RECEIVED
SEP 16 2008
DEPT. OF WATER RESOURCES
SOUTHERN REGION

**HOBDEY LAW OFFICE, PLLC**
125 FIFTH AVENUE WEST
P. O. BOX 176
GOODING, IDAHO 83330
Telephone (208) 934-4429

**TELECOPY COVER SHEET**

**DATE:** 9-16-08

**PLEASE DELIVER THE FOLLOWING __ PAGES (INCLUDING TRANSMITTAL)**

**TO:** Allen Merritt

**FROM:** Craig Hobdey

**RE:** Water Rights Use Agreement (Dry Lot / BWCC

If you do not receive all of the pages, please call (208) 934-4429

**Telecopy number called:** 736-3037

**Telecopy sent from:** (208) 934-4420

**THE DOCUMENTS BEING TRANSMITTED BY THIS FACSIMILE ARE CONFIDENTIAL AND ARE FOR THE EXCLUSIVE USE OF THE ADDRESSEE**

RECEIVED
SEP 16 2008
DEPT. OF WATER RESOURCES
SOUTHERN REGION

# WATER RIGHTS USE AGREEMENT

THIS WATER RIGHTS USE AGREEMENT ("Agreement") is made by and between DRY LOT LLC ("Dry Lot"), an Idaho limited liability company, and BIG WOOD CANAL COMPANY ("BWCC"), an Idaho non-profit corporation. Dry Lot and BWCC may be referred to hereinafter as a "Party" or collectively as "Parties."

## RECITALS

A. Dry Lot has entered into an agreement to purchase a portion of water rights #37-21130, #37-21137, and #37-21139 from Old Cutters, Inc. In total, Dry Lot intends to purchase 3.51 cubic-feet per second ("cfs") of the referenced water rights, which is currently being used to irrigate 58.5 acres. Dry Lot's purchase of the water rights from Old Cutters is conditioned upon the Idaho Department of Water Resources' ("IDWR") approval of Dry Lot's application for permit #37-22252 and application for transfer #74449 (hereinafter collectively referred to as "Applications"). Pursuant to the applications, Dry Lot will be required to transfer the nature of use and dry up up to 58.5 acres under the water rights it is purchasing in order to mitigate for the diversion of groundwater under water right #37-22252. The portion of the water rights being transferred for recharge mitigation purposes shall hereinafter be referred to as the "Water Right".

B. Through application for permit #37-22252 Dry Lot seeks to obtain the right to divert and use groundwater for irrigation purposes on 39.6 acres within the Valley Club Homeowners Association Subdivision. In order to mitigate for water right #37-22252, Dry Lot will be required to recharge at least 138.6 acre-feet at its infiltration sites. Accordingly, Dry Lot will be required to change the nature of use for at least 39.6 acres under the water rights it is purchasing from "irrigation" to "recharge". Dry Lot's application for transfer #74449 was filed for that purpose.

C. BWCC has filed objections to water rights #37-21130, #37-21137, and #37-21139 in the Snake River Basin Adjudication ("SRBA"). BWCC has further filed protests to Dry Lot's application for permit #37-22252 and application for transfer #74449.

D. It is the intention of the Parties hereto to settle and dispose of, fully and completely all claims and issues related to the disputes and controversies concerning BWCC's objections to the Water Right and protests to the Applications; and

E. The Parties hereto have reached an agreement which will result in a full and complete settlement of all claims stated in BWCC's objections and protests.

## COVENANTS

NOW, THEREFORE, in consideration of the mutual promises, covenants and conditions contained herein, and for other good and valuable considerations, the receipt and sufficiency of which is hereby acknowledged, the undersigned Parties expressly agree to the following terms and conditions in a full settlement, compromise and satisfaction of the claims which are alleged, or could have been alleged, against the Water Right and Applications.

1. Diversion and Use of Water Right from the Big Wood River. Dry Lot hereby expressly agrees to only divert and use up to 2.51 cfs from the Big Wood River pursuant to the water rights it is purchasing. Dry Lot further agrees to only divert and use its Water Right until a point in time during the irrigation season when the required number of acre-feet has been recharged at its infiltration sites pursuant to the Mitigation Plan for mitigation for the additional 39.6 acres to be irrigated under permit #37-22252. The Parties recognize that the total required number of acre-feet that Dry Lot must recharge has yet to be determined through IDWR's approval of the Mitigation Plan for application for permit #37-22252.

2. Diversion and Use of Water Right from the Hiawatha Canal. Dry Lot hereby expressly agrees to only divert and use up to 2.33 cfs of the Water Right from its diversion point off of the Hiawatha Canal. The Parties agree and recognize that the difference between 2.51 cfs and 2.33 cfs, which is estimated at 0.18 cfs by IDWR, will remain in the Hiawatha Canal as "carriage loss" associated with the transfer of the Water Right upstream on the Hiawatha Canal from the former place of use. The Parties recognize that IDWR may require this "carriage loss" amount to be diverted throughout the irrigation season or until a point in time when the Water Right is curtailed in priority regardless of Dry Lot's diversion and use.

3. Water to Remain in Big Wood River. Dry Lot hereby agrees to leave 1 cfs under the water rights Dry Lot is purchasing in the Big Wood River, which 1 cfs will remain in the Big Wood River and not be diverted by Dry Lot, or any successor in interest of (or to) Dry Lot.

4. Measurement and Reporting Requirements. The Parties recognize that Dry Lot's diversion of the Water Right from the Big Wood River will be measured by the Water District 37 Watermaster. Dry Lot hereby agrees to measure and report the diversion under its Water Right off of the Hiawatha Canal. Dry Lot further agrees to measure its water diversion into its infiltration sites as well as any operational spill out of the infiltration sites. Dry Lot will further measure and report its diversions from groundwater under water right #37-22252. Dry Lot agrees to report these measurements on a monthly basis to the Water District 37 Watermaster, IDWR, and BWCC.

5. Formal Measurement and Reporting Plan. As part of the required mitigation plan to be approved by IDWR, Dry Lot agrees to prepare and submit a written plan detailing the measurement sites and the reporting schedule identified above prior to diversion and use of the Water Right. Dry Lot agrees that the plan is subject to BWCC's approval. BWCC agrees to provide prompt review and negotiations to effect expeditious approval of the reporting plan.

6. Operational Spill. BWCC agrees that the operation and use of water at Dry Lot's infiltration sites may result in a spill of water into the Valley Club pond system. Dry Lot agrees to use best efforts to minimize operational spill when diverting and using water at the infiltration sites.

7. Notification to Watermaster. On an annual basis Dry Lot hereby agrees to notify the Water District 37 Watermaster to cease diversion of the Water Right owned by Dry Lot at the Big Wood River once the required number of acre-feet for mitigation of 39.6 acres allowable under the approved mitigation plan have been diverted and recharged to mitigate for ground water diverted under water right #37-22252. Dry Lot will provide this notification to BWCC as

well. The Parties recognize the date of notification may change depending upon the water year and conditions regarding the diversion and use of the Water Right.

8. Portion of Water Right Not Required for Mitigation Retained. Although Dry Lot will be required to dry up a certain number of acres under the water rights it is purchasing to mitigate for the irrigation of 39.6 acres under water right #37-22252, Dry Lot reserves the right to use, lease, sell and/or transfer any remaining portion of those rights, not including the 1cfs remaining in the Big Wood River pursuant to paragraph #3 above, (i.e. any acres not required to be dried up by IDWR and their proportionate annual volume and diversion rate). However, Dry Lot agrees that the total diversion rate under the water rights from the Big Wood River will not exceed 2.33 cfs. BWCC reserves the right to protest any future applications concerning the remaining portion of the Water Right retained by Dry Lot.

9. Withdrawal of Objections and Protests. BWCC agrees to withdraw its objections to the Water Right in the SRBA Court with prejudice. BWCC further agrees to withdraw its protests to the Applications before IDWR with prejudice. The Parties hereby agree to execute and file any necessary documents with the SRBA Court or IDWR to accomplish the timely withdrawal of the objections and protests.

10. Notices. Any notice, measurements, or reports required under this Agreement shall be in writing and be delivered in person, by U.S. Mail, by private courier, or by facsimile. Notice shall be provided to the following:

**BWCC:**
Lynn Harmon, Manager
Big Wood Canal Company
112 South Apple Street
Shoshone, Idaho 83352
Phone: (208) 886-2331

**BWCC's Counsel:**
Craig D. Hobdey
125 5th Ave. West
P.O. Box 176
Gooding, Idaho 83330
Phone: (208) 934-4429

**Dry Lot LLC:**

Bernard I. Friedlander
116 Valley Club Drive
Hailey, Idaho 83333
Home: (208) 578-2116
Cell: (786) 390-6346

Darell Rubel
21 Hidden Lake Drive
P.O. Box 3308
Hailey, Idaho 83333
Home: (208) 788-9079
Cell: (208) 720-3299

Jim Luckman
75 Club View Dr.
P.O. Box 4068
Hailey, Idaho 83333
Home: (208) 788-3033
Cell: (208) 309-0830

**Premier Resorts (Subdivision Manager):**
John Wells – General Manager
335 S. Main St.
Ketchum, Idaho 83340
Work: (208) 727-4012

**Dry Lot's Counsel:**
Travis L. Thompson
Barker Rosholt & Simpson LLP
113 Main Ave. St., Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Work: (208) 733-0700

**Water District 37 Watermaster**
Kevin Lakey
107 W. 1st St.
Shoshone, Idaho 83352
Phone: (208) 886-2451

**IDWR:**
Southern Regional Office
1341 Fillmore St., Suite 200
Twin Falls, Idaho 83301-3380
Phone: (208) 736-3033

11. Attorneys' Fees. In any suit, action or appeal therefrom, to enforce this Agreement or any term or provision hereof, or to interpret this Agreement, the prevailing Party shall be entitled to recover all its costs reasonably incurred therein (and on appeal), including reasonable attorneys' fees.

12. Duty of Good Faith. Each of the Parties to this Agreement agrees to perform and execute this Agreement in accordance with the highest standards of good faith, honesty in fact, and fair dealing. Accordingly, the Parties agree to cooperate fully and execute any and all supplemental documents and take any and all additional actions which may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

13. Entire Agreement. This is the entire agreement of Dry Lot and BWCC with respect to matters covered hereby and supercedes all prior agreements between them, written or oral. This Agreement may be modified only in writing, signed by Dry Lot and BWCC.

14. Counterparts. This Agreement may be executed in any number of counterparts for the convenience of the Parties, all of which, when taken together and after execution by all Parties hereto, shall constitute one and the same Agreement.

15. Idaho Law. This agreement shall be governed by the laws of the State of Idaho.

16. Severability. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision hereof.

17. Successors. This Agreement is for the benefit only of the Parties hereto and shall inure to the benefit of and bind the heirs, personal representatives, successors and assigns of the Parties hereto.

18. Effective Date. The Effective Date of this Agreement shall be the date on which both Dry Lot and BWCC executed this Agreement, if executed on the same day, or the later date, if executed on different days.

IN WITNESS WHEREOF, the undersigned have duly executed this Agreement.

DATED this 4 day of Sept, 2008

DRY LOT LLC

Bernard I. Friedlander, Member / Manager

STATE OF IDAHO )
) ss.
County of Blaine )

On this 4 day of September, 2008, before me, a Notary Public for said County and State, personally appeared Bernard Friedlander, known or identified to me, to be the person whose name is subscribed to the within instrument, and acknowledged to me that he/she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

BOBBI MOORE NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC FOR IDAHO
Residing at: Blaine County, ID
My commission expires: 7/18/14

DATED this 5th day of September, 2008

BIG WOOD CANAL COMPANY

~~Jerry Nance - Chairman~~
Mike Faulkner - Vice Chairman

STATE OF Idaho )
) ss.
County of Gooding )

On this 5 day of September, 2008, before me, a Notary Public for said County and State, personally appeared Mike Faulkner, known or identified to me, to be the person whose name is subscribed to the within instrument, and acknowledged to me that he/she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Craig Hobdey
NOTARY PUBLIC FOR Idaho
Residing at: Gooding
My commission expires: 10-24-12

CRAIG HOBDEY NOTARY PUBLIC STATE OF IDAHO