BEFORE THE DEPARTMENT OF WATER RESOURCES

FOR THE STATE OF IDAHO

APPLICATION FOR AMENDMENT OF PERMIT 95-9045 IN THE NAME OF BLACK ROCK UTILITIES, INC.	))))	**PRELIMINARY ORDER**

PROCEDURAL BACKGROUND

On September 14, 2000, the Idaho Department of Water Resources ("IDWR" or "Department") approved permit to appropriate water no. 95-9045 in the name of CAG Investments, LLC. Permit no. 95-9045 authorized the appropriation of 2.50 cubic feet per second ("cfs") for irrigation of 668 acres within portions of Sections 8, 9, 16, and 17, Township 48 North, Range 4 West, in Kootenai County, Idaho. The permit also authorized the appropriation of 1.00 cfs for domestic purposes within the same described lands. The total appropriation authorized by permit no. 95-9045 was 3.50 cfs.

Permit no. 95-9045 required that the permit holder file proof of beneficial use on or before September 1, 2005. On August 25, 2005, IDWR approved an extension of time for filing proof of beneficial use, extending the time within which to submit proof of beneficial use to September 1, 2010.

On January 12, 2006, CAG Investments, LLC assigned ownership of permit no. 95-9045 to Black Rock Utilities, Inc ("Black Rock").

On March 10, 2006, Black Rock filed an application to amend permit no. 95-9045. The application for amendment was assigned a unique application number of 72669. The application for amendment seeks to change the nature of use from irrigation and domestic to municipal purposes. The application for amendment also seeks to increase the total land base within which water would be used to include an additional development area.

Notice of the application for amendment was published and protested by the Kootenai Environmental Alliance and by the Coalition for Positive Rural Impact at Rockford Bay ("the Coalition").

On August 4, 2006, IDWR received a *Notice of Settlement and Conditional Motion to Withdraw Protest*. Attached to the notice was a document titled *Settlement*

Agreement Between Black Rock Utilities, Inc. and the Kootenai Environmental Alliance in Regards to IDWR Application for Amendment of Permit No. 72669. The documents conditionally withdrew the protest of Kootenai Environmental Alliance. The conditions of withdrawal of the protest required the following:

1. Eliminate the 1.00 CFS for domestic use as described in Permit No. 95-9045.

2. Limit the municipal use for irrigation only from 3/15 to 11/15, with the exception of fire protection and construction water. "Construction water" will be used only for dust control and compaction during a two-year period for construction of roads, golf course and building pads. Black Rock will notify IDWR in writing at the beginning and end of the two-year construction period.

3. Require on a yearly basis the annual water withdrawal information from Lake Coeur d'Alene by Black Rock Utilities, Inc. by October 15 for fiscal Report year ending on October 1 to IDWR.

4. IDWR shall issue the above referenced water right permit with a provision stating, "The diversion and use of water described in this order is subject to additional conditions and limitations agreed to by both Kootenai Environmental Alliance, and the water right holder under a separate agreement to which the Department is not a party and which is independently enforceable by a court of law;" and

5. IDWR shall specifically reference the attached Settlement Agreement in the amended water right permit and include a copy in the permit file.

The settlement agreement stated that Black Rock must submit the annual pumping data to IDWR.

On February 27, 2007, IDWR conducted a hearing for the remaining protest of the Coalition. Black Rock appeared by and through its attorney, John R. Layman. Jai Nelson appeared as a representative of the Coalition. Kootenai Environmental Alliance did not appear at the hearing. Following consideration of the evidence presented at the hearing, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Black Rock filed application to amend permit no. 95-9045, seeking to change the nature of use to municipal purposes. Following the settlement with Kootenai Environmental Alliance, Black Rock reduced the permitted flow rate from 3.5 cfs to 2.5 cfs. The settlement with Kootenai Environmental Alliance requires that the municipal use be limited to irrigation from March 15 to November 15, fire protection year-round, and construction purposes for a period of two years.

2. The application for amendment proposes reduction of the irrigated place of use from 668 acres to 545 acres.

3. Some of the acres proposed as an irrigated place of use are included within the place of use described by original permit no. 95-9045, and some of the acres proposed as an irrigated place of use are included within an approximate additional 1,000 acres, referred to as "the Black Rock North Development."

4. The application for amendment seeks a place of use for lands served by both existing and proposed irrigation and fire protection distribution systems. The lands proposed as a place of use are located within sections 4, 5, 8, 9, 16, and 17, Township 48 North, Range 4 West, Kootenai County.

5. A housing development was constructed in conjunction with the original water right permit no. 95-9045. The housing development will be referred to as "the Club at Black Rock."

6. During development of the Club at Black Rock, the permit holder installed pumps in Coeur d'Alene Lake that lift lake water into a pressurized pipe system. The piped lake water discharges into a series of artificial lakes, ponds, and delivery channels with waterfalls and other aesthetic amenities. Within the boundaries of the Club at Black Rock, three ponds receive water pumped from Coeur d'Alene Lake. Only one of these ponds is a source of water for irrigation and fire protection purposes. The pond from which water is relifted for irrigation and fire protection is approximately two acres in size, and is approximately 18 to 20 feet deep. A pond of these dimensions contains a volume of approximately 40 acre-feet.

7. Coeur d'Alene Lake water stored in the pond is relifted into two separate delivery systems. One system delivers lake water for irrigation of a golf course. Another system delivers lake water for irrigation of home lots and for fire protection. A separate third system delivers ground water to the subdivision homes for potable use and is not the subject of this application for amendment.

8. Permit no. 95-9045 initially authorized the irrigation of 668 acres. An 18-hole golf course was constructed within the Club at Black Rock boundaries. During the development of the Club at Black Rock, the developer employed water conservation measures and minimized the acreage irrigated. Much of the original permitted place of

use was landscaped with natural vegetation. As a result, the total irrigation was reduced to 215 acres, leaving a residual permitted irrigated acreage of 453 acres.

9. Black Rock proposes construction of an additional development north of the Club at Black Rock referred to as the Black Rock North Development. Within the Black Rock North Development, the developer proposes construction of an additional 18-hole golf course and a smaller three-par golf course. By employing conservation measures similar to those employed in the Club at Black Rock, irrigation of the golf course and the home lots will result in irrigation of 330 additional acres. Irrigation in both the Club at Black Rock and Black Rock North Development will result in a total irrigated acreage of 545 acres, leaving a residual 123 acres of the place of use authorized by the original approved permit. If the application for amendment of permit is approved as proposed, the residual 123 acres would not be irrigated.

10. Plans for the Black Rock North Development propose construction of at least two ponds. One pond would be approximately two acres in surface area, approximately 20 feet deep, and would contain approximately 40 acre-feet. Lake water would be relifted from the pond into extensions of the previously described systems for irrigation of the golf course, irrigation of the home lots, and fire protection. Black Rock also proposes construction of a pond for a recreational amenity at a clubhouse. The proposed recreational pond would be at least one-half acre in surface area. A pond one-half acre in area and 20 feet deep will contain approximately 10 acre-feet.

11. Irrigation water diverted continuously at a rate of 2.5 cfs will accrue a volume of approximately 5.0 acre-feet over a 24-hour period.

12. The irrigation season at the location of the proposed place of use is from March 15 through November 15, spanning 245 days. A flow rate of 2.5 cfs diverted continuously will accrue a volume of 1,215 acre-feet of water annually.

13. Regulations for fire protection require a water flow rate of 4,000 gallons per minute (gpm) for a period of four hours. A flow of 4,000 gpm will accumulate a volume of approximately 1.5 acre-feet in four hours.

14. The original order approving permit no. 95-9045 stated:

> Use of water under the permit is subject to all prior water rights including those of Avista for power generating purposes.

15. No other water rights would be adversely affected by the proposed change in the use of water.

16. A reduction in the number of acres irrigated from 668 acres to 545 acres will result in less use of water than originally permitted. The infrequent use of water for fire protection will not significantly increase use of water beyond the volume of water needed for irrigation.

17. The protestant expressed concern about runoff to Lake Coeur d'Alene and the possible attendant sediment and nutrient discharge into the lake.

18. Black Rock aggressively monitors and controls the application of irrigation water by computerizing each irrigation sprinkler head, assigning personnel full time to monitor the irrigation, and watering some portions of the irrigated area by hand.

CONCLUSIONS OF LAW

1. Idaho Code § 42-211 states, in pertinent part:

> Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of diversion or proposed use or uses of the water, he shall file an application for amendment . . . and upon receipt thereof it shall be the duty of the department of water resources to examine same and if approval thereof would not result in the diversion and use of more water than originally permitted and if the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application . . . .

2. Idaho Code § 202B(6) defines municipal purposes as follows:

> "Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

3. Idaho Code § 202B(5)(c) defines municipal provider to include:

> A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in section 39-103(10), Idaho Code.

4. Black Rock qualifies as a municipal provider. As a municipal provider, Black Rock may hold a water right authorizing municipal use.

5. In *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993), the Idaho Supreme Court held that an application to amend a permit is subject to a determination that the application is in the local public interest.

6. Idaho Code § 202B(3) defines the local public interest as follows:

> "Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

7. The applicant bears the burden of proof for all of the factors listed in Idaho Code § 42-211.

8. Because fewer acres will be irrigated than authorized by the original permit no. 95-9045, the proposed amendment will not result in the diversion and use of more water than originally permitted.

9. Approval of the proposed amendment will not adversely affect other water rights.

10. Approval of the application for amendment of permit will reduce the irrigated acreage and eliminate the domestic use authorized by the original permit, resulting in a reduction in the water diverted from Coeur d'Alene Lake.

11. Runoff of irrigation water or storm water from the development into Coeur d'Alene Lake could contribute to contamination and siltation of the lake. Black Rock and its successors must comply with all water quality statutes and rules administered by the Idaho Department of Environmental Quality.

12. Because of restrictions in the settlement agreement with Kootenai Environmental Alliance, the approval of the application for amendment cannot authorize the storage of water diverted from Coeur d'Alene Lake.

13. Nonetheless, IDWR has recognized the need for short-term storage for irrigation sets of duration less than 24 hours. The shorter, more concentrated irrigations are necessary for golf courses, where irrigation during playing hours would frustrate the purpose of the irrigation. In addition, homeowners may also concentrate irrigation during shorter periods of the day. To accommodate the need for short term storage, IDWR has allowed water to be delivered to storage by a direct flow water right, but has limited the storage to the volume of water that can be accrued by diverting the direct flow authorized for a period of 24 hours.

14. As stated in the findings of fact, the total volume that can accrue at a flow rate of 2.5 cfs is approximately 5.0 acre-feet. In addition, Black Rock should be able to store an additional 1.5 acre-feet for fire protection.

15. If the application for amendment is approved as proposed, the total pond storage to which water pumped from Coeur d'Alene Lake under permit no. 95-9045 can accrue would be limited to 6.5 acre-feet. Only 5.0 acre-feet of lake water could be stored in a reservoir from which water for irrigation is pumped and delivered. An additional 1.5

acre-feet for fire protection could be stored in the irrigation reservoir or in a separate reservoir.

16. Current storage within the existing Club at Black Rock exceeds 6.5 acre-feet. Furthermore, at least two ponds store water not used for irrigation. In the Black Rock North Development, Black Rock proposes additional storage reservoirs. Storage of water pumped from Coeur d'Alene Lake for irrigation in excess of 5.0 acre-feet cannot be authorized by approval of this application for amendment of permit no. 95-9045. Furthermore, storage of water pumped from Coeur d'Alene Lake for purposes other than irrigation in excess of 1.5 acre-feet cannot be authorized by approval of this application for amendment of permit no. 95-9045.

17. This application for amendment proposes a reduction in the authorized place of use of 123 acres and a corresponding reduction in consumptive use and volume diverted.

18. Existing ponds in the Club at Black Rock that do not store irrigation water or that exceed the storage recognized by the 24-hour fill policy might have to be filled-in if another source of water is not found.

19. Approval of this application for amendment of permit should allow a period of time for reconstruction of the existing ponds and delivery systems or for changes to or identification of water rights that would authorize the storage in the existing Club at Black Rock ponds and perhaps future storage in ponds proposed to be located within the Black Rock North Development.

20. The residual 123 acres that were not included on the application for amendment and the associated irrigation use should be left on the permit for the period of time allowed for reconstruction or water right identification/change described above.

21. The holder of permit no. 95-9045 must not store additional water in the Black Rock North Development under this approval and must reduce its storage to 6.5 acre-feet or less within the Club at Black Rock unless the permit holder obtains or identifies other water rights it owns that authorize storage of water in the ponds. Furthermore, if water from other sources is commingled with water diverted from Coeur d'Alene Lake, the permit holder must develop a plan, approved by IDWR, insuring no more than 6.5 acre-feet of water from Coeur d'Alene Lake diverted pursuant to permit no. 95-9045 will be stored.

ORDER

IT IS HEREBY ORDERED that the application for amendment of permit no. 95-9045 is **Approved** with the following specific adjustments:

Use: Municipal	Flow: 2.5 cfs	Volume:	1,215 acre-feet
Use: Irrigation of Residual 123 Acres	Flow: 2.46 cfs	Volume:	369 acre-feet

Place of Use for residual 123 acres must be within the irrigation place of use described in the original permit no. 95-9045.

Totals for Municipal & Irrigation	Flow: 2.5 cfs	Volume:	1,215 acre-feet

IT IS FURTHER ORDERED that, within one year of the final approval of amendment no. 72669, the right holder must: (a) limit the storage under permit no. 95-9045 to the storage volumes set forth in the conditions of approval; (b) identify other water rights that authorize additional storage; or (c) change other water rights to authorize the additional storage.

IT IS FURTHER ORDERED that, after the expiration of one year from the date of final approval of amendment no. 72669 the irrigation use identified separately from the municipal use authorized by the amendment shall be stricken from the permit unless the use has been changed or is the subject of a change application pending before the Department.

IT IS FURTHER ORDERED that permit no. 95-9045 is subject to the following conditions:

Proof of beneficial use shall be submitted on or before September 1, 2010.

Subject to all prior water rights.

Municipal use is limited to irrigation of 545 acres and fire protection within Sections 4, 5, 8, 9, 16, and 17, Township 48 North, Range 4 West, Kootenai County. In addition, water diverted under this right may be used for construction within the Black Rock North Development for two years during initial development. Black Rock shall inform the Department in writing when the two years begin. The construction period must be complete within two years and prior to the date proof of beneficial use is due.

Storage of water under this right is limited to 5.0 acre-feet for irrigation and 1.5 acre-feet for fire protection. Furthermore, the 5 acre-feet stored for irrigation must be stored in a reservoir from which water for irrigation is pumped and delivered. The remaining 1.5 acre-feet may be stored in a separate reservoir.

The holder of this water right shall not store water in the Black Rock North Development and must reduce its storage to 6.5 acre-feet or less in the Club at Black

Rock unless it obtains or identifies other water rights it owns that authorize storage of water in the ponds. Furthermore, if water from other sources is commingled with water diverted from Coeur d'Alene Lake, the holder of the permit must develop a plan, approved by IDWR, that will insure no more than 6.5 acre-feet of water from Coeur d'Alene Lake diverted under this right will be stored.

Water may only be diverted and used for irrigation from March 15 through November 15.

This right when combined with all other rights shall provide no more than 3.0 acre-feet annually per acre at the field headgate for irrigation.

The total volume diverted for irrigation under the municipal use shall not exceed 1,215 acre-feet.

The right holder shall submit to the Department the final design of the water use facilities including wastewater treatment and storm runoff facilities for the project for review and approval prior to construction.

The right holder shall comply with all water quality statutes and rules administered by the Idaho Department of Environmental Quality.

The right holder shall install and maintain a fish screen at the point of diversion with ¼ inch or smaller screen mesh.

The diversion and use of water is subject to additional conditions and limitations agreed to by both Kootenai Environmental Alliance and the water right holder under a separate agreement to which the Department is not a party and which is independently enforceable by a court of law. A copy of the agreement shall be included in the Department water right file.

The right holder shall install a suitable measuring device and shall annually report the total volume of water diverted under this right to the Department on or before October 15 of each year.

Dated this 4th day of June, 2007.

Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of June, 2007, a true and correct copy of the above and foregoing documents described below was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Preliminary Order, and Explanation Sheet titled "Responding to Preliminary Orders Issued by the Idaho Department of Water Resources.

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