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DEPARTMENT OF
WATER RESOURCES

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**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 PETITION FOR
CLARIFICATION AND/OR
RECONSIDERATION OF THE
PRELIMINARY ORDER**

Applicant Black Rock Utilities, Inc. ("Black Rock"), through its attorneys Givens Pursley LLP, and pursuant to Idaho Department of Water Resources Rule 760, IDAPA 37.01.01.760, hereby files its Petition for Clarification and/or Reconsideration of the Hearing Officer's Preliminary Order dated May 21, 2009 in the above-captioned matter. The Hearing Officer's careful analysis and summary of the record is evident in the Preliminary Order. Nevertheless, Black Rock believes specific findings of fact, conclusions of law, and conditions in the Preliminary Order should be reconsidered and/or clarified.

ITEMS FOR CLARIFICATION AND/OR RECONSIDERATION

Black Rock respectfully requests clarification and/or reconsideration of the following items from the Preliminary Order:

1. Black Rock's service area boundary

In its application and supplemental submissions, Black Rock has identified the boundaries of its current proposed service area. Black Rock does not, at this time, have plans to modify those boundaries. Nonetheless, Black Rock has stated that it believes it is entitled to a service area with flexible exterior boundaries in line with its status as a municipal provider. Former Protestant Kootenai Environmental Alliance ("KEA") agreed to a flexible service area. See *Stipulation for Conditional Withdrawal of Protest* (Oct. 24, 2008) and *Black Rock's Submission of Proposed Conditions* (Nov. 3, 2008) (in particular, comment to proposed condition number 3: "The language retains the limitation to 545 acres of irrigation but eliminates the specific identification of the place of use. Black Rock believes that it is inconsistent with the nature of this municipal water right [to] identify a specific place of use.")).

It is unclear whether the Hearing Officer intended to allow future flexibility in this permit's service area exterior boundary. Conclusion of Law 13 states: "The place of use should be circumscribed by the Black Rock service area. The conditions of approval should locate the place of use by section, township, and range." The fifth condition listed in the Preliminary Order (found on page 10) states "Irrigation shall be limited to not more than 545 acres and within Sections 4, 5, 8, 9, 16, and 17, Township 48 North, Range 4 West, Kootenai County." And, a provision on page 9 of the Order states that "a map depicting the place of use boundary for this water right at the time of this approval will be attached to the permit approval document for illustration purposes." These provisions do not expressly accept or reject Black Rock's request

for a flexible municipal service area. Does the reference to “for illustration purposes” mean that the boundaries are not fixed? Does the reference to township and range mean that the service area is fixed to the identified sections? If so, is the service area flexible within those sections?

Black Rock believes the statements quoted above may lead to confusion in the future and requests the Hearing Officer to clarify and/or reconsider his intent in regard to whether the service area boundary of this municipal provider may be adjusted without seeking a permit or license amendment.

2. Locations of ponds within the service area

During the course of the hearing process, considerable discussion was devoted to whether Black Rock’s identification of current and proposed ponds and water features was intended solely for illustrative purposes (as stated in the application) or whether their identification has the effect of locking in the location of each pond and water feature. We construe the Hearing Officer’s order as recognition that, as a municipal provider, Black Rock is authorized to relocate ponds and water features, so long as it does not enlarge its water right. Likewise, the water right may be used to serve homeowners who have installed small water features on their property. We are concerned, however, that the preliminary order is not entirely clear on this important issue. Conclusion of Law 10 states: “Black Rock also seeks to have the place of use for these various pond uses defined as a service area circumscribed by the boundary of the Black Rock surface water delivery systems.” As quoted above, other provisions in the Preliminary Order state that “[t]he place of use should be circumscribed by the Black Rock service area” and that irrigation should be limited to 545 acres within a number of 640-acre sections. These provisions imply that ponds may be located anywhere within the Black Rock service area so long as other permit conditions related to the ponds are satisfied. To clear up any confusion now or in the future,

Black Rock requests that the Hearing Officer clarify and/or reconsider his intent in regard to whether ponds may be located anywhere within the service area.

3. Reference to stipulated settlements in conditions

The last condition in the Preliminary Order (p. 11) states:

The diversion and use of water is subject to additional conditions and limitations agreed to by both Kootenai Environmental Alliance and the water right holder under two separate agreements 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.

Black Rock believes it is inappropriate for the Department, on its own volition, to include a permit condition that references private agreements to which the Department is not a party and over which the Department has no jurisdiction.

This condition appears to be based on condition number 11 of the prior Amendment of Permit dated July 27, 2007. That condition was appropriately included. The first settlement agreement between Black Rock and KEA (dated July 19, 2006) expressly provided for inclusion in the permit of a condition referencing the stipulation.

Black Rock later determined that doing so was a mistake because reference to third-party contracts leads to confusion and misunderstanding among the many people who may be called upon to review the water right documents.¹ Accordingly, Black Rock negotiated a new stipulation with the KEA (dated October 24, 2008) that expressly called for the removal of this condition:

Accordingly, the Parties stipulate that IDWR may remove from Water Right No. 95-9045 the condition referencing the First Settlement so long as the conditions set out in paragraphs 13 and

¹ Of course, the stipulation will remain a public record in IDWR's files. But its enforcement is a private matter between the parties. IDWR has no enforcement responsibility or jurisdiction.

14 are added to the water right without material change as binding conditions.

Stipulation for Conditional Withdrawal of Protest ¶ 20 (Oct. 24, 2008). The referenced conditions 13 and 14 dealt with other matters. Unlike the first settlement, the second settlement contained no provision contemplating the inclusion of a condition referencing the settlement.

This is consistent with *Black Rock's Submission of Proposed Conditions* (dated Nov. 3, 2008) which struck former condition number 11 in its entirety, provided no replacement, and stated in the comment: "This condition is obsolete and should be eliminated. KEA expressly agreed to its removal in paragraph 20 of the *Stipulation for Conditional Withdrawal of Protest*." KEA was served a copy of this document, and KEA has expressed no disagreement.

For this reason, the Department's *sua sponte* inclusion of a reference to the stipulation—without any discussion of the subject during the hearing—undermines the carefully negotiated settlement. Including such a condition will do nothing more than place a cloud on this water right in the eyes of potential lenders, insurers, and purchasers.

Black Rock respectfully requests the Hearing Officer to reconsider his Preliminary Order and remove this permit condition.

4. Proof of beneficial use requirements

The fifth condition in the Preliminary Order (p. 10) states, in part:

At the time of filing proof of beneficial use, the right holder must submit: (a) evidence of the number of acres of open space irrigated, (b) the average irrigated acreage irrigated within each lot upon which a home is constructed; and (c) the number of domestic connections stubbed to platted lots where homes are not constructed.

Black Rock believes it is inappropriate to list the requirements for proof of beneficial use in this water right permit. Unless and until the Department adopts a guidance or regulation on this subject, one cannot presuppose what the Department's policies regarding proof of beneficial use

will be when proof is due. The Department is currently redeveloping its policy on how it will quantify water rights at proof for non-future needs municipal providers. While a draft policy has been released for public review, there is no telling what the final policy will look like (or whether it will look the same when proof of beneficial use is due for this water right permit). More importantly, the draft guidance notes that the policies reflected in the guidance will be applied flexibly with respect to existing permits.

In addition, the issue of quantification at time of proof was never raised as an issue in these proceedings. No party presented any evidence or legal argument about proof of beneficial use requirements.

Accordingly, Black Rock requests the Hearing Officer reconsider his Preliminary Order and remove this condition.

5. Impervious pond liners

Finding of Fact 7 states, “Black Rock has installed impervious liners in the ponds proposed by the application for amendment.”

This finding is not accurate. Rather, Black Rock has installed impervious liners in all ponds except one that is built in solid rock and has minimal (if any) leakage. Black Rock fully intends to install impervious liners in any new ponds it constructs that will use water under this permit. Black Rock requests the Hearing Officer to clarify Finding of Fact 7 to reflect this.

For the same reason, Black Rock requests the Hearing Officer clarify and/or reconsider the eleventh condition in the Preliminary Order (p. 10), which states, “The right holder shall install and maintain impervious liners on the ponds authorized under this right.” Black Rock suggests that this condition read as follows:

Where the underlying ground surface is not already impervious,
the right holder shall install and maintain impervious liners on the

ponds served by this right that are constructed by or are under the ownership, control, or maintenance of the right holder or its affiliates.

The suggested language reflects Black Rock's understanding that the water right holder is not responsible for monitoring and enforcing pond lining requirements on small water features that may be constructed by homeowners on their property. Inclusion of such a requirement would be inconsistent with how other municipal water right providers are treated, goes beyond water conservation requirements agreed to in the stipulation with KEA, and would place IDWR in the untenable position of being the ultimate enforcer of such a requirement.

6. Annual volume limit for irrigation from storage

Finding of Fact 4 states:

Black Rock anticipates storage in the ponds may be depleted during the irrigation season and may need to be refilled. An additional 164 acre-feet might be rediverted out of the ponds that must be refilled during the same irrigation season.

Condition 9 states: "Annual pond refill shall not exceed 164 acre feet."

For the reasons discussed below, Black Rock asks that Condition 9 be re-stated as follows:

Annual filling and refilling of all storage ponds for any purpose authorized under this right shall not exceed 369 acre-feet, plus any further allowance the Department deems appropriate for small water amenities associated with individual homes under the "24 hour guideline."

As noted in Finding of Fact 2, the difference between the aesthetic storage volume (209 acre-feet) and the municipal storage volume (369 acre-feet) is 160 acre-feet. The 209 acre-foot volume corresponds to the maximum authorized volume of the various storage facilities (aka

“volume of the vessel”), that being 123 acre-feet, plus a cushion of 86 acre-feet to allow re-fill to compensate for seepage and evaporation.²

The 369 acre-foot number simply derives from the size of the residual irrigation component (123 acres times 3.0 acre-feet per acre).³ Black Rock requested the entire 369 acre-foot number for the municipal storage volume to give it maximum flexibility in operating its ponds, without any enlargement.

Thus, for example, Black Rock could complete an initial fill of the ponds for 123 acre-feet and then draw them down and refill them repeatedly to the extent of an additional 246 acre-feet. In the alternative, if it began the year with carry-over storage of, say, 100 acre-feet, it could fill the ponds (23 acre-feet) and then draw them down and refill them repeatedly up to 346 acre-feet ($369 - 23 = 346$). It would make no difference whether the reason the ponds need re-filling is because water has been diverted to irrigation or lost to seepage and evaporation. As a practical matter, since all the ponds are lined or otherwise impervious, the seepage numbers are likely to be low. If so, then more water can be diverted for irrigation—subject, of course, to the overall cap of 1,215 acre-feet. But the seepage/evaporation quantity should not be an offset against the amount of re-fill allowed, as the current Finding of Fact 4 seems to imply. Nor should the refill number be fixed, since the amount of re-fill allowed is a function of the amount of carry-over storage.

In addition, Black Rock asks that Conclusion of Law 24 (dealing with the 24 hour guidance) be reflected in this condition.

² The volume of the vessel was stated in the application as 125 acre-feet, but was reduced in subsequent filings to 123 acre-feet. No modification was made to the overall quantity of the aesthetic volume, which remained at 209 acre-feet.

³ It is purely coincidental that the volume of the vessel (123 acre-feet) and the number of acres in the residual irrigation component (123 acres) are the same number.

7. Annual volume limits

Condition 14 states: “The total volume diverted under this right for irrigation shall not exceed 991 acre-feet.” Black Rock objects to this condition.

The controlling, overall volume limitation is stated correctly on the face of the new permit as 1,215 acre-feet. This volume would be measured at the diversion point out of Lake Coeur d’Alene. How much of this water finds its way to irrigation in any year is a function of (1) how effectively Black Rock manages seepage and evaporation, and (2) the delta between storage volume at the beginning and the end of the year.

The Preliminary Order assumes, incorrectly, that every year there will be a fill of 123 acre-feet and no re-fill, and that evaporation and seepage will be 101 acre-feet. At least we assume that is where the 991 number came from ($1,215 - 123 - 101 = 991$).

To take an extreme example for illustration, if the ponds were full at the beginning of the year and at the end (zero delta), and if Black Rock had lined and covered its ponds so as to prevent all seepage and evaporation, then Black Rock should be allowed to divert 1,215 acre-feet out of the lake and all apply all 1,215 acre-feet to irrigation. Doing so would result in no injury or enlargement. This is how it would work if the ponds were actually storage tanks.

To the extent Black Rock chooses to leave more water in storage at the end of the year than it began with and to the extent that Black Rock’s ponds are subject to seepage and evaporation, then less water will be available for irrigation during that year.

There is no reason to lock Black Rock in to any particular seepage/evaporation estimate. As explained at the hearing, Black Rock intentionally used a “worst case” estimate in order to be sure that it sized its aesthetic storage right correctly.

By the way, to the best of our recollection, the number Black Rock presented for its estimate of seepage/storage is 81 acre-feet (more or less). As noted above, the 209 acre-foot quantity for aesthetic storage has a slightly larger cushion of 86 acre-feet. We do not recall adding in an additional 20-acre cushion to the 81 acre-foot estimate bringing this to 101 acre-feet, as stated in Finding of Fact 3.

Likewise, there is no reason whatsoever to assume that the delta between beginning and end-of-year storage will be 123 acre-feet.

For example, if Black Rock's estimate of seepage/evaporation turned out to be slightly low, and total seepage/evaporation was 105 acre-feet per year, that would be Black Rock's problem because it would mean less water was available for irrigation. No other water user would be affected. Whatever the evaporation and seepage, and whatever the fill or re-fill, Black Rock's diversion from the lake remains fixed at 1,215 acre-feet—just as it was before the permit amendment. Enlargement is impossible. No one will be injured. And Black Rock retains the incentive to keep seepage and evaporation as low as possible.

In sum, there is no reason for the condition. Including it on the permit would materially disadvantage Black Rock.

CONCLUSION

For the foregoing reasons, Black Rock respectfully requests that the Hearing Officer clarify and/or reconsider the Preliminary Order to reflect the changes and corrections described above.

DATED this 5th day of June, 2009.

Respectfully submitted,

GIVENS PURSLEY LLP

By 
Christopher H. Meyer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of June, 2009, the foregoing was filed, served, or copied as follows:

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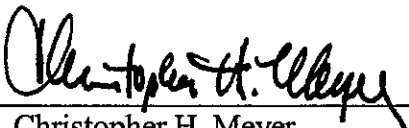
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