BEFORE THE DEPARTMENT OF WATER RESOURCES

FOR THE STATE OF IDAHO

APPLICATION FOR AMENDMENT OF PERMIT NO. 95-9045 (APPLICATION NO. 74780) 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 sought to change the nature of use from irrigation and domestic to municipal purposes. The application for amendment also sought 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.

On June 4, 2007, IDWR issued a preliminary order. At the hearing, the applicant established that it had constructed and filled ponds with water within the proposed development. Because of the stipulation for withdrawal of protest with Kootenai Environmental Alliance, IDWR could not authorize storage uses of water.

The June 4, 2007 order recognized a reduction in irrigated acreage from 668 acres to 545 acres. The preliminary order also recognized that Black Rock had reduced the total use of water under its permit, and water equivalent to the irrigation of 123 acres would be sacrificed if the

permit were strictly approved. As a result, IDWR allowed a period of one year for Black Rock to identify water rights that would authorize the storage use within the ponds or to file an application to amend the residual portion of the permit.

On April 14, 2008, Black Rock filed a subsequent application for amendment of permit no. 95-9045. IDWR assigned number 74780 to the application for amendment. Notice of the application for amendment was published, and was subsequently protested by Kootenai Environmental Alliance and Jai Nelson on behalf of the Coalition for Positive Rural Growth.

The Kootenai Environmental Alliance subsequently withdrew its protest by executing an agreement with Black Rock. The stipulation for withdrawal of protest required the inclusion of the following conditions into any approval of the application for amendment:

> Direct flow use and diversions from storage under this right are limited to irrigation of 545 acres of turf and landscaping and for fire protection. In addition, water diverted under this right may be used for dust suppression and related construction purposes during the initial development and build-out of the project.
>
> The owner of this right shall meter and record its diversions from Lake Coeur d'Alene under this right and its diversions out of each water storage unit and shall report annually to IDWR on or before January 10 of each year the total annual diversions from the lake and from storage. Such reports shall be matters of public record.
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> The owner of this right shall install or require to be installed a meter for each of its customers served by this right. The meter shall measure and record the quantity of water delivered to that customer.

The hearing officer determined that the Coalition for Positive Rural Impact did not have sufficient structure and membership to qualify as a recognizable association. The hearing officer ruled that Jai Nelson could represent herself as a person-party at the hearing but could not represent a non-existent association.

IDWR conducted a hearing for the protest on January 27 and February 25, 2009.

On April 15, 2009, Jai Nelson filed a *Request for Submission of Recent Findings, Reopening of Hearing or Denial of Application.* The request asserts that Black Rock is experiencing financial difficulties, does not have the financial ability to complete the project, and does not have the necessary local government approvals to complete the project.

After having considered the evidence presented at the hearing, the hearing officer proposes the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. Application for amendment of permit no. 95-9045, numbered 74780, proposes to change the place of use, nature of use, and period of use for 123 acres of irrigation that is a residual portion of permit no. 95-9045 recognized by the preliminary order dated June 4, 2007. The application also seeks to incorporate the portion of permit no. 95-9045 recognized by the June 4, 2007 preliminary order.

2. The application for amendment filed on April 14, 2008, sought the diversion of 2.46 cfs to storage, 209 acre feet of storage for aesthetic purposes, 369 acre feet for municipal storage, and 369 acre feet for the purpose of municipal use from the storage. The application seemed to imply that there were 209 acre feet of aesthetic storage and an additional 160 acre feet of storage that would either be stored in separate holding facilities or be diverted, possibly resulting in total actual physical storage volume of 369 acre feet.

3. This confusion was addressed by the applicant during the hearing. Testimony at the hearing established that 123 acre feet will be physically stored in the various ponds. Black Rock estimates that an additional 13 acre feet will evaporate from the ponds and connecting streams. Black Rock estimates another 68 acre feet will percolate into the ground from unlined stream channels, an unlined pond, and through the linings in the lined ponds. The total volume of water needed for estimated evaporation and seepage is 81 acre feet. To allow for inaccuracies in estimated seepage or evaporation, Black Rock offered 101 acre feet of water for compensation for evaporation and losses.

4. Black Rock anticipates storage in the ponds may be depleted during the irrigation season and may need to be refilled. An additional 164 acre feet might be rediverted out of the ponds that must be refilled during the same irrigation season. In total, 369 acre feet is the sum of both the total physical storage volume, projected evaporation and seepage losses, and refill volume that might be needed for the entire year.

5. A volume of 369 acre feet is the maximum annual volume that could be diverted for irrigation of 123 acres.

6. The 369 acre feet is a portion of the total annual diversion volume of 1,215 acre feet authorized by permit no. 95-9045.

7. Many of the ponds and streams that are amenities within the Black Rock development have already been constructed. Black Rock has installed impervious liners in the ponds proposed by the application for amendment. If the liners remain impervious during operation, seepage from the ponds and streams will be less than the 68 acre feet annually.

8. If the impervious integrity of the liners is maintained, the application for amendment offers sufficient additional water to refill the ponds after seepage, evaporation, and diversion from the ponds for irrigation.

9. Lands within the subdivision will be irrigated out of ponds 1 and 9.

10. The application for amendment seeks a municipal place of use within the service area of Black Rock. The application for amendment identifies the following public land survey quarter-quarters as within the service area:

T 48 N, Range 4 W,	Section 4	NWNW[1], S1/2NW, SW, NWSE, S1/2SE
	Section 5	NE, NENW, SENW, NESW SESW, SE
	Section 8	NE, N1/2SW, SESW, SE
	Section 9	NWNW, S1/2NW, SW
	Section 16	NENE, NW, N1/2SW
	Section 17	E1/2NE

11. The application for amendment identified five purposes of use. In addition to the municipal use recognized by the previous amendment, the four proposed purposes of use are set forth below. Storage uses were each designated with an alpha character identifier.

Diversion to storage
Aesthetic storage = J
Municipal storage = N
Municipal from storage = M

12. Aesthetic storage is defined as water stored in a pond that will not be rediverted for other uses.

13. Municipal storage is defined as water stored in a pond that would subsequently be diverted for municipal uses, primarily irrigation.

14. Municipal from storage is defined as water diverted from a pond for municipal uses, primarily irrigation.

15. Just prior to and during the hearing, Black Rock sought to have all the above uses included under the larger umbrella of "municipal purposes."

16. While the waters in the various ponds are identified as being used for one, some, or all of the beneficial uses listed above, the findings of fact will not reflect the individually identified uses for each pond.

17. Storm water is routed into and out of the ponds into natural channels flowing from the Black Rock property. The discharge of storm water from the ponds is administered by the U.S. Environmental Protection Agency ("EPA"). Black Rock has acquired the necessary EPA approvals for the routing and release of storm water.

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[1] Public land survey descriptions in this decision without a fraction following a two alpha character descriptor are presumed to be followed by the fraction "1/4." In addition, all public land survey descriptions are presumed to be based on the Boise Meridian. All locations are in Kootenai County.

18. Sewage collected from residences within the Black Rock development is treated at a sewage treatment plant located on the Black Rock property. Treated sewage is reapplied as irrigation water on the Black Rock property. Black Rock has obtained the necessary approvals from the Idaho Department of Environmental Quality ("DEQ") for treatment and disposal application.

19. During construction and after the completion of some of the Black Rock development and the associated ponds, streams discharging from the Black Rock property and into Coeur d'Alene Lake flow at a higher rate and flow more consistently than before the development. Increased flows in at least one stream were caused by a pond lining that failed. Water diverted to the pond was percolating into the ground, traveling underground, and discharging into a surface water stream. The pond was drained, the liner was repaired, and the pond was refilled. After the pond was drained, repaired, and refilled, the quantity of water flowing in the stream diminished.

20. Water quality tests of water flowing in and located near some of these streams demonstrated high levels of coliform that exceeded acceptable standards. Investigations about the source of the contaminants were unable to determine the source of the contamination.

21. When permit no. 95-9045 was originally approved, the Department determined that the quantity of water that would be diverted would not negatively impact Coeur d'Alene Lake and would not injure other water users. The same or a lesser quantity of water will be diverted from Coeur d'Alene Lake for the uses identified in this amendment of permit.

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, or will qualify, 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. When reviewing an application for amendment of a permit, IDWR cannot consider whether the application is speculative, or whether the applicant has sufficient financial resources to complete the project proposed by the application for amendment.

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

9. Black Rock seeks to have the four proposed uses originally identified in the application for amendment (diversion to storage, aesthetic storage, municipal storage, and municipal from storage) recognized under the broader umbrella definition of "municipal purposes." Within these four sub-uses described by the application for amendment, the municipal storage and the municipal from storage uses are, in reality, irrigation storage and irrigation from storage.

10. Black Rock also seeks to have the place of use for these various pond uses defined as a service area circumscribed by the boundary of the Black Rock surface water delivery system(s). Aesthetic storage, municipal storage, and municipal from storage are all uses related to "residential, commercial, industrial, irrigation of parks and open space." Consequently, aesthetic storage, municipal storage, and municipal from storage are sub-uses within the larger definition of "municipal purposes."

11. The statutory recognition of many sub-uses within the municipal use umbrella does not prohibit the Department from limiting the uses, if necessary, to satisfy the criteria it must consider under Idaho Code § 42-203A or to ensure that other statutory provisions are satisfied or are not violated.

12. Recognition of aesthetic storage, municipal storage, and municipal from storage as sub-uses within the definition of municipal purposes, without proper restrictions, could result in a municipal provider diverting a greater than historically diverted flow rate during non-peak use seasons, and storing a significant volume of water for use during the peak demand periods. If the diversion and storage increases after the development period, other water rights could be injured. Any approval must expressly limit the actual physical storage and the volume of water stored and rediverted from storage during the development period.

13. The place of use should be circumscribed by the Black Rock service area. The conditions of approval should locate the place of use by section, township, and range.

14. Approval of this amendment will not injure other water rights.

15. By limiting the total volume of water that can be stored, the volume that can be rediverted for irrigation, and the number of acres that can be irrigated with stored water, approval will not result in an enlargement of the use of water.

16. There is no conclusive evidence to establish that Black Rock is causing violations of the water quality laws and standards of the state of Idaho.

17. Any approval of this permit must require adherence to the water quality laws and standards of the state of Idaho.

18. With proper limitations as set forth above, the proposed use of water is in the local public interest.

19. Protestant KEA and Black Rock agreed that any approval of this application for amendment would be limited by the following condition:

> Direct flow use and diversions from storage under this right are limited to irrigation of 545 acres of turf and landscaping and for fire protection. In addition, water diverted under this right may be used for dust suppression and related construction purposes during the initial development and build-out of the project.

20. The words "direct flow use" are subject to interpretation. The words could be narrowly interpreted to mean those uses that have an immediate use unrelated to storage. If the phrase "direct flow use" was only intended to refer to irrigation, the condition would not limit the diversion of water for municipal storage or for aesthetic storage.

21. If the phrase "direct flow use" is broadly interpreted to include diversion to storage for the aesthetic and the irrigation storage uses, the condition would not allow these uses. Interpreting the phrase "direct flow use" to include these uses, and then prohibiting the uses because of the agreed-to condition would fully frustrate the intent of the application for amendment and prevent the uses that are sought by the application for amendment.

22. The hearing officer concludes that the phrase "direct flow use" was not intended to prevent the diversion to storage for aesthetic and municipal uses. The phrase will be narrowly interpreted to apply only to the direct flow for immediate uses unrelated to storage, primarily irrigation use. The condition should not prevent the diversion of water for aesthetic and municipal storage.

23. The application for amendment implicitly seeks unwritten recognition of an additional five acre feet of storage that would be recognized under the "24 hour" guideline. For rights authorizing diversion for irrigation without an express storage component, IDWR has recognized the common irrigation practice and operational need to store water for short periods of time to account for unforeseen shutdowns or for operational cycles of water application and nonapplication. IDWR has allowed a water right holder to store, without an express water right authorization, a volume of water that would accrue for 24 hours in a storage reservoir as if the flow rate authorized by the water right were flowing into the storage reservoir. This allowance of storage for 24 hours is commonly referred to as the "24 hour rule," but more accurately should be referred to as the "24 hour guideline."

24. If a water user seeks to store water in excess of the volume authorized under the "24 hour guideline," the entire storage quantity must be described by the water right. Consequently, the annual volumes listed in the findings of this order do not implicitly include an additional five acre feet of storage under the 24 hour guideline. Some allowance for small water amenities associated with homes may be recognizable under the 24 hour guideline.

ORDER

IT IS HEREBY ORDERED that Jai Nelson's *Request for Submission of Recent Findings, Reopening of Hearing or Denial of Application* is **Denied**.

IT IS FURTHER ORDERED that application for amendment no. 74780 (amendment of permit no. 95-9045) is **Approved**.

IT IS FURTHER ORDERED that permit no. 95-9045 is adjusted as follows:

Use: Municipal Flow: 2.5 cfs Volume: 1,215 acre-feet

IT IS FURTHER ORDERED that a map depicting the place of use boundary for this water right at the time of this approval will be attached to the permit approval document for illustration purposes.

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.

Prior to or in connection with the proof of beneficial use statement to be submitted for municipal water use under this right, the right holder shall provide the department with documentation showing that the water supply system is being regulated by the Idaho Department of Environmental Quality as a public water supply and that it has been issued a public water supply number.

Municipal use is for irrigation, diversion to storage, aesthetic storage, irrigation storage, and irrigation from storage, and fire protection.

Irrigation shall be limited to not more than 545 acres and within Sections 4, 5, 8, 9, 16, and 17, Township 48 North, Range 4 West, Kootenai County. Irrigation of golf courses, parks, common areas, and other open spaces (hereafter referred to as "open space") must be complete at the time of the filing of proof of beneficial use. At the time of filing proof of beneficial use, the right holder must submit: (a) evidence of the number of acres of open space irrigated, (b) the average irrigated acreage irrigated within each lot upon which a home is constructed; and (c) the number of domestic connections stubbed to platted lots where homes are not constructed. Any license issued for this right shall limit the irrigated open space to the acreage irrigated during the development period.

Water diverted under this right may be used for construction within the Black Rock North Development during the remainder of the development period.

Total physical storage is limited to 123 acre feet.

Total annual volume due to seepage and evaporation shall not exceed 101 acre feet.

Annual pond refill shall not exceed 164 acre feet.

The total annual volume for all storage and storage uses shall not exceed 369 acre feet.

The right holder shall install and maintain impervious liners on the ponds authorized under this right.

All storage beneficial uses must be complete at the time of the filing of proof of beneficial use. The right holder must submit evidence of the completion of the storage ponds, the storage capacity of the ponds, and the volume of water stored in the ponds during the development period. Any license issued for this right will limit the total storage component of the municipal use to the volume of water actually constructed and stored during the period of development prior to the filing of proof of beneficial use.

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

The total volume diverted under this right for irrigation shall not exceed 991 acre-feet.

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.

Direct flow use and diversions from storage under this right are limited to irrigation of 545 acres of turf and landscaping and for fire protection. In addition, water diverted under this right may be used for dust suppression and related construction purposes during the initial development and build-out of the project. In this condition, the phrase "direct flow use" will be narrowly interpreted to apply only to the immediate uses of water directly diverted from Lake Coeur d'Alene unrelated to storage, primarily irrigation use.

The owner of this right shall install or require to be installed a meter for each of its customers served by this right. The meter shall measure and record the quantity of water delivered to that customer.

The owner of this right shall meter and record its diversions from Lake Coeur d'Alene under this right and its diversions out of each water storage unit and shall report annually to IDWR on or before January 10 of each year the total annual diversions from the lake and from storage. Such reports shall be matters of public record.

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 two separate agreements 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.

IT IS FURTHER ORDERED that the available procedures and applicable time limits for seeking reconsideration or other administrative relief are as set forth in the accompanying *Statement of Available Procedures and Applicable Time Limits for Responding to Preliminary Orders* incorporated herein by reference.

Dated this 21st day of May, 2009.

Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May, 2009, a true and correct copy of the above and foregoing document 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 Statement of Available Procedures and Applicable Time Limits for responding to Preliminary Orders

KYLE CAPPS SCSC, VP SITE DEVELOPMENT AND MAINTENANCE BLACK ROCK DEVELOPMENT PO BOX 3070 COEUR D ALENE ID 83816	(✓) U.S. Mail, Postage Prepaid ( ) Facsimile ( ) E-mail
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