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DEPARTMENT OF
WATER RESOURCES

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

**IN THE MATTER OF APPLICATION FOR) RESPONSE TO BLACK ROCK'S
AMENDMENT FOR PERMIT NO) PETITION FOR CLARIFICATION
95-9045 BLACK ROCK UTILITIES INC.) AND/OR RECONSIDERATION
) OF THE PRELIMINARY ORDER**

Pursuant to the above protest, Jai Nelson "Protestant" respectfully submits a **RESPONSE TO BLACK ROCK'S PETITION FOR CLARIFICATION AND/OR RECONSIDERATION OF THE PRELIMINARY ORDER** based on the following issues presented.

1. Black Rock's service area boundary

One of the issues addressed at hearing was; will this proposed amendment enlarge the use over that originally permitted? Black Rock is not entitled to future flexibility and is not deserving of this request as could evolve into an enlargement. The project boundaries should be fixed without any additional flexibility in the service area within those sections and areas noted on the original application. The Department does not have the local oversight or manpower to ensure that any alterations and variations of acreage boundaries remain at the permitted amount.

At hearing, the Protestant clearly requested that in light of the specific and multiple evolutions of this permit the Hearing Examiner place a condition that the service area for Black Rock Utilities be limited to the application's Exhibit B map, identified by "quarter-quarter" sections and additionally be limited to the requested acreage of 545. Furthermore, any future changes or modifications should require a new permit or amendment application.

Furthermore, at hearing the Protestant specifically requested the following:

Per the signed stipulation agreement with the Kootenai Environmental Alliance, under TERMS, number 13 (replacing number 3 in the amended permit) that IDWR add a condition "substantially in accordance with the following language": Direct flow use and diversions from storage under this right are limited to irrigation of 545 acres of turf and landscaping and for fire protection. In addition, water diverted under this right may be used for dust suppression and related construction purposes during the initial development and build-out of the project.

In the reconsideration document, Mr. Meyer references Kootenai Environmental Alliance (KEA) and *proposed* condition number 3. While KEA did review the proposed condition prior to hearing when Mr. Meyer requested the language be changed, the stipulation/settlement language with KEA was NOT changed prior to the hearing nor afterward. It is completely unacceptable to reference this *proposed* condition as if it were fact as there is no agreement with KEA to this condition.

2. Locations of ponds within the service area

The application clearly identifies each pond type, location, size, depth and capacity in minute detail. This level of detail hardly represents "illustrative" purposes. Additionally, numerous maps and drawings were submitted to define and clarify the pond information and locals. Furthermore, at the hearing Kyle Kapps testified for Black Rock Utilities that the expense of relocating ponds is significant and the golf course layout and subdivision lots are already planned (submitted to Kootenai County) and in many cases already constructed around the pond layout submitted to the department.

Furthermore, the Department does not have the local oversight or manpower to repeatedly and perpetually ensure that any alterations of ponds and volumes of ponds remain at the permitted amount and within the allotted area.

3. Reference to stipulated settlements in conditions

The Protestant concurs with the decision of the Department to include a permit condition referencing the private agreement between KEA and Black Rock. This agreement is directly correlated to the water right and as such, there is good cause to include the reference.

Mr. Meyer states (pg 5, paragraph 2) "KEA has expressed no disagreement." This is not entirely correct. KEA did NOT agree to any new language. Mr. Meyer's "comment" was not specifically agreed to by KEA. Moreover, Mr. Meyer has the burden of proof that KEA did agree; Where is the NEW language with Barry Rosenberg's signature? Where is Barry Rosenberg's signature agreeing to the "comment"?

Principally, it is within the rights of the Department to bind the KEA agreement -- it is a condition that helps enforce the parameters that the Department has to manage and oversee. Additionally, the agreement was that language in the permit must be "substantially in accordance" with the language in the Stipulation. The Department condition makes this true and enforceable.

Bottom line: the Hearing Examiner came up with a perfectly reasonable interpretation of what the document actually means. If Mr. Meyer had concerns or wanted to present clarification he could have called Barry Rosenberg of KEA to testify, but he chose not to call him.

4. Proof of beneficial use requirements

The Protestant believes it is entirely appropriate to list the requirements of beneficial use in the water right permit. Proof of beneficial use as a condition is relevant to Black Rock's ability to complete the project to demonstrate it is not speculative. Mr. Meyer is incorrect when he states neither party presented evidence on beneficial use, issues of quantification and requirements. At hearing, the Protestant gave the following lengthy testimony, observations and requests of the Department specific to beneficial use:

This hearing is NOT about 123 residual acres. This hearing is all about the original 1,215 permitted as irrigation under municipal. Black Rock is not utilizing nearly close to this quantity of water and therefore will not be able to prove beneficial use by September 2010.

The most unique feature of an Idaho water allocation is the "use it or lose it" requirement. The rules require that a beneficial use be made. This rule serves to ensure that water is actively "in play" and not stored in the attic. Water must be put to work, one way or another, or its holder loses all rights therein.

There is no beneficial use within most of these ponds, two are for fishing by children in a private development, which lies within walking short distance from a Lake known for its excellent fishing. Is the fish stocking merely a smoke screen to claim a possible use?

And of those proposed 2 ponds for irrigation storage, is stored irrigation water really necessary? Or it is merely a ploy to hold more water concealed with a thin veil of this possible use?

Idaho's water doctrine has an anti-speculation feature, which is the same as the foundation of the doctrine itself; water rights are based on beneficial USE of a public resource that remains the property of the public. Beneficial use is the basis, the measure, and the limit of the right. Water rights cannot be maintained indefinitely as a "paper" entitlement. The appropriation doctrine has denied any legal protection to those who would hold water for speculative purposes.

I assert that these ponds are simply visual amenities, are not a USE and therefore not beneficial and consequently must be for speculation. In fact, Mr. Kapps testified that Black Rock actually requires much less water to irrigate that this permit is requesting.

Furthermore, Black Rock's "reasonable future use" needs can easily be judged by the original development which was scheduled to be completed within a ten-year time frame. After ten years in the making the development is less than 25% complete—out of an approval for 381 residences. Additionally, while the Black Rock North golf course and some of the amenities are completed, not a single unit out of 325 residences has been erected. In fact, Kyle Capps stated at an October 2008, meeting at KEA that Black Rock North may take 20 to 30 years for build-out. Accordingly, this applicant should not be allowed to store water for this type of speculation. When they determine they need more water they can simply file another application.

This application has and will fail to follow the statutory requirements. They will fail to put this water to genuine beneficial use by the proof date unless they are allowed to store it. Clearly, the legislature did not intend for a municipal holder for a private development to hoard and store tremendous volumes of stored water.

Under Title 42-204: the department may grant one (1) extension of time, not exceeding five (5) years beyond the date originally set for completion of works and application of the water to full beneficial use and this extension has already been granted to Black Rock. Additionally prior to the extension they substituted the first permit into the current one.

Black Rock's continued bad faith attempts to find technical loop holes in a continuing pattern of applying, modifying and amendment requests is a clear example that the applicant cannot presently meet the statutory requirements.

It is clear that the developer intends to by the purpose to use this application to establish a water right far in excess of what he has shown by his existing use that he actually needs. The only logical reason for this exorbitant request would be for the purpose of speculation.

This shell game being played by the applicant is a thinly veiled attempt to obscure the fact that the applicant and his legal council are attempting to set a new precedent in Idaho water use allowing for the hording of unneeded water by asking this hearing examiner to unjustifiably expand the definition of beneficial use to include what is water hording storage ponds.

Moreover, several additional specific goals and requests of IDWR in this water protest are:

- *The fully proposed application for aesthetic storage and irrigation storage should not be approved as beneficial uses. Aesthetic ponds provide a visual amenity and irrigation storage is not a use.*
- *In the application document on page 9, Black Rock suggests modifying condition 8, revised to item 7--this is the key to this issue. The applicant has not fully utilized their 1,215 acre-feet and now wants to change this aspect from irrigation under municipal to municipal for all uses including storage. This is speculation. I am requesting that the Department adhere to their 2007 Order and the irrigation under municipal remain as such and the water may only be diverted and used for irrigation from March 15 to November 15.*
- *I am requesting that the beneficial use date of September 1, 2010 be strictly adhered to.*

In conclusion, the ONLY real question that needs to be decided by this hearing officer is rather simple: if you have the ability to build enormous storage ponds, does the state of Idaho agree that you have the right to all the water you can place in these ponds and replenish that water on a yearly basis even if your only intent is to horde the water as a future speculative investment?

5. Impervious pond liners

First and foremost, the protection and guardianship of our public surface and groundwater sources is regulated by the Department. As such, the Department is authorized to consider potential impact of contaminated return flows, seepage, contaminates and pollutants on the environment as well as water conservation efforts.

The Idaho Supreme Court has ruled that water rights in Idaho are held subject to the public trust. The Public Trust Doctrine ensures that no legislative or administrative entity may *casually* convey vital public water resources to private use. Furthermore, public trust issues take priority over non-public uses when there is a conflict between them.

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. The "local public interest" legislation is to ensure that the *greatest possible benefit* from [the public waters] for the public is achieved. Specifically, the local public interest includes how this application may affect water quality, and the availability for other beneficial uses.

At the hearing, Kyle Kapps not only testified in detail regarding the *impervious* liners in the ponds but sang countless praises concerning the superior construction of the ponds and features.

Black Rock has listed a significant number of private water features for residential lots. Mr. Meyer asserts that Black Rock cannot be responsible for these "private" features. Yet, Black Rock in its entirety is a private gated community and ALL of Black Rock's features are under their ultimate control, all are private—some private and others "private-private" at residences. All of the features are for the private enjoyment of the club members. Black Rock's CC&R's requires explicit criteria to be adhered to on all aspects of what a homeowner can and cannot do on their property. Consequently, Black Rock specifically agreed (with KEA) to make many conservation measures REQUIREMENTS in their CC&R's for their homeowners regarding watering and conservation measures. If Black Rock can require, control and monitor all of these conditions, why can't they require and monitor pond liners?

As Black Rock's homeowners are required (per the KEA agreement) to have individual meters, any significant change in volume, such as pond leakage, should be easily detected.

All of Black Rock's aesthetic water use--the private features and the private-private features have the potential to impair the local public interest and impact the environment. Therefore the requirement for all ponds to be imperviously lined should stand.

6. Annual volume limit for irrigation from storage

At hearing, the applicant's expert witness, Scott King testified that the 3 uses of water being applied for are: 1) Fire 2) Construction and 3) Irrigation.

A fire is a rare event and there are fire hydrants in this development. Therefore, water for fire use should be very limited in scope. Likewise, water for construction use is only for the building months and for a fixed period of time. Water for construction and especially dust control could come from the fire hydrants. Therefore, water for construction use should be very limited in scope.

This leaves us with the primary use of irrigation. In fact, the numerous sub-uses requested by the applicant, in reality, all fall under irrigation and hence, direct flow.

On page 8, Mr. Meyer states: "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." The Protestant would assert that it does indeed make a difference if the water is diverted or lost. Does it make a difference to the Department? In one case, it is directly under the control of the applicant and in the other case a factor of nature and weather.

Only two ponds using lake water are designated as irrigation ponds, ponds 1 and pond 9. A third pond, pond 2, is to filled with effluent and will be re-filled with same. Therefore, while Mr. Meyer goes into great detail concerning filling and refilling, the only ponds that will truly need substantial refilling are ponds 1 and 9.

Furthermore, while Mr. Meyer gives the example of an "initial fill" the Department is reminded that all of the ponds on Black Rock were initially filled years ago. According to the applicant's spreadsheet, the Club Black Rock currently has 7,430,260 gallons or 22.81 acre-feet of aesthetic storage completed and filled.

This is also true with the ponds on Black Rock North—by far the largest storage vessels—including Black Rock North Pond #1 Irrigation Lake with a volume of 18,830,288 gallons, Lake #2 with a volume of 4,235,814 gallons (to be effluent filled) and Kootenai Lake, pond 3, with a volume of 9,263,774 gallons. Per an October 10, 2008 memo from Kyle Capps of Black Rock Utilities, the ponds were initially filled on the following dates: Pond 1 (Irrigation pond) August 3, 2007, Pond 2 (Lake #2) September 3, 2007 and Pond 3 (Kootenai Lake) October 24, 2007. The applicant requested an additional 32,859,267 gallons and

100.84 acre feet aesthetic storage at Black Rock North—a 335% increase—over 4 times the amount at the original Club Black Rock.

Concerning seepage, on page 8, Mr. Meyer states: “As a practical matter, since all the ponds are lined or otherwise impervious, the seepage numbers are likely to be low.” Mr. Meyer claims there will basically be no seepage but still wants to be able to claim, divert and use the water allocated for seepage and evaporation. So the surplus should be available for irrigation??!

Bottom line: All of the above noted ponds and features have already been initially filled and the applicant states the seepage rate will be low. Therefore, the seepage/evaporation quantity should be offset against the amount of re-fill allowed and the re-fill amount should be fixed as it directly correlates, not as much with the amount of carry-over, but with the amount diverted for irrigation out of ponds 1 and 9.

7. Annual volume limits

The Protestant agrees with the total volume limit. How much water finds its way to irrigation in any year is a NOT a function of seepage, evaporation and the delta between storage remaining but a function of controlled irrigation from only two designated ponds. Black Rock’s assertion that they can apply all 1,215 acre-feet to irrigation is a ludicrous and coercion.

Black Rock most specifically needs to be locked-in to set seepage, evaporation and irrigation volumes or the approval may result in an enlargement of the use.

Black Rock states it has an “incentive” to keep seepage and evaporation as low as possible. However, evaporation rates are largely out of their control and evaporation rates are not stagnant. Notwithstanding, evaporation losses are offset by net gains from storm water and precipitation.

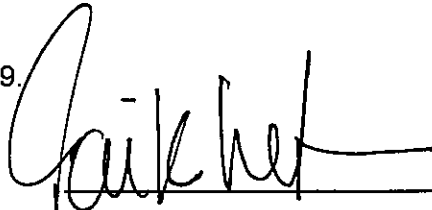
Conversely, seepage rates are largely within Black Rock’s control and with diligence can be nearly stagnant. Therefore, any “incentive” to reduce seepage should be willingly supplemented via oversight and regulation by the Department.

As the Hearing Examiner has stated he is unaware of municipal water rights that recognizes municipal storage and particularly "aesthetic storage" as part of a larger municipal use, any approval MUST limit the actual volume stored and the volume stored for re-diversion from storage.

CONCLUSION

It is clear the Hearing Officer made a careful analysis, summary and conclusion of the record and facts presented in hearing. The Departments conditions are fair and effective for insuring "consistency" with the protection and conservation of water resources in the State of Idaho. Consequently, the Protestant believes the specific findings of fact, convulsions of laws and the conditions in the Preliminary Order should stand as written.

Dated this 19th day of June, 2009.



Jai Nelson, Protestant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing STATE OF IDAHO DEPARTMENT OF WATER RESOURCES RESPONSE TO **BLACK ROCK'S PETITION FOR CLARIFICATION AND/OR RECONSIDERATION** relating to Black Rock Utilities Inc. 95-9045 Water Permit Amendment addressed to the person(s) as shown below on the date set forth below by the following method or methods:

☒ By mailing full, true and correct copies thereof, in sealed, first-class postage-prepaid envelopes, addressed to the person(s) as shown below with the United States Post Office at Coeur d' Alene, Idaho on the date set forth below as listed.

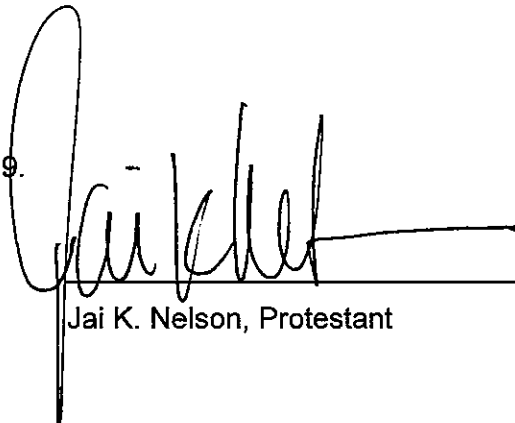
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Dated this 19th day of June, 2009.



Jai K. Nelson, Protestant