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August 29, 2008

Via Email

Robert G. Haynes
Regional Manager
Northern Regional Office
Idaho Department of Water Resources
7600 N. Mineral Drive, Suite 100
Coeur d'Alene, ID 83815

Re: *Black Rock Utilities, Inc., Water Right No. 95-9045, Transfer No. 74780*

Dear Bob:

Enclosed is a copy of my August 28th letter to Barry Rosenberg and Jai Nelson and a copy of the proposed revised conditions to Black Rock's pending application for amendment. Please place my letter and the proposed conditions in the file for this proceeding to become part of the record. Thank you.

Sincerely,



Christopher H. Meyer

Encl : August 28, 2008 Letter
Proposed Conditions

cc w/o encl.: Barry Rosenberg, Executive Director, Kootenai Environmental Alliance
Jai K. Nelson, RN, Coordinator, Coalition for Positive Rural Growth
Kyle Capps, CGCS, Vice President, Black Rock Development
John R. Layman, Esq., Layman, Layman & Robinson, PLLP
Scott N. King, P.E., Senior Project Engineer, SPF Water Engineering, LLC

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August 28, 2008

Via Email and U.S. Mail

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Re: *Black Rock Utilities, Inc., Water Right No. 95-9045, Transfer No. 74780*

Dear Mr. Rosenberg and Ms. Nelson:

At the conclusion of Tuesday's prehearing conference, I agreed to provide a revised set of proposed conditions for your consideration, which I enclose. I am also copying Bob Haynes of the Idaho Department of Water Resources (the "Department") and will ask that this letter and the enclosed proposed conditions be made a part of the record in this proceeding.

During the prehearing conference we learned that you believe that the intent of the application was to evade limitations imposed under the Stipulation with KEA, which were also included in the Amendment of Permit. Specifically, the Amendment of Permit in effect now limits use of the municipal component of the water right to irrigation within the irrigation season, fire protection, and certain construction uses. You expressed concern that the amendment would allow use of the municipal component of the water right for any purpose at any time of the year.

This was not Black Rock's intent. In the hope of eliminating any uncertainty on this and allowing resolution of your protests, I am attaching a revised set of proposed conditions of approval. This set displays each of the conditions now in effect on the Amendment of Permit. The changes sought by the pending amendment are shown in redline format (strike-out and underscore).

Barry Rosenberg
Jai K. Nelson, RN
August 28, 2008
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In response to your request for clarification at Tuesday's prehearing conference, I have made two further changes. Both are highlighted in yellow.

First, I added a sentence to the end of condition No. 3. The new sentence reads: "No other municipal use of this water right is authorized." The purpose of this sentence is to clarify that the uses listed (irrigation, fire protection, and certain construction uses) are the only uses allowed of the municipal portion of the water right. Condition No. 3 should be read in conjunction with Condition No. 6 (now renumbered 5), which adds the additional limitation that the irrigation use may occur only during the irrigation season. This condition overrides and limits the season of use listed on the face of the right (01/01 to 12/31). In sum, the limitations imposed by the KEA Stipulation remain in effect as to the municipal portion of the right.

Second, I modified the proposed changes to Condition No. 8 (now renumbered 7). You were concerned that as previously proposed the condition might have expanded the allowable uses. The revised proposal, I hope, makes it clear that no such expansion of uses is allowed. (The only new uses are those expressly identified in the application for storage.) The sole purpose of this condition is to ensure that the various volume and flow limits set out for the new storage purposes are not cumulative and do not enlarge the right. This is a limitation on the right. It is there for your benefit, not Black Rock's.

The bottom line is that the proposed amendment is very limited in scope. It takes the 123-acre residual irrigation component (which would otherwise have expired after one year) and converts it to storage uses in the various ponds and water features. This is exactly what was contemplated by the Department in its preliminary order of June 4, 2007. As we discussed on Tuesday, the availability of the 123-acre portion of the right was resolved by the Department's decision last summer. As the attachment to the Order explained, it became final after 14 days. After that, you had 28 days to appeal to district court. No appeal was filed. In lawyers' parlance, it is now *res judicata*. This means that the issues decided in the Order cannot and will not be reconsidered by the Department in a subsequent proceeding involving the same parties.

The only issue before the Department is whether the change in the 123-acre component will result in injury, enlargement, or violation of the local public interest. It is impossible that it will result in any injury or enlargement, because the existing quantity authorized under the Amendment of Permit is not being changed. This is simply a matter of doing the math. You indicated in Tuesday's conference that you do not have any dispute as to the math. As for the local public interest, we discussed on Tuesday how the Legislature's 2003 amendment significantly narrowed the scope of issues that may be raised. That scope is even narrower here, because you have already presented your case on local public interest during the hearing on the last amendment. You did not identify any concern in Tuesday's conference that was not previously evaluated by the Department and rejected. Accordingly, the Department's determination as to those issues is also *res judicata*.

Barry Rosenberg
Jai K. Nelson, RN
August 28, 2008
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At the end of Tuesday's prehearing conference, you asked for additional information regarding Black Rock's planned development. Kyle promised to get that to you, and to explore further with you ideas that you may have. Black Rock is interested in your thoughts on what can be done to make this project consistent with sound water resource development. You expressed an interest in plans for land application of treated effluent. Kyle will be following up with you on that as well.

I thought our meeting on Tuesday was productive. It identified areas of misunderstanding which, I hope, we have been able to overcome. Indeed, our goal is to continue to work with you toward resolution of your protests prior to the hearing now set for December 2-3, 2008.

Sincerely,



Christopher H. Meyer

Encl: Proposed conditions

cc: Robert G. Haynes, Regional Manager, Idaho Department of Water Resources
Kyle Capps, CGCS, Vice President, Black Rock Development
John R. Layman, Esq., Layman, Layman & Robinson, PLLP
Scott N. King, P.E., Senior Project Engineer, SPF Water Engineering, LLC

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