

JUL - 9 2009

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. 95-945 in the Name of
Black Rock Utilities (Application No.
74780)

**BLACK ROCK'S EXCEPTIONS TO THE
AMENDED PRELIMINARY ORDER**

Applicant Black Rock Utilities, Inc. ("Black Rock"), through its attorneys Givens Pursley LLP, and pursuant to Idaho Department of Water Resources Rule 730(b), IDAPA 37.01.01.730(b), hereby files its Exceptions to the Hearing Officer's Amended Preliminary Order dated June 23, 2009 and served on June 25, 2009 in the above-captioned matter.

Black Rock appreciates the Hearing Officer's careful consideration of its Petition for Clarification and/or Reconsideration. The Hearing Officer's response to that petition resolved many of the issues raised. Black Rock believes, however, that the Amended Preliminary Order incorrectly quantifies the volume of the water right.

The original Permit dated October 20, 2000 authorized diversion of 2.5 cfs over a 245-day irrigation season. Although no annual volume was stated, this equates to a maximum of

1,215 acre-feet. The 1,215 acre-feet was authorized to irrigate 668 acres. (The right also included an additional 1.0 cfs for domestic use, which was later dropped.) This yields a duty of water of 1.82 afa, which is very low. Indeed this is slightly less than the estimated ET for turf in this area. Thus, meeting the consumptive use requirements of irrigated turf will require a very efficient irrigation system and a resulting application that will approach 100% consumptive use.

The Amendment of Permit dated July 27, 2007 authorized diversion of the same 1,215 acre-feet per year for municipal use, but was limited to irrigation, construction, and fire protection. The original 668 acres of irrigation was changed to 545 acres of permanent irrigation plus 123 acres of "residual irrigation component" reflecting the dry-up of 123 acres previously authorized for irrigation. Condition 14 gave Black Rock one year to change the residual irrigation component to another use.

The Application for Amendment of Permit ("Application") dated April 10, 2008 implemented condition 14. It sought to convert the 123 acres of residual irrigation component to various storage uses for ponds and water features on the property. In order to avoid injury or enlargement, the Application proposed limiting total diversions for all uses to 1,215 acre-feet per year, the same as the volume allowed under the original Permit and the existing Amendment of Permit. Essentially, Black Rock was drying up 123 acres of land and using the water associated with that dry-up to support a new storage right on the remaining 545 acres.

Let us think through how that transaction should be quantified. A hypothetical may help. Let us begin by allocating pro-rata the 1,215 acre-feet between the 545-acre parcel (991 acre-feet) and the 123-acre parcel (224 acre-feet). Let us suppose that the original right was owned by Bob, who diverted the water from Lake Coeur d'Alene for direct application (without storage) to a highly efficient turf farm. Suppose that Mary sought to purchase Bob's 224-acre-foot water

right associated with the 123-acre parcel for use on a brand new turf farm down the road.

Suppose further that Mary intended to construct new storage ponds with a volume of 123 acre-feet to be used in conjunction with her new turf farm. Suppose further that the ponds would suffer evaporation and seepage losses totaling 81 acre-feet per year.

If she applied for a change in place of use and nature of use of Bob's right, should she be allowed to divert the full 224 acre-feet for use at her new turf farm? The answer is yes, and here is why.

If the ponds leak and evaporate 81 acre-feet, that would leave 143 acre-feet for her to apply to the turf. However, she would have to reduce the irrigated acres from the 123 acres that Bob irrigated by 36% ($81/224$). Thus, she could only irrigate 79 acres. This additional dry-up of 44 acres ($123-79$) would save 80 acre-feet of consumptive use, based on Bob's duty of water of 1.82×44 acres. (Recall that the use was virtually 100% consumptive.) This is roughly equivalent to the 81 acre-feet in new evaporation and seepage associated with the new storage.

Thus, the system is in balance (but for 1 acre-foot). Bob irrigated 123 acres, consuming very nearly all 224 acre-feet. Mary will irrigate 79 acres, again consuming virtually all 224 acre-feet (81 to evaporation and seepage and the rest to turf). Thus, no injury and no enlargement.

This is a very conservative evaluation. In fact, the system will be better off after the transfer to Mary. The reason is that the losses to seepage are not really lost to the system. All or nearly all of that water will find its way back into Lake Coeur d'Alene. This will more than make up for the 1 acre-foot difference between pond losses versus consumptive use associated with the dry-up of 44 acres. It will also more than make up for the fact that the turf use must, as a practical matter, be something less than 100% consumptive.

It may be that Mary's estimate of seepage and evaporation associated with the ponds was high. If that is the case, then she will irrigate a few more acres of turf. But there will be a corresponding reduction in the need to mitigate for seepage and evaporation. They basically cancel out. So it does not matter if the seepage and evaporation losses turn out to be lower. Mary can continue to divert the full 224 acre-feet, and no one will be worse off.

Now, adjust the hypothetical. Suppose that instead of Bob selling the water to Mary, he simply dries up his 123-acre parcel and applies that water to his already irrigated 545-acre parcel, adding in the storage just like Mary proposed to do. The result is identical. Actually, the system is probably a little better off, because he will have slightly increased his duty of water. The result is that his use will now be less than 100% consumptive, and more water will return to the Lake.

This hypothetical now matches Black Rock's Application.

For these reasons, Black Rock should be allowed to divert the same 224 acre-feet associated with the 123-acre residual irrigation component and add it to the 991 acre-feet associated with the 545-acre development. The result is a total diversion volume of 1,215 acre-feet per year.

This is what Black Rock sought in the Application. This is what Black Rock was told made sense when it had pre-application consultations with Department staff. No one, including the Hearing Officer, raised any question as to this volume issue during the entire two-day hearing. The first time Black Rock learned of the Hearing Officer's concern was in the Preliminary Order and in the Amended Preliminary Order.

Make no mistake. Not all of the 1,215 acre-feet of water diverted will be applied to irrigation. Some amount will be lost in the ponds to evaporation and seepage. It will probably

be less than 81 acre-feet because, as Scott King explained repeatedly during the hearing, that is a very conservative (meaning high) number that was intended to reflect the highest possible losses. We believe that the estimated evaporation (13 acre-feet) is pretty accurate. But the estimated seepage losses of 68 acre-feet are probably very high compared to the reality. After all, these are lined ponds.

But there is no need to quantify this. Whatever water is left over in the ponds belongs to Black Rock, and Black Rock can take it out and apply that water to beneficial use as it sees fit. At the end of the day, the previously authorized use in the original Permit was very nearly 100% consumptive. It will be somewhat less consumptive afterward, despite the addition of additional seepage and evaporation associated with the storage. As a result, there will be the same amount of water (or, most likely, more) in Lake Coeur d'Alene after the pending amendment. There is simply no reason to place any cap on how much water can be applied to turf and landscaping.

Nor is there any reason for the permit to be concerned with issues of carry-over storage. This is a red herring. It has nothing to do with the injury or enlargement analysis. And, again, it was never raised during the hearing, the pre-hearing conference, or in pre-application consultation. Once the water is diverted and stored, Black Rock owns the molecules. It may carry over the storage or not as it chooses. If Black Rock begins a season with full ponds carried over from the prior year, and finishes an irrigation season with partially or fully emptied ponds, any filling of ponds in the following season must be within the limits of the total volume limit.

CONCLUSION

For the foregoing reasons, Black Rock respectfully requests that the Department remove from the final Order in this matter the condition on page 12 of the Amended Proposed Order

which reads, "The total volume diverted under this right for irrigation shall not exceed 991 acre-feet."

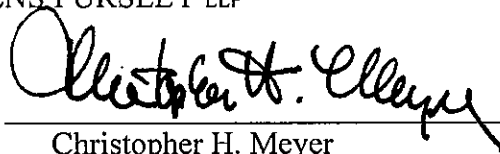
If there is any limit on the quantity specifically applied for irrigation, it should be a reduction from the total 1,215 acre-feet diverted based on the quantity actually diverted to supply pond evaporation, seepage, net annual filling of ponds (ending pond volume minus beginning pond volume) and other allowed uses (i.e., construction). As discussed above, however, we do not believe there is any need for such an administratively-complex condition in order to prevent injury and enlargement.

DATED this 9th day of July, 2009.

Respectfully submitted,

GIVENS PURSLEY LLP

By

A handwritten signature in black ink, appearing to read "Christopher H. Meyer", is written over a horizontal line.

Christopher H. Meyer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of July, 2009, the foregoing was filed, served, or copied as follows:

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Christopher H. Meyer

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Sent: Thursday, July 09, 2009 4:09 PM
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Subject: Black Rock's Exceptions to Amended Preliminary Order [JWOV-GPDMS.FID303593]
Attachments: BR Exceptions to Amended Preliminary Order.PDF

Attached is a copy of Black Rock's Exceptions to the Amended Preliminary Order which is being hand delivered and filed with the Department this afternoon. Hard copies will also be mailed to Ms. Nelson and Mr. Haynes.

Best regards,

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7/9/2009

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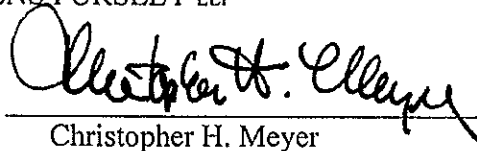
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DATED this 9th day of July, 2009.

Respectfully submitted,

GIVENS PURSLEY LLP

By


Christopher H. Meyer

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