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Attorneys for Applicant Nevid LLC

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 61-12090 IN THE NAME OF NEVID LLC	**APPLICANT'S PETITION FOR RECONSIDERATION AND CLARIFICATION OF PRELIMINARY ORDER**

COMES NOW the above-named Applicant, by and through its counsel of record Norman M. Semanko of the firm Rose Law Group Borton, and pursuant to Idaho Code § 67-5243(3) and Procedure Rules 230, 730 and 770 of the Department's Rules of Procedure, hereby petitions the Hearing Officer to reconsider and clarify certain aspects of the Preliminary Order issued in this matter, as set forth below.

I. INTRODUCTION

The Applicant generally agrees with the Preliminary Order issued by the Hearing Officer in this matter and appreciates the effort put into processing the application by the Department. However, the Applicant believes that there are three issues raised by the Preliminary Order that should be addressed on reconsideration and clarified.

II. ISSUES TO BE RECONSIDERED AND CLARIFIED

Specifically, the Applicant asks that the Hearing Officer reconsider and clarify the applicable findings of fact, conclusions of law, and portions of the order regarding:

1. The quantity of water available for appropriation in the Elk Creek Village area;

2. The sharing of water among all applicants in the area, regardless of priority; and

3. The limitation on the use of water for irrigation of open space.

III. BASIS FOR RECONSIDERATION AND CLARIFICATION

The factual and legal basis for reconsideration and clarification of each of these issues is discussed below, along with the Applicant's requested relief.

A. THE HEARING OFFICER SHOULD RECONSIDER HIS FINDINGS REGARDING THE AMOUNT OF WATER AVAILABLE FOR APPROPRIATION IN THE ELK CREEK VILLAGE AREA.

Idaho Code § 42-203A(5)(b) requires a determination that the water supply is sufficient for the purpose for which it is being sought. The statute does not require a determination of the exact amount of water available; only that there is enough water available for the purpose being sought; in this case, up to 5 cubic feet per second (cfs) and 580 acre-feet per annum (afa) has been requested.

Finding of Fact No. 23 in the Preliminary Order states that the total annual average recharge in the area is 811 afa. The Applicant requests that this finding be reconsidered, and that the annual recharge in the area be recognized as greater than 811 afa for the following reasons.

All water that falls on the Elk Creek Village capture zone area that is not lost to evapotranspiration, surface diversions, and channel runoff from the capture zone area becomes aquifer recharge. This difference, estimated using IDWR precipitation data

and evapotranspiration estimates based on Anderson Dam weather station data (which may be higher than actual evapotranspiration in the Elk Creek Village area), is approximately 2,400 acre feet in an average year. *See*, Exhibit 2 (SPF, 2009) Table 2, p. 23 (revised water budget summary). This is a "low estimate" (as compared with a "high estimate" of 8,400 acre-feet derived from the same precipitation value but a lower evapotranspiration estimate), and IDWR testimony at the hearing agreed that it is reasonable to rely upon this low-end estimate of 2,400 acre-feet. No other evidence in the record rebuts this conclusion.

Procedure Rule 712.01 requires that: "*Findings of fact must be based exclusively on the evidence in the record* of the contested case and on matters officially noticed in that proceeding" (emphasis added). Therefore, the Hearing Officer should reconsider the 811 afa finding and revise it to a minimum of 2,400 afa. Alternatively, the Hearing Officer should cite the evidence in the record, including the range of 2,400 to 8,400 afa in Exhibit 2, and make a determination that sufficient water is available based upon the record, without making a firm determination of the exact amount. In such case, the Applicant's required monitoring can be expected to provide more data and give the Department a more definitive assessment of the available water levels. In no case, however, should the Hearing Officer make a firm and final determination that 811 afa is the correct amount. Such a finding cannot be supported by the record.

The Hearing Officer assumes that 14 percent of the difference between precipitation and evapotranspiration becomes aquifer recharge (Finding of Fact 23). A water budget using this assumption does not account for all water that falls in the Elk Creek Village area as precipitation, i.e., the Hearing Officer's water budget does not

account for the remaining 86 percent of the difference between precipitation and evapotranspiration. Very little, if any, surface water flows from the Elk Creek Village capture zone area in a typical year. All water not lost to evapotranspiration (or other consumptive uses) and that does not flow from the capture zone as surface water becomes recharge to local aquifers. This recharge may occur as:

(a) Areal infiltration at a rate higher than 3 percent. For example, SPF assumed a 5 percent infiltration rate for rangeland in the Elk Creek Village area in Exhibit 2 because of the presence of a higher percentage of more permeable soils than in other parts of the Treasure Valley (compared to other studies which have assumed a 2-3 percent average rangeland infiltration rate). The actual infiltration rate in parts of the Elk Creek Village area could be even higher than 5 percent because of the presence of permeable soils.

(b) Shallow subsurface underflow from granitic areas to sedimentary areas at the base of the Danskin Mountain front.

(c) Seepage from surface channels in the Elk Creek Village area.

SPF had initially assumed that channel seepage accounted for 14 percent of the difference between precipitation and evapotranspiration in the Elk Creek Village analysis. Exhibit 3A (SPF, 2007b, Groundwater Supply Evaluation for Elk Creek Village, Application for Permit No. 61-12090). This assumption was based on seepage estimates in the Mayfield Townsite area. However, this assumption was not used in the revised Elk Creek Village water budget (Exhibit 2 (SPF, 2009)) for the following reasons:

a) Low estimates of channel losses alone did not account for the apparent difference between precipitation and other losses in the Mayfield Townsite area. Consequently, Table 5 in the Mayfield Townsite report (SPF, 2007a, p. 27) listed a low estimate of channel seepage (4,200 afa, which is approximately 14 percent of then-estimated channel flows in Indian Creek at Mayfield Bridge) and a high surface-channel seepage estimate of 29,730 afa. The latter volume reflects precipitation that could not be accounted for as surface water diversions or water leaving the Mayfield Townsite area as surface flow. In reality, this larger volume does not necessarily flow under Mayfield Bridge in the Indian Creek channel but recharges aquifers as channel seepage above Mayfield Bridge, areal infiltration, or as shallow subsurface flow from surrounding hills. Evidence for shallow subsurface flow includes abundant shallow vegetation and boggy areas at the base of the Danskin Mountain Front in the Indian Creek area.

b) It was assumed in the revised water budget information submitted for the Nevid Application 61-12090 (Exhibit 3A (SPF, 2007b)) that the entire difference between precipitation and estimated losses (e.g., evapotranspiration, surface water diversions, and channel runoff leaving the area) ultimately becomes aquifer recharge by areal infiltration, channel seepage, or shallow subsurface underflow. This is a legitimate approach because any water that falls in the catchment area does not become surface runoff from the catchment area, and is not lost to evapotranspiration, ultimately becomes aquifer recharge. It was categorized as channel seepage, but some of this water could recharge aquifers via other pathways (e.g., areal infiltration).

c) Even using the more conservative (i.e, higher) estimates of evapotranspiration based on Anderson Ranch weather station data, the difference between estimated annual precipitation (24,300 afa) and estimated evapotranspiration (21,900 afa) is 2,400 afa. Some of the precipitation enters the ground as areal infiltration (e.g., 700 afa if the infiltration rate is 5 percent or less if the infiltration rate is 3 percent), some of the water seeps from surface channels, and some of it recharges local aquifers as shallow underflow from granitic areas. In this case, there are insufficient data to quantify flow in these individual pathways, but regardless, water that does not leave the capture zone area as surface flow (which it usually does not) becomes aquifer recharge. Therefore, the Applicant believes that an annual low recharge estimate of 2,400 afa is much more realistic than the estimate of 811 afa.

Some additional, related findings that merit reconsideration and clarification include the following:

Finding of Fact No. 19 states that "Nevid assumed that all water falling on the upper granitic area that is not consumed by evapotranspiration contributes to surface water flows in the ephemeral streams whose channels run through the contributing area." The revised water budget prepared for the Nevid property actually states that "Precipitation in granitic areas in the upper Sand Hollow Creek and Bowns Creek watersheds is expected to contribute to aquifer recharge in the project area via (1) seepage from surface channels into underlying sediments *and (2) shallow underflow*". Exhibit 2, p. 15 (emphasis added). The distinction is important because, as discussed above, there are several mechanisms that contribute to aquifer recharge in this area,

including shallow underflow. We suggest that the Hearing Officer consider modifying Finding of Fact No. 19 to recognize shallow underflow as a recharge pathway.

Finding of Fact No. 24 states that "Nevid's computations of recharge assume there is no effect on the target aquifer from other ground water withdrawals outside of the contributing area." Similarly, we request that the Hearing Officer also recognize that Nevid (SPF) assumed that Elk Creek Village wells would not capture recharge from outside of the capture area shown in the revised water budget.

Finding of Fact No. 25 states that Nevid assumes that "all water recharging the aquifer up-gradient from the proposed development is available for appropriation". However, the proposed withdrawal under Application No. 61-12090 is substantially less than the estimated annual recharge of 2,400 afa in the Elk Creek Village capture zone area. Thus, we suggest that the Hearing Officer delete this finding or modify it to recognize that recharge in the Elk Creek Village area is likely greater than the requested application volume.

B. THE HEARING OFFICER SHOULD RECONSIDER HIS CONCLUSION THAT WATER BE SHARED AMONG ALL OF THE APPLICANTS, REGARDLESS OF PRIORITY.

Conclusion of Law No. 6 states:

> It is in the local public interest to promote the full use of the limited ground water resources in the desert areas that approximately straddle the Ada County – Elmore County border. There are many developments proposed in this area. <u>It would not be in the public interest to approve an appropriation of water that could significantly commit a large portion of the ground water resources to a single development</u>. (Emphasis added).

In addition, Conclusion of Law No. 8 states:

> The doctrine of prior appropriation harshly recognizes that the first appropriator in time receives all the water before the next appropriator receives any water. If IDWR strictly applied notions of the prior appropriation doctrine when it considers applications to appropriate water, Nevid might be entitled to all the unappropriated water recharging up gradient from the Elk Creek Village property. (Emphasis added).

The Applicant agrees that "the full use of the limited ground water resources" of the area should be promoted. The Applicant also understands the Hearing Officer's concern about "all the unappropriated water" going to "the first appropriator in time". However, it does not follow that the amount allocated to the Applicant should be arbitrarily limited in order to share it with other applicants which have later in time priorities. This runs counter to the appropriation doctrine and long-established legal precedent. In addition, the concern is unwarranted because the amount of water available in the area is greater than 811 afa, as discussed above.

The case of *Lemmon v. Hardy*, 95 Idaho 778 (1974), stands for the proposition that when an applicant's use is speculative no water right should be granted and the later-in-time applicants should be given an opportunity to appropriate the water. This case involves exactly the opposite scenario. The Applicant is ready, willing and able to move ahead with the proposed development – and is first in line. This diligence should be recognized and rewarded, consistent with the prior appropriation doctrine and the *Lemmon* case, not minimized.

The Hearing Officer's reliance on the "local public interest" criteria to limit the amount of water made available to the applicant is misplaced. One of the key cases interpreting the criteria, *Shokal v. Dunn*, 109 Idaho 330 (1985), pointed out the

importance of "the intent and ability of the applicant to complete the appropriation". Again, the Applicant has demonstrated the intent and ability to develop Elk Creek Village and should not be arbitrarily limited. *Shokal* also indicated that it was appropriate to consider the "loss of alternative uses . . . that might be made within a reasonable time if not precluded or hindered by the proposed appropriation". However, "alternative uses" must mean something different in character than what is being proposed by the Applicant. In this case – unlike *Shokal* – the proposed uses are all of the same nature: planned communities. If the Applicant is ready and willing to proceed, and the public's interest is in the full utilization of the resource, there is no valid basis – under the "local public interest" criteria or otherwise – to limit the Applicant's development in favor of a later-in-time planned community development that is for the same purpose, not an alternative use.

The 2003 amendments to the "local public interest" criteria further demonstrate this point. The Statement of Purpose accompanying the bill, H. 284, states:

> This legislation clarifies the scope of the "local public interest" review in water right applications. The "local public interest" should be construed to ensure the greatest possible benefit from the public waters is achieved . . . the availability of water for <u>other beneficial uses</u> is appropriately considered under the local public interest criteria. . . .
>
> Water Resources role under the "local public interest" is to ensure that proposed water uses are consistent with securing "the greatest possible benefit from [the public waters] for the public." Thus, within the confines of the legislation, Water Resources should consider all locally important factors affecting the public water resources, including . . . the effect of such use on the availability of water for <u>alternative uses of water that might be made within a reasonable time</u>."

www3.state.id.us/oasis/2003/H0284.html (emphasis added).

Again, there are no "other beneficial uses" or "alternative uses of water" proposed in the local area, and certainly none that can "be made within a reasonable time." All of the proposed uses are for the same purpose: planned communities. The public's interest lies in maximizing the use by the Applicant, who has demonstrated that it is ready, willing and able to follow-through on its commitments. The public has no interest in arbitrarily reducing the amount of water made available to the Applicant in favor of other later-in-time developers that may or may not demonstrate the same level of commitment as the Applicant.

Finally, as emphasized in the technical reports submitted into evidence in this matter by SPF, the Applicant's proposed development is in what has been labeled as the Elk Creek Village area. There is sufficient water for the development in this area, without interfering with other proposed developments in the larger I-84 corridor area. This, combined with the Applicant's proposed reconsideration of the findings of fact regarding the quantity of water available in the Elk Creek Village area, should serve to alleviate any concerns about all of the water being appropriated to one development or needing to cut the Applicant short in an effort to share the water in the area among all applicants.

For these reasons, the preliminary order should be reconsidered so as not to arbitrarily limit the amount of water allocated to the Applicant by ignoring the priority of the application and requiring sharing with later in time applicants.

C. THE HEARING OFFICER SHOULD RECONSIDER THE LIMITATION ON THE USE OF WATER FOR IRRIGATION OF OPEN SPACE TO RECOGNIZE THE PRACTICAL REALITIES OF WASTE WATER USE.

The Applicant applied for a municipal purposes water right. Pursuant to Idaho Code § 42-202B(6), "municipal purposes" includes "water for residential, commercial, industrial, irrigation of parks and open space, and related purposes . . ." (emphasis added).

Given this definition, it would be appropriate to include "irrigation of parks and open space" in the municipal use water right granted to the Applicant. In fact, it is difficult to understand the legal basis for excluding these uses. There has been no management plan adopted for the ground water management area that limits municipal uses in such a way. As argued above, reliance upon the "local public interest" criteria for such a limitation is misplaced. In addition, as demonstrated at the hearing and clarified above, there is certainly sufficient water available to satisfy these purposes.

As noted in the Preliminary Order, the Applicant did indicate that certain common areas could eventually be irrigated with wastewater. This was represented at the hearing as a work in progress, with nothing firm in place. More importantly, it is a simple hydrologic fact that the amount of water generated by the homes in the planned community will not be sufficient to irrigate all 50 acres of open space; according to SPF, there may be at most 100 afa of waste water generated, which would be enough to irrigate 25 acres, or only half of the open space in the development. In addition, there will be no waste water available for irrigation of open space until homes have actually been built and occupied.

In consideration of these practical, physical realities which directly impact the viability of the planned development, the Applicant requests that the Hearing Officer

reconsider the limitation on the use of water for irrigation of open space by allowing sufficient water for ***temporary,*** direct irrigation of 50 acres of open space until the homes are built and occupied, and thereafter allowing permanent, direct irrigation of 25 acres of open space, with the other 25 acres to be irrigated only with wastewater generated from the homes, thereby allowing the full 50 acres of open space to be irrigated throughout the life of the development. Alternatively, if temporary, direct irrigation of 50 acres of open space is not permitted, the Applicant would request that at least 25 acres of permanent irrigation be allowed, with the remaining 25 acres to be irrigated with waste water.

Mitigating in favor of this request, the Applicant indicated at the hearing that it would only irrigate up to 1/3 acre per lot, rather than the standard 1/2 acre per lot included in the application, thereby reducing the irrigated lot acreage from 88 acres to 59 acres – a difference of 27 acres of irrigation. Allowing 25 acres of permanent, direct open space irrigation will only increase the total irrigated acreage to 84 acres – still less than the irrigated lot acreage included in the application (88 acres) – and much less than the total of 138 acres of lot acreage and open space irrigation included in the application itself.

The Applicant believes that this is a reasonable accommodation, justified by the circumstances – including the amount of water available in the area -- and requests that the Hearing Officer reconsider this portion of the preliminary order. Without such a change, it will not be possible to irrigate the open space in the development – there simply will not be enough waste water generated.

IV. REQUESTED RELIEF

In summary, the relief discussed above and requested by the Applicant is as follows:

1. Reconsider the quantity of water available in the Elk Creek Village area to: (a) increase it from 811 afa to a minimum of 2,400 afa; or (b) based upon the record, conclude that sufficient water is available for the Applicant's proposed use, with no firm, fixed determination of the total amount that is available;
2. Reconsider and eliminate the requirement that water be shared among all of the planned community applicants in the I-84 corridor area without regard to priority of applications submitted to the Department for the same use; and
3. Reconsider the limitation on the use of water for irrigation of open spaces in the development to authorize: (a) temporary, direct irrigation of 50 acres of open space until the homes are built and occupied, and, thereafter, permanent, direct irrigation of 25 acres of open space, with the remaining 25 acres of open space to be irrigated with waste water generated by the homes; or (b) permanent, direct irrigation of 25 acres of open space, with the remaining 25 acres of open space to be irrigated with waste water once the homes are built and occupied.

V. CONCLUSION

The Applicant appreciates the diligent and prompt attention that the Hearing Officer and the Department have already given to this matter. We look forward to a decision on reconsideration and clarification of the preliminary order. We also look forward to continuing to work with the Department to move the proposed development forward for the mutual benefit of the Applicant, the State of Idaho, the local community and its residents.

DATED this 9th day of July, 2009.

ROSE LAW GROUP BORTON

By _____
Norman M. Semanko

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of July, 2009, I served a true and correct copy of the foregoing APPLICANT'S PETITION FOR RECONSIDERATION AND CLARIFICATION OF PRELIMINARY ORDER by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

Dana L. Hofstetter
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