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JUL 18 2007

**DEPARTMENT OF
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July 16, 2007

David Tuthill, Director
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098

RE: Applications for Transfer of Comore Development, Inc.

Dear Director Tuthill:

We are writing directly to you in connection with the processing of two Applications for Transfer on behalf of our client, Comore Development, Inc. Comore Development is owned by the Skidmore family of Idaho Falls, Richard Skidmore and his sons, who have been responsible for the development of a substantial upscale group of subdivisions known as Comore Loma, in the foothills south and east of Idaho Falls. We think the history of how the current proposals came about may be helpful in understanding the concerns we express in this letter.

The Skidmores have been developing the referenced property since the early 1970s. Their construction company is Skidmore Construction and Millwork, 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 filed an Application for Water Right Permit and after the well was drilled, the delivery system installed and the license issued, would assign the water right to Comore Loma Water Company. This approach has been used or will be used in connection with Water Rights Nos. 25-7040, 25-7042, 25-7161, 25-7578 and 25-7652.

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Idaho Department of Water Resources
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Then, in March and April of 2004, Applications Nos. 25-14166 and 25-14167 were filed by Comore Development in the usual course of business as described. Both were protested by Northside and Twin Falls Canal Companies, who had apparently decided it would be a good policy to protest every application for groundwater upgradient from their service areas. Because of the development schedule, Comore entered into an agreement with the canal companies to change the applications to seek inside water use only, which the companies agreed is non-consumptive, and to purchase within two years other groundwater rights to supply outside or 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 watering and irrigation in connection with residential development, and which are also available for purchase, 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. Actually, Mr. Foster agreed to sell 100 acres of water rights from the Gneiting land in 2005, and we filed the first Application for Transfer, which was numbered 72674 in November of that year. Recently, 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 yet to come. As you can well imagine, substantial sums have been paid by Comore for both the Gneiting and Polatis rights.

We prepared the second Application for Transfer and filed it recently, in accordance with the stipulation with the canal companies. We are receiving some negative feedback from various officers of IDWR in both the Idaho Falls, and we understand, Boise offices. The concern seems to be that some feel there should be a requirement to use the "new transfer tool" and provide that information with our applications. We are extremely reluctant to do so for a number of reasons. Our thought is that if we attempt to articulate some of them, and you have a chance to consider them, perhaps we can avoid the need to resolve the issue through litigation. The client feels strongly enough and there is enough at stake to probably justify litigation in this case, if necessary.

First, we are enclosing a colored photo showing the location of the affected Comore land (place of use for all existing water rights and proposed place of use for

rights to be transferred) with the description of all points of diversion (existing and proposed). The area in the upper left hand corner in red shows the eastern boundary of the Eastern Snake Plain Aquifer (ESPA) from IDWR records. As you can see, the proposed place of use is wholly outside the official boundary of the ESPA. We note that Section 3, Subsection (12) of the "Administrator's Memorandum Re: Transfer Processing Policies and Procedures", dated October 30, 2002, provides that "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 groundwater model for the ESPA, . . .", but only "if the application for transfer proposes to move the point of diversion for a water right to divert and use groundwater from one location to another within the Eastern Snake Plain Aquifer (ESPA)" (emphasis added).

Some have said that because the proposed place of use for Comore is "close" to the ESPA, we should nevertheless be required to submit the "Transfer Tool" analysis. There appear to be both legal and practical problems with that suggestion. Boundaries are normally considered to mean something in the law. And how close is too close or not close enough? If one to three miles is close enough to be treated as if the land is "within" the ESPA, where is the boundary? Is it five miles, or 10 miles, or 25 miles? Isn't all of the groundwater in every tributary basin "hydraulically-connected to the ESPA"?

Even if we were to attempt to provide the results from the Department's groundwater model, sometimes referred to as the "transfer tool", there is no active cell or node available for the proposed new place of use and points of diversion. We have received two possible suggestions (rather strong suggestions) from Department personnel: (1) use the nearest node or cell, or (2) use the "new transfer tool". We would prefer not to do either; in part for the legal reason expressed above, and, in addition, it has been our observation that the results from the nodes near the extreme eastern edge of the ESPA are most likely to provide inaccurate, often grossly inaccurate results. In this particular instance, the results from the "nearest node" appear to us to be too extreme to be credible. As we understand it, the Department has not yet made any official decision to change from the "old tool" to the "new tool", although some Department personnel insist that we should use the "new tool" in any event. But the predictions of each are neither consistent nor believable. The use of either would apparently require the loss or perhaps taking of so much of the water rights sought to be transferred as to make the very substantial price paid for them completely unreasonable.

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But, in this case, whose rights would be injured by the proposed transfer? We imagine that the canal companies who protested the Applications for Permit referenced above, would be pleased to see any amount of groundwater pumping in the area west of Blackfoot cease because the cessation of such pumping would have positive effects on the American Falls Reservoir reaches of the Snake River. Indeed, given the various water calls on the ESPA, it would seem that moving water rights outside of the ESPA would be a positive move for water users and IDWR. We do not know whether anyone would protest the Applications for Transfer because notice of their filing has not yet been published. But we remain skeptical that the predictions of either version of the "Transfer Tool" can provide credible evidence of a real or measurable injury to any surface or groundwater right.

How does an attorney advise a client except based on his understanding of applicable statutes, rules and regulations and cases which have the force and effect of law. Does a Departmental memo have the force and effect of law? And do all of the individual interpretations by various personnel of the Department of Water Resources, such as that one should use a newer version of the "Transfer Tool", or that one to three miles outside the ESPA is close enough to require the use of the "Transfer Tool", or that a predicted impact that cannot be confirmed by actual measurement or observation is nevertheless presumed to be an injury to other water rights, have the force and effect of law? We realize our frustrations with the transfer memo are showing, but we believe in this particular case, we probably need your attention and assistance. Thank you in advance for your consideration.

Yours very truly,



Kent W. Foster

Enclosure

c: Dave Carlson - Eastern Region
Randy Skidmore

COMORE DEVELOPMENT

