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August 6, 2008

Gary Spackman
Water Management Division Administrator
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098

COPY

RE: Response to Internal Memo from John Lindgren Regarding Application for Transfer
Nos. 72674 and 74088, in the Name of Comore Development.

Dear Mr. Spackman:

This letter is in regards to Application for Transfer Nos. 72674 and 74088, in the name of Comore Development, Inc., ("Comore"). We have been trying to work with the Department for over three years to finalize these transfer, which is a condition of two approved water right permits: 25-14166 and 25-14167. The transfer was submitted in response to a stipulation entered into between the applicants and the original protestants, Twin Falls and North Side Canal Companies.

Most of the history of these transfers was provided in a previous letter to Director David Tuthill, by Mr. Kent Foster, dated July 16, 2007, and since there have been developments since that time, we feel a recounting of the history of these transfers is important.

Comore Development is owned by the Skidmore family of Idaho Falls, who have been responsible for the development of an upscale group of subdivisions known as Comore Loma in the foothills south and east of Idaho Falls. The Skidmores have been developing property since the early 1970s. Their construction company is Skidmore Construction, Inc.; the development company is Comore Development, Inc.; and a water company to hold the water rights and own and operate the diversion and delivery system was created several years ago as Comore Loma Water Company. Over the years, as additional water was needed in connection with the development of more lots, Comore Development generally would file an Application for Water Right Permit and after the well was drilled, delivery system installed, and the license issued, would assign the water right to Comore Loma Water Company. This approach has been or will be used in connection with Water Right Nos. 25-7040, 25-7042, 25-7161, 25-7578, and 25-7652.

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Department of Water Resources
Eastern Region

Established in 1896

Then, in March and April of 2004, Applications for Permit Nos. 25-14166 and 25-14167 were filed by Comore Development in the usual course of business as described. Both were protested by North Side and Twin Falls canal companies. Because of their development schedule, Comore entered into an agreement with the canal companies to change the applications to seek inside water use only, which the companies agree is non-consumptive, and then for Comore to purchase within two years other groundwater rights to supply outside irrigation water, and to apply for transfer of the place of use and point of diversion when such rights were acquired.

As you know, valid groundwater rights which can be used for outside water and irrigation in connection with residential development are not plentiful. After significant effort, the Skidmores were able to persuade Mr. Brad Foster, who had acquired land west of Blackfoot from Thayne Gneiting and Richard Polatis, to sell them some water rights. Mr. Foster agreed to sell 100 acres of water right from the Gneiting land in 2005, and we filed the first Application for Transfer, which was numbered 72674 in November of that year.

A company formed by Mr. Foster's family, Black Rock, LLC, agreed to sell the balance of a groundwater right on the Polatis land west of Blackfoot, to Comore. It is for about 238 acres and could be sufficient to accommodate Comore's needs for outside water for some time to come. As you can well imagine, substantial sums have been paid by Comore for both the Gneiting and Polatis rights.

After the second Application for Transfer (No. 74088) was filed, we were informed that we needed to perform an injury analysis using the "New Transfer Tool" and provide that information with our applications. Mr. Foster previously indicated his reluctance to do so. First, Mr. Foster provided a colored map showing the location of the affected Comore land with the description of all of the points of diversion. The proposed place of use was wholly outside the official boundary of the ESPA. Quoting from Section 3, Subsection 12 of the "Transfer Memo", it states that "the applicant must submit an attachment to the application that sets forth the time history of calculated depletions (transient to study state) to reaches of the Snake River that are hydraulically-connected to the ESPA using or based on the Department's current groundwater model for the ESPA", but only "if the application for transfer proposes to move the point of diversion from a water right to divert and use groundwater from one location to another within the Eastern Snake Plain Aquifer" (emphasis added). Thus, Mr. Foster's initial argument was simply that the transfer memo, by its very terms, would not be necessary in the transfers filed by Comore because the transfers would move water from the ESPA outside of the ESPA.

Second, Mr. Foster expressed some concern that advice from IDWR officials to use the transfer tool node that was "closest to the ESPA." Mr. Foster stated simply that boundaries are normally considered to mean something in the law, and it is somewhat arbitrary to require someone to use the closest node in a given situation. Mr. Foster asked if the use of the closest node would be required one, three, five, ten, or perhaps 25 miles away. Because of this uncertainty, Mr. Foster argued additionally that an analysis under the transfer tool was not appropriate.

Third, Mr. Foster stated that in our own transfer tool analysis, we noted that results from the nodes near the extreme eastern edge of the ESPA produced what appear to be inaccurate results. As such, Mr. Foster expressed his concern that use of either the old transfer tool or the new transfer tool would apparently require the loss or perhaps taking of so much of the water rights purchased by Comore as to make the very substantial price paid for them completely unreasonable.

Fourth, Mr. Foster noted that the transfers would move water rights from the Blackfoot area, which is much closer to springs that feed American Falls Reservoir, to an area outside of the ESPA. These transfers would therefore help reduce pumping in areas deemed sensitive by IDWR in the Surface Water Coalition water calls.

Lastly, Mr. Foster suggested that the Department publish the Applications for Transfer to determine if there would be any protestors to the transfer. Mr. Foster also generally expressed his frustration as to the use of the transfer memo, the constantly changing rules being promulgated by Department personnel, and the general uncertainty and difficulty we have as counselors to our clients to provide them with sound advice as to how to resolve their water rights issues.

Approximately one month after Mr. Foster sent his letter to the Director, you responded with a letter dated September 13, 2007. In that letter, you instructed your staff to submit a depletion analysis using the ESPA transfer tool and then to provide copies of the Department's simulation to us for comment and/or rebuttal. In addition, you stated that notice of the applications for transfer should be published prior to any reduction of the water right to be transferred. Thirdly, you noted that the published notice sent to all interested parties should expressly state that the quantities of the transfers have not been adjusted to prevent possible reach losses simulated by the ESPA model. In your letter you stated

"following publication, the filing of possible protests, and Department assessment of the accuracy and applicability of model simulations, the Department will complete

its determination of whether the applications for transfer should be approved, denied, or approved with conditions.”

On October 1, 2007, Dave Carlson of the Eastern Region office of IDWR forwarded to Kent Foster the Department’s ESPA analysis of the Comore Development transfers. As suspected, the analysis predicted a significant effect on certain reaches of the Snake River, which would likely result in substantial reductions in the water right amount to be transferred.

After receiving this analysis, Comore employed the services of Clearwater Geosciences, LLP, of Idaho Falls, Idaho, to provide a professional and specific analysis of whether or not the proposed transfer would injure any other water users if approved. The detailed report was completed in January 2008, and a copy was provided to the Department of Water Resources shortly thereafter. Generally speaking, Clearwater Geosciences noted discrepancies between actual measured data and data contained in the model. An analysis based on actual data showed that the transfers would not cause injury to other water right holders, which is at odds with the Transfer Tool results.

Then, on April 2, 2008, we received a notice from IDWR that the applications for transfer would be published on April 10th and April 17th, 2008, in the Idaho Falls Post Register. The application was published accordingly, and after the protest period had ended, no protests were received by the Department. Since we then had not yet received any response to Clearwater Geosciences’ injury assessment, and since the transfers had been advertised, we had assumed that the Department had agreed with the analysis prepared by professional engineers Tom Wood and Robert Podgorney of Clearwater Geosciences. In your letter dated September 13, 2007, you specifically provided or allowed us to provide some rebuttal to the ESPA transfer tool analysis. We provided such rebuttal, and the transfers were advertised as required by Idaho law. In your closing paragraph of that letter, which we have quoted above, you stated that the Department would complete its determinations as to whether the transfers should be approved, denied, or approved with conditions. The Department did none of the above three.

Instead, in May 2008, we were forwarded an internal memo prepared by Mr. John Lindgren and addressed to Aaron Marshall, with copies to Jeff Peppersack, Alan Wiley, Shawn Vincent, and Rick Raymondi. The subject of the memo was to be an analysis of whether or not the injury assessment provided by Clearwater Geosciences was adequate to address any injury concerns resulting from the transfer. The actual text of the memo was less than half a page, and made very broad and generalized assertions responses to the detailed analysis provided by Clearwater

Geosciences. Once this document was forwarded to us, we provided it to Clearwater Geosciences for their review.

Enclosed with this letter is a copy of a letter addressed to me from Clearwater Geosciences in response to the memo from Mr. Lindgren. Specifically, the memo rebuts every alleged weakness in Mr. Lindgren's short memo. As you can see in the letter, Mr. Wood and Mr. Podgorney stress the fact that they have relied on actual measured data in the Comore area in their analysis. In doing so, they have determined that the model is somewhat inaccurate when used in these specific transfers. Much to their surprise, they had hoped that the information we had provided to the Department could perhaps be used by the Department to better calibrate and refine its model. You can perhaps understand our frustration when instead, the analysis was essentially dismissed with a half-page memo.

As you can see from Clearwater Geosciences' response, our level of frustration is high. We have worked to provide the Department with information that is requested, yet for some reason, we simply cannot provide the information the Department desires to finalize these transfers. In a touch of irony, Comore received today two letters from Deborah Gibson of your office informing us that the proof due notice on Permit Nos. 25-14166 and 25-14167 are due by October 1, 2008. Obviously, because of where we are at with the transfers, we will have to ask for an extension. Nevertheless, these letters have simply reminded us that we have been at this for over three years, and the patience of Comore and its consultants are wearing thin.

We request you review our response to Mr. Lindgren's memo and thereafter finalize the transfers. Based upon our review of this response, and my limited understanding of hydrogeology, it appears that their analysis is sound and the transfers should be approved. We note additionally that the criticism made by Mr. Wood and Mr. Podgorney relates to the scale at which the transfer tool is used not the Transfer Tool itself. From an aquifer wide perspective, Mr. Wood and Mr. Podgorney state that, in their view, "it is a fine representation of aquifer flow at the scale of the entire aquifer. However, small transfers, especially near the boundary of a model, are not accurately represented in its current configuration.

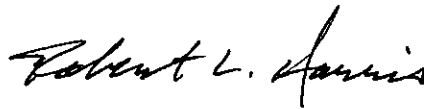
We have expressed on a number of occasions that we would rather work these issues out with the Department rather than resorting to litigation which is why we expended our time and effort in preparing the rebuttal documents. But, this back and forth between us and the Department simply cannot continue for an undefined period of time.

Gary Spackman
Water Management Division Administrator
Idaho Department of Water Resources
August 6, 2008
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Please be advised that my client has instructed me that if there is any further dismissal of the information we have provided to you, we are to move this process into litigation. While doing so is something Mr. Foster and myself have hoped to avoid, we have simply gotten to a point where we have no other choice in the event the Department maintains its current position.

If you have any questions, please feel free to contact us at your earliest convenience. Additionally, Mr. Wood and Mr. Podgorney have provided their phone numbers on the last page of their letter, and are happy to answer any questions regarding their analysis. It is our hope to receive a prompt response to the information we have provided, and we will follow up with the Department in a few weeks to determine where you are at in the review of our information and the continued processing of the transfer applications. Please note that we have provided a copy of this letter to Ernie Carlsen and Dave Carlson of the Eastern Region office of IDWR, and further, feel it is appropriate to provide a copy to Director Tuthill, so that he is aware of the situation as he had been written directly by Mr. Foster previously.

Best Regards,



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Enclosure

c: ✓ Ernie Carlsen
✓ Dave Carlson
Director Tuthill
Comore Development
Clearwater Geosciences (w/o enclosures)