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**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

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| IN THE MATTER OF APPLICATION FOR PERMIT NO. 37-22252 and TRANSFER NO. 74449 (In the Name of Dry Lot LLC) | ) | **APPLICANT DRY LOT LLC'S RESPONSE IN OPPOSITION TO PROTESTANT'S MOTION TO VACATE HEARING AND PRE-HEARING SCHEDULE** |

COMES NOW, the applicant DRY LOT LLC (hereinafter "Dry Lot"), by and through its attorneys of record, BARKER ROSHOLT & SIMPSON LLP, and hereby submits this *Response in Opposition to Protestant's Motion to Vacate Hearing and Pre-Hearing Schedule* in the above-captioned matter. The bases for Dry Lot's response are set forth below.

**BACKGROUND**

Dry Lot filed the above-referenced applications for permit and transfer approximately a year and a half ago on August 8, 2007. Various amendments to the applications were filed in the spring of 2008 and IDWR noticed the applications for protest on May 14th and 21st, 2008. Indian Creek Ranch Owners Assn., Inc. ("Protestant" or "Indian Creek") filed protests to the

applications on June 2, 2008. IDWR held its first pre-hearing conference on July 17, 2008. Six days later on July 23, 2008, IDWR informed the parties that it would not schedule a hearing in the matter until the outstanding objections to the water rights that were the subject of the transfer were resolved in the Snake River Basin Adjudication ("SRBA"). After the objections to the water rights were resolved via Standard Form 5s filed in the SRBA on September 12, 2008, IDWR then held a second pre-hearing conference with the parties on October 2, 2008.

As a result of the second pre-hearing conference, both Dry Lot and Indian Creek agreed to the pre-hearing schedule and hearing date of February 10, 2009. *See* October 16, 2009 *Pre-Hearing Order*. Thereafter, Dry Lot provided the results of a preliminary model scenario completed by Brockway Engineering to the Protestant's counsel on November 14, 2008. *See* Dry Lot's November 10, 2008 *Notice of Delayed Filing*. Dry Lot then provided its draft *Development of a Groundwater Flow Model for the Big Wood River Aquifer: East Fork to Bellevue* tothe Protestant's counsel on December 17, 2008. The results of the model scenario for Dry Lot's application did not change from the report that had previously been provided to Indian Creek on November 14, 2008 report. Finally, Dry Lot served its first discovery requests on Indian Creek on December 22, 2008. Indian Creek has conducted no other discovery.

Although the case had progressed to a point where the hearing was approximately 45 days away, Indian Creek filed a motion to vacate the proceeding indefinitely on December 19, 2008. Indian Creek claims that: 1) a basis for its protest; 2) the delay in providing the model scenario; and 3) the fact no application amendment has been filed warrant vacating the hearing and pre-hearing schedule indefinitely. As set forth below, there is no basis for Indian Creek's motion and therefore it should be denied.

## RESPONSE

### I. The Applicability of Idaho Code § 67-6537 Does Not Justify Vacating the Hearing.

Indian Creek alleges that since the water rights subject to Dry Lot's transfer are currently appurtenant to property owned by Old Cutters, "any City or IDWR approval of the transfer of these rights from the property" would violate Idaho law and therefore the hearing should be vacated. *Motion* at 4. Whether or not the requirements of Idaho Code § 67-6537 provide a reason to deny the transfer is a question that needs to be resolved through the hearing, not put-off for an indefinite time.

Indian Creek carries the burden to demonstrate the transfer should be denied because of any alleged violations of Idaho Code § 67-6537. Indian Creek will have its opportunity to justify its protest at the hearing in this matter. Accordingly, any alleged grounds for a protest should be handled by completing this proceeding, not setting it off for an indefinite time period. After all, that is the purpose of an administrative hearing before IDWR, to resolve the protests to the applications. A basis for the protest cannot simply be used as a "delay" tactic to prevent a hearing from taking place or to otherwise proceed towards resolution of a contested case.

Although not specifically stated, Indian Creek implies that the City of Hailey's pending action on Old Cutters' requested Annexation Agreement amendment somehow justifies vacating the present hearing on Dry Lot's applications as well. Contrary to Indian Creek's suggestion, the City of Hailey has no jurisdiction regarding the transfer of any water rights, therefore the actions it takes on Old Cutters' requests on the Annexation Agreement would not preclude IDWR's actions on Dry Lot's applications in this proceeding. Moreover, whether the City's actions to date have been appropriate or not in the context of Idaho Code § 67-6537 is a matter for Indian Creek to pursue in another forum. If Indian Creek believes IDWR's approval of Dry Lot's

applications is contrary to state law, for any reason (including the applicability of Idaho Code § 67-6537), it will have an opportunity to pursue judicial review of that decision before a district court following the issuance of a final agency order. *See* Idaho Code § 67-5271. In sum, the basis for Indian Creek's protest does not justify vacating the present hearing and pre-hearing schedule.

## II. Delay in Providing Brockway Report / No Amended Application Necessary

### A. Dry Lot Provided the Relevant Brockway Report on November 14th

Indian Creek further alleges the hearing should be vacated indefinitely because the Brockway Report "was only recently provided" and the "amended applications which were anticipated have not yet been provided". *Motion* at 5. As identified at the October 2, 2008 pre-hearing conference, Dry Lot proposed the November 10, 2008 date to provide the Brockway Model Report and any amendment to the transfer application. The preliminary model scenario for Dry Lot was not completed until November 14, 2008, or four days later. Dry Lot advised Indian Creek and IDWR of this delay immediately on November 10, 2008. Indian Creek did not object to the four-day delay at that time. Dry Lot further provided a draft *Development of Groundwater Flow Model for the Big Wood River Aquifer: East Fork to Bellevue* to Indian Creek's counsel on December 17, 2008. This report details the groundwater flow model developed for not only Dry Lot, but other clients of Brockway Engineering that have pending applications before IDWR as well. Accordingly, the report provided on December 17, 2008 was not just for Dry Lot's purposes. Moreover, the results of the model scenario concerning Dry Lot's application included in the draft report had already been provided to Indian Creek's counsel on November 14th.

Accordingly, since Dry Lot provided the results of the Dry Lot model scenario on November 14th (four days after the November 10th date identified in the pre-hearing order) and provided the additional model report on December 17th (nearly two months before the hearing), there is no basis to vacate the hearing now based upon any alleged "delay". In summary, Indian Creek has had sufficient time to review the model scenario and prepare for hearing.

**B. Amended Applications**

At the October 2, 2008 pre-hearing conference Dry Lot stated that it may need to amend the transfer application (#74449) to reduce the number of acres currently identified for mitigation "recharge" purposes. At the time of the pre-hearing conference Dry Lot was not aware of the requirements for mitigation as would be determined by the model scenario. As a result of the model scenario it is now apparent that Dry Lot will only need to change the nature of use for 39.5 acres (essentially a one-for-one acre mitigation for new water right #37-22252), not the 58.5 acres as originally identified in the application for transfer.[1] However, since any IDWR approval of the transfer may require additional conditions, including mitigation of additional acres, Dry Lot does not intend to formally amend the transfer application to ensure that its application properly covers any additional mitigation conditions that could be required. *See e.g.*, I.R.C.P. 15(b) ("Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."); *Snake River Equip. Co. v. Christensen*, 107 Idaho 541 (Ct. App. 1984).

Whatever the Department will require (which may include additional acres for mitigation) as part of the transfer approval, assuming it is approved, is not known at this point.

[1] Although the transfer application identified 60 acres, Dry Lot's agreement to purchase portions of water rights #37-21130, #37-21137, and #37-21139 was amended on April 3, 2008 to reduce the acreage by 1.5 acres. Dry Lot advised Indian Creek of this change at the pre-hearing conference.

Therefore, the application as filed appropriately includes all acres to cover the scenario in which additional acres may be required by IDWR for conditional approval of the transfer.

In short, the fact the application for transfer does not need to be amended does not justify vacating the hearing. Moreover, although Dry Lot believes that the approval only needs to change the purpose of use for 39.5 acres of the water rights, not the entire 58.5 acres, the fact that less acres are required for mitigation (as contended by Dry Lot), is not a reason to vacate the hearing. Since IDWR may require additional mitigation for approval, Dry Lot has appropriately identified all 58.5 acres under the water rights to be subject to the transfer.

Moreover, this is not a case where "new" issues will be addressed regarding the transfer at hearing. Indian Creek has had the application for transfer since at least June 2, 2008 (the date it filed the protest), and therefore has been apprised of the proposed change in the water rights since that time. The fact Dry Lot's information shows that a reduced number of acres for mitigation "recharge" is required for transfer approval based upon the model scenario does not change the nature of the transfer. Stated another way, whether it was 58.5 acres, 50 acres, or 39.5 acres, the concept of transferring part of the water right to the "recharge" mitigation purpose of use has been plainly stated and explained in Dry Lot's application and accompanying narrative.

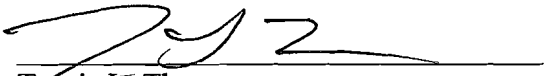
Accordingly, although Dry Lot does not need to formally amend the transfer (given the outstanding question of whether or not IDWR would conditionally approve the transfer to require more mitigation) that has not and does not affect Indian Creek's ability to "undertake discovery and otherwise prepare for the hearing". As such, there is no basis to vacate the hearing on this ground.

## CONCLUSION

Dry Lot has pursued approval of its applications before IDWR since August 2007. A hearing schedule, agreed to by Indian Creek, has been in place since October 2, 2008. Dry Lot has expended considerable time and expense in preparing for hearing and prosecuting the approval of its applications over the past year and a half. Indian Creek would have IDWR vacate the hearing indefinitely on the basis of one of the grounds for its protest and the fact it received the Brockway Report four days after it was contemplated to be filed. As described above, there is no basis to vacate the hearing on those grounds and therefore Indian Creek's motion should be denied.

DATED this 7th day of January 2008.

**BARKER ROSHOLT & SIMPSON LLP**



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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2009, I served a true and correct copy of the foregoing by email and depositing same in the United States mail, postage prepaid, addressed to the following:

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