

RECEIVED

DEC 22 2008

DEPT. OF WATER RESOURCES
SOUTHERN REGION

Dana L. Hofstetter, ISB #3867
Hofstetter Law Office, LLC
608 West Franklin Street
Boise, Idaho 83702
Telephone: (208) 424-7800
Facsimile: (208) 424-8774
E-Mail: Dana@IdahoWaterLaw.com

Attorney for Protestant Indian Creek Ranch Owners, Inc.

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

In the Matter of Application for	)	
Permit No. 37-22252 and	)	
Transfer No. 74449	)	
In the Name of Dry Lot LLC	)	MOTION TO VACATE HEARING
_____	)	AND PRE-HEARING SCHEDULE

Protestant Indian Creek Ranch Owners Association, Inc. ("ICROA"), by and through its counsel of record, Dana L. Hofstetter of Hofstetter Law Office, LLC, and pursuant to the Idaho Department of Water Resources' Rules of Procedure and other applicable legal authorities, hereby moves for vacation of the hearing and pre-hearing schedule in this matter. This Motion is supported by Idaho Department of Water Resources ("IDWR") files for the above-referenced matter, other matters of record with IDWR, and the *Affidavit of Dana L. Hofstetter* filed contemporaneously herewith.

Background

In Application for Permit No. 37-22252, Dry Lot LLC requests a ground water right for 0.79 cubic feet per second (“cfs”) to irrigate 39.6 new acres that represent the total lot acreage in excess of the ½ acre per lot irrigation limitation under the Valley Club’s existing ground water rights.¹ The associated Transfer Application No. 74449 proposes the use of portions of three Big Wood River irrigation rights for recharge mitigation of Permit No. 37-22252. The subject water rights (37-21130, 37-21137, and 37-21139) that are to provide mitigation for Permit Application No. 37-22252 presently are appurtenant to the Old Cutters Subdivision in Hailey, Idaho.²

Protestant ICROA asserts that *Idaho Code* § 67-6537 applies to the Old Cutters Subdivision and precludes the conveyance of the subject water rights from the Old Cutters Subdivision to Dry Lot. ICROA has raised the issue of retention of the subject water rights for the Old Cutters Subdivision with the City of Hailey in the context of Old Cutters’ requested Annexation Agreement amendment. *Affidavit of Dana L. Hofstetter*. The Hailey City Council has tabled the matter pending a report and recommendation from the City Attorney. *Id.* At the present time, there is no certain date by which the Annexation Agreement amendment matter will be on the City Council meeting agenda for consideration. *Id.*

¹ The description of the Applications are based on the original Applications filed as the anticipated Amended Applications have not yet been filed.

² Title to the subject water rights has not changed, as yet. Although Applicant Dry Lot LLC, has a contract to purchase portions of the subject water rights, Dry Lot’s purchase is conditioned on the approval of Transfer No.

The current hearing and pre-hearing scheduling pursuant to the October 16, 2008 *Notice of Joint Hearing and Pre-Hearing Order* makes immediate preparation for hearing on the instant applications necessary although this entire proceeding would be mooted if *Idaho Code § 67-6537* is correctly applied. For this reason, ICROA respectfully requests that the Department vacate the pre-hearing and hearing schedule in this matter pending resolution of the applicability of *Idaho Code § 67-6537* to the Old Cutters Subdivision. Other ancillary reasons for vacating the hearing and pre-hearing schedule include the Applicant's failure to provide its amended applications by the deadline of November 10, 2008. (The amended applications have not yet been submitted as of this writing.) Preparations for hearing cannot properly begin until the actual applications have been made available. Also, the Brockway model report required to be provided by November 10, 2008 was provided in draft form on December 17, 2008.

Legal Discussion

As last amended in 2005, Idaho Code § 67-6537 requires "applicants proposing to make land use changes... to use surface water, where reasonably available, as the primary water source for irrigation." Under the statute, "reasonably available" includes situations where "a surface water right is ... appurtenant to the land."

The requirements of Idaho Code § 67-6537 squarely apply to the Old Cutters Subdivision and preclude transfer of the subject water rights from that property. The Old Cutters property was annexed to the City of Hailey in March 2006. *Affidavit of Dana L.*

Hofstetter. Immediately thereafter, in April 2006, the Old Cutters Subdivision application was submitted to the City of Hailey. *Id.* The Old Cutters Subdivision final plat was approved by the City in Summer 2007. *Id.* Thus, Idaho Code § 67-6537 was in effect at the time the Old Cutters Subdivision application was submitted and approved.

The Old Cutters Subdivision application submitted to the City of Hailey in April 2006 constituted a land use change proposal triggering Idaho Code § 67-6537. At that time and through to the present, the Old Cutters Subdivision property had appurtenant irrigation surface water rights (37-21130, 37-21137, and 37-21139). The express terms of Idaho Code § 67-6537 prevent the transfer of those appurtenant rights from the Old Cutters Subdivision. Any City or IDWR approval of the transfer of these rights from the property would violate this statute and would constitute *ultra vires* agency action, beyond the scope of statutory authority and, as such, would be void *ab initio*.

The instant applications hinge on transfer of the Old Cutters water rights from the Old Cutters Subdivision and, thereby, run afoul of Idaho Code § 67-6537. The current hearing schedule does not permit the requirements of this statute to be addressed and resolved before hearing preparations must begin in earnest. To avoid unnecessary hearing preparations, the hearing and pre-hearing schedule should be vacated.

Additional grounds for vacating the current schedule include the Applicant's delay in providing the Brockway Report and the absence of amended Applications at this late date. The hearing in this matter is scheduled to begin on February 10, 2009 with a discovery deadline of January 19, 2009. Although the October 16, 2008 *Notice of Joint*

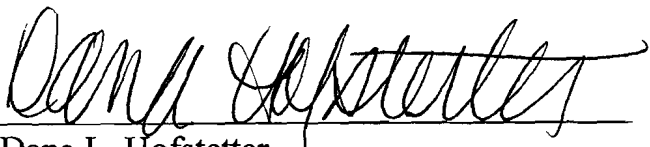
Hearing and Pre-Hearing Order required that the Brockway model report and the amended applications be provided by November 10, 2008, the Brockway model report was only recently provided (and only in draft form) and the amended applications which were anticipated have not yet been provided. It is virtually impossible to undertake discovery and otherwise prepare for hearing without the actual applications which are the very subject matter of the proceeding.

Conclusion

For the foregoing reasons, Protestant respectfully requests that the pre-hearing and hearing schedule in this matter be vacated to allow the applicability of Idaho Code § 67-6537 to the Old Cutters Subdivision to be addressed prior to preparing for and holding a potentially unnecessary hearing. Further it is noted that the delay in amending the applications and providing the expert report also necessitate vacating the schedule.

RESPECTFULLY SUBMITTED this 19th day of December, 2008.

HOFSTETTER LAW OFFICE, LLC

By 
Dana L. Hofstetter
Attorney for Protestant Indian Creek
Ranch Owners Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of December , 2008, I caused the foregoing be served by the pre-paid method(s) indicated on the following:

Original to:

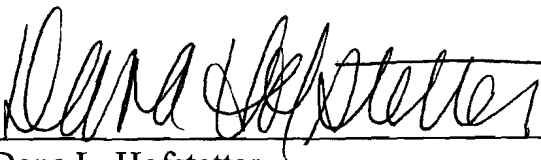
David R. Tuthill, Jr., Director
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho 83702
☐ U.S. Mail ☐ Fed Ex ☒ Hand ☐ Fax

Copies to:

Gary Spackman
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho 83702
☐ U.S. Mail ☐ Fed Ex ☒ Hand ☐ Fax

Allen Merritt
Idaho Department of Water Resources
1341 Fillmore Street, Suite 200
Twin Falls, Idaho 83301
☒ U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax

Travis Thompson
Barker Rosholt & Simpson LLP
P.O. Box 485
Twin Falls, Idaho 83303-485
☒ U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax


Dana L. Hofstetter