



State of Idaho

DEPARTMENT OF WATER RESOURCES

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March 11, 2009

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

ROBERT L HARRIS
ATTORNEY AT LAW
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Re: Comore Development, Inc. transfer applications 72674 and 74088

Dear Mr. Harris:

On August 6, 2008, you sent me a letter asking for assistance to address continued processing conflicts for applications for transfer nos. 72674 and 74088 in the name of Comore Development, Inc. ("Comore"). This letter is a response to the August 6, 2008 correspondence. In the interim time between your August 6, 2008 letter and today, staff of the Idaho Department of Water Resources ("Department") reviewed a technical analysis prepared by Clearwater Geosciences, LLP attached to your letter and discussed the analysis with Clearwater. In attempting to resolve issues, you and I have also conversed on the telephone several times and exchanged emails.

Applications for transfer nos. 72674 and 74088 were filed to provide mitigation for simulated depletions to the Snake River caused by diversion of ground water authorized by permits to appropriate water nos. 25-14166 and 25-14167 held by Comore. Application for transfer no. 72674 is intended to provide water/mitigation for irrigation of ½ acre lots. Application for transfer no. 74088 is intended to provide water/mitigation for irrigation of additional lots and other "non-domestic" irrigation.

When permits nos. 25-14166 and 25-14167 were pending before the Department as applications, the applications were protested by Twin Falls Canal Company ("Twin Falls") and North Side Canal Company ("North Side"). Twin Falls and North Side agreed to conditionally withdraw the protests. The following is a condition of approval on the permits that captures a portion of the conditional withdrawal of protest agreement:

The right holder shall mitigate for the consumptive use of water under this right by acquiring sufficient ground water right(s) to offset the depletion to the Snake River caused by the use of water under this right by either (a) abandoning the mitigation right(s), (b) changing the nature of use of the mitigation rights to "mitigation" through the appropriate administrative process and ceasing to divert and use water under the right(s), (c) transferring the right(s) to the point of

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Eastern Region

diversion and place of use for this right, or (d) other mitigation agreeable to the right holder and the protestant and approved by the Department.

The applications for transfer propose moving ground water rights authorizing diversion of ground water from a location west of Blackfoot, Idaho to the Comore residential developments located east of Idaho Falls. Department analysis of the proposed transfers concluded that discontinuation of pumping west of Blackfoot would sufficiently increase gains to the Snake River reaches between Blackfoot and Minidoka to compensate for depletions to the Snake River below Blackfoot caused by Comore's diversion of ground water. Department analysis also concluded that diversions proposed by the applications for transfer associated with the underlying water right permits, would cause a net depletion to reaches of the Snake River above Blackfoot. These simulated depletions were a cause of disagreement between Comore and the Department. Because of these technical disagreements, we further discussed other solutions.

Through our various discussions, I committed to the following:

1. The ground water underlying the new proposed points of diversion, identified by the applications for transfer and by permit nos. 25-14166 and 25-14167, is "non-trust water" and is located within the "Non-Trust Water Area."
2. There is presently no moratorium in the larger Non-Trust Water Area.
3. There is presently a moratorium that restricts appropriation of water in the Trust Water Area. The Trust Water Area Moratorium Order excepts from the moratorium prohibition the processing of applications for domestic and municipal use that would satisfy, for each residential lot, the definition of domestic contained in Idaho Code § 42-111. No parks, school grounds, common areas, or large plots of land can be irrigated under this moratorium exception.
4. The processing of water rights within the Non Trust Water Area, where no moratorium is effective, should not be more restrictive than within the Trust Water Area.
5. The Department should process new water right applications within the Non-Trust Water Area for domestic or municipal purposes that limit the use per residential lot to the definition of domestic in Idaho Code § 42-111.
6. Applications to appropriate water proposing limited domestic and municipal uses as described above will be subject to protest. Processing of these water rights does not create a presumption that any of the criteria of Idaho Code § 42-203A are satisfied.
7. Proposed uses of water in excess of Idaho Code § 42-111 (each home must satisfy the definition) must be fully mitigated for each impacted reach of the Snake River within the guidelines of the Transfer Memo, dated January 21, 2009.
8. Any approval of a transfer of a water right (to provide irrigation limited to ½ acre per residential lot) would advance the priority date to the date of the filing of the application for

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transfer when the Department is considering issues of local interference or petitions for delivery call filed by surface water users above Blackfoot or ground water users.

9. There are periods of time when depletions to reaches of the Snake River above Blackfoot would reduce the quantity of natural flow delivered below Blackfoot to satisfy the Twin Falls and Northside natural flow water rights. Staff at Water District 01 determined that the transition period during which the natural flow rights of Twin Falls and Northside are reduced due to depletions above Blackfoot is very short. Nonetheless, I stated that a proposal that would not fully mitigate depletions to the Snake River upstream of Blackfoot would be disclosed in writing to Twin Falls and Northside.

10. If Twin Falls and North Side do not object, full mitigation to the Snake River reaches below Blackfoot will satisfy the requirements of the conditions in permit nos. 25-14166 and 25-14167.

Thank you for your help in addressing these issues.

Respectfully,


Gary Spackman

cc: Travis Thompson, Barker, Rosholt & Simpson
✓ Dave Carlson, Eastern Region
Jeff Peppersack, Water Allocation Bureau