveway, well number 2 is right down there. So it is a significant distance.
Spackman	OK. Well let's just see if we can correlate it approximately. The problem I see here, Mr. Meyer and Ms. Nelson, is I think, the well logs, there would be an assumption that the well logs would identify the location of the wells and identify it accurately and the well logs do not. So because of that, any attempts to identify where that is both on the part of the Applicant and the Protestant, in my opinion, would have been frustrating and it is not until there was a discussion recently about it that that was discovered. So let's just see if we can approximate where the well is.
Meyer	Well, your Honor, I would suggest a different approach. I would suggest that we simply strike all of the testimony and exhibits relating to depth of well and static water level since we have now demonstrated that we don't have a precise foundation for those and leave the record where it is which is there is no evidence of injury. We would certainly want to keep in the record the testimony that we had from Mr. King that this is an application for the amendment of an existing water right and that whatever impact the existing permit may have is not going to be changed by this. So we would want this to be kept in the record but strike all of the evidence regarding the actual quantification. That was a belt and suspenders argument that was really unnecessary.
Spackman	I am willing to accept that and we will just not consider Exhibit 35 of the computations.
Meyer	Very good.
Spackman	That would be fine. Again, if it is in the record then I am looking at numbers that may not be accurate and that was my concern.
Meyer	Exactly.
Spackman	So Exhibit 35 is not part of the record. That will be one that you have identified. Thank you. I agree that the argument, given the change in the lake levels anyway probably not that important.
Meyer	Thank you your Honor. Well, I think that wraps up the discussion on that point and the only other one I had, even though it is past the noon hour, why don't we go just go ahead and finish that up.
Spackman	That would be fine. If you have a few more questions for Mr. King or...
Meyer	Very few.

Spackman	OK.
Meyer	The last area that I wanted you to address, Mr. King is the potential for contamination of wells. Now I am not entirely sure the extent to which you can respond to that given the new information about the location of the wells. To what extent can you provide testimony that would be useful to the Hearing Officer as to your opinion as to the potential for contamination from surface flow into the wells?
King	Well, not knowing exactly where the well is located now but going on the assumption of that general location of Ms. Nelson's home, my understanding is there is a portion of the project that is topographically up hill from that location so there could possibly be water that would run from the project towards the location of Ms. Nelson's home. My understanding is that those areas are fairly limited and would include a couple residential home sites that are planned and none of the golf course areas, per my understanding, would drain towards that location. So regarding that, potential for contamination, I would expect that there would be very low minimal, perhaps nonexistent potential for contamination from any of the golf course activities migrating towards that well site or that home site and I can't speak to what could happen with the home sites that would be there.
Meyer	I want to make certain that the record is clear that even despite the uncertainty as to the precise location of Ms. Nelson's home and wells, were you able to offer that as a professional opinion? Your testimony, just the last few moments.
King	Yes, but in some generalities because I don't know precisely where the well is located. Again, toward the general location, it appears that the likelihood is very, very small. I wouldn't expect a contamination issue prefaced without knowing exactly where that well is at, I don't feel comfortable giving a completely confirmative answer.
Nelson	And I guess I would object to that testimony. It is just overly broad and it is not specific to my well and you said you don't know where my well is so we are sort of...it is sort of approximating information and speculating.
Meyer	Mr. King was your...
Spackman	Sustained. Go ahead.
Meyer	Do you have...has Ms. Nelson told you where her house is?
King	No she has not.
Nelson	Objection, I just did.
King	Well, ok, you pointed on the map approximately where your house was at and where your well was at. I guess she identified it on the map, yes.
Meyer	And based on that information, are you able to express an opinion as to which portions of the project are likely to have potential surface flow in that direction.
King	Yes, I can and that goes back to my understanding that there is a little bit of area that would encompass a couple of residential lots, and none of the golf course, that would drain towards that area of the house of which the well is very near by and we would expect the well to have the similar characteristics as based on a previous interpretation of a topographic map.
Meyer	Thank you. Are there other areas of this project that I haven't asked questions on that you think I have overlooked because I don't have any additional questions on direct.
King	No, I can't think of anything else.
Meyer	That concludes the direct examination of this witness your Honor.
Spackman	Let's break for lunch. It is approximately 12:25 pm so...1:30 would that be good? That will give me a little bit of time to drive to and from.

	Lunch Break
Spackman	We are recording after the lunch recess. Mr. Meyer, you may continue your questions.
Meyer	I had just a couple of wrap up items. First of all, would you just step through each of these larger exhibits and identify them for the record? We have smaller versions that are going to be the official exhibits but these larger ones are illustrative and I wanted to make certain that we had at least a few words about each of them.
King	Certainly. The first one would be BR 30. This is a map dated October 7, 2007. I believe this map was included with the First Submission of Supplemental Information for the Amended Application. This is just a larger version of the same map that is in the submission. The next one here, BR 56 is dated January 2, 2009. Again this was a map included with the Second Submission of Supplemental Information for the Amended Application. BR 44 is a map created by Taylor Engineering showing the location of golf course and lot, residential lots, and road and essentially the plan for the community here. I am not quite sure if this was ever submitted with one of the applications...
Meyer	The original.
King	I am pretty sure it was one of the exhibits.
Meyer	Would you just explain what the colors are? The dark green, light green and tan?
King	I will. It is my understanding is the light green are open areas, tan areas I understand are residential lots, and the green areas are golf course areas. I would say that is my understanding of it and if there was anything more detailed we would probably have to defer to Kyle.
Meyer	That is all that we needed and we can confirm that is correct.
King	OK. Oh, can I also add here on this Exhibit BR 44? The ponds are numbered here, 1, 2, 3, 4, there are little circles which corresponds to a list of those water features on the map itself and that corresponds with the tables that we have discussed earlier, showing the different ponds and the sizes and the volumes. BR 34 is aerial imagery 2006 and 2008 imagery and I believe the only difference between this and the one that is found in the exhibits, the ones in the exhibits identify the northwest, northwest quarter-quarter of Section 5 where we initially thought Jai Nelson's well was located. So on the exhibit in your file, you will see a little call out pointing to this quarter that is not included on this version. And very similarly, BR 37 is a USGS topographic map. It is going to correspond really close to the one in the file for BR 37. It shows the boundary for Black Rock Development and also has a call out pointing to that northwest, northwest quarter-quarter of Section 5 but it is not included on this version but you will see the call out in the version you have in your exhibits.
Meyer	Thank you Mr. King. We will have some testimony later on with regard to a couple of water features that are served by the city's of Coeur d'Alene and Post Falls. Did you have an opportunity to review water rights to determine whether those municipal water rights contain a component specifically for aesthetic water features?
King	Yes. What I did was I did a search of the Department's on-line database of water rights for use of aesthetic storage that was owned by a city and I came up with a few hits of those but I can't recall if Coeur d'Alene or Post Falls included either...either Post Falls or Coeur d'Alene were listed as owners of water rights specifically listing aesthetic storage.
Meyer	I am not certain if I heard you correctly, did you say you cannot recall or that you do recall that they are not listed?
King	I do recall that they weren't listed.

Meyer	That is all that I have your Honor.
Spackman	OK. I have one question related to the examination about the large mounted maps and the question I have is, what am I to consult and what is accurate and what is not. Are the documents contained in the binders the official documents or are those somehow being enhanced or changed by Mr. King's discussion in reference to the documents?
Meyer	They are identical except to the extent that Mr. King pointed out a difference on that. Very minor difference on one, an identification that is missing from the large one. The official documents are the ones in your binder and these we are providing only to the extent that other witnesses or you may find them useful to see them on a larger scale.
Spackman	I was just concerned that perhaps that you were taking to substitute these documents for what was in the binder.
Meyer	No I am not.
Spackman	Alright, thank you. Ms. Nelson, you may cross-examine Mr. King.
Nelson	Mr. King, could you explain to me the difference municipal storage and aesthetic storage?
King	Can I ask you to clarify, do you mean specifically in terms of this application?
Nelson	Yes.
King	OK. Aesthetic storage in the application is listed at 209 acre feet which included the storage in the ponds, both the volume in the vessel, the pond vessel, the evaporation and the seepage associated with those ponds. Municipal storage encompasses all of that aesthetic storage and also provided additional flexibility for pumping water out of ponds and refilling the ponds for the municipal uses authorized by the permit which are irrigation, primarily with fire fighting and construction.
Nelson	OK. So just to clarify, municipal is for irrigation but the actual use of the aesthetic?
King	I'm sorry?
Nelson	What is the actual use of the aesthetic?
Meyer	Your Honor, I don't believe she accurately characterized the witness's testimony.
Spackman	Well, I don't think I believe I understood the first question, but I think she has re-worded the question and asking or directly inquiring a misunderstanding. I don't hear...
Meyer	I think there may be some confusion between Ms. Nelson's reference to municipal and what the witness was speaking of which was municipal storage. Those are two different uses listed. The first one is limited to irrigation.
Spackman	OK, but her last question related solely, I think, his understanding of aesthetics.
Nelson	Yes, exactly. The term aesthetic.
Spackman	So I don't see any confusion. Overruled.
King	Could you repeat the question?
Nelson	In speaking just of the aesthetic, what is aesthetic?
King	It lists an aesthetic storage component but not an aesthetic component.
Nelson	What is the use of aesthetic storage?
King	The use of aesthetic storage is storing water in ponds or other water features within the project under the permit application, the amended permit application for aesthetic uses.
Nelson	So storing for aesthetic so what is aesthetic?
King	I would have to defer to what the Department defines as aesthetic.
Nelson	And you worked for the Department so do you know what they defined that...what the definition is?
King	The Department may have a specific definition but I don't have it in front of me. My

	understanding is that aesthetic storage is storage of water for aesthetic uses, the enjoyment of those that are utilizing the water features for beautification for example. For enjoying the visibility of having a water feature.
Nelson	In the application, you went over in your testimony, some confusion on some of the aspects and I think something that has confused me is the 1,215 acre feet is limited to irrigation under municipal. If you look at the order dates, they are seasonal, they are March to November and if you look at your proposed conditions, condition 11 is restricting those to those irrigation dates. But on the application, your proposed uses is from 01/01 to 12/31, year round. So could you please clarify the dates for me please?
King	Well what I would like to look at is the approved permits from prior.
Nelson	So the application is BR 19 and the conditions, I will give you a reference point...maybe Chris knows...
Spackman	What conditions are you referring to?
Nelson	The condition exhibit, proposed conditions I should say.
Meyer	OK. There were conditions included in BR 19 which is the original, or second application and I will try to get that for you in a moment.
Nelson	And then, this is my only question where I forgot to write the Black Rock numbers. OK, proposed conditions, BR 58.
King	And which...
Nelson	OK, let's go through the application BR 58 first. We will do it in order.
Spackman	OK, so you asked a question of him and I am assuming you are withdrawing that question now so that you can establish a foundation for him.
Nelson	OK.
Spackman	The other question is withdrawn. Now let's go forward with the question you are asking.
Nelson	So, on BR 19, on the application for the amendment, on page one, the dates the purpose is from 01/01 – 12/31, year round. I am trying to find the dates on here but I know it is on the... OK. In the conditions, and then in the conditions, BR 58 it was condition number 6 which is struck out, it is now condition number 4. Water may only be diverted and used for irrigation from March 15 through November 15. So I am confused as to, is it year round for the application or is it seasonal irrigation, March 15 through November 15 per the proposed conditions. Please clarify that for me.
King	Certainly. On the Application for Amendment of Permit, Exhibit 19, we list municipal 2.5 cfs and 1,215 acre feet with a season from 1/01 – 12/31. That is consistent with the amended permit, Exhibit BR 15 as approved by the Department in 2007. Municipal 01/01 – 12/31. Now that municipal use, as you say condition number 4 in BR 58 says water may only be diverted and used for irrigation from March 15 through November 15. We established a consistency use here where the municipal use, the diversion for municipal, as listed in the amended permit that was approved by the Department, is listed as fully, year round and it can only be used for irrigation during the irrigation season. That more limited season. What we have included on this application is the ability to store water for municipal purposes or for aesthetic purposes year round and also to be able to divert it for those purposes year round. But the irrigation under the municipal component would only be during the irrigation season. That more limited period of time of March 15 through November 15.
Nelson	OK, so let me just clarify. So, you are only irrigating out of the municipal, seasonal use, but you want your municipal year round. Correct?

King	The municipal storage and aesthetic storage is sought for year round. The diversions to storage would be sought year round. Use of water, under the municipal portion for irrigation would be during the irrigation season only.
Nelson	So that diversion to storage year round is what quantity?
King	Under Exhibit BR 19, diversion to storage is 2.46 cfs. Now what I would say, what I would expect, Black Rock was filling ponds outside of the irrigation season, this application seeks to divert up to 2.46 cfs. Once the ponds were full, I would not expect them to be diverting any longer after that if the ponds were full. There would be no other use for the water. So this application seeks to be able to fill ponds outside of the irrigation season if necessary up to a diversion rate of 2.46 cfs.
Nelson	OK. So just let me clarify. So once the ponds are full, there is no other use for the water so there is the one time filling of the ponds and then there is not other use so why do you need it year round, year after year after year?
King	To authorize storage in the ponds for a year round use. There could also be opportunities, I would see where, a pond might be emptied for a maintenance purpose. Black Rock might have to do some maintenance on a pond so they drain it, and use that water, for instance, during irrigation season for irrigation or for fire fighting or for construction and then have a need to refill that pond, for instance, during the non-irrigation season, any time of the year to have the ability to refill.
Nelson	What would you estimate that amount for maintenance, drainage, fire, well lets not put fire in, that is a rare event, and construction. What would you estimate that to be yearly?
King	I don't have the ability to estimate that.
Nelson	On, in BR 19, the application, on page 9, it is struck out as number 8 and is now number 7. The words "irrigation under the municipal" are struck out as proposed by the Applicant. Is it your understanding that they don't want any irrigation listed on the...if they were to seek approval and get approval, they wouldn't want the irrigation on that approval, they would simply want municipal. Is that your testimony?
Meyer	I apologize. Which paragraph are we looking at?
Nelson	On page 9 of 15, it is strike out number 8 and it is number 7 in the middle of the page.
Meyer	Thank you.
King	May I ask Chris where our revised conditions are at? There is probably a set of conditions that supersedes this set of conditions.
Nelson	I believe it is on page 3 of 58.
Meyer	It would be 58.
King	Because I would like to refer to the most recent conditions.
Nelson	OK, so you are no longer asking for this condition number 7?
King	Well, let's look at 58 and see if there is a similar condition.
Nelson	There is, it is now struck out as number 8 and it is number 6 on page 3 and again, the same words are struck out, "irrigation under the municipal use" so is the Applicant wanting the irrigation language, if they are to be approved on this permit, deleted?
King	What the application is seeking is the limitation of the 1,215 acre feet per year that is diverted is limited to only irrigation use. So that that 1,215 acre feet per year could be for irrigation as well as for water storage. We could also refer to condition number 3 on Exhibit 58 where it says direct flow use and diversions from storage under this right are limited to irrigation of 545 acres of turf and landscape and for fire protection to fight or repel an existing fire. In addition, water diverted under this right may be used for dust

	suppression or related construction purposes during the initial development and build out of the project.
Nelson	So those uses, what's the key use, what is the number one use?
King	They are both important. Of which use...
Nelson	What is the primary use?
King	Of which uses, excuse me?
Nelson	Of that shopping list you just went through.
King	Of turf irrigation, fire protection and construction?
Nelson	Yes, what is the primary use of the water?
King	They are all primary.
Nelson	OK. What is the main use, the largest volume component?
King	I would generally expect the turf irrigation to be the largest volume, generally, but maybe there was large fire and there might need to be more water used for fire then used for turf irrigation.
Nelson	But under the Idaho statutes isn't water used for fire an exemption from any permit?
King	A water right is not required to fight or repel an existing fire.
Nelson	OK. So the key component being irrigation, then why strike the language irrigation under the municipal use in number 6 on page 3?
King	That would be so that the diversion could be used for irrigation and fire protection and construction and storage of water for municipal storage and for aesthetic storage.
Nelson	And the municipal storage is for what?
King	The municipal storage is to be used for aesthetic storage because our aesthetic component is within the municipal storage and the municipal storage can also be used for irrigation or fire protection, for dust control construction.
Nelson	So we are right back to the same. We are right back to irrigation again other than visual component, the aesthetic storage. So again, it seems to me, the primary value of this water is irrigation. So why not leave the irrigation under the municipal?
Meyer	Your Honor, if I may? The irrigation is under the municipal. I don't... I am completely baffled by this line of questioning.
Nelson	It is but you are asking that that be struck...
Spackman	Just a minute...
Nelson	I'm sorry.
Spackman	Go ahead. If you are responding to Mr. Meyer.
Nelson	OK, I'm sorry.
Spackman	No I interrupted you and I shouldn't have.
Meyer	I'm sorry I missed your response.
Spackman	Well, no wait a minute, I thought you were responding to Mr. Meyer's statement.
Nelson	I was, I was.
Spackman	OK, so good ahead, I interrupted.
Nelson	So again, Mr. Meyer just said something to the effect that irrigation is under the municipal...
Spackman	OK, well I think you are questioning Mr. King and I thought you were responding to Mr. Meyer's objection. If you are responding directly to his objection, then it needs to come to me because there is a pending objection and I need to rule on it before you continue questioning Mr. King.

Nelson	That was my response to his objection.
Spackman	Which is?
Nelson	Is then why strike the irrigation under the municipal use?
Spackman	Are you asking me that question?
Nelson	Well, I am saying that is...I guess I would just say that we don't need to strike this irrigation under the municipal use, I don't see the need for it to change that language.
Spackman	OK, well now I am baffled. So I will sustain the objection. You need to ask the question so we understand the direction you are going and I don't.
Nelson	OK, I guess, my question is if appears to me the primary use is irrigation whether we are looking at direct irrigating or storing water for irrigating, the focus is the irrigation so why strike the irrigation under the municipal use language?
King	Because there are other municipal uses including the aesthetic storage and this application seeks not to limit the diversions only to irrigation but also to include the storage uses that are listed in the application.
Nelson	So, under the irrigation, or under the municipal I should say, you are requesting to move the ponds around the project without securing another permit or amendment. Is that correct?
King	Yes.
Nelson	Through the process, through governing regulations of physically infilling ponds and going over here and digging a new pond and doing all of that, are there other permits out there besides the Department of Water Resources that are required?
King	There may or not be, I am not aware of those.
Nelson	You talked about several existing ponds and fountains. One you mentioned was in Boise at the City Hall. Would you consider this stored water?
King	Yes.
Nelson	Could I, if I was to go to Boise, could I view that fountain or pond at City Hall or is it gated off, am I restricted from viewing that in any form or fashion?
King	The one at City Hall is open for your viewing and the one in my neighbor's back yard would be difficult for you to view.
Nelson	The Quinn's pond you mentioned and where is Quinn's pond again? Quinn's pond is in Boise.
King	Quinn's pond is in Boise.
Nelson	Again, as a member of the public, could I go view that pond?
King	Certainly, yes.
Nelson	Could I recreate on that pond in a boat? I don't know how big this pond is, is it possible I could recreate on it?
King	Yes, that pond in particular is intended for paddle boat recreation.
Nelson	And the Park Center Pond, again, could I go view that and enjoy that. Is there any recreational functions I could enjoy on that pond?
King	Yes, you certainly could.
Nelson	Are any of these ponds, the Boise City Hall, Quinn's Pond, Park Center Pond are their permits that you looked up, is their permit irrigation under municipal?
King	I would have to look closer at those individual water rights to answer that question. I am not positive.
Nelson	Do you know if any of those ponds are lined or concrete or some kind of impervious

	material?
King	My personal knowledge of the pond at City Hall is, it is in a lined type of a container, concrete tile something of those sorts. Quinn's Pond and Park Center appear to have a gravel bottom but they may very well be lined. I am not purvey to the exact construction of those facilities.
Nelson	In your experience have you been involved, when you were with the Department particularly, with any applications concerning ponds? Either storage or aesthetic?
King	While I was at the Department of Water Resources, I was familiar with applications for water storage whether it be aesthetic or otherwise.
Nelson	Does the Department require either an aesthetic or any type of storage be lined? Is that a requirement?
King	Not that I am aware of, no. I will follow up on that, there may be specific examples of that but again, not that I am aware of.
Nelson	Examples of?
King	Of the Department requiring a pond to be lined for some purpose.
Nelson	OK.
King	There may be some examples out there but I am not familiar with them
Nelson	OK. You talked about the 24 hour rule, which isn't really a rule, it is a policy which allows for that daily fluctuation and you talked about it may need to be diverted out, diverted out for what?
King	Probably for irrigation because my understanding of the 24 hour rule is that it is generally applied to a storage of water and subsequent diversion for irrigation use. However, the Department may have applied that 24 hour rule for other storages where the water was used for something other than irrigation. Since it is a guideline, as opposed to a rule, and let's go back to that, it is not necessarily recorded somewhere where we can go and look and see what those different applications of the guideline would be.
Nelson	OK. You mentioned in your earlier testimony you talked about Department oversight and the resources for that. Did you spend any time with issues of violations or concerns or did you have to address issues regarding a leaking pond or a pond failure?
King	I worked in the safety of dams program for awhile, and so safety of dams was part of my responsibility at the Department of Water Resources. During that time, I was not involved in any dams that had failed or were pending failure but that could have been one of my responsibilities. A leaking pond, or a pond that had failed, I cannot recall any experience at the Department that I was involved in specifically related to a leaking pond or a pond that had failed.
Nelson	OK. So if a dam was to fail or leak would you consider that a valuable use of your time to investigate that?
King	Yes it would be because the dams of Idaho, the dams under the jurisdiction under the Department of Water Resources are inspected and part of the program because of a public health and safety concern. If a dam failed, there could be life or property at risk.
Nelson	So you would consider that oversight a valuable use of time?
King	Yes, and I believe it is required by a statute as well.
Nelson	In your expertise in storing water for aesthetic or irrigation are there chemicals required to keep that water clean? For instance, an aesthetic use, if it was to grow algae or maybe look unsightly...
Meyer	Your Honor, objection. We haven't qualified this witness to show that he has expertise in

	this area. If he does, then I don't object to the question.
Spackman	OK. I will allow her to explore whether he has any expertise. I think that is where this question is going...
Nelson	OK. In your dealing with ponds have you ever run into an issue where there is where someone has given you information on the chemicals they are using in that particular facility?
King	I have had client advise me that they do need to apply chemicals to certain ponds to keep them maintained.
Nelson	And do you know what those chemicals are?
King	No, I do not.
Nelson	Did they tell you the quantity or any kind of correlation between volume and ...
Meyer	Your Honor, I renew the objection.
Spackman	Sustained. I think Mr. King has indicated that he doesn't have expertise in the area. He doesn't know what the chemicals are, he doesn't have any expertise in the area based on what he said.
Nelson	OK. I will just continue on. As far as the evaporation issues, are the 16 plus ponds at the Black Rock facility and Black Rock North, are these ponds fairly shallow? I know the depths are listed on the spreadsheet, but in your estimation, are they fairly shallow?
King	That is kind of a qualitative term, I am not quite sure what you mean by fairly shallow but I do know from reviewing the materials the ponds range from several inches, maybe 6 inches deep to many, many feet.
Nelson	OK. In your expertise, is the evaporation rate greater on a shallow surface or on a deeper surface.
King	In general, from the reviewing the ET Idaho information and the information that is all included in that, that evaporation from a shallow system can be greater than on a deeper system, yes.
Nelson	Did the information you looked into on that website by the U of I, did they have any components that referenced a lake?
King	On the ET Idaho website there are different categories for open water evaporation. There is a deep water, there is shallow streams and ponds and then there are shallow stock ponds. We used the intermediate category of the streams and ponds – shallow water.
Nelson	And how do they define shallow?
King	My review of that website doesn't give a very complete, clear indication of the difference between, well what I should say, is that they define deep lakes and reservoirs per a report that was included on that website as being greater than, I believe, the number is 4 meters and approximately 12 feet deep. And those would be defined as the deeper systems.
Nelson	And how many ponds do you have greater than 12 feet deep? Now maybe I should look at the updated...
King	Which one is our updated submittal?
Nelson	That would be BR 55. I believe. And that is page 10. And you have a calculated average depth.
King	So calculated average depth, based on page 10 of Exhibit BR 55 lists two ponds, irrigation lake and Kootenai lake, with depths exceeding 12 feet.
Nelson	So the, can we presume that all of the other ponds should be considered shallow?
King	If you are using 12 feet as the definition between shallow and deep, yes.
Nelson	When you were going over the application, earlier today, BR 19 and you testified

	something to the effect that you believe it was confusing how this was laid out and maybe you wished you had done it differently...the 209 acre feet does include the seepage and evaporation rates correct?
King	Yes it does.
Nelson	Then when we go to exhibit B, page 5, this chart, this spreadsheet does not include those rates.
King	You are correct, yes.
Nelson	So I calculated that if I used the 71 acre feet and the 13 acre feet, instead of the 40 million gallons, it is a little bit over 68 million gallons. Does that sound about right to you?
King	All of my calculations, largely for volume have been done in acre feet so we need to convert to acre feet.
Nelson	OK, so then we are back to the 209 correct?
King	I believe so.
Nelson	OK, you talked about, going back to the front page, page 1, the difference, the 161 acre feet difference for refilling and draining and you testified that Black Rock can make use of that. Could you tell me how?
King	Yes. As an example, I could expect that Black Rock, for instance, needing to pump more water out of a pond for irrigation during, let's say, an extremely high, hot period of the summer, then they can refill the pond from the lake. So they can use that water, pump out of that pond and drain it and then refill it back from their diversions from the lake over a period of time to refill the pond back up. There might also be time when maintenance would need to be done on the pumps from the point of diversion of the lake or the pipeline or some other infrastructure along where there would be an opportunity to utilize the storage in those ponds that have pumps from them for the irrigation use, and drain that and then refill it later.
Nelson	OK. So you talked about they might use it for irrigation and refilling, is it correct that only two of the ponds are being used for irrigation?
King	It is my understanding that two ponds have pumping stations to which they use for diverting back out of the ponds for the irrigation.
Nelson	And which ponds are those, if we go back to the spreadsheet again?
King	The spreadsheet on page 5, exhibit B? Irrigation Lake and Kootenai Lake, number 1 and number 3 are my understanding of which ones have pumps back out them for irrigation.
Nelson	OK, so it is your understanding those are the only two lakes used for irrigation?
King	That is my understanding.
Nelson	And then as far as maintenance, do you know, to date how frequently, or infrequently Black Rock does maintenance on any of the existing water features?
King	I have no knowledge of that.
Nelson	OK.
Meyer	Your Honor...
Spackman	Yes.
Meyer	It has just been pointed out to me that there is an inaccuracy in this witness' testimony where he identified which of the two ponds...would it be helpful to clarify the record now rather than wait until later?
Spackman	Well, I don't know how we want to operate. Certainly the witness is testifying from his best knowledge in Ms. Nelson's cross-examination.
Meyer	I am happy to wait, I was trying to help out.

Spackman	Ms. Nelson, it is up to you but...
King	I think I know what you mean, now that it has been mentioned.
Nelson	Would you like to clarify which of the two ponds...
King	I believe it is number 1 and number 2, Irrigation Lake and Lake number 2 but without cross-referencing my maps and places of use...
Meyer	Keep guessing
King	I might still be incorrect there and I would need to defer to the file.
Nelson	OK, so Lake 1 and Lake 2 are for irrigation?
King	Again, I believe so but without cross-referencing back to my files or querying Kyle, I could still be incorrect.
Meyer	Your Honor, I move to strike this testimony, it is obvious that the witness is guessing to answer the question, he doesn't have the knowledge.
Spackman	OK. Just a minute. I guess I will overrule the objection, Mr. Meyer. The witness answered the questions and there has been testimony under direct examination that there were some lakes that were used for irrigation and some that were not. But there is a presumption, I guess, by counsel, or by the Protestant that he should know, or have some knowledge of that and he has given it his best attempt. If it is incorrect, he can <u>[unintelligible]</u> guess...so overruled, go ahead Ms. Nelson.
Nelson	Mr. King, was it your earlier testimony that you participated in putting this application together?
King	Yes.
Nelson	OK, I would like to talk about the seepage rate now. As far as the seepage rate is, is the seepage rate greater in individual ponds than in Lake Coeur d' Alene?
King	I have no personal knowledge of the exact seepage rate in any of these individual ponds or in Lake Coeur d' Alene.
Nelson	Were you the one that compiled the seepage rate calculations?
King	I listed the seepage rate calculation on this application based on approximations that I received from the client on the what the seepage rate was.
Nelson	So all of the seepage rate information came directly from the client? From Black Rock, is that correct?
King	Yes.
Nelson	And that rate is the 71 acre feet?
King	The rate of seepage listed on this application is .25 inches per day.
Nelson	OK. 71 acre feet is that per year?
King	Yes.
Nelson	Would you expect the seepage rate to be greater in the summer or in the winter?
King	I couldn't answer that, I am not purvey to information about what seepage rate, how they may change in this area over a season.
Nelson	So, would I say, could I say that as far as your knowledge of seepage rates, and the information you compiled, it didn't directly come from any of your direct research or experience?
King	The exact seepage rates for these ponds are not based on my research. I can say that the value of a .25 inch per day, is in line and consistent with lined ponds based on my experience with ponds that have been lined with a soil type liner.
Nelson	And are all the ponds built to date and those purposed, are they lined and to be lined?

King	I can't answer that question, I don't know.
Nelson	OK, but you used a seepage rate based on a lined pond.
King	I used the seepage rate that was based on what the client had advised me was appropriate which is consistent with that of a lined pond.
Nelson	And that .25 inch per day do you know where the client got that information that they gave you?
King	No, I do not.
Nelson	OK. I would like to go to BR 51 and go back to evaporation rates just for a moment. And you did do the research and the calculations on that information yourself, did you not?
King	That is correct.
Nelson	Is the evaporation rate greater in the summer than in other times of the year?
King	Yes it is.
Nelson	Is the evaporation great...does it correspond with the more surface area you have the faster the rate of evaporation?
King	No. The evaporation rate as provided by the ET Idaho information is consistent for the type of application that you are looking at. And for instance, I will use lawn as an example instead of water. 10 square feet of lawn would be expected to evaporate at the same rate as an acre of lawn. Now the total volume evaporated would clearly be more over the larger area, but the rate of evaporation is the same whether it was one square foot or an acre. And similar, very similarly for the open water, the evaporation rate was consistently applied whether it be a small body of water or a large body of water, surface area wise.
Nelson	But then rate changed...so as per your research and the U of I information, but the rate does change per the depth, correct?
King	There is some correlation with depth. The U of I information does not give you the ability to, for each unit depth of water, determine an application rate, or an evaporation rate. As I mentioned before, there were different categories, there was the deep lakes and reservoirs and there were shallow streams and ponds. I chose shallow streams and ponds because it appeared to conservative in this application. Some of those ponds might be a little deeper but I still used the shallow category as an application rate, or an evaporation rate.
Nelson	OK. You talked about earlier the evaporation rate of working water, you talked about irrigating crops. That is moving water, that's water that is hopefully penetrating into the soil. Do you see that use more beneficial than the aesthetic, as you called it, for the enjoyment water?
King	No.
Nelson	How do you see them?
King	The State of Idaho lists a number of beneficial uses and my understanding is there is not a scale that one particular use is necessarily more beneficial than another use, and so I would place all beneficial uses that the State recognizes on the same level.
Nelson	But the whole concept that the beneficial use is based on, are you familiar with the foundation purpose of that for the State of Idaho? Where that stems from, the history?
King	No I don't.
Nelson	So because we are looking at storing water rather than utilizing it for a function at that particular time, is this why we are looking at the 13 acre feet for evaporation at all? As opposed to if it was being irrigated and put on the golf course and soaking into the ground. Is the evaporation rate the same if it is sitting stored versus soaking into the ground?
King	Well, based on the ET Idaho information, the evaporation rate from open shallow water is

	less than the evaporation from turf. If it was applied to bare ground, that is an evaporation rate that I didn't look at in this case, and I couldn't comment on it.
Nelson	So it evaporates faster sitting on top of turf or as it is penetrating? Could you just explain that little be please?
King	Yeah, sure. Turf, you irrigate turf and turf is growing, the grass leaves evapotranspire water. There is going to be some water that might leave the surface of the dirt underneath the turf but much of water, it is my understanding, I am not a crop scientist and I have to qualify myself as I am not an expert here, but my understanding is the evaporation, much of it comes, the evapotranspiration, from the plants, actually having water evapotranspire out of them. The water leaves, departs the leaves into the atmosphere. The rate of evaporation from turf is more than the rate of evaporation from open shallow water based on the information I looked up on ET Idaho.
Nelson	OK. So the evaporation water goes into the atmosphere. Where does the seepage water go?
King	The seepage water would go subsurface.
Nelson	So into the ground.
King	Yes.
Nelson	So is there the potential that it could get into a neighborhood well?
King	You know, I can't speak specifically for any individual well, or any individual seepage on this site, because I have not conducted a thorough enough analysis, I can say that the water from a pond that seeps is going to go into the ground.
Nelson	So you have looked into my well specifically, is there the potential that seepage into the ground could potentially seep into the ground where my well lies?
King	I would expect in your case for it to be highly unlikely, because the ponds are a far distance and lower elevation than your well. So I would expect that that water and ground water gradient would be flowing away from your well and not towards your well. So I would expect there to be a very, very low likelihood that water seeping in from a pond on this site would contribute to water in your well.
Nelson	And have you actually walked the site and walked from the Black Rock property or Black Rock North near my property and seen where my well lies, physically?
King	No, I have not.
Nelson	And isn't your earlier testimony that part of this application is Black Rock's desire to move these ponds and have flexibility to modify the location and the dimensions of individual ponds.
King	That is correct.
Nelson	And in fact didn't you read in from the record in the application, page 5, under exhibit B...
King	Which exhibit is this, excuse me?
Nelson	Exhibit BR 19, on page 5.
King	Just one moment please. OK
Nelson	And on the bottom of that page, there is a little paragraph, didn't you earlier read that paragraph into the record that basically says they want to have the ability to modify the location or dimensions of ponds and water features?
King	Yes I did.
Nelson	So isn't there the potential then, very near where my well is, that there could be one pond there multiple ponds there, relocated to that site?
King	My understanding based on looking at the topographic map, in relation to where to your

	property is at, is that all of the golf course is situated further away and there are residential lots that could be physically higher in elevation above where your lot is at. So, is it possible that one of those residents could create a pond on their property that could be upgrade of your well, I suppose that could be possible, yes.
Nelson	But with modifying the location and dimensions and asking for flexibility, isn't the potential there that there could be a pond or multiple ponds closer to anything we have seen in the documents so far closer to my well?
King	Yes, I suppose that is a possibility.
Nelson	And is there a possibility that there could potentially be a reservoir, a quite large reservoir close to my, or closer than what we have seen on any of the documents so far, closer to my property?
King	You know, I have not looked to see if a large reservoir could be created. I am not sure a large reservoir could be created. I would say if it was a large reservoir, it would probably fall under the Department of Water Resources safety of dams program and would have to be approved under a different application.
Nelson	OK, well let me restate that then. Is Irrigation lake number 1...is approximately 58 acre feet. Isn't the potential there to say that lake could be relocated much closer to my property?
King	I suppose there might be a potential but I can't speak specifically for that if it would be physically possible to put that facility closer to your property or not.
Nelson	But the potential is there yet, correct?
King	Perhaps, I cannot say that it is or that it isn't.
Nelson	Earlier in your testimony, you talked about the KEA stipulation that was done with the Applicant and KEA and is it no longer valid, correct? Or, the stipulation says the prior agreement is no longer valid.
King	You know, I would have to look at the exact stipulation language to speak to that concisely.
Nelson	But the order Mr. Spackman produced in June 2007, is that still in effect?
King	Yes. I believe so.
Nelson	So what happens outside of that order is immaterial, correct?
King	I am not quite sure what your question is.
Meyer	Your Honor, it seems to me the question calls for the witness to answer a question of law that really doesn't really have any bearing here.
Spackman	Sustained.
Nelson	OK. Earlier in your testimony, you talked about using conservative numbers to compile your evaporation numbers. But yet, you used the higher rate and I guess that seemed a little upside down to me, so could you please explain that?
King	Certainly. Here is what I was looking at. I wanted to ensure that the evaporation and use under these ponds would not exceed the quantity of water that would be required for the residual 123 acres that was listed in the amended permit. So by conservative, what I am looking at here is using the highest number for the evaporation from the ponds. The highest number for vessel volume. Maybe a high number for seepage, I am trying to see and ensure that the quantity of water that we are seeking does not enlarge the permit over what it was prior and by conservative that is what I am looking at, is I am looking to see what are the higher numbers to make sure we are not exceeding the prior approval of the 123 acre feet. It goes to the rule of enlargement and ensuring we are not proposing

	something that is enlarging the use of under the water right.
Nelson	In the application, BR 19, you are asking for a sum of water that basically states you have enough water to fill these ponds each and every year, forever and ever.
King	Yes.
Nelson	And ever. Why so much water?
King	To provide Black Rock with the ability to keep their ponds full within the authority of the permit.
Nelson	But once they are full once, and you've got the seepage and you have your evaporation and maybe you had some occasional maintenance...
Meyer	Your Honor, asked and answered. We have been through this.
Spackman	Do you have some further argument to Mr. Meyer's objection?
Nelson	No, can I ask a new question?
Spackman	Hold on I need to rule on the objection. I will sustain the objection, I think we have been over this and I think I understand that Mr. King has adequately explored why the quantities are there.
Nelson	OK. So is it your testimony that you expect Black Rock to completely deplete the ponds each and every year?
King	No that is not my testimony.
Nelson	How frequently do you expect them to deplete this volume?
King	I don't have personal knowledge of that. I couldn't answer that question.
Nelson	In BR 55, you spoke earlier about the changed location of water features and it was your attempt or the Applicant's attempt to tell the whole story and this is the most current plan. It looks to me like there has been a lot of research and diligence in being very forthright in showing where and how these many features fit into the design, so if this information is so precise and definitive, why would you still want to modify, and move and relocated water features?
King	Well there's a couple of reasons I could think of. One is Black Rock, as I understand, may still have some work to do on their project. I am not sure that it is all completely developed and finished yet so there may be needs as they work through their project to determine that it would be more useful and appropriate to have a water storage feature in one location as opposed to the one that they had initially decided on. And secondly, we have identified that there are a number of residences that have individual water features in their property and do not want to limit the ability of those individual residences to continue to do those as they build homes and so there might be areas right now where there might not be any storage but may in the future, have some storage based on a change in pond location, or because a resident built a home and decided to have a small water feature in their yard.
Nelson	OK, but if a resident decided to do a small feature, that would be a private homeowner. Correct?
King	Yes. And this application seeks to have a storage authority whether it was for a private homeowner or whether it was for the home owners association or the developer itself.
Nelson	But the home owner aspect of this application is rather minimal, correct?
King	I don't follow.
Nelson	It is a rather small amount. You testified earlier that when we went through the revised spreadsheet that had the bottom line was, that was a rather small amount in comparison to the rest.

King	In comparison to the rest.
Meyer	Your Honor, if I may interrupt with an objection. It seems to me that we are covering issues that have been covered before. The nature of the cross-examination is really more in the nature of argument that could be presented later. We have an awful lot to cover and we just have one day for this hearing.
Spackman	Ms. Nelson, your response?
Nelson	Well, I just made notes as his testimony went through so I am just going back to clarify information.
Spackman	Well, by its very nature, cross-examination is argumentative, Mr. Meyer. I don't think that I can completely deny Ms. Nelson the opportunity to cross-exam and to at least ask some preliminary questions related to clarification of testimony. I do want though, Ms. Nelson, in that examination for you to find questions that ultimately distinguish Mr. King's testimony from things that he has already testified. In other words, I don't want repetitive answers being given my Mr. King that don't really bring to light something that is either compromising his testimony or something that clarifies. So in other word, I just don't want to rehash his testimony. So overruled at this point.
Nelson	OK. If you find I am rehashing, feel free to flag me please. Is it your understanding that both golf courses are built and completed?
King	You know, it's not my understanding of that because I am not exactly sure where the project is in its completion of its development.
Nelson	Well, could we, for the sake of argument, let's say that both golf courses are...
Meyer	Your Honor, beyond the scope of direct. This witness did not testify as to the status of the golf courses.
Spackman	He did testify about their locations, however. It seems to me if he is testifying about the golf courses, she has some opportunity to inquire. So, overruled.
Nelson	So for argument's sake, both golf courses are complete and your testimony is that Black Rock may find a place for a water feature that is more useful in another location. Aside from the golf courses, since they are complete, could you give me an example of that statement?
King	You know, it would seem like I would have to defer to the developer as to where they would decide where a more appropriate place to put a water feature and decide to put one in a new location. I don't know if I can answer that question.
Nelson	OK. In the documentation submitted in the exhibits, in BR 55, in the footnote on page 7, which you testified, there are 208 on the ground identified features. Fairly definitively described but there is still...but the Applicant is still asking for 209. So is it your testimony that this Applicant is not even willing to give up one acre foot of unidentified use?
King	No, that wouldn't be the case. What I would say is the Applicant is seeking to have the ability to develop up to the full 209 acre feet. There may be additional features that could be developed, for instance, in those residential lots, that might total up to the 209 acre feet in the future.
Nelson	So it is your testimony this Applicant is not even willing to give up one acre foot?
Spackman	OK, I think he has said that that is not his testimony, Ms. Nelson. So I think he has answered that question.
Nelson	In BR 55, exhibit D, the place of use, you have given quarter-quarter descriptives of the place of use. Is this a requirement under the municipal?

King	My understanding is that, no, this is not a requirement for a municipal water right and that the place of use could be, instead, described by digital boundary or a large place of use boundary.
Nelson	And indeed, that is what you are asking for, is that correct?
King	That is correct.
Nelson	Then why in fact did you supply a quarter border description?
King	To make the record very clear as to what exactly what was being requested so that the Department, when they review this application would understand that these are quarter-quarters that are included within that boundary.
Nelson	OK. And in BR 55 on page 9, it states that there will be no diversions from aesthetic storage. Can you explain that statement?
King	Where do you see this?
Nelson	On page 9.
King	That is of exhibit 55.
Nelson	55.
Meyer	It is the last sentence under the first bullet.
King	Oh, ok thank you. The intent of that statement was to say that a pond or water feature there that was listed for aesthetic storage it was not intended to have a subsequent diversion out of that pond on a regular basis, on a regular type of case. There are these two ponds, or lakes that were identified as being storage features to provide irrigation water to be pumped out of there later. But it was not anticipated...this statement was there to indicate that there wasn't an expectation of diverting water back out of the other water features. There are two of them there that were used for the subsequent re-diversion use.
Nelson	So the exceptions are lake one and two, feature one and two.
King	Yes, and my guess is that is incorrect also.
Nelson	Are you aware of any pond leakage or failures at Black Rock or Black Rock North to date?
King	No, I am not.
Nelson	In Exhibit BR 15 of the amendment of the permit, you refer to that after the expiration of one year, the irrigation part would be stricken unless changes were made and that language. Do you believe that an application for an amendment gives you the right to store water?
King	The application in of itself?
Nelson	Yes, an application.
King	I believe that the application for amendment itself does not provide the legal authority to store water but that the application, whatever application must first be approved by the Department to provide that authority to store. I will say though, based on the prior reading, there was an indication that Black Rock needed to identify what water rights it was going to change or acquire or identify to authorize storage for the ponds which was the purpose for this amendment.
Spackman	And I will note for the record, that that's not the one interpretation of the decision.
Nelson	So an application doesn't give one water right? Correct?
King	That is correct. Not until it is approved by the Department.
Nelson	Then you talked about the water bank rental and why exactly was that filed?
King	The water bank rental application was filed to secure storage in the ponds and authority to store in the ponds until such time that Black Rock could change this right or identify or acquire other rights to authorize storage in the ponds.

Nelson	And was that water bank rental prior to the one year or after the one year?
King	Prior to the one year.
Nelson	When was that water bank rental agreement made?
Spackman	OK, I guess I want to stop the inquiring into this subject and the reason I want to do that is, Jai, is I let you delve into it a little bit. If you want to ask Mr. King any knowledge he might have about, you know, whether water was stored or not stored or in compliance with the conditions, that is fine. But I don't want to go through the water bank questions and whether it was rented or not, I don't think that is part of the record, or shouldn't be and it doesn't help in the <i>[unintelligible]</i> .
Nelson	OK, I would like to make a motion to object to Mr. King's interpretation of the order and to the water right on the record.
Spackman	Well, I have already taken exception.
Nelson	OK. Mr. King, do you consider yourself in domestic wells?
King	I have substantial knowledge and experience in reviewing driller's reports and constructing...being an engineer for well construction but I cannot say that I am expert in all aspects of domestic wells.
Nelson	So you are not an expert in domestic wells, correct?
Spackman	OK, I want to stop a minute. Because I don't know what that means when you say an expert in domestic wells. Do you mean in the construction of, do you mean in the interpretation of domestic well logs, or the production quantities, or...
Nelson	OK. Specific to his testimony of the potential for injury to my personal well. He testified to the likelihood of this project, if it approved, if this application is approved how it might or might not impact my well.
Spackman	OK.
Meyer	Your Honor, the testimony from this witness with regard to injury related simply to the difference in height between the lake level and where the well was. I think we have established that this witness has sufficient expertise to read the well log.
Spackman	Well, there was also testimony related to the topography of the location of her home as opposed to the topography within the Black Rock development and I think that sufficient at least to go to the question of whether that topography and the depth of the wells and those relative issues might have the possibility to injuring her domestic well. Overruled.
Nelson	Mr. King, I wrote down a quote that you said earlier, that there is a very low likelihood of impacting my well. Do you recall making that statement?
King	Yes.
Nelson	So is it your testimony today that in no way, shape or form is there potential for injury to my well?
King	My testimony is that diversions from Lake Coeur d'Alene under this permit or the amended permit application, in my professional experience would have very, very low insignificant likelihood of causing decreases in water levels or production capacity in your well.
Nelson	And as far as your testimony on seepage, that it goes into ground water and the potential for them to move water features closer to my property, is there the potential for injury to my well?
King	I suppose there may or may not be a possibility of that. I would have to look at that closer. I cannot answer that definitively.
Nelson	So you cannot say that there is no potential for injury.

Spackman	OK. I think we will stop there. I think he has answered that question sufficiently. Next line of questioning.
Nelson	Mr. King, you testified earlier about the local public interest and in BR 19 in the application that you testified you were part of putting together...
Spackman	I am sorry, we need to change a tape. OK, we are recording again, I am sorry for the interruption.
Nelson	OK, I know we were on BR 19. I apologize, oh here it is. BR 19, page 8, third paragraph from the bottom. It's talking about nonirrigation season water rates out of Lake Coeur d' Alene. It says these users would benefit from this change because their water requirements are greatest during the summer seasons but also benefit downstream users in Washington State where some water quality issues are tied to low summer levels. So in putting this application together, is it your contention that this application, if it is approved would benefit Washington State and as well, the Spokane River?
King	Yes there is a potential that there would be a benefit to those water bodies.
Nelson	So would you include those water bodies in the local public interest then? As per the application?
King	Yes.
Nelson	Is storing water a beneficial use?
Spackman	OK, I will say as a matter of law, that the Department recognizes storage of water as a benefit.
Nelson	OK
Spackman	Storage of water for some beneficial use.
Nelson	Do you know the quantity of water that Black Rock needs on a yearly basis to water both golf courses?
King	I do not know the exact quantity of water that Black Rock needs to irrigate both golf courses.
Nelson	Do you have an estimation or are you saying you don't know exactly...approximately?
King	Well, what I could estimate is we have a given number of acres, I think that is 540 acres and ET Idaho would give us a value of water requirements for turf irrigation to keep a full productive crop of turf so we could look at the volume of water required for a given crop and the number of acres for that and we could calculate how much could be required if that water...if that turf was given its full supply of water that it could use.
Nelson	But how much out of that 545 acres is actually irrigated?
Meyer	Your Honor, I believe this is beyond the scope of the direct examination and it is also beyond the scope of the issues that this Protestant has identified in the pre-hearing conference and all of the discovery. I am not really sure where she is going with it? We are going to get as much water as we are going to get but nobody has identified an issue that we haven't asked for enough water.
Spackman	I guess my question, Ms. Nelson, is one of where are you headed with this line of questioning?
Nelson	Well, because they are irrigating out of two of the ponds, there is the marriage between aesthetic storage and municipal storage and irrigation so....I think the irrigation element is tied into this application. And in fact, they want the irrigation stricken from the language.
Spackman	The issue of whether the irrigation is described specifically or whether it is assumed into the larger municipal definition, isn't a matter having been stricken, it really is a matter of redefining that irrigation use to be within the larger umbrella of municipal. So I don't see

	that as a particular issue, unless the argument is that the Department is somehow prevented or should restrict the use, but the Department has already recognized in the previous approval, that we would approve this water right for municipal use, describing that municipal use as irrigation. And in the previous amendment, I would have to go back and look at it, but in the previous amendment there was a recognition that there was sufficient water to irrigate the 545 acres. So the issue before us now is, that some of that water to irrigate those 545 acres, is that the right number? Is being retained in these ponds for a period of time that that is being diverted out. So I don't see it as a germane issue before the Department at this point. So I will sustain the objection.
Nelson	OK. Mr. King, you showed us the larger exhibits, the maps, BR 30, 56, BR 34. I see some discrepancies between those. Could we just briefly pull those back up and you could explain a couple of things please?
King	Which one would you like to look at?
Nelson	This one.
Meyer	And this one is, for the record.
Nelson	BR 44. In BR 44 I see some parcels up here, to the very north and I don't see those in any of the current exhibits that show municipal or aesthetic storage. Could you explain what happened to that property?
King	No, I couldn't.
Nelson	And on this exhibit, do you know is that a section?
King	I did not construct that map, I can't say whether that is a section line or not a section line.
Nelson	OK, does it appear that on these other maps it goes to the full...
Spackman	What are you referring to for the sake of the record, Ms. Nelson?
Nelson	That they are talking about the project and now it appears the project has been altered as far as it perimeters.
Spackman	OK, but you are referring to a particular line on a map and the record cannot recreate what you are referring to unless you describe what the line is, where it is located and identify it somehow. Otherwise it is just identified as this line.
Nelson	Section 33, are these a section...yeah. So it is section 33 to the north, I see this area that is shaded and says individual lot irrigation. That is now no longer on the other exhibits. ...have an explanation is that correct?
King	I cannot speak to this area off this map, BR 44 in the far northern beige quarter-quarter approximate.
Nelson	Thank you. And, hang on. And you mentioned the legend on this BR 44 and I would just like to say this is not an inclusive list, is that correct?
King	On BR 44 there are lists in the upper right hand corner, number 1-15, circled numbers that correspond to pond locations on the map. That does not include every single water feature that has been listed and identified on the second corrected submission of additional information on the amended application.
Nelson	Has Black Rock completed a study that would show that water from municipal or aesthetic storage, just a minute here, let me make sure I word this right. I am going to retract that question and ask you another question. Have you had a conversation between yourself and Black Rock, or their representatives, where a concern was raised that if this amendment is not approved, Black Rock would not be able to prove a beneficial use of the existing permit?
King	No.

Nelson	That's all my questions. Thank you.
Spackman	OK, Mr. Meyer? Redirect?
Meyer	Thank you your Honor, there was some question during the cross-examination about the 209 acre foot number for aesthetic storage and the 369 acre feet for municipal storage. Is it fair to say, although you have suggested that the Department might eliminate that separate 209 number, it is nevertheless helpful to have that displayed on the application in order to document that the size of the vessel, the evaporation and the seepage will fall within and be below the 369 number?
King	Yes that is true. We wanted to paint the full picture for the Department so that we could be forthright in explaining what we were seeking to do.
Meyer	On Black Rock 19, page 8, Black Rock 19 is the Application for Amendment of Permit that is pending, page 8, there is a condition 13 that describes what is included within the aesthetic use. Protestant Nelson asked a question about what was included within aesthetic and you said you weren't really sure, but I wanted to call that to your attention and make certain there is a record as to that.
King	OK. Condition number 13 states the aesthetic storage use under this right also includes use for fish and wildlife and recreational purposes. The intent of the application was to include aesthetic uses, as well as fish, wildlife and recreation from the water features on the project.
Meyer	There has been quite a bit of discussion during the cross-examination about what the Protestant seems to be suggesting is a discrepancy between the season of use. If you look on the first page of Exhibit 19, which is the Application for Amendment of Permit, the first item, which is municipal use, lists a year round season of use. Is that correct?
King	That is correct.
Meyer	And what is your understanding of what uses are included within municipal when you take into account the conditions on this permit?
King	My understanding is that the municipal uses that were included on the permit included, irrigation, fire protection and water, for instance, for construction such as dust control and those were the three uses that were included within that municipal use.
Meyer	And we also have separate condition that was identified earlier, that limits the irrigation use to the irrigation season. Is it your understanding that that limits and overrides this year round identification of nature of use as to the irrigation component.
King	Oh, it certainly does, yes.
Meyer	So there is no inconsistency there?
King	No. No the irrigation use is limited to the irrigation season and that seems clear by the conditions.
Meyer	But there are two other uses that are permissible under the municipal that would be allowed year round. Is that correct?
King	That is correct.
Meyer	Let's turn to Black Rock 58. That is the submission of proposed conditions. Condition number 6, let's see...if I can recollect what I wanted to address here. This is the new six, not the six with the strike out on it on page 3. There was concern expressed by the Protestant that we were striking the irrigation, the words irrigation under the municipal use are indeed stricken out. Is it your understanding that that change in this condition in any way eliminates the limitations elsewhere presented in the application for what can be irrigated and when it can irrigated?

King	No, my understanding is that it does not change the other limitations, the conditions proposed continue to limit irrigation to 545 acres within the irrigation season of March 15 through November 15.
Meyer	So if it wasn't eliminated... if it wasn't intended to eliminate those restrictions, what is the thrust and the purpose of this new section, or condition 6?
King	To make it clear that within that total volume of water diverted from Lake Coeur d' Alene, shall not exceed 1,215 acre feet per year or 2.5 cfs and that those are the overriding limits of this application or this permit.
Meyer	The Protestant seems to have a concern that there is something in this condition that is providing the Applicant some wiggle room to escape conditions. Can you understand what she is talking about? Is there some concern here that this revised language would allow some greater flexibility to the Applicant?
Nelson	Objection. They are trying to speculate on what I am thinking.
Spackman	Overruled.
King	I don't see how this language here provides any more wiggle room above what we are already clearly applying for in this application.
Meyer	There was some question about which are the two ponds used for irrigation. Let's go back to the original application which is BR 19. I know there has been some updates to this but the ponds have not... the irrigation ponds have not changed. If you will look at the list on page 5 which is exhibit B to that, there are two names of ponds that have the word irrigation in them, number 1 and number 9. Does that refresh your recollection about which are the two ponds that are used for irrigation?
King	Yes it does, it does refresh my mind and my understanding, and thinking back on it now that it was the number 1 and the number 9 that are identified with the word irrigation and the names are the two that will be used for subsequent re-diversions for irrigation uses or other fire fighting or construction uses.
Meyer	For purposes of putting together the application and calculating all of the quantities, does it make any difference which of these two ponds are used for irrigation?
King	For calculating the quantities for preparing the application, particularly for quantities, no. Maybe for preparing the application, there could be, because we may have wanted to identify a pond in a different quarter-quarter if that other pond in another quarter-quarter was indeed the one going to be used for the subsequent diversions for irrigation.
Meyer	For purposes of injury or enlargement does it make any difference?
King	No, it doesn't.
Meyer	That is all I had your Honor.
Spackman	OK. Re-cross exam.
Nelson	I don't have anything, thank you.
Spackman	Mr. King, I have a couple of questions I hope they can be short.
King	OK.
Spackman	You referred to what I think what's been marked and received into evidence as exhibit 19 which I think is the Application for Amendment that was filed in the spring of 2008.
King	That's correct.
Spackman	You are looking at it. And I want to refer specifically to the grid for the place of use this would be item number 3 on the first page.
King	Yes.
Spackman	And before looking within the grid itself, within the spreadsheet, below it is a key. So

	right below there is a typed in portion that says "Key: J is equal to aesthetic storage." Are you reading with me?
King	Yes, I am .
Spackman	"N is equal to municipal storage and M is equal to municipal from storage." And, you prepared this application with those particular key reference letters is that correct?
King	That is correct.
Spackman	And so then I want to go into the interior of the grid and look at the various notations there. For instance, in the first line, and we come across under where it is labeled northwest of northwest and I have an M or there is an M letter there and then the lot 4. Don't... I am not worried about the lot 4 but what is the solid and solitary M supposed to signify?
King	Solitary M is municipal from storage. Those locations where water was going to be used from storage, irrigation, fire protection and potentially construction.
Spackman	But there would be no municipal storage at that location?
King	In this table, in the revised table that we submitted later, you will see that there would be a storage component in that but in this one there was not.
Spackman	OK. The reason I am asking these questions, and I am not after you to try to illustrate problems or mistakes but this application is still part of the record and its interpretation, I think, is important so I want to understand because, frankly, in some of the motions that were filed and some of what was presented to me, I went to this along with maps that were submitted that showed various markings, whether they were cross-hatchings or circles that were marked and I was trying to identify this with that to try to figure out what those uses were within the various areas. So I guess I want to understand what the thinking was behind these markings. For instance, in the next grid, I have a J and an M and that tells me that there is aesthetic storage and municipal from storage. But no municipal storage.
King	Correct.
Spackman	So what was the intention of that combination?
King	Then intention of that combination was to identify that in that quarter-quarter there would be a pond there for storage of aesthetic purposes. But that that pond was not one of those that would subsequently have a pumping system to take water back out of that pond for the other municipal storage, municipal from storage uses such as irrigation. You could say a dead end pond. Water went to that pond but was not subsequently diverted back out of that pond.
Spackman	So the municipal from storage is a non-defined...it is identifying a municipal use from storage but that municipal use has not been taken from storage?
King	It is being taken from storage but in a pond in a location that is not in the same location as that quarter-quarter that you are looking at there. There were a few quarter-quarters here that had the N, municipal storage, those are the two ponds that we have talked about where water goes to the pond and then there is a pumping station for subsequent redirection from that. That pumping station serves, for example, that southwest of the northwest in Section 4 where we have municipal from storage.
Spackman	OK, well, I am not sure I want to pursue it any farther. Well, one more question, I guess and that is that this key system was at least intended to identify those storage facilities from which water was being redirected or pumped out of that pond for irrigation use as opposed to being placed in the pond solely for aesthetic use.
King	That is correct.

Spackman	OK. And that is the way I would have interpreted this or the [unintelligible] as well as the maps that had the different identifications. And so then, if I were looking at this application and were to go back up to the quantities that were listed under various uses, in reading that, I would identify then 209 acre feet for aesthetic storage and then back down to the key and look at the J and say that is where the 209 should be located? Correct?
King	Correct.
Spackman	But, there are those that do not have a J mark in them? Correct?
King	That is correct.
Spackman	And so those would not be part of the 209, correct?
King	That is correct.
Spackman	But your testimony is that the 209 includes all of the storage within the Black Rock development.
King	And there is a reason for that. After submitting this amendment, there were changes to the plans and Black Rock identified that they would instead have a pond here as opposed to a pond here and there was also identification of all of those little miscellaneous ponds that were included in the residential lots. Many of those locations would be identified on this chart only by an M and not by a J because we weren't aware that that water was being stored in those individual residential water features and we weren't aware that they were going to change the plan and instead put a pond at this location as opposed to this location.
Spackman	But I guess what I am trying to point out is the significant confusion for the Hearing Officer looking at this application, the linkage between aesthetic storage and the key numbers that are here matched up with the maps that were prepared and now the testimony that is coming in relating to those 209 acre feet. Because there appear to be significant differences in what was proposed here, as opposed to what is proposed at present.
King	Particularly regarding the place of use. The quantities don't change but the places of use now list other quarter-quarters that were not listed before, specifically in this table.
Spackman	OK. Alright and I will have to try to reconcile those looking at this versus what we had. OK, the other place I want to defer to is, and by the way, Mr. Meyer, part of the reason I went through this examination, I don't want to dwell on it but in prior motions that you filed, I went directly to these numbers, the uses that were here and the maps that were provided and I looked at them just the way were described. And there were separate aesthetic ponds that were identified and there were separate municipal use or those that I assumed were ponds from which water would be rediverted for irrigation purposes. And that is the way it was described specifically. OK, I want to go to Exhibit 58? Mr. King, I understood that your testimony about this exhibit characterized the conditions as those conditions that were agreed to in a stipulation with Kootenai Environmental Alliance and Black Rock Utilities. Is that correct?
King	That is correct.
Spackman	OK. And so I want to look at the condition that is number 3, on page 2. And I want to read that carefully with you and then tell me, if you can, how the Hearing Officer should interpret this language. So I'll start and this is underscored portion: "Direct flow use and diversions from storage under this right...", so what would you identify as a direct flow use?
King	Municipal, which includes irrigation, fire protection and construction and diversion to storage.

Spackman	OK. And diversions from storage which you would include as what?
King	Diversion to any of the ponds or water features that are listed as part of this project.
Spackman	OK. So it does not include a storage for some use?
King	The diversion to storage.
Spackman	OK. Let me tell you the reason I am asking this question because I will go through the rest of it. "...under this right, are limited to irrigation of 540 acres of turf and landscaping and for fire protection to fight or repel an existing fire. In addition, water diverted under this right may be used for dust suppression and related construction purposes during the initial development build out of the project." And the reason for my question is, does this condition, as it is presently worded, allow for the aesthetic uses that are sought by this application? I am asking Mr. King.
King	No, there should be, it should be clarified to identify diversion to storage as well.
Spackman	OK. And well that is why I am looking at the first two lines. So I ask Mr. King this because there was a reference but Mr. Meyer, I am concerned about the way this worded and whether this language puts us right back where we started in the initial approval and I don't want to be stuck with that...
Meyer	No, we don't want that your Honor. <i>Laughter</i>
Spackman	I don't want to be stuck with that in writing the decision so I am looking at this language and say, when it says direct flow use, and diversions from storage...
Meyer	Your Honor, may I explain what I thought the intent was... this would perhaps be in the nature of argument but if we could jump to that now, I think it might be useful.
Spackman	Well, then maybe what we ought to do is skip through that, maybe there ought to be a discussion with Mr. Rosenberg at this point and time. Maybe there ought to be an opportunity for some clarification so that...I mean we can hear an argument about it...
Meyer	There is a very simple explanation your Honor, if I could provide it now it might allow us to...
Spackman	OK, that is fine.
Meyer	The purpose of this language was not to describe all of the uses that could be made of this water right, it was to place a limitation on only the direct flow and diversions from storage use. It wasn't intended to describe the entire water right and so, as I view it was limiting the first described, when there were five natures of use, this is a limitation on the first one only. It does not eliminate the other that are still available on the water right.
Spackman	OK. And in my questions of Mr. King, it took that much, at least for me to understand what was meant by the direct flow use and if that is Mr. Rosenberg's understanding, again you guys can have a discussion, but I don't want to write the decision and then have Mr. Rosenberg say, wait a minute, that wasn't my understanding of what was happening. So...
Meyer	I agree and I appreciate your raising that. I think we could certainly modify the language here to make it crystal clear so that we are all on the same page. And I appreciate the fact that Barry Rosenberg is in the room and might want to participate in that.
Spackman	Nor do I want a third party come in later in time and look at that language and say wait a minute, this is the way I want it interpreted. So I want that to be clear through the process and it is something that just jumped out at me as we were reading. So ok, that is all the questions I have of Mr. King. Mr. Meyer, further questions for him?
Meyer	Just one, the...going back to the original application, I think is that 19?
King	Yeah.
Meyer	On page 5 we previously read the note at the bottom, the last sentence of which saying the

	description of these water features is not intended to limit Black Rock's ability to modify their locations. And you were aware that that statement was in there?
King	Yes.
Meyer	How do you reconcile that statement with the fact that we have identified Js and Ms and Ns only in particular quarter-quarters. How do you reconcile those two?
King	This statement here was intended, on page 5, to identify that Black Rock could modify the locations and sizes of ponds individually and this table here, was an identification of what we were aware of at the time or expected to be constructed. And I suppose there are maybe perhaps a little bit of discrepancy between those two because of that where we didn't mean to necessarily limit to certain areas but that is what we included in the table.
Meyer	So that was a description of everything that we knew that was on the ground as of the date that this was submitted?
King	Everything that we knew that was on the ground or that Kyle had informed me wasn't constructed and may be constructed and I didn't exactly know the status whether they were constructed or not, but it was as identified to what we were aware of that would be developed in the future or was developed already.
Meyer	So in retrospect, would it have made more sense to put a J in every single quarter-quarter? And that is in fact what we have done through the information, the supplemental information submission, is that correct?
King	Yes.
Meyer	Now, you have well...I am not going to take this any further. I guess it would be helpful to have some direction from the Hearing Officer as to whether you think that this creates a problem. It seems to me that we put the world on notice adequately through this application and that we have been very forthright in saying this has led to some confusion and we apologize for that, but I would hope that providing this very detailed information isn't construed by the Hearing Officer to say, well, now I am going to ignore the other statement in here.
Spackman	No, I understand what is being proposed and I understand now, I think, the evolution of where we came from to where we are at. It's just that it was not explained to me, I guess, the starting point and what this grid really meant, Chris. We skipped over this grid.
Meyer	Yes.
Spackman	And we skipped over the keys and I...and this is the document that I had used to respond to some motions looking at the original application that I had.
Meyer	And the Hearing Officer does understand that we have modified these in the information submissions?
Spackman	Sure, yes. I didn't go through that intending it as either a public flogging or an attempt to say because this was the way it was originally filed, I am holding you to it and you will have to go through some other onerous process. I was just asking so that I understand where we started and why it was that way. Because I had 209 acre feet here, and 369 and I had 209 identified with these keys and so it was locked in to these specific uses and I didn't understand the evolution of how we moved from here to the 209 as Scott described it.
Meyer	And I trust it is clear now. When we started this process and filed this application, we frankly did not appreciate that there was going to be any movement.
Spackman	And I understand that so it was for my benefit.
Meyer	Thank you.

Spackman	OK? Ms. Nelson, do you have further questions for Mr. King?
Nelson	Well, I think I just need to clarify what you were just saying.
Spackman	Well...
Nelson	So that I understand...
Spackman	Well I am not sure you will get that in examining Mr. King so, should I subject myself to... <i>laughter</i>
Nelson	So, in just what you were saying in getting from here, the original to BR 55 and to now what you are saying, my understanding is you would put a J in every single one of these boxes. Is that correct, is that what or you or Mr. Meyer just said?
King	Let me look at BR 55 to make sure...
Nelson	Page 8. And I guess the evolution like Mr. Spackman was saying.
King	Yes, you are exactly correct and, in fact, on page 8 we did put a J in every one of those boxes.
Nelson	OK. But in the original, BR 19, the Js equated to 209, correct?
King	Correct?
Nelson	And in this, page 8 of BR 55, the Js still equate to 209?
King	They do yes.
Spackman	OK, are we finished with Mr. King?
Meyer	Just one follow up your Honor.
Spackman	OK.
Meyer	I just want to remind the witness of your prior testimony that you also suggested that the Department might want to eliminate the J all together. Is that correct?
King	That remains my testimony, yes.
Meyer	In which case, how would this grid look?
King	I am going to go to BR 58, second corrected submittal, no...
?	55
King	55, excuse me.
Meyer	You did answer this before and maybe we don't need to take time to go over it, but I just wanted to make certain that...
King	Page 8, the table. On every single one of those entries, we would have an N for municipal storage and an M for municipal from storage if the Department were to remove the aesthetic storage component and just call it all municipal storage.
Meyer	That is all I have your Honor.
Spackman	Let me just say at this point and time as Mr. King is stepping down, the Department has recognized flexibility, particularly in the development of a permit that a person developing a water use may have some need to move water at least to some degree and so, and that has been true whether it has been municipal use or whether it has been irrigation or any other use. And if that movement has been outside the identified area, then we have often just allowed that movement without revocation to recognize that if we feel that it does not result in injury. So, I guess, for both sides, I am not adverse to recognizing areas within which people can develop. Now, there may be question about whether or not it is being described as an entire service area. That is something that we can argue...but at least, with respect to attitude and approach, you know, these kinds of changes, I guess, can be expected as people go through a process of developing and perfecting their water rights. OK. Maybe that is helpful, maybe not.

	Alright. Thank you Mr. King. We ought to talk, its, and probably break but we are going on 4:00 folks so we need to talk about how we think we can finish today, or when. And so I guess I want to talk about how many more witnesses, Mr. Meyer, how much longer you will think you will go and then I need to give Ms. Nelson a reasonable period of time to present her evidence. And I need to know what people's time schedules are and what their commitments are tonight. I am willing to stay until we finish, but I don't know what you have Ms. Nelson, I don't know what the other parties have, so I think we need to talk about that maybe before we break. In fact, let's go off the record at this point.
	<i>Off the record to discuss scheduling..</i>
Spackman	OK, we are recording again. We talked about scheduling, Ms. Nelson feels that she needs to leave at 5:00 today and Mr. Meyer you have a statement?
Meyer	My statement is that the Applicant has made clear that it is available both this evening and tomorrow and Black Rock is very disappointed that the Protestant is not able to accommodate either one of those. I can understand that she may have preference for one over the other, but it would seem to me that one or the other ought to be available. She has expressed a concern that she would be paid to be at work tomorrow, it seems to me that that pales in comparison to the enormous expense that Black Rock is going to be subjected to bring this team of people back here on another occasion. Flying in from Boise, as you know, turns into a three day event every time we come here and to not be able to continue this tomorrow morning, I think, is an outrage.
Spackman	OK. Thank you Mr. Meyer. OK, well my concern is and Ms. Nelson, I am disappointed that we don't have the opportunity to press, at least a little later today. I recognize you have commitments tomorrow, but I am, I guess I am disappointed, I don't know that I can change that necessarily. I guess the reasonable expectation is, Mr. Meyer, that a work day would end and the hearing would end at approximately 5:00 pm. I have had a lot of attorneys who have expected the same thing of me in hearings if they have other commitments so I don't know that I can impose that on Ms. Nelson and to the extent that the hearing is going longer than the day allotted, I share some of that blame, I think the parties as well, should share some it looking at the extent of the testimony that was anticipated. I frankly didn't look through the list of, the total list of witnesses, I normally don't do that to try to estimate how long it will take and on this particular one, I looked at the parties, the nature of the filing itself and even the complexity of it compared to the last hearing and I assumed that one day would be sufficient and we identified one day with all of the parties. And we are not finishing in that time.
Meyer	Just to clarify the record, Black Rock identified two days for this hearing, it was originally set for two days. It was reset for one day and we have endeavored, and we could have completed today, I am confident, if we had not had so many interruptions. But I don't think it makes sense to argue about, I have made my record and I think we ought to move on.
Spackman	OK, alright. Next witness, Mr. Meyer.
Nelson	Do I need to make a statement on the record because mine was all off the record as to my rationale or?
Spackman	No, I don't think that is necessary and I don't think Mr. Meyer's statement was necessary for the record either. Its not determinative as to what we are doing with this particular application.

Nelson	OK.
Spackman	Mr. Meyer, next witness.
Meyer	Black Rock calls Chas Ariss.
Spackman	Mr. Ariss, if you will come forward. Raise your right hand, do you swear to tell the truth, the whole truth and nothing but the truth?
Ariss	I do.
Spackman	Thank you, please be seated.
Meyer	Mr. Ariss, would you state your name and address for the record?
Ariss	Certainly. My name is Charles William Ariss, I go by the name of Chas. My address is 1503 Shenandoah Drive, Boise, Idaho 83712, that's my residence.
Meyer	Depending on how things unfold, we may have an opportunity to step through your resume in more detail if we end up coming back here on another occasion, but given the sense of the urgency that I feel now, I am going to... we have already admitted your resume into the record, again I would like to flesh that out later, but for purposes of the moment, I would simply move for the qualification, or that this expert or that this witness be recognized as qualified to testify as to matters of water quality, storm water management, waste water management and environmental regulation.
Spackman	Any objection?
Nelson	No.
Spackman	So recognized.
Meyer	Let's... I am going a little bit out of my earlier planned order and jump to land application first and I am hoping we can make short work of it. Let's look at Exhibit BR 18. Have you been involved, Mr. Ariss in assisting Black Rock in connection with their waste water and land application activities of Black Rock?
Ariss	Yes, I have.
Meyer	Are there on-going environmental enforcement matters involving that?
Ariss	There are no environmental enforcement matters associated with their waste water reuse program.
Meyer	The waste water reuse program utilizes water from what source?
Ariss	All of the water that is processed at the Black Rock Utilities waste water treatment plant is derived from two domestic water supply wells that Black Rock maintains on the south end of their property. I believe it's on the club property and that is then piped to residences, the club house, and other use facilities where waste water is then generated and piped to the waste water treatment plant for treatment.
Meyer	I just want to make certain the testimony is clear. Is any water from Lake Coeur d' Alene used or land applied under this waste water management system that you are familiar with?
Ariss	No, the water that is derived is from a ground water source of course in the approximately to Lake Coeur d' Alene but the water is from ground water, not from surface water and it is then brought to within Black Rock properties for domestic use and that is the source of where the waste water that is generated.
Meyer	Your Honor, based on this testimony, I would move that the scope of this hearing be restricted to eliminate evidence with respect to waste water management on Black Rock. Recognizing that there may be waste water issues that could possibly even affect the Protestant hypothetically, but that they do not relate to the water right which is the subject of this hearing.

Spackman	OK. Ms. Nelson?
Nelson	So that is just waste water no storm water?
Meyer	So far, we are dealing just with waste water. That would include the septic systems on the individual lots and the more comprehensive treatment and land application that Black Rock undertakes.
Nelson	Then I guess my question would be if there is any commingling at all?
Spackman	OK. You have the opportunity, I guess, in response to this particular motion before the Hearing Officer, Ms. Nelson, I will allow you to examine...and how is Ariss.
Ariss	Ariss.
Spackman	Ariss and how do you spell it?
Ariss	A-r-i-s-s.
Meyer	Your Honor, I would allow Ms. Nelson to ask some foundational questions, I thought we...I mean I asked it twice and we got two answers that there was no commingling. I don't know what further we need to do to resolve this.
Spackman	Nonetheless, I think she has the right to ask questions in response to...you are asking me to rule on a particular issue at this point, and I can't cut her out of that opportunity, Mr. Meyer. Ms. Nelson
Nelson	OK, so I do hear the word commingling in Mr. Meyer's questions but...so in the waste water component, is there any commingling of that currently or planned with the aesthetic or the municipal stored water?
Ariss	No.
Spackman	Other questions?
Nelson	No.
Spackman	OK. I will rule on that particular motion and the ruling is with respect to the waste water system, and I guess that would be waste water coming from the homes and the uses inside those homes, that is a separate system, water is provided separately and it is not at issue in this particular hearing. And we won't explore that in any further testimony.
Meyer	Your Honor, just for purposes of clarification it would also include waste water from the club house and restaurants and that sort of thing.
Spackman	Yes.
Nelson	Can I ask one more question? Or am I done?
Spackman	Well, I ruled on that particular issue, let's move on.
Meyer	Let's turn now to storm water. Would you provide, let me just let everyone know where I am going, I would like to have a little bit of foundational testimony about the nature of the storm water management system and then I will invite the Hearing Officer to rule on whether we need to have a full blown evaluation of that or not. So, if you could just provide just a thumbnail sketch of what the regulatory environment is, affecting storm water, and where the water comes from that is found in those storm water management facilities.
Ariss	OK. Storm water generated at the Black Rock properties is from natural precipitation and it is regulated under the U.S. EPA, the U.S. Environmental Protection Agency program, the National Pollute and Discharge Elimination System Program. There is a specific permit that Black Rock has coverage under which is the construction general permit that any construction project, of course, as with Black Rock North is currently engaged in building a golf course and residential lots, would be required to gain coverage under and they have done so and are essentially in compliance with the terms of that permit at this

	point in time. The facilities are generally, are managed through the storm water... I should say is generally managed through a variety of storm water best management practices on-site and those facilities per best management practice include a variety of soil and water management techniques to route storm water both above and on the properties, through conveyance structures to accommodate erosion control, erosion prevention, sedimentation control, and protection of the water quality.
Meyer	The facilities that are utilized for storm water management, do they...is there any commingling of water from the runoff and precipitation with water that is diverted out of Lake Coeur d' Alene for purposes of the water feature?
Ariss	At this time, on Black Rock North are we talking specifically?
Meyer	Either, well, that is a good question. I think the on-going regulatory matters are limited to Black Rock North so why don't we limit the question to Black Rock North.
Ariss	OK. During my activities working on the Black Rock North property, to my knowledge, there was no storm water generated that commingled with irrigation water. Typically, the irrigation was performed during periods of non-precipitation events and so there would not have been commingling on the general lands. The storage ponds, on the facility, may have some commingling with storm water with irrigation water drawn out of Lake Coeur d' Alene.
Meyer	When water comes down through precipitation or runoff, it is going to end up in those ponds. Is that your testimony?
Ariss	Correct. The ponds that are on-site serve a dual purpose. They are there both for sedimentation control as well as irrigation storage.
Meyer	Would it also be fair to say that the purpose of the regulatory program, that is the storm water management program and the general permit, is solely to regulate the water that comes from precipitation and run off from precipitation.
Ariss	That is the general task, correct.
Meyer	Are...is there a detailed program in place now whereby these storm water issues are managed by another agency?
Ariss	Correct, as I indicated earlier, the storm water program is administered by the U.S. EPA under the construction general permit for this particular project.
Meyer	Are...based on that testimony I would move at this point, to have a ruling from the director as whether we need to go on with a more detailed explanation of this storm water management which will probably be an hour or so. The reasons that I would suggest it might be appropriate, in fact that I strongly suggest it would be appropriate to limit the scope of the hearing, are two fold. One is that the purpose is really not to regulate anything that has anything with the diversion of water from Lake Coeur d' Alene, although there may be some physical commingling, the regulatory purposes aimed at an entirely different source of water. And second, we had testimony that is covered by a comprehensive federal regulatory program that lies beyond the Department's jurisdiction.
Spackman	Ms. Nelson, do you have questions for Mr. Ariss?
Nelson	I do. Mr. Ariss, you stated that the EPA, your general construction permit, you are in compliance with the permit currently. Have you ever not been in compliance with the EPA permit?
Ariss	Have I personally?
Nelson	No, Black Rock.
Ariss	Black Rock has had three different incidences of inspections and two notices of violations

	related to that permit coverage since 2003, to my knowledge.
Nelson	And what were those violations?
Ariss	The violations were predominantly administrative, certain record keeping deficiencies and to a limited extent, there were some water quality issues associated with increased turbidity as a result of erosion from the golf course of exposed soils on the golf course.
Nelson	And so, does that come into the erosion and sedimentation factor as well? You kind of listed the three factors.
Ariss	Correct.
Nelson	So...
Meyer	Your Honor, it sounds to me like we are getting into the substantive part of this examination. The Applicant will stipulate that there are...that there is a history of regulatory issues and if we need to get into it, we will demonstrate that those issues have been fully resolved. And that the Applicant has responded very effectively to those. If the Hearing Officer feels that that is part of the Department's jurisdiction to hear that, we will get into it, but I have suggested that there is no need to.
Spackman	OK, well I understand your suggestion, Mr. Meyer. I will allow Ms. Nelson some latitude to explore and let's see where we land. Let's see if any substance there.
Nelson	OK
Spackman	Ms. Nelson.
Nelson	Mr. Ariss you stated there is no commingling of storm water with Lake Coeur d'Alene at this time but has there ever been?
Ariss	Not to my knowledge.
Nelson	And you stated that the ponds serve a dual purpose, correct?
Ariss	Correct.
Nelson	And that...could you just describe that dual purpose again, please?
Ariss	It is a combination of storm water detention and irrigation storage.
Nelson	And per Kootenai County, is that storm water allowed to be in those ponds? Are they...do they have that type of design?
Ariss	Per Kootenai County?
Nelson	Yes.
Ariss	I am not sure I understand the question.
Nelson	Per the requirements of Kootenai County to contain, like storm water in grassy swells where it can slowly infiltrate and, you know, the contaminants will hopefully leach out, do those fall under those guidelines.
Ariss	My understanding of Kootenai County requirements is that they have a site disturbance ordinance that requires preparation of a planned control runoff to control erosion, control sedimentation and the Black Rock facilities have a planned...a site disturbance plan in place that was actually prepared by my firm, CENTRA and they are in compliance with the Kootenai County site disturbance ordinance.
Nelson	And per the order, Black Rock was to have an approved plan by the Department of Water Resources for commingling. Are you aware if there is such a plan?
Ariss	I am not aware of any plan requirement.
Spackman	I am not aware of anything the Department of Water Resources is involved in relating to commingling Ms. Nelson.
Nelson	Your order said there had to be an approved plan by the Department for commingling.

??Capps or Ortmann	If the other water source we identified would be commingled with irrigation water. I think what it was anticipating if we used domestic to fill the water features and commingled it with irrigation, excuse me, we would have to supply a plan that you could look at and justify.
Spackman	Statements need to come in through Mr. Meyer or he needs to be questioning you so, and the reason for that is, number one, you are not under oath, second of all the record doesn't show who you are. So, we need to have it come in that way. Ms. Nelson, I think I will strike that question and any related statement. I don't think there is anything in Department approvals that would require anything related to storm water and anything any commingling of that water with water diverted under this permit. Further questions for Mr. Ariss?
Nelson	No, no more questions.
Spackman	Well, the Department of Water Resources has a responsibility to ensure in its approvals that water quality standards and laws are not, of the State of Idaho, are not violated and in this particular case, the intrusion, I guess, occasionally of storm waters into these features for the purpose of some sort of retention, in my opinion, is not closely related enough to this proposal, Ms. Nelson, that I want to consider any additional information related to that subject. And so, as a result, I will restrict testimony related to that subject in this particular hearing. OK? Alright.
Meyer	I thank you for that your Honor, and I just ask, does your Honor wish to have any testimony from this witness as to the general ability of the Applicant to comply with environment laws? I want to make sure that we have covered all of our bases...
Spackman	I don't know the answer to the that Mr. Meyer.
Meyer	Could I be permitted to ask that question?
Spackman	Sure.
Meyer	Without going into all of the multi-hour long detail of the history of this environmental enforcement matters with EPA, based on everything that you know, is...do you have an opinion as to whether the Applicant will be able to comply with all storm water management requirements?
Ariss	Yes, I do have an opinion. My opinion is that Black Rock will and is in compliance with the U.S. EPA construction storm under general permit. So, I believe that they have taken extreme efforts to demonstrate compliance, to implement best management practices, to monitor water quality and to protect the surface water resources that the storm water ultimately discharges to.
Spackman	OK? Ms. Nelson?
Nelson	Mr. Ariss, who is employing you to be at this hearing?
Ariss	Black Rock is.
Nelson	Thank you.
Spackman	OK, further questions of Mr. Ariss?
Nelson	No.
Spackman	Mr. Meyer?
Meyer	I need to pause for a minute based on your ruling, and find out what if anything I need to ask Mr. Ariss further. Could you give me a moment because this, has indeed I think, substantially reduced the scope of his testimony.
Spackman	How long do you need Mr. Meyer, we can go off the record here if you want.

Meyer	I think a minute or two.
Spackman	OK, let's go off the record.
	<i>Off the record.</i>
Spackman	Mr. Meyer, Mr. Ariss is still sitting in the witness chair, do you have further questions?
Meyer	Just a few. Are pesticides, pesticide use at Black Rock likely to pose a problem to neighboring uses or neighboring owners?
Ariss	My understanding of pesticide use at the Black Rock properties is in conjunction with their certified golf course managers. They have licensed pesticide applicators that they employ and all of the herbicides and pesticides used on the golf course maintenance are done per their licensure and per the instructions of those individual chemicals that are applied. So, if they are applied according to the standards that those licensed individuals would normally adhere to, then I would not anticipate any adverse water quality impacts as a result of their use on-site.
Meyer	Are you familiar with the types of pesticides that are used - specifically whether they are long-lived or short-lived.
Ariss	The pesticides typically used at Black Rock golf course are short-lived, short half life pesticides and herbicides.
Meyer	And does that factor in to your conclusion?
Ariss	It does. They are normally surface applied and have a short half life, meaning that they act on the pests or weeds that are out there and dissipate into the environment very quickly so...
Meyer	Your Honor, I had earlier planned on asking this witness a question about whether there would be a potential for environmental contamination from septic tanks on individual lots. Based on your ruling, I think that is no longer a proper subject at this hearing but I want to make certain that I understood your ruling correctly.
Spackman	That is correct because there are no waters that are supposed to be diverted under this particular application for amendment that would make their way into those septic systems. That is my understanding.
Meyer	Your Honor, that concludes my direct examination.
Spackman	OK, further cross-examination of Mr. Ariss.
Nelson	I do not have any questions.
Spackman	Thank you Mr. Ariss. Your next witness Mr. Meyer.
Meyer	Your Honor, the only witness I anticipate calling at this time is Kyle Capps. But we have just twenty minutes left and again I think it is really important that we get to the bottom of the June Bergquist matter before we leave. I wouldn't mind going out of sequence if particularly if we can make it unnecessary for her to return on another occasion.
Spackman	OK. Well, Ms. Nelson, she is your witness. If you want to examine her at this point in time because she is here, out of order, I will allow you to examine her. If you want to wait, I will allow Mr. Meyer to call her, I said before, as an adverse witness, if you want to do that. I would not expect her testimony, you wouldn't examine her as an adverse witness and place her in the crossfire, I assume, Mr. Meyer. So...but I would allow you to do that to at least attempt to establish relevancy of testimony. So, Ms. Nelson what is your...
Nelson	Well I guess I, June is only a few blocks away, where is the other witness from Boise? Would it be more...
Spackman	We have called all the witnesses from Boise.
Nelson	Oh...

Meyer	Your Honor, if I may just...if we could be informed as to the nature of the testimony, it has been made abundantly clear to me that June Bergquist is here solely for one purpose which is to address storm water management. You have ruled that that is not a proper subject of this hearing. I don't understand why we can't dispose of this now.
Spackman	I don't know that.
Nelson	OK, well maybe I need clarification because you said you were going to restrict and restrict in as far as what?
Spackman	Well, testimony about the storm water management, as described by Mr. Ariss. My ruling was that that storm water and the regulation of that storm water, with respect to environmental rules, even though that water will intrude occasionally, perhaps on these ponds, that it is, it is remote enough from the Department's consideration of these applications for amendment that I will restrict and prevent in the presentation of testimony evidence about storm water, storm water use. I do not <i>[unintelligible]</i> storm water runoff as it relates to this application for amendment. That was the ruling.
Nelson	I think I would rather wait and confirm, she would rather wait and come back at a different time and go through the whole thing because I don't think we have time right now to go back and forth...
Spackman	OK.
Nelson	Then we are just going to end up chopping her off...
Meyer	Your Honor, it is a very simple question. Can you ask the Protestant whether she intends to ask this witness questions of...that go beyond what you already ruled is not proper.
Spackman	I don't think that is my place, Mr. Meyer. I will allow you to call her as an adverse witness if you want to.
Meyer	I will. I will call her now.
Spackman	OK. Ms. Bergquist, if you will come forward. Raise your right hand please, do you swear to tell the truth, the whole truth and nothing but the truth.
Bergquist	I do.
Spackman	Please be seated. OK, Mr. Ariss did I swear you in...I did.
Ariss	Yes, you did.
Spackman	I don't recall. Mr. Meyer
Meyer	Thank you Ms. Bergquist. Would you state your name and spell it and your address for the record.
Bergquist	June Bergquist. It is June like the month, J-u-n-e Bergquist, B-e-r-g-q-u-i-s-t. My work address is Idaho Department of Environmental Quality, 2110 Ironwood Parkway, Coeur d' Alene, Idaho 83814.
Meyer	Thank you. What is the scope of your responsibilities with DEQ, to the extent that they interact with the Black Rock project?
Bergquist	Well, I do compliance and enforcement for surface water.
Meyer	And when you say surface water, does that mean storm water management?
Bergquist	It does include storm water.
Meyer	Do I understand correctly that the EPA NPDES program, under the Clean Water Act is a nondelegated program in Idaho?
Bergquist	That is right.
Meyer	And so the storm water management program is administered exclusively by the federal EPA, is that correct.

Bergquist	That's right.
Meyer	What then is the role of DEQ with respect to storm water management?
Bergquist	In projects where EPA has authority, it is only projects that have one acre of disturbance or greater. We support EPA in assisting them with, because what they are trying to do is to achieve state water quality standards so they come to us and say, you know, we have to work together on it because the goal is to meet the state water quality standards. So in cooperation with EPA, storm water is at the top.
Meyer	So you're well familiar with the regulatory matters affecting storm water and this Applicant, is that true?
Bergquist	Yes.
Meyer	Outside of storm water management, are you engaged in any active environmental regulatory matters that affect this Applicant?
Bergquist	Any active?
Meyer	Yes
Bergquist	...matters, you mean like an enforcement action?
Meyer	Yes.
Bergquist	From the State?
Meyer	From the State.
Bergquist	No.
Meyer	Would you have any testimony that you could give at this hearing affecting, with respect to Black Rock, that would go beyond the subject of storm water management?
Bergquist	I also respond to complaints and some of the complaints I have received have been puzzling and have created quite a long history of interaction with Black Rock once Black Rock property started to be developed and then continued on to Black Rock North but the issue there, and I know this is a confusing point for you, is that the complaints were that people were observing different changes in water levels, stream flows and things like that once Black Rock got built. And so, what we were looking at is what the effects were...it's, I don't know how to...the complaints were: my well vault is flooded, my drain field has failed, there's water in the road ditch in August when, the driest part of the year where you would...and there is no water in the road ditch on either side of Black Rock, just where Black Rock is. And the streams that are seasonal streams are flowing year round now when they normally only flowed for like four months out of the year four or five months out of the year, sometimes less. And so, these people, they, you know, go through the phone book and they see Department of Environmental Quality and they call in and I get the complaint because I am the surface water person for compliance and enforcement and I respond to complaints. So, so, I got to know Kyle really well in responding to these complaints and trying to figure out where this water is coming from because it was very, very unusual. We looked all over the area to see, you know, and I am familiar with the area quite a bit, and it was very odd. So we did some water sampling and we did some...
Spackman	OK, Ms. Bergquist. I think the nature of your testimony now is going to perhaps some of what Ms. Nelson might inquire about and so, I guess I am not sure I want this entire narrative, Mr. Meyer, unless you have further questions related to the distinctions between storm water and this particular issue, which she is talking about, which I think is outside of the waste water treatment question, it is outside the storm water question and I think there is additional information that Ms. Nelson might want to pursue from Ms. Bergquist and

	that is her prerogative. So, I think at this point in time, I would want to excuse Ms. Bergquist and not have her continue to testify about the details unless you think it is appropriate to do so.
Meyer	Well, your Honor it is not yet clear to me whether there is going to be a proper basis for this testimony, I am still laying foundation. But, even if in the end, there is a proper...we determine that this is a proper witness, I would like to continue with the examination simply as part of our testimony today. So Black Rock would call Ms. Bergquist at this time.
Spackman	OK. I will allow you to proceed. You have about five minutes.
Meyer	Thank you, thank you your Honor. Ms. Bergquist, when you received these complaints, does EPA, or excuse, does DEQ have a regulatory program that they fall within?
Bergquist	That is what I am supposed to determine.
Meyer	And what did you determine?
Bergquist	Well, we are talking about, like I said, several different complaints. I don't know which one you want to talk about.
Meyer	Well let me ask it this way. Are there any of these complaint that you have determined formed the basis for a DEQ enforcement?
Bergquist	No.
Meyer	Are you pursuing...
Bergquist	Not to Black Rock.
Meyer	Not to Black Rock. Are you pursuing activities under your DEQ authority with respect to any of these complaints?
Bergquist	Pursuing what? Activities?
Meyer	Are you pursuing any of these complaints today? Are you taking regulatory action based on these complaints?
Bergquist	Not regulatory action.
Meyer	You Honor, we have established that we don't have an on-going enforcement matter or any official action by DEQ. Do you think it is appropriate nevertheless have an examination of a number of complaints that ultimately the Department of Environmental Quality has determined don't fall within its jurisdiction?
Spackman	I don't know. I don't know what Ms. Nelson may, may inquire further of Ms. Bergquist right now. So, I won't deny her that opportunity to establish that there are matters within her jurisdiction, Department of Environment Quality, or to which the Department of Water Resources needs to address.
Meyer	Well then, I will continue. What have you been able to determine were the causes of the problems that people were complaining about?
Bergquist	We didn't determine for certain any cause, but we did identify some potential causes and what came of that was that Black Rock initiated monitoring surface water monitoring program where they were monitoring the streams that were unusually discharging, you know, for this extended period of time during the driest months that normally they would be bone dry. And so, I think it was in 2000...
Meyer	May I interrupt for just a moment? Was that monitoring program instituted as a result of the EPA enforcement authority...
Bergquist	No. It was voluntary on Black Rock's part.
Meyer	Now, you are familiar with the EPA 308 order?
Bergquist	Yes.

Meyer	And you are saying this was not in response to the 308 order?
Bergquist	No.
Meyer	You may continue.
Bergquist	OK, so there was a lot of back and forth. Like the water in the ditch was below a certain point at Black Rock, Black Rock investigated that and fixed some broken pipes and then eventually in the Fall, they turned the water feature off and the water dried up. But again, that's anecdotal, it is not a scientifically based study because we didn't have the money to really test the water to find some sort of tracer that we could find again in the road ditch that would say for certain that the water came from that water feature and ended up in the road ditch down there. The same is for the flooded well vault. This guy, down below Black Rock, the well vault had been there since '74 and the only time it has filled up with water is after the snow melt and then it has always been dry. But in 2004, I believe it was, the well vault was flooded all summer long to the point where the guy had to dig down, punch a hole in the bottom of it and run a garden hose off it. So we saw a lot of shallow ground water that, again anecdotally, people have said it hadn't been there before. There was another instance, where a drain field flooded, where the people who were seasonal residents, who were only there in the summer, had never had trouble. But there was, they pointed to the stream that was right next to them and said that well that stream is running year round now, that is probably influencing our drain field. That could have been a possible explanation, but we don't know for sure.
Meyer	What authority does DEQ have to investigate these matters?
Bergquist	Well, we respond to complaints and if there is a water...like for example, the stream beside the drain field, the stream went right into the lake right at that point, so I sampled the stream maybe ten feet up from the lake. There was lots of bacteria. It exceeded our water quality standards for E. coli so that was a concern for us. And so, we were like, well, it's a problem to surface water. The ground water, the well vault flooding, the well, the original complaint was that the well, was producing bacteria contaminated water and so, in our office, we also deal with the ground water rule and so and we also, so we were wondering what's wrong there. So, it wasn't me who did a test on that but I was there to look at it because the water from the well vault was being channeled down the hill to the lake and after investigating it, it didn't, from what I saw, it didn't reach the lake but, anyway that's why we get involved in those things because...
Meyer	Was the concern that this contamination might have derived from septic systems or the land application?
Bergquist	From the well vault?
Meyer	Well, you described finding some contamination.
Bergquist	Yes, yeah...
Meyer	...including E. coli.
Bergquist	...and the people...we sampled the well and we sampled the well vault water and they were both contaminated. And there was some potential causes of that. One, like I said before, the ground water, the shallow ground water, may be elevated, or it could have a guy who left a sprinkler on and maybe he flooded his drain field.
Meyer	But focusing just on the E. coli contamination...
Spackman	Mr. Meyer, last questions.
Meyer	Do you have...ok, then let me broaden it. Are...based on all of these reports of concern, and all of your investigation, have you found anything that would point to a source of

	these problems being the diversion of water out of Lake Coeur d' Alene?
Bergquist	Yes, that was one of the potential sources was because water was being sprinkled up on Black Rock, on the golf course and the water features and that was...there's a certain amount of runoff from that. That's raising the shallow ground water table or, you know, super charging it and then the water is coming out. Since Black Rock is on a bluff, it's coming to the surface and those stream channels were going underground and coming up in drain fields or in this well vault. That is one theory, there are probably others and we proposed, in order to resolved this issue, since it would require a lot of money, we had proposed a study, and it wasn't funded and we are still trying to get it funded. Because it has significance to land use planning and for other developments that would be helpful for the counties to really be aware for the effects so that these effects could be mitigated before they approve these subdivisions and golf courses and such.
Meyer	May I ask the witness whether she has reason to believe that Black Rock is not capable of complying with any of these requirements? I know you told me there was one last question.
	Well, Mr. Meyer, regardless of where this question and answer goes, I will not deny Ms. Nelson the opportunity to examine Ms. Bergquist.
Meyer	I understand that...
Spackman	...if she wants to do that.
Meyer	I understand that your Honor.
Spackman	And I am somewhat concerned as well, I did allow you to call Ms. Bergquist as a witness, I am not sure she was even identified as one of your witnesses...
Meyer	She was your Honor.
Spackman	OK. I didn't look back through the ...
Meyer	I...just to make certain we are clear. We identified several of our witnesses by name and then we said in addition we reserve the right to call any of the witnesses identified by the Protestant. So she has been identified as a witness.
Spackman	Well, it is an interesting process, I guess, to go through it that way and then call this witness prior to the Protestant having that opportunity. So, regardless of what the answer to your next question will be, I will not allow, I will not restrict Ms. Nelson's opportunity to examine Ms. Bergquist and I think at this point and time, really the purpose, I think, for my allowing your calling Ms. Bergquist as your own witness to flesh out whether there were issues beyond the storm water issues and waste water issues that could be discussed and that she could testify about. I heard at least from what she has said that there are those issues and I will allow Ms. Nelson to explore them and I think she should be allowed to call her witness specifically identified first for those purposes. So at this point in time, I want to end the examination of Ms. Bergquist and we will come back and at that time Ms. Nelson examines her and then you will have the opportunity to follow. But I don't think I should be allowed, or that I should allow some preemptive examination for a specifically identified witness but not through that general identification, Mr. Meyer. I can appreciate it but we are at 5:00. Let me just talk a for a minute about what we will do. We can set up the video/audio link, Mr. Meyer, you will need to go the Department offices, if you want to examine Mr. Capps or any other witnesses through that link. You can do that and I will make an effort to be here, Ms. Nelson, because I think I owe to you to be at this location. Mr. Meyer, you may

	be in some disadvantage but I don't think so. It is completely interactive. I think, I hope they have resolved any problems related to that . We had a little bit...some glitches. Our IT people are trying to resolve it so I think we can get that taken care of. Next question is when. I have calendar with me, do you happen to know.
Nelson	I didn't bring my calendar so I...
Spackman	OK, so let's go off the record because we will just establish a time and then.
	<i>Off the record – end of tape.</i>

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of January, 2009, the foregoing was filed, served, or copied as follows:

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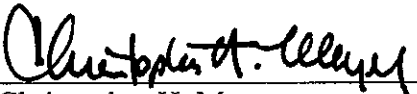
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