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State of Idaho
DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

September 13, 2007

C. L. "BUTCH" OTTER
Governor
DAVID R. TUTHILL, JR.
Interim Director

KENT FOSTER
ATTORNEY AT LAW
1000 RIVERWALK DRIVE STE 200
PO BOX 50130
IDAHO FALLS IDAHO 83405

Re: Applications for Transfer of Comore Development, Inc. – Letter dated July 16, 2007

Dear Mr. Foster:

Thank you for your letter raising concerns about the Idaho Department of Water Resources' ("Department") review of the proposed transfers of water rights by Comore Development, Inc ("Comore"). Because of our recent telephone conversation about this subject, the Director asked me to respond to your letter.

As I understand the facts, Comore previously obtained ground water rights for existing development of property located in the foothills east of Idaho Falls. Comore sought additional water rights for proposed developments in approximately the same location. Because of restrictions on further appropriations of ground water, or protests filed against Comore's applications, Comore purchased irrigation ground water rights describing points of diversion located west of Blackfoot, Idaho, and also west of the Snake River. Comore filed applications to transfer the water rights to its proposed developments located east of Idaho Falls.

As part of their review, IDWR staff requested that Comore submit, prior to processing of the applications, an analysis of the injury to other water users using the ESPA ground water model spreadsheet tool. You have taken exception to this request. You assert that a Department Memorandum titled "Administrator's Memorandum Re: Transfer Processing Policies and Procedures," dated October 30, 2002, prohibits the Department from requiring Comore to submit the information. The Department commonly refers to the memorandum as "the transfer memo." In your letter, you quote portions of the transfer memo. The full text of the portions of the transfer memo containing your quoted language states the following:

...if the application for transfer proposes to move the point of diversion for a water right to divert and use ground water from one location to another within the Eastern Snake Plain Aquifer (ESPA), the applicant must submit an attachment to the application that sets forth the time history of calculated depletions (transient to

steady-state) to reaches of the Snake River that are hydraulically-connected to the ESPA using or based on the department's current ground water model for the ESPA, or other equivalent analysis acceptable to the department.

The purpose of the attachment is to provide a basis for evaluating whether the proposed transfer will increase depletions to hydraulically-connected reaches of the Snake River. Increases in such depletions are presumed to cause injury to existing water rights because all of the hydraulically-connected reaches of the Snake River (including tributary springs) have water rights that are not fully satisfied at certain times.

The above memorandum guides Department staff in processing applications for transfer. The memorandum is not a rule carrying the force of law. The overriding requirement is that the Department determine, under Idaho Code § 42-222, whether the proposed transfer will injure other water rights. The transfer tool and the underlying ground water model are methods of analyzing the possible injury to other water rights that would be caused by approval of the application for transfer.

The simulation of depletions that would be caused by a proposed transfer and mitigation for the simulated depletions has significantly reduced the number of protests filed by water right holders of rights that authorize diversion of surface water from hydraulically connected spring reaches. The prospective protestants have expected the mitigation analysis as part of the Department's review.

The reference in the transfer memo to the "Eastern Snake Plain Aquifer" is subject to interpretation. Nonetheless, the Department will assume the boundary plotted on the map you attached defines the boundary of the "ESPA" discussed in the transfer memo. By this letter, I am instructing staff to do the following:

1. Comore is not required to submit a depletion analysis with the application for transfer. Department staff is instructed to run the most recent ESPA model (or spreadsheet tool) internally and assess its applicability to the applications for transfer filed by Comore. Copies of the Department's simulation and any written analysis of the simulation should be forwarded to Comore for comment and/or rebuttal.
2. Notice of the applications for transfer filed by Comore should be published prior to any reduction, based on the Department's simulations, in the flow rates/annual volumes of water sought to be transferred.
3. The published notice and any notice sent to interested parties shall expressly state that the quantities sought for transfer have not been adjusted to prevent possible reach losses simulated by the ESPA model.

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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.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Spackman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Gary Spackman
Water Management Division Administrator

cc: Eastern Region
Jeff Peppersack