

Christopher H. Meyer, Idaho State Bar No. 4461
Michael P. Lawrence, Idaho State Bar No. 7288
GIVENS PURSLEY LLP
601 West Bannock St.
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
chrismeyer@givenspursley.com
mpl@givenspursley.com
www.givenspursley.com
Attorneys for Applicant Black Rock Utilities, Inc.

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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)

**BLACK ROCK'S RESPONSE TO JAI
NELSON'S "REQUEST FOR SUBMISSION
OF RECENT FINDINGS, REOPENING OF
HEARING OR DENIAL OF
APPLICATION"**

Applicant Black Rock Utilities, Inc. ("Black Rock") hereby responds to Protestant Jai Nelson's *Request for Submission of Recent Findings, Reopening of Hearing or Denial of Application* ("Request").

In Ms. Nelson's Request, she seeks a reopening of the hearing and other relief on the basis of statements taken out of context from newspaper clips regarding the financial condition of the Black Rock. There is no denying that the current economic conditions are extraordinary. They are taking their toll on virtually everyone in Idaho, including the Department. However, the news clips provide an incomplete and inaccurate picture. And, of course, they fail to recognize the recent good news in financial markets.

Rather than attempt to rebut Ms. Nelson's allegations, however, the simple and compete response is that the issues raised in her Request lie outside the bounds of the issues before the Hearing Officer. Moreover, the Request is untimely. We address each of these points below.

The Response raises issues beyond the scope of this proceeding.

The Hearing Officer has ruled repeatedly on the scope of this proceeding. It is hard to imagine how he could have been more clear on the subject. The economic condition of the applicant is not one of the criteria the Department is bound or allowed to consider in an application for amendment of a permit.

The law on this subject is well settled. The Idaho Water Code establishes two criteria applicable to an application for amendment of a permit. "[I]t shall be the duty of the department of water resources to examine the same and if approval thereof would not result in the diversion and use of more water than originally permitted and if the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application and return an approved copy to the permit holder." Idaho Code § 42-211 (emphasis added.). These equate to the familiar "no enlargement" and "no injury" criteria applicable to water right transfers.

In addition, Idaho case law has recognized that the local public interest test is applicable to the Department's consideration of an application for amendment of a permit. *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993). These three issues (injury, enlargement, and the local public interest) constitute the full extent of the Department's evaluation of Black Rock's 2008 Application.

The financial viability criterion referenced by Ms. Nelson is among the seven criteria applicable to applications for new appropriation.¹ It is not applicable to applications for amendment of a permit. Ms. Nelson's contention that *Hardy v. Higginson* makes all seven of the permit criteria applicable to applications for amendment of a permit is incorrect. The only issue in *Hardy* dealing with applicable criteria was "Whether the Director may consider the local public interest in amending a water permit under I.C. § 42-111." *Hardy*, 123 Idaho at 488, 849 P.2d at 949. There is no authority for incorporating any of the other permit criteria and, frankly, no logic for it. The reasoning of *Hardy* was based upon the notice and protest provisions in section 42-211 which require the Department "to give notice and address protests" and to consider the "rights of others [that] would be adversely affected." *Hardy*, 123 Idaho at 489, 849 P.2d at 950. This reasoning compels consideration of the local public interest in addition to injury and enlargement. It does not compel reconsideration of other issues, such as the financial standing of the applicant, which were fully vetted during the hearing on the permit. The Department does not have the resources constantly to reconsider these issues. If changes in financial conditions after permit issuance are significant enough to affect project development, that will be apparent at the time of licensing. That is why we have licensing.

This conclusion is consistent with longstanding Departmental guidance, including the statement of issues provided to parties to every contested case, including this one. It is also consistent with the Hearing Officer's repeated prior rulings on the scope of this proceeding.

The financial condition of the applicant is not part of the local public interest.

Ms. Nelson's contention that the financial condition of the applicant is somehow part of the local public interest test cannot be squared with the plain language of that criterion, which

¹ "An appropriation application may be denied where "the applicant has not sufficient financial resources with which to complete the work involved therein." Idaho Code § 42-203A(5)(d); see IDAPA 37.03.08.040.05.f. This criterion has been a part of the Idaho Water Code since 1935. 1935 Idaho Sess. Laws, ch. 145, § 2.

reads, “‘Local public interest’ is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code § 42-202B(3). The former and much broader language of the local public interest test was amended by the Legislature in 2003 to ensure that the local public interest test remains focused on the effect of the appropriation on the public water resource, not on what the Legislature described as “secondary” issues.²

² As the Legislature said in the Statement of Purpose:

This legislation clarifies the scope of the “local public interest” review in water right applications, transfer and water supply bank transactions. This legislation is intended to ensure that the Department of Water Resources has adequate authority to require that diversions, transfers and other actions affecting water resources do not frustrate the public’s interest in the effective utilization of its water resources. The “local public interest” should be construed to ensure the greatest possible benefit from the public waters is achieved; however, it should not be construed to require the Department to consider secondary effects of an activity simply because that activity happens to use water. For example, the effect of a new manufacturing plant on water quality, resident fish and wildlife and the availability of water for other beneficial uses is appropriately considered under the local public interest criteria. On the other hand, the effect of the manufacturing plant on the air quality is not within the local public interest criteria because it is not an effect of the diversion of water but rather a secondary effect of the proposed plant. While the impact of the manufacturing plant on air quality is important, this effect should be evaluated by DEQ under the EPHA. As noted by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330 (1985), “[i]t is not the primary job of Water Resources to protect the health and welfare of Idaho’s citizens and visitors—that role is vested” in other agencies.

Water Resources’ role under the “local public interest” is to ensure that proposed water uses are consistent with securing “the greatest possible benefit from [the public waters] for the public.” Thus, within the confines of this legislation, Water Resources should consider all locally important factors affecting the public water resources, including but not limited to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality and the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time. This legislation contemplates that “[t]he relevant impacts and their relative weights will vary with local needs, circumstances, and interests.” “The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources’ sound discretion.”

In recent years, some transactions have been delayed by protests based on a broad range of social, economic and environmental policy issues having nothing to do with the impact of the proposed action on the public’s water resource. Applicants have experienced costly delays and have been required to hire experts to respond to issues at an agency whose purpose has nothing to do with those issues.

The Request is untimely.

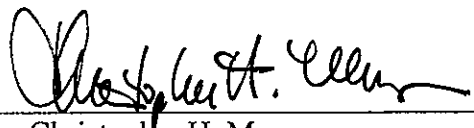
The arguments raised in the Request are not only wrong, but untimely. Black Rock's position with respect to the scope of this hearing, and, in particular, the issue of economics, has been made clear to Ms. Nelson from early in this proceeding. She raised no objection to Black Rock's discovery responses, which clearly identified the limited scope of this hearing as a basis for not providing further documentation. The parties have been through an extended and costly hearing on this matter, and Ms. Nelson never raised any issue with respect to discovery or with respect to the scope of the proceeding. To raise it now would be improper and highly prejudicial.

Accordingly, the Request should be denied.

DATED this 15th day of April, 2009.

Respectfully submitted,

GIVENS PURSLEY LLP

By 
Christopher H. Meyer

This legislation also clarifies that the effect on the local economy of a watershed or local area that is the source of a proposed use of water but not the place of use for the proposed use shall be considered. The purpose of this criteria is to ensure that out of basin transfers do not deprive a local area of use of the available water supply.

Statement of Purpose, H.B. 284 (2003).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of April, 2009, the foregoing was filed, served, or copied as follows:

DOCUMENT FILED:

Mr. Gary L. Spackman
Administrator, Water Management Division
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
Fax: (208) 287-6700
Email: Gary.Spackman@idwr.idaho.gov

☒	U. S. Mail
☐	Hand Delivered
☐	Overnight Mail
☐	Facsimile
☒	E-mail

SERVICE COPIES TO:

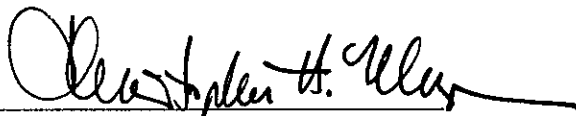
Jai K. Nelson, RN
Spokesperson/Coordinator
Coalition for Positive Rural Growth
15192 Gate 7 Ridge Road
Coeur d'Alene, ID 83814
Email: jaikandcadence@yahoo.com

☒	U. S. Mail
☐	Hand Delivered
☐	Overnight Mail
☐	Facsimile
☒	E-mail

COURTESY COPIES TO:

Robert G. Haynes
Regional Manager
Idaho Department of Water Resources
7600 Mineral Drive, Suite 100
Coeur d'Alene, ID 83815
Fax: (208) 762-2819
Email: bob.haynes@idwr.idaho.gov

☒	U. S. Mail
☐	Hand Delivered
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☐	Facsimile
☒	E-mail


Christopher H. Meyer