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Department of Water Resources
Eastern Region

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

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 22-13689, 22-13690, 22-13691
and APPLICATION FOR TRANSFER NO.
72904 IN THE NAME OF BOYD SMITH
TRUST

**RUSKIN AND KAREN VEST'S MOTION
TO VACATE SCHEDULED HEARING
DATE, TO COMPEL DISCOVERY AND
FOR EXPEDITED HEARING AND ORDER**

Ruskin Vest and Karen Vest (the "Vests"), through their counsel of record Givens Pursley LLP, pursuant to Idaho Department of Water Resources Rules of Procedure and Idaho Rules of Civil Procedure 37(a), hereby moves for: 1) an order by the Department vacating the scheduled hearing date for the above-captioned matter, and 2) for an order compelling the Applicant to produce discovery responses required by Department Rule 524 and IRCP 30(b)(5). The grounds for the instant Motions are set forth below and supported by the Affidavit of Michael C. Creamer submitted herewith.

GROUND FOR MOTION

The hearing in this matter currently is scheduled to commence on Wednesday, April 28, 2010 in Driggs, Idaho. Since early March, the Vests and other parties have been engaged in discussions with the Applicant concerning the Applicant's intended operation of the proposed aquifer recharge and recovery program described in the Applications for Permit for diversions to recharge from South and North Leigh Creeks and diversions of tributary groundwater. Pursuant to the Department's Scheduling Order, the Vests timely served the Applicant with Vests' First Combined Discovery Requests to Applicant Boyd Smith Trust ("Vests' Discovery Requests") on February 26, 2010. Per the Department's Scheduling Order, the deadline for responding to Vests' Discovery Requests was March 31, 2010. The discovery deadline was extended to April 14, 2010 on motion filed by the Applicant, which was not opposed by the Vests on the understanding that settlement discussions would be fostered by the extension and that the Applicant's discovery responses would be forthcoming and complete when produced.

Among other things, Vests' Discovery Requests included the following Request for Production:

REQUEST FOR PRODUCTION NO. 6: Please produce the MODFLOW model for the Teton Ranch ("Ground Water Model") referenced in the Brockway Engineering, LLC Summary Report on Teton Ranch Proposed Managed Recharge Plan and Ground Water Modeling dated September 14, 2009 and every subsequent version thereof developed, used or capable of being used in analyzing, characterizing or simulating ground water and surface water interactions within the ground water domain encompassed by such Ground Water Model(s) including ground and surface water responses to the managed recharge and/or ground water pumping on the Teton Ranch proposed by the above-captioned applications. In responding to this Request for Production, the Ground Water Model and each subsequent version thereof should be produced on computer-ready compact disk with all executable files, solvers used for modeling, water balance information used to develop the well files, all input data and source code.

Because the Applicant is relying almost exclusively on the predictions of surface and ground water interactions generated by the Brockway Ground Water Model, it is critical for Vests' consultants to have access to the model and its documentation to be able to evaluate the input files and source codes to verify whether the Ground Water Model has been properly constructed and can be used for the purposes proposed by the Applicant. This evaluation is critical to Vests' consultants being able to testify on these issues at hearing and critical to the Hearing Officer being able to weigh all appropriate evidence concerning the Ground Water Model.

Applicants' Response to Vests' Discovery Requests, received by Vests' counsel on April 15th failed to produce the Ground Water Model. Instead, the Applicant responded as follows:

RESPONSE TO REQUEST FOR PRODUCTION NO. 6.: Since receiving these discovery requests, counsel for the Applicant has communicated with counsel for the Vests, and have determined that rather than producing the MODFLOW documents, Brockway Engineering, the consultant for the Applicant, will be made available to answer any questions from the expert retained by the Vests.

Counsel for Vests and the Applicant have had numerous communications over the previous months, but not with respect to this Production Request or the Applicant's Response. To the extent the Applicant has "determined" to make Brockway Engineering available to answer questions rather than producing the MODFLOW documents as requested in Vests' Discovery Request and as required by the Rules, that determination is a unilateral one on the Applicant's part. It never has been discussed with, or agreed to by, the Vests or their counsel.

If the Applicant had a valid objection to the Production Request, none of which have been raised, the Applicant's duty under IRCP 26(c) was to seek a protective order from the Department and establish good cause for not producing the Ground Water Model or perhaps to seek an extension by stipulation. Applicant took none of these actions. Consequently, the Vests

are left on the near-eve of hearing without critical information requested through discovery that goes directly to the merits of the Applicant's case.

Even more problematical is the fact that the Ground Water Model and the Brockway report concerning the Model that will be proffered by the Applicant at the hearing are not the same Ground Water Model and report that were submitted in support of the Applications. Applicant's discovery responses contain a copy of a report prepared by Brockway Engineering entitled "Teton Ranch, Groundwater Model, Teton County, Idaho" dated April 12, 2010. It is apparent from even a cursory review of these materials that key modeling parameters and assumptions and, consequently, the results of new model runs are significantly different from the original. Unless the Applicant produces the Ground Water Model as requested "in computer-ready compact disk with all executable files, solvers used for modeling, water balance information used to develop the well files, all input data and source code" (as requested in Vests' Discovery Requests), Vests' expert will be precluded from evaluating the bona fides of either the original Ground Water Model, or the April 12th version, or from understanding the differences between them and the resulting effects on model results.

Even had the discovery deadlines not been extended and the Ground Water Model had been produced as required, the time in which to evaluate them still would have been quite limited. Now, however, even if the Applicant were required to immediately produce what has grown to be several versions of the Brockway Ground Water Model, the remaining time until hearing is so short as to make it impossible for Vests to undertake an appropriate evaluation of and be able to fully offer expert testimony concerning the reliability of the model as a tool to answering the questions pertaining to injury, enlargement, and related matters being offered by the Applicants—something the Vests believe is seriously in question based on their

understanding of the original Ground Water Model. The Vests need their discovery answered and additional time to evaluate this information.

REQUESTED RELIEF

For the foregoing reasons, Vests respectfully request that the Department issue an Order: 1) vacating the hearing in this matter currently scheduled to begin April 28, 2010; 2) compelling the Applicant to produce the Ground Water Model, including the original and all subsequent versions and its supporting documentation; and 3) holding the hearing in abeyance or, in the alternative, rescheduling the hearing to a later date so as to provide Vests' experts an adequate opportunity to review the Ground Water Model.

Given the shortness of time before the scheduled hearing date, the Vests request an expedited telephonic hearing on their Motion.

Dated this 20th day of April, 2010.

GIVENS PURSLEY LLP

A handwritten signature in black ink, appearing to read "Michael C. Creamer", written over a horizontal line.

Michael C. Creamer

Attorneys for Ruskin Vest and Karen Vest

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2010, a true and correct copy of the foregoing was sent by **e-mail and U.S. Mail**, postage prepaid, to the following:

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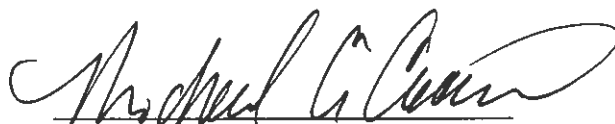
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