

BEFORE THE DEPARTMENT OF WATER RESOURCES
FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	ORDER GRANTING MOTION
FOR PERMIT NO. 37-22252 AND)	TO VACATE HEARING
APPLICATION FOR TRANSFER NO.)	AND PRE-HEARING
74449 IN THE NAME OF DRY LOT LLC)	SCHEDULE
_____)	

The protestant in the above contested case, Indian Creek Ranch Owners Association, Inc. ("ICROA") filed a motion to Vacate Hearing and Pre-Hearing Schedule. The applicant, Dry Lot LLC ("Dry Lot") opposed the motion.

The Motion to Vacate Hearing and Pre-Hearing Schedule argued the following:

1. Idaho Code § 67-6537 prohibits Department consideration and possible approval of application for transfer no. 74449, which proposes the transfer of surface water rights from the "Old Cutters Subdivision."
2. Dry Lot did not timely file documentation of its groundwater model by November 10, 2008 as required by the prehearing order.
3. Dry Lot has not filed amended applications as contemplated by the prehearing order.

Facts accepted by the hearing officer:

Dry Lot's application for transfer seeks to change the place of use for surface water rights now appurtenant to lands within the Old Cutters Subdivision.

In 2006, the City of Hailey annexed the land upon which Old Cutters Subdivision is located. In 2007, the City of Hailey approved the final plat for Old Cutters Subdivision.

The City of Hailey approved the annexation of and the final plat for Old Cutters Subdivision after the enactment of Idaho Code § 67-6537.

The Annexation, Services and Development Agreement ("Annexation Agreement") between the City of Hailey and Old Cutters states that Old Cutters "shall retain ownership of all the water rights which are currently appurtenant to the Property (the "Water Rights") and, except as hereinafter provided, in its sole and absolute

discretion, may sell or otherwise convey and transfer the Water Rights off of the Property.”

The developer of Old Cutters requested that the City of Hailey amend the annexation approval because of difficulties in paying annexation fees required by the annexation approval.

ANALYSIS

Authority to Enforce Idaho Code § 67-6537

Idaho Code § 67-6537 is found in Chapter 65 of title 67 titled “LOCAL LAND USE PLANNING.”

Idaho Code § 67-6503 states the following:

Participation of local governments. – Every city and county shall exercise the powers conferred by this chapter.

Idaho Code § 67-6537 read as follows:

Use of surface and ground water. (1) The intent of this section is to encourage the use of surface water for irrigation. All applicants proposing to make **land use changes** (emphasis added) shall be required to use surface water, where reasonably available, as the primary water source for irrigation. Surface water shall be deemed reasonably available if:

(a) A surface water right is, or reasonably can be made, appurtenant to the land;

(b) The land is entitled to distribution of surface water from an irrigation district, canal company, ditch users association, or other irrigation delivery entity, and the entity’s distribution system is capable of delivering the water to the land; or

(c) An irrigation district, canal company, or other irrigation delivery entity has sufficient available surface water rights to apportion or allocate to the land and has a distribution system capable of delivering the water to the land.

(2) Consistent with sections 42-108 and 42-222, Idaho Code, any change in the nature of use of surface water provided by an irrigation delivery entity must be authorized by the entity holding the water right(s) for the available surface water. Nothing in this section shall alter the authority and discretion of irrigation delivery entities to apportion, allocate, and distribute surface water, or for municipalities, counties, or water and sewer districts to pass ordinances or regulations to promote the use of surface water for irrigation.

(3) Nothing in this section shall be construed to override or amend any provision of title 42 or 43, Idaho Code, or impair any rights acquired hereunder.

(4) When considering amending, repealing or adopting a comprehensive plan, the local governing board shall consider the effect the proposed amendment, repeal or adoption of the comprehensive plan would have on the source, quantity and quality of ground water in the area.

Section 67-6537 directs cities and counties in Idaho to require retention of surface water rights when land use changes are proposed to the city or county. It is unclear to IDWR whether the City of Hailey consulted the statute or not at the time of annexation and plat approval for Old Cutters Subdivision. The City of Hailey expressly recognized, however, that its approval and annexation of the Old Cutters Subdivision did not prevent the surface water rights from being transferred from the Old Cutters Subdivision lands.

IDWR does not have the authority to second guess the land use change approved by the City of Hailey and its associated agreement and annexation. As a result, IDWR will process the application for transfer. IDWR will be sensitive to the possibility of separate legal action, either before the City of Hailey, or in the courts of the State of Idaho, that could require retention of the water on the property.

Preparation of Ground Water Model

Dry Lot agreed, as a condition precedent to consideration of these applications, that it would develop a ground water model that would analyze whether the proposed recharge would fully compensate for the ground water diversion proposed by application no. 37-22252. The hearing officer understands that the Director of IDWR assigned a small technical committee to participate in the development of the model. The hearing officer understands that this committee was asked to "peer review" the proposed ground water model. At least one IDWR employee was a member of the committee.

On December 10, 2008, IDWR received a copy of a draft document titled *Development of a Groundwater Flow Model for the Big Wood River Aquifer: East Fork to Bellevue*.

The hearing officer has been informed that one employee from the Department emailed some general comments to Brockway. The hearing officer has not read or seen these comments. The hearing officer is unaware of any other action taken by the review committee.

Based on the above, the hearing officer determines that the promised model is not in final form, and has not been submitted to ICROA in time for adequate review and preparation. As a result, the hearing will be postponed until the model is finalized through the peer review process, including Department review, and submitted to ICROA.

Upon submittal of the final document with supporting information, the hearing officer will reschedule the hearing for the contested case, allowing sufficient time for technical review and hearing preparation by ICROA.

Amendments to the Applications

The applicant must file applications that will satisfy the criteria that must be considered by IDWR. IDWR will not postpone a hearing because of a deficient application unless the pending application, on its face, does not satisfy the requirements of filing. Because the model is incomplete, IDWR cannot presently factually determine whether the applications satisfy the statutory criteria. Dry Lot can amend its applications, at its own discretion, following completion of the modeling work.

ORDER

IT IS HEREBY ORDERED that the Motion to Vacate Hearing and Pre-Hearing Schedule is **Granted**, and the hearing for the contested case in the above titled matter, presently scheduled for February 10-11, 2009, is **Postponed** and **Continued** to a later date.

IT IS FURTHER ORDERED that, upon appropriate peer review of the draft ground water model by the technical committee, including IDWR staff, and service of a final ground water model with supporting documentation on the Department and Indian Ranch Owners Association, Inc., the hearing officer will reschedule the contested case hearing.

Dated this 20th day of January, 2009.

A handwritten signature in blue ink, reading "Gary Spackman", written over a horizontal line.

Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2009, a true and correct copy of the foregoing document described below was served on the following as noted:

Document(s) Served: Order Granting Motion to Vacate Hearing and Pre-Hearing Schedule

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