HOFSTETTER LAW OFFICE, LLC

608 West Franklin Street
Boise, Idaho 83702
Phone: (208) 424-7800
Fax: (208) 424-8774
E-Mail: Dana@IdahoWaterLaw.com

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

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	)	**REPLY IN SUPPORT OF 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 respectfully submits this *Reply in Support of Motion to Vacate Hearing and Pre-Hearing Schedule.*

Background

ICROA requested vacation of the current hearing and pre-hearing schedule on the the grounds that: 1. immediate preparation for hearing on the instant Applications is necessary although the entire proceeding would be mooted if Idaho Code § 67-6537 is correctly applied by the City of Hailey during the pending renegotiation of the Old Cutters Subdivision Annexation Agreement; 2. although IDWR's October 16, 2008 Order required the Applicant, Dry Lot, to submit its updated Applications by November 10, 2008, Dry Lot has not yet amended its Applications in this matter to reflect the changed quantities of the water rights it plans to purchase from Old Cutters; and 3. Dry Lot's delay in providing the aquifer model information by the same deadline of November 10, 2008.

Legal Discussion

1. Proceeding with an extensive evidentiary hearing involving aquifer modeling and surface to ground water interconnection is ill-advised before the overarching issue concerning Idaho Code § 67-6537's prohibition of the subject water right transfer is addressed.

Although Dry Lot does not specifically identify why Idaho Code § 67-6537 is inapplicable, in its Response Dry Lot claims that this overarching legal matter should be addressed in connection with the IDWR evidentiary hearing on the subject water right applications. Dry Lot's suggested approach illogically would require that all of the legal and technical issues be extensively addressed at hearing when determination of this overarching legal issue could moot the subject Applications entirely. The approach

recommended by Dry Lot likely would result in unnecessary expenditures of IDWR's and the parties' time and effort.

As noted in the original Motion and supporting Memorandum, ICROA has requested that the City of Hailey consider the applicability of Idaho Code § 67-6537 in connection with the water right holder's, Old Cutter's, request of an Annexation Agreement amendment. Based on published reports, it appears that the City's on-going negotiations with Old Cutters include possible retention of the subject water rights. The outcome of these negotiations, and the outcome of subsequent related proceedings, could moot the subject applications entirely. While the matter of the applicability of Idaho Code § 67-6532 is being resolved, it would be unwise to proceed with a possibly unnecessary complex evidentiary hearing.

Dry Lot suggests that IDWR should decide the applicability of Idaho Code § 67-6537 in the context of the subject water right Applications. ICROA would not be opposed to IDWR addressing this issue first in a summary decision context before proceeding with what ICROA considers will be an entirely unnecessary evidentiary hearing. ICROA believes that this overarching issue should be conclusively decided before IDWR undertakes an extensive and complex evidentiary hearing on the subject applications. The City of Hailey's re-negotiation of the Old Cutters Annexation Agreement appeared to offer a fortuitous forum for this matter to be addressed before the

hearing on the water right applications. However, the status of the City's and Old Cutters' resolution of this matter necessitate a vacating of the current hearing schedule.

2. Dry Lot's failure to provide up-to-date and accurate Applications independently necessitates vacating of the current hearing and pre-hearing schedule.

Originally, 60 irrigated acres worth of the Old Cutters' surface water rights were to be transferred to Dry Lot to mitigate for its increased use of ground water to irrigate an additional 39.6 acres. Apparently, the contractual arrangement between Old Cutters and Dry Lot has been revised to provide for the transfer of only 58.5 acres worth of the Old Cutters surface water rights. IDWR's October 16, 2008 Order required that Dry Lot provide an amended Transfer Application by November 10, 2008:

> **By November 10, 2008**, the applicant shall make available the Brockway Report based on the model being created. By that same date the applicant will modify the transfer application (likely decrease the amount of acres being dried up - currently 60 but likely to end up something less).

Despite his express directive, by its attorney's own admission, Dry Lot has not submitted the amended Application, nor does it intend to do so.

The submission of a complete and accurate application is fundamental to the IDWR review process. Idaho Code § 42-222 ("Such application shall be on forms furnished by the Department and shall describe the right ... which is to be changed and the changes which are proposed.") It is wholly inappropriate to withhold amended Applications and expect IDWR and ICROA to guess what those amendments should be. Further, preparing for hearing is extraordinarily difficult without up-to-date applications –

it's the ultimate procedural moving target. Dry Lot is in the best position to know what it is applying for and, indeed, is legally required to submit an application that accurately describes what is being sought. Undertaking hearing preparations without accurate Applications is unjustified.

3. The Applicant's delay in finally providing the full model report on December 17, 2008 when it was due over a month prior, also warrants vacation of the schedule.

IDWR's October 16, 2008 Order also required submission of the aquifer model report by November 10, 2008. While Dry Lot provided a small portion (16 pages) of the aquifer model report (in draft form) on November 14, 2008, it was not until December 17, 2008, less than two months before the scheduled hearing, that the full draft report was provided. The full model report volume which is over an inch thick includes extensive technical data and analysis and would necessitate significant time for expert review and for discovery in order to adequately prepare for hearing. While Dry Lot requested an aggressive hearing schedule, it was not able to deliver its materials in the designated time to allow ICROA to adequately prepare for hearing.[1]

[1] In its Response, Dry Lot states that ICROA agreed to the current hearing schedule. ICROA never stipulated to the current schedule; it was Dry Lot that requested an aggressive hearing schedule.

Conclusion

For the foregoing reasons, ICROA respectfully requests that the pre-hearing and hearing schedule in this matter be vacated.

RESPECTFULLY SUBMITTED this 8th day of January, 2009.

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 8th day of January, 2009, I caused the foregoing to be served by the pre-paid method(s) indicated on the following:

Original to:

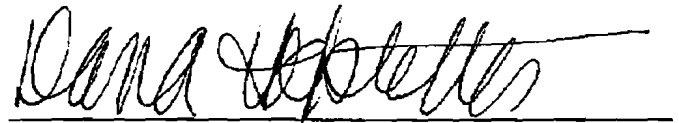
David R. Tuthill, Jr., Director
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho 83702
X U.S. Mail ☐ Fed Ex ☐ Hand X Fax

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 X Fax

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

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



Dana L. Hofstetter

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