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DEPARTMENT OF
WATER RESOURCES

Jai Nelson, Protestant
15192 Gate 7 Ridge Road
Coeur d' Alene ID 83814

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) EXCEPTIONS TO THE
95-9045 BLACK ROCK UTILITIES INC.) AMENDED PRELIMINARY
) ORDER

Pursuant to the above filing, Jai Nelson "Protestant" respectfully submits a **RESPONSE TO BLACK ROCK'S EXCEPTIONS TO THE AMENDED PRELIMINARY ORDER** based on the following issues presented. In the applicant's **EXCEPTIONS** filing, the applicant's attorney, Mr. Meyer, asserts the Amended Preliminary Order incorrectly quantifies the volume on the water right.

Mr. Meyer quantifies the water transaction thorough a multi-page hypothetical algorithm and an adjusted hypothetical setting with the characters "Mary" and "Bob." The Protestant briefly considered countering with another theatrical analogy using "Dick" and "Jane". However, quickly realized the applicant has adequately fictionalized this entire process.

Therefore, the following is a realistic depiction of Black Rock's water application and rights. Mr. Meyer asserts: "Once the water is diverted and stored, Black Rock *owns* the molecules." My understanding of Idaho law drastically differs. In Idaho, water belongs to the residents of the State and an individual or entity may obtain a *right* to divert water for a beneficial use. Idaho's water is a public resource and water rights in Idaho are *held* subject to the public trust. Idaho's water doctrine is founded on the principal that water rights are based on beneficial use of a public resource, which *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.

In fact, 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. Water must be put to work, one way or another, or its holder loses all *rights* therein. Black Rock’s vast amounts of stored water (millions of molecules) will require a proven use by late summer, 2010 or the *right*—not ownership—shall be lost or forfeited for nonuse per Idaho Code.

Per the preliminary order, Black Rock may only divert water from March 15 through November 15 each year and this equates to 245 days as noted in Mr. Meyers’s filing. Idaho water allocation laws and guidelines allow an purveyor of municipal rights to base their request on the concept of instantaneous diversion, the MOST water that will be needed at any one given time. This amount is irrational as our North Idaho climate water needs and use are very different mid-spring and mid-fall as compared to mid-summer. This area has a precipitous climate. Therefore, Black Rock will not need to irrigate each and every one of the 245 days. Little, if any, watering is needed in March, April and even into May. Likewise, in the fall months, especially October and November the precipitation increases and the necessity for irrigation is again greatly reduced. During the remaining summer months, there is often a day or several days of significant rainfall during which time any additional watering might lead to an overly soggy and mossy golf course. Hence, the actual days requiring irrigation is certainly less than 245.

Mr. Meyer notes that the 1,215 acre-feet was originally “authorized” to irrigate 668 acres, however this was later reduced to 545 acres per the applicants request. Using the wrong numbers (668 instead of 545) for his calculation, he still comes up with a figure which is only *slightly less* that estimated ET’s for turf in this area. Mr. Meyer notes this estimate will require a very effluent irrigation system—exactly the type of system Black Rock representatives have stated is in place and functioning. Specifically, Kyle Kapps testified that Black Rock requires much less water to irrigate that this permit is requesting. Black Rock representatives have also detailed countless conservation measures, including low-moisture plant species, drip irrigation on landscaping, fairway hand watering and

watering in non-evaporative peak daylight hours just to name a few. All of these measures equate to the need for less water.

In hearing exhibit BR 54 (applicant's exhibit) the last page titled "Irrigated Acreage Summary Map" with a Map Key which details the breakdown of irrigation the 545 acres. Of the 215 acres to be irrigated at the Club at Black Rock 100 acres are golf course turf and Loff's Bay Road for 5 acres. Of the 330 acres to be irrigated at Black Rock North, 125 acres are golf course. In addition, four more roads are to be irrigated: Loff's Bay Road; 10 acres and Roads I, A and B for another 20 acres. If these five roads were not irrigated, 35 acres of designated watering could be utilized on actual turf.

In this filing, Mr. Meyer continues to grossly exaggerate the requirement for refilling of the ponds for irrigation. Again, only two ponds are being used filled with lake water and utilized for irrigation. These are pond 1 with 18,830,288 gallons or 57.79 acre feet and pond 9 with 5,000,000 gallons or 15.35 acre-feet. These volumes equate to 73.14 acre feet, a mere fraction of the total acre feet allowed. Per the Preliminary order's total annual refill volume of 246 acre feet, these two ponds will be able to be drained and refilled multiple times each year.

In addition to lake water and stored lake water, Black Rock has a third source. Black Rock intends to reuse effluent water for irrigation. Currently, Black Rock has an application filed at the Idaho Department of Environmental Quality: draft permit application LA-000188-2. This application includes using a maximum of 9.5 MG at the Club at Black Rock. (Note: the Protestant does not recall any mention of effluent use sought by the applicant at the original Club site). This application also includes a maximum of 18.9 MG at the Black Rock North. At the North site, effluent water is designated to fill pond number 2 with 4,235,814 or 13 acre-feet. In the application, Black Rock's engineer has estimated, for 2009, that 2.5 million gallons of effluent will be available for reuse. This number is low due to the factor that the Club site is approximately one-third built-out and the North site is yet to be developed.

In addition to the above dynamics, if the applicant later finds they still need more irrigation water, they simply need to file an amendment to reduce the storage volume for aesthetic ponds, streams and waterfalls and put this water to work. According to the applicant's spreadsheet the original Club Black Rock currently has 7,430,260 gallons or 22.81 acre feet of aesthetic storage and the applicant had requested an additional 32,859,267 gallons or 100.84 acre feet of aesthetic storage at Black Rock North—a 335% *increase*—over 4 times the amount at the original Club Black Rock. A striking and noticeable enlargement of water storage on the second site which could most certainly be reduced.

The above list of accurate specifics portrays reasonable water consumption and serves as a “reality check” to counter the “Bob” and “Mary” chronicle and Black Rock's actual water use which, in truth, will be something much less than 100% consumptive.

CONCLUSION

Idaho is distinguished by having one of the highest rates of water consumption in the country. This can be partially attributed to the fact that the State of Idaho's current policies governing the issuance of water rights provide little incentive for conservation measures and the rights for excessive amounts of water are routinely granted. This is precisely why there has been an increase in citizen-based protests. All water applications need to be individually scrutinized, especially in North Idaho.

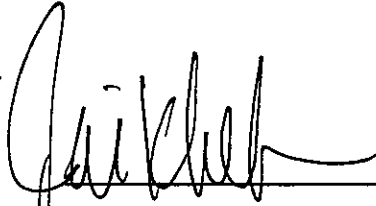
Idaho's fastest rate of growth is in the panhandle, which is in the midst of unprecedented growth. More than anything before, growth is why we're losing so much of what makes Idaho *Idaho*. Growth issues can divide us, but also unite us. Connecting diverse and independent Idahoans is challenging. But in problem solving we find opportunity. This opportunity can act as a catalyst to unite our goals and lead to policy improvements and much needed conservation measures. Conservation through compromise and collaboration with the Idaho Department of Water Resources is the only logical pathway to protecting Idaho's valuable natural resources. In North Idaho, we are defined by our public water resources. Let's be diligent in keeping that definition whole and secure.

In Idaho, the majority of water rights are quantified in terms of both diversion rate and annual quantity. Moreover, an irrigation right need only be diverted at its full diversion capacity for a fraction of the year—the irrigation season. Therefore, any Department approval must limit the actual volume stored and the volume stored for re-diversion from storage.

In the recent filing, the applicant protests any administratively complex condition regarding limiting quantities. The Hearing Examiner did in fact made a precise and clear-cut condition with a total volume diversion. As such, Black Rock most specifically needs to be locked-in to a set total volume; seepage, evaporation and irrigation volume limits or the approval may result in an enlargement of the use which could lead to injury. Hence, the Protestant agrees with Condition 12 as written.

Consequently, the Protestant believes the specific findings of fact, convulsions of laws and the conditions in the Amended Preliminary Order should stand as written.

Dated this 18th day of July 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 EXCEPTIONS TO THE AMENDED PRELIMINARY ORDER** 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.

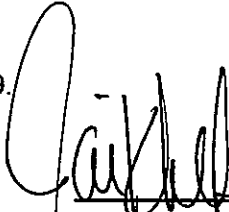
Department of Water Resources of the State of Idaho
Gary Spackman, Hearing Examiner
P.O. Box 83720
Boise, Idaho 83720-0098

Department of Water Resources of the State of Idaho
Robert Haynes, Regional Manager
7600 Mineral Drive, Suite 100
Coeur d' Alene ID 83814

Givens Pursley
Christopher Meyer
PO Box 2720
Boise ID 83701

Black Rock Utilities
Kyle Capps
PO Box 3070
Coeur d' Alene 83816

Dated this 18th day of July 2009.



Jai K. Nelson, Protestant