

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR PERMIT NO. 11-7582 IN THE	)	<b>PRELIMINARY ORDER DENYING</b>
NAME OF THE RETREAT AT BEAR	)	<b>APPLICATION FOR PERMIT</b>
<u>LAKE, LLC d/b/a BLACK BEAR RESORT</u>	)	

This matter having come before the Idaho Department of Water Resources ("Department") as a result of an application for permit to appropriate the public waters of the state of Idaho, the Department finds, concludes, and orders as follows:

**BACKGROUND**

1. On August 14, 2008, The Retreat at Bear Lake d/b/a Black Bear Resort ("The Retreat") filed Application for Permit No. 11-7582 with the Department seeking to appropriate ground water for use at a proposed resort development located northwest of Bear Lake. The original application listed a diversion rate of 5.0 cfs and an annual diversion volume of 1,842 acre-feet. The application stated that water would be used for municipal purposes and that it would take up to 25 years to complete the diversion works and put the water to beneficial use. It also stated that 429 acres would be irrigated and up to 2,650 residences would be served by the ground water wells. Water used for culinary purposes would be captured, treated, and re-used for irrigation or snow-making. (See Water Mitigation and Management Plan (hereinafter "Mitigation Plan"), Applicant's Exhibit A, pages 1-2)

2. The application was advertised to the public and was protested by Eugene (Gene) Boehme, Paul Keetch, Nuffer Ditch Company, Preston-Montpelier Irrigation Company, West Fork Irrigation Company, Rodney Wallentine, EA Hart Family Trust, Ted McGhee, Daniel and Kathleen Nelsen, Mark Peterson, Lotwick Reese, Roger Reese, Dale Thornock, Marcia Wilson, Bert LaMar, Dean Michaelson, Gary Payne, Dean and LeRoy Ward, PacifiCorp, Bear Lake Watch, and Bear River Water Users Association. A joint protest was filed by the City of Bloomington, the City of Paris, the City of St. Charles, Bloomington Irrigation Company, St. Charles Irrigation Company, Paris Irrigation Company, and Paris Irrigation Company 11-E (hereinafter "the Coalition"). It was later determined that Paris Irrigation Company and Paris Irrigation Company 11-E are different names for the same entity. The Coalition is represented by Rob Harris of Holden Kidwell Hahn & Crapo PLLC. William Pettis filed a Petition to Intervene on February 12, 2009, which was granted by the Department on February 27, 2009.

3. In a Notice issued on May 28, 2010, the Department outlined the legal principles governing applications that propose a beneficial use development period greater than 5 years (commonly referred to as "reasonably anticipated future needs"). The Department requested that The Retreat amend its application to comply with the legal principles set forth in the Notice. The

Retreat amended its application in June 2010, reducing the amount of water sought to a diversion rate of 2.7 cfs and an annual diversion volume of 733 acre-feet. The amended application stated that the water would be used for up to 620 residences included in Phase I of the resort development, a golf course, and commercial units. The time needed to put the water to beneficial use was reduced to 5 years. Other amenities of the resort development requiring water and additional phases would be included in future permit applications.

4. A hearing was held in this matter on November 8 and 9, 2010 in Montpelier, Idaho. Prior to the hearing, Nuffer Ditch Company, West Fork Irrigation Company, Rodney Wallentine, Gary Payne, and Bear River Water Users Association withdrew their protests. The Nuffer Ditch Company, West Fork Irrigation Company, Rodney Wallentine, and Gary Payne withdrew their protests contingent on certain language being incorporated into the Mitigation Plan and into orders issued by the Department. The language is set forth in the individual withdrawal documents contained in the Department's files.

5. Due to a failure to appear at any of the pre-hearing conferences, Eugene Boehme was dismissed as a party to the case through an order issued on November 8, 2010, the first day of the hearing. Due to a failure to appear at the hearing without notice, Lotwick Reese, EA Hart Family Trust, Roger Reese, and Bert LaMar were dismissed as parties to the case through an order issued in conjunction with this Preliminary Order.

#### **ADMISSIBILITY OF CLARK REPORTS**

1. During the administrative hearing held in this matter, the question was raised whether certain documents prepared by Scott H. Clark of SHC Consulting should be admitted as part of the evidentiary record. Mr. Clark performed some analyses related to the hydrogeology of the development area. His findings were included as part of the permit application and were relied upon by The Retreat in forming its Mitigation Plan.

2. Rob Harris, attorney for the Coalition, asserted that Mr. Clark was not licensed as a geologist in Idaho at the time he performed his field work and argued that Mr. Clark's reports should therefore be excluded. The Hearing Officer asked the parties to file memos addressing the specific question of whether Mr. Clark's reports should be admitted. Steven Wuthrich, on behalf of The Retreat, and Rob Harris on behalf of the Coalition, filed memos discussing the applicable legal provisions.

3. Idaho Code, Title 54, Chapter 28 governs the licensure and registration of professional geologists within the state of Idaho. Section 54-2801(2) states, "It shall be unlawful for any person to practice . . . geology for others in this state, as defined in the provisions of this chapter . . . unless such person has been duly registered or is otherwise exempted under the provisions of this chapter." Section 54-2802 defines the practice of geology as "any professional service such as consultation, investigation, evaluation, planning, and mapping, or responsible supervision of such activities in connection with any public or private project . . . when such service is rendered in a professional capacity and requires the application of geologic principles and data." Based on

the testimony presented at the hearing and the information contained in the documents at issue, the Department finds that Mr. Clark practiced geology within the state of Idaho. The Retreat has not produced any evidence that Mr. Clark had a license to practice geology in the state of Idaho at the time his field work was completed.

4. Section 54-2822 sets forth a number of exceptions to the licensing requirement. One of these exceptions, described in Section 54-2822(b), is for a situation where the work performed does not exceed thirty days in a calendar year. To qualify under sub-section (b) a person must, in advance, file a statement with the professional geology board describing the work to be performed. Although evidence suggests that Mr. Clark's work within the state of Idaho did not exceed thirty days, he did not file a statement with the board and therefore does not qualify under the exception described in sub-section (b).

5. Section 54-2822(d) states that a professional license is not required for "[t]he work of . . . an employee of a person practicing lawfully under subsection (a), (b) or (c) of this section, provided that such work is done under the direct responsibility, checking, and supervision of a person holding a certificate of registration under this act or a person practicing lawfully under subsection (a), (b) or (c) of this section." Section 54-2822(a) pertains to "[t]he practice of any profession or trade for which a license is required under any law of this state." Lance Anderson, who is a principal engineer with Cache-Landmark Engineering and The Retreat's primary civil engineering consultant in this matter, testified that he is a registered professional engineer in the state of Idaho. He also testified that the work performed by Mr. Clark was for Cache-Landmark Engineering and that he was present during the field work performed by Mr. Clark. The documents at issue state that they were prepared "[f]or Cache-Landmark Engineering." Therefore, Mr. Clark's work qualifies under the exception set forth in 54-2822(d).

6. IT IS ORDERED that all of the documents prepared by Scott H. Clark of SHC Consulting, offered by The Retreat as evidence in this matter, are ADMITTED into the evidentiary record. These documents are found in the appendices to the Mitigation Plan, identified as "Applicant's Exhibit A."

### **FINDINGS OF FACT**

1. The amended application described four points of diversion, all located within Township 14 South, Range 43 East. The first point of diversion is located near the west boundary of Section 32 ("proposed well 1"). The second point of diversion is located in the southwest quarter of the southwest quarter of Section 32 ("proposed well 2"). The third point of diversion is located in the southwest quarter of Section 29 ("proposed well 3"). The fourth point of diversion is located in the southeast quarter of Section 33 ("proposed well 4"). (See Proposed Well Site Locations, Appendix E to Applicant's Exhibit A)

2. The Retreat is no longer seeking to use proposed well 3 as a production well. Instead, the well is to be used as a test well to monitor any changes in aquifer levels due to pumping from proposed wells 1 and 2. The monitoring well is meant to ensure that drawdown effects from The

Retreat's production wells do not propagate across the aquifer to the Bloomington Spring. If any decline in the ground water level is detected, diversions from proposed wells 1 and 2 will be reduced or terminated, and the water will instead be diverted from proposed well 4.

3. Bruce Barrett, president of The Retreat, and other representatives of The Retreat have been working on the proposed development for six years. Initial development activities were financed by personal contributions from officers and by loans from banks and credit unions. The economic downturn in the last two years has delayed the project and has delayed the revenue stream intended to repay the loans. The Retreat has recently re-negotiated the terms of some of its initial development loans.

4. The Retreat obtained a mortgage from Deseret First Credit Union ("DFCU") to purchase a portion of the development property. The Retreat has fallen behind on its mortgage obligation by multiple payments. On August 3, 2010, DFCU filed a foreclosure action on the property associated with its mortgage contract. (See Protestant's Exhibit 10 and Protestant's Exhibit 14) The foreclosure action affects 21 of the 68 quarter-quarters designated for municipal water use under the application. The foreclosure action affects 32 of the 247 acres designated for irrigation use under the application. The Retreat is currently working with representatives from DFCU to re-negotiate the terms of the mortgage. On October 21, 2010, Clinton R. Gurney, president and CEO of DFCU, sent a letter to the Department stating that DFCU supports The Retreat's efforts to obtain a water right for the development property. (Applicant's Exhibit I)

5. Roughly 360 acres (or 9 quarter-quarters) of the place of use described in the application are owned by Christin Jensen. The Retreat does not have any current agreement with Ms. Jensen to purchase or otherwise use the property. The Retreat has held option contracts in the past to purchase the property, but all of the contracts have now expired. (See Applicant's Exhibit H, page 4) The Retreat intends to pursue an official purchase contract with Ms. Jensen once the water right administrative process is complete. On October 22, 2010, Ms. Jensen's attorney, Adam McKenzie, sent a letter to the Department stating that Ms. Jensen does not oppose or object to the approval of the proposed application. (Applicant's Exhibit P)

6. An appraisal of the Black Bear Resort (The Mountain Community) was prepared by LECG, LLC for DFCU on May 11, 2009. The appraisal was paid for by The Retreat. The appraised value of the property is the estimated present value of the completed project, not the value of the underlying land. (Appraisal Cover Letter, Applicant's Exhibit H, page 1) The majority of the appraised value is tied to the value enhancement that comes from successfully implementing the development plan, including construction of the associated amenities. (Id.) The appraisal identified the project as a "large-scale high risk development." (Id.) As the development moves closer to approval of the final plat, the risk level of the project declines. LECG estimated that the present value of the development property exceeds (Id.) The appraised value incorporates the cost of construction for the resort and its amenities, which were estimated to be (See LECG Appraisal, Applicant's Exhibit H, page 53) The appraisal was completed after the financial downturn and is therefore still valid in today's financial market. The appraisal specifically acknowledged the poor economy and incorporated the existing market conditions into the assumed discount rate. (See id., pages 26 and 58)



7. The LECG Appraisal sets forth a number of "extraordinary assumptions" used to arrive at the appraised value. (Appraisal Cover Letter, Applicant's Exhibit H, page 2) The appraisal expressly assumes that a sister resort, Lake Community at Black Bear Resort, will be developed at the northwest corner of Bear Lake. (Id.) The Retreat currently maintains options to purchase property on Bear Lake. The appraisal also assumes that The Retreat owns 1,283.87 acre-feet of water and will be able to change the water from irrigation to culinary use. (Id.) It also assumes that The Retreat will acquire a 120-foot access easement to the property that will serve as the main entrance to the resort. (Id.) The Retreat does not currently possess a 120-foot access easement for the development property. The appraised value would be less if any of the extraordinary assumptions are not realized or if any of the proposed amenities are not constructed.

8. One of the amenities described in the LECG Appraisal is a public ski resort developed on an adjacent mountain. (LECG Appraisal, Applicant's Exhibit H, page 13) The United States Forest Service currently owns the property where the public ski resort is contemplated. The Retreat has not purchased the ski resort property and has not executed any land exchange agreement with the United States Forest Service to obtain the property. The public ski resort is considered a long-term project, however, and was not taken into account by LECG in forming the appraisal estimate. (Id.) Another amenity that was considered in the valuation process was a semi-private, 600-slip marina at the Lake Community. (Id. at page 14) The Lake Community and the 600-slip marina have not been constructed.

9. The appraisal incorporated a discounted cash flow model to determine the present value of the property. LECG applied a discount rate of 20 percent to arrive at the appraised estimate. This discount rate is based on market conditions, the cost to complete the development, and sales information from other comparative resorts.

10. The Retreat did not provide as part of the administrative process, a current, audited financial balance sheet. Prior to the hearing, Mr. Barrett prepared an Approximate List of Assets and Debts of the Retreat at Bear Lake, LLC. (Applicant's Exhibit G) The list identified

in debts (including land debts, development financing notes, and an accounts payable). (Id.) The financing notes are related to personal loans made to The Retreat by its officers. The accounts payable is related to money owing to architects, engineers, and golf course contractors, among others. The Retreat maintains option contracts to purchase certain tracts within the development property that were not quantified in the list of debts. (Id.) The list also identified

of lot distribution obligations. (Id.) Therefore, the total debt of the development project exceeds

As part of the preliminary plat approval process, Bear Lake County required The Retreat to resolve small, outstanding debts with local vendors. All of these debts have been resolved, except for one disputed balance of with a local vendor, Hansen Oil.

11. Developers of projects of the size proposed by The Retreat do not seek and cannot obtain full project financing until all of the major regulatory hurdles have been cleared. In this case, The Retreat will not enter into financing agreements with primary lenders until a water permit has been granted, the final plat has been approved by Bear Lake County, and performance bonds for construction are in place.

12. Developers hire financial intermediaries to find lenders and capital investors to finance large-scale projects. The Retreat hired Hugh Larratt-Smith at Trimingham, Inc. to raise capital and to contact potential lenders and investors. Over the last seven months, Trimingham, Inc. has contacted roughly 400 potential lenders regarding financing the resort development, but has not executed any official financing agreements. Some of the lenders have asked for proof that the required permits, including water permits, are in place before pursuing financing negotiations. In a letter to the Department dated June 24, 2010, Mr. Larratt-Smith affirmed that he reviewed The Retreat's asset appraisals and its financial statements and stated that there is a high degree of probability that The Retreat will secure the full amount of financing required for infrastructure and project development. (Applicant's Exhibit C)

13. Bloomington Spring, Paris Spring, Jarvis Spring and St. Charles Spring are located at outcroppings of a water-bearing geologic layer called the Bloomington Formation. (See Geology and Hydrogeology of the St. Charles – Bloomington, Idaho Area: Bear Mountain Development (hereinafter "Clark 2006 Report"), Applicant's Exhibit A, page 4) Proposed wells 1-3 are located over the Bloomington Formation and are intended to tap into that formation. The Bloomington Formation is recharged by precipitation falling at higher elevations, seeping through permeable surface layers, and passing through a series of limestone layers until it enters the Bloomington Formation. Ground water generally moves from west to east within the formation, and is forced to the surface in a series of springs by the Paris Thrust Fault, running north and south, which creates a hard boundary to ground water flow. The Bloomington Formation lies directly above a less-permeable rock layer, which prevents water from seeping out of the formation and contributes to water being forced to the surface at the spring locations.

14. Springs are formed in areas where the Bloomington Formation is exposed to the land surface. Springs are delicate water features because they are formed due to pressures created by gradients in ground water elevations. "Typically, springs are under low pressure (i.e. head); therefore, a few feet of decline in the water table can cause dramatic decreases in the discharge of springs." (Wood 2008 Report, Protestant's Exhibit 1, page 8)

15. There is very little hydraulic communication across the Paris Thrust Fault. Wells drilled to the east of the Paris Thrust Fault will have little or no impact on springs arising from the Bloomington Formation (located on the west side of the fault). The Paris Thrust Fault is located approximately 2 miles east of the Bloomington Spring and runs parallel to the line of springs arising out of the Bloomington Formation. The precise location of the Paris Thrust Fault is difficult to determine without field investigation. "[F]aults can fragment near land surface and be hidden by erosion and sedimentation." (Wood 2010 Letter, Protestant's Exhibit 2, page 2)

16. The Bloomington Formation is recognized as a "karst" environment. (See Source Water Assessment Delineation Report: Bear Mountain Wells 1 & 2, Bear Lake County, Idaho (hereinafter "Clark 2007 Report"), Applicant's Exhibit A, page 5) This type of aquifer is characterized by water flowing through fractures and cavities in the formation rather than through pores in the formation material. The Bloomington Formation is made up of shale and bedded

limestone, and is susceptible to solution activity, where additional cavities in the layer are formed by water dissolving the limestone.

17. The Salt Lake Formation, which locally is primarily found east of the Paris Thrust Fault and extends across the Bear Lake Valley, is also a potential source of ground water. However, the Salt Lake Formation becomes thin and intermittent near the Paris Thrust Fault and may not provide a reliable source of water in that area. (See Clark 2006 Report, Applicant's Exhibit A, pages 7-8) Proposed well 4 is located very close to the Paris Thrust Fault, as delineated in the Clark 2006 Report. (See Proposed Well Site Locations, Appendix E to Applicant's Exhibit A and Appendix A to the Clark 2006 Report, Applicant's Exhibit A, page 13 (incorporating a map prepared by Wylie, et al.))

18. "It does not appear wells completed in the Salt Lake Formation would be high yielding but may be sufficient to provide a supplemental source . . ." (Clark 2006 Report, Applicant's Exhibit A, page 9) "[V]ery little well data from the Salt Lake Formation exists in the project area." (Id.) "A disadvantage to a well in the Salt Lake Formation is that the water bearing gravels/conglomerates may lack direct connection to a large recharge area and may be limited to recharge from precipitation and stream flow on a small area between the well site and the Paris Thrust Fault . . ." (Id. at page 10) "[I]t is believed that aquifers immediately east of the Paris Thrust Fault have a limited recharge area and are limited to recharge from direct precipitation onto and stream flow across the ground above these aquifers." (Id. at page 5)

19. Evidence suggests that proposed well 4 may actually be located within the Wells Formation. (See Cross Section C-C', Appendix C to the Clark 2006 Report, Applicant's Exhibit A) "There is no data relating to the aquifer characteristics of [the Wells Formation] in this area and no wells have been drilled in the area." (Clark 2006 Report, Applicant's Exhibit A, page 7) "It is unknown whether the [Wells Formation] is connected to a sufficiently large recharge area to produce sufficient water for the development." (Id. at page 10) The Retreat's Mitigation Plan acknowledges that, of all of the proposed well sites, proposed well 4 is the least likely to result in a high-yielding well. (Applicant's Exhibit A, page 14)

20. As part of his analysis, Mr. Clark recognized that the "[p]rediction of any potential interference the Bear Mountain wells may have on Bloomington Spring prior to drilling the wells and conducting an actual pump test with monitoring of nearby wells or springs is difficult because of the heterogeneous fracture controlled nature of most carbonate aquifers." (Clark 2007 Memo, Applicant's Exhibit A, page 1).

21. As an initial alternative to pump testing, Mr. Clark performed a water budget analysis of the Bloomington Spring recharge area in September 2007. The resulting water budget memo estimated the amount of recharge to the area of the aquifer supplying water to Bloomington Spring and proposed wells 1 and 2. In his calculations, Mr. Clark assumed that the recharge area covers 11,209 acres, the average annual precipitation in the area is 39.4 inches, and that 20% of the annual precipitation eventually enters the Bloomington Formation. Mr. Clark found that the annual ground water recharge to the Bloomington Spring sub-basin is approximately 7,353 acre-feet and that the average annual discharge of Bloomington Spring is approximately 3,794 acre-feet.

22. Tom Wood from Clearwater Geosciences, LLP prepared a report for the Coalition in July 2008, analyzing the potential impacts of the proposed ground water diversions on the springs arising from the Bloomington Formation. (Protestant's Exhibit 1) His report states: "The lower elevation of the Bloomington spring recharge area suggests that the recharge zone may be thinner and provide less water storage for the Bloomington spring, which could make the spring more sensitive to wet and drought cycles and groundwater pumping." (Wood 2008 Report, Exhibit 1, page 5) Mr. Wood believes only 10% of the annual precipitation within the recharge area actually enters the Bloomington Formation. "[T]he prediction of potential interference from the Bear Mountain wells on the springs for Bloomington, Paris, and St. Charles is difficult to evaluate on the basis of [a] recharge area analysis because of the heterogeneous nature and anisotropic nature of limestone aquifers." (Id. at page 6) "[The Resort's] wells will preferentially produce more draw down in the more permeable limestone and fracture zones known to host the Bloomington, St. Charles and Paris Springs." (Id.) "As a consequence of pumping water from the trend of the contact springs there will be more impact on the Bloomington, St. Charles and Paris springs than suggested by the recharge area analyses performed by [Mr. Clark]." (Id.)

23. Mr. Wood's July 2008 report also contained a theoretical drawdown analysis for the proposed wells using a standard Theis equation. Assuming a transmissivity value of 50,000  $\text{ft}^2/\text{day}$ , which was based on transmissivity values obtained from other pump tests performed in the area, and a pumping rate of 3000 gpm (6.7 cfs) from proposed wells 1 and 2, the drawdown at Bloomington Spring was calculated to be 5.5 feet, the drawdown at St. Charles Spring 5.0 feet, and the drawdown at Paris Spring 4.5 feet. Mr. Wood also ran a theoretical drawdown analysis using the transmissivity value proposed in the Clark 2007 Report (750  $\text{ft}^2/\text{day}$ ) and a pumping rate of 3000 gpm. The drawdown at Bloomington Spring was calculated to be 125 feet, the drawdown at St. Charles Spring 87 feet, and the drawdown at Paris Spring 62 feet. The transmissivity value proposed by Mr. Clark (750  $\text{ft}^2/\text{day}$ ) represents the average transmissivity of the Bloomington Formation and the overlying geologic layers. (See Clark 2007 Report, Applicant's Exhibit A, pages 4 and 5)

24. A significant limitation to the theoretical drawdown analysis performed by Dr. Wood is that the Theis equation assumes an aquifer with infinite areal extent (that the aquifer extends an infinite distance in all directions). Geologic maps prepared by Mr. Clark and Mr. Wood show significant faults running north to south in the foothills where the springs and the proposed wells are located. The Paris Thrust Fault, one of the major faults in the area, is located approximately two miles east of Bloomington Springs and proposed wells 1 and 2. These various faults could impact the flow of water through the aquifer and the size and shape of the aquifer. Another assumption used in the Theis equation is that the ground water aquifer is uniform and level. Again, the multiple faults across the aquifer impact the uniformity of the aquifer. The Clark 2007 Report estimated an aquifer gradient of 0.065. (Clark 2007 Report, Applicant's Exhibit A, page 4) The hydrologic gradient will affect the size and shape of the cone of depression created by the diversion from proposed wells 1 and 2.

25. Proposed well 1 was drilled in September 2007 for the purpose of conducting pump tests. The well was constructed using 12-inch casing and is roughly 1000 feet deep. Proposed well



2 was drilled in October 2007, also for the purpose of conducting pump tests. The well was constructed using 10-inch casing and is roughly 1100 feet deep. The two wells combined cost more than to complete. Water bearing layers were found between 550 feet and 950 feet.

26. Well driller's reports for the two wells were filed with the Department by American Well Drilling. The lithographic log portions of the reports do not describe the geologic layers encountered with any specificity. Mr. Clark was present for part of the well drilling and inspected the material samples as they were brought to the surface. Besides the well driller's reports, however, no descriptions of the geologic layers encountered have been provided to the Department. Proposed well 2 was pumped for eight hours and was only able to produce 100 gpm. The drawdown at the well was over 100 feet. The pump test showed that water was not available at proposed well 2 in the quantity sought by The Retreat. No specific records of this short test were produced by The Retreat. No other pump tests were performed on the test wells.

27. As part of the Mitigation Plan filed with the original application in 2008, The Retreat stated that it was "currently in the process of completing test wells to verify adequate water quality and quantity for the project." (Mitigation Plan, Applicant's Exhibit A, page iv). "Completion of the well tests will also verify an adequate ground water supply to support the Resort without negatively impacting prior water rights in the area." (Id.)

28. The Retreat tried to obtain a permit from the Department to drill a large-diameter test well at proposed well 3. In a letter received by the Department on September 8, 2008, Mr. Anderson wrote, "We need to continue to drill our test wells to ensure there is sufficient water for the proposed development. In addition, we want to test pump the wells to gain an accurate measurement for transmissivity. This will allow us to present accurate information to what our impact will be to surrounding water rights." Mr. Anderson requested that the Department issue drilling permits for proposed wells 3 and 4. The Retreat proposed installing a 16-20 inch casing at proposed well 3 to allow for larger test equipment. Mr. Anderson concluded his request, "We want to ensure there is not going to be any interference to adjacent springs or wells."

29. On October 1, 2008, the Department sent a response letter to The Retreat notifying it that a large-diameter test well could be permitted, as long as certain pre-conditions were met. First, The Retreat would need to submit a written acknowledgement that it assumed the entire risk of constructing an expensive, large-diameter well (to drinking water standards) prior to obtaining a water right. Second, The Retreat would need to acknowledge that it would abandon the well if the water right application were denied. Third, The Retreat would need to post a surety bond to ensure payment for abandonment (closure and sealing) of the wells. Fourth, The Retreat would need to obtain a temporary water permit if it intended to use a substantial amount of water during its test pumping. Finally, The Retreat was asked to provide a detailed plan of construction and testing for the proposed test wells. There is no evidence in the record that The Retreat met or attempted to meet any of these requirements. Consequently, a drilling permit was never issued and a test well was never constructed at the point of diversion for proposed well 3.

30. A Mitigation Plan (dated July 2008) was filed with the original permit application. The stated purpose of the plan was to comply with the requirements of the Management Plan for the

Bear River Ground Water Management Area (hereinafter "BRGW Management Plan"). The Mitigation Plan states that it follows the "individual method." It is unclear whether the Mitigation Plan intends to follow the "simplified method" set forth in the BRGW Management Plan. The "simplified method" is only available for mitigation plans offering replacement water from the Bear River or its tributaries in the Lower Division for new depletions in the Lower Division. (See BRGW Management Plan, Section F.4(sic).c, page 7) The Retreat's Mitigation Plan offers replacement water from the Bear River in the Central Division for ground water depletion in the Lower Division. The BRGW Management Plan also notes that the "simplified method" is only available as long as other water right holders do not protest an application and provide information suggesting injury to their water rights. (See id., Section D, page 4)

31. Portions of the July 2008 Mitigation Plan were later revised to address some of the concerns raised by the protestants throughout the administrative process. A revised or "redlined" version of the Mitigation Plan was offered into evidence. (See Applicant's Exhibit A1) Five of the protestants withdrew their protests prior to the hearing. Four of these withdrawals were conditioned on additional revisions being made to the Mitigation Plan. These additional revisions were subsequent to and therefore not included in the redlined version of the Mitigation Plan.

32. The Mitigation Plan describes a process where irrigated acres in the Pegram area would be incrementally dried up to offset depletions at the proposed resort. The Resort purchased four water rights on the Bear River appurtenant to the Four Pines Ranch near Pegram:

<u>Water Right</u>	<u>cfs</u>	<u>After July1</u>	<u>Acres</u>	<u>Priority Date</u>
11-7597 (Nuffer)	11.5	7.67	304.99*	4/15/1877
11-7599 (Sorenson)	5.71	3.81	224.60	4/15/1877
11-7601 (Nuffer)	0.35	0.35	17.5	4/15/1885
11-930 (Sorenson)	0.60	0.60	30.0	4/15/1885

(\*Irrigated acres may vary based on outcome of pending transfer 74916.)

33. Water rights 11-930 and 11-7599 are diverted through the Sorenson Ditch. Water Rights 11-7597 and 11-7601 are diverted through the Nuffer Ditch. These ditches divert water from the Bear River over 13 miles from the ground water points of diversion proposed by The Retreat. The Sorenson and Nuffer Ditches are located in the Central Division of the Bear River, as defined in the Bear River Compact. The proposed resort development is located in the Lower Division.

34. According to the Mitigation Plan, at the beginning of the irrigation season, The Retreat will estimate the amount of depletion that will occur at the resort over the course of the calendar year. An equivalent amount of acres will be dried up to offset the depletion. The water associated with the dried-up acres will be delivered to the Rainbow Inlet, which diverts water to Bear Lake. At the end of the calendar year, The Retreat will calculate and report the total amount of depletion occurring at the resort development. The actual depletion will be compared to the number of acres dried up. Deficits in mitigation will be made up in the following irrigation season. An annual report will be submitted to the Bear River watermaster and the Department accounting for the previous year's water use and describing the acres to be dried up in the following year.

35. Phase I of the project, which includes the golf course and commercial units, is projected to deplete 342 acre feet of water on an annual basis. Phase I mitigation will primarily be accomplished by drying up acres under water rights 11-930 and 11-7599 in the Sorenson Ditch, and allowing the corresponding amount of diversion rate to pass by the Sorenson Ditch headgate. Future phases will be primarily mitigated with Nuffer Ditch water rights. There are 254.6 acres associated with the Sorenson Ditch water rights, which equates to a depletion of 300 acre-feet per year. As Phase I nears completion, some mitigation may be required from the Nuffer Ditch water rights. Water rights will still be diverted through the Nuffer Ditch headgate. Mitigation water from the Nuffer Ditch will be returned to the Bear River through a ditch with a measurement section on the Four Pines Ranch property.

36. Bloomington Spring is located approximately 1 mile to the northwest of proposed well 3 and approximately 2 miles to the northwest of proposed wells 1 and 2. Bloomington Spring and Jarvis Spring contribute to the flows in Bloomington Creek. The City of Bloomington has a decreed water right (11-244) and a beneficial use claim (11-4223) out of Bloomington Spring. Bloomington Irrigation Company has three decreed water rights out of Bloomington Creek (11-208, 11-209, 11-210). There are times of the year when portions of these water rights are not filled due to a scarcity of water.

37. St. Charles Irrigation Company has a decreed water right for Spring Creek (11-1055). There are times of the year when a portion of this water right is not filled due to a scarcity of water. A section of Spring Creek is located less than 1.5 miles from proposed well 4. There are also ground water diversions in the lower Spring Creek area. One of the protestants, Dean Michaelson, diverts from a ground water well located approximately 2 miles east of proposed well 4.

38. Proposed well 4 is located within 1/8 mile of the Worm Creek channel. Mr. Anderson performed a drawdown analysis for proposed well 4 shortly before the hearing. The results of his analysis were not provided to the other parties prior to the hearing and were not offered as an exhibit at the hearing. Mr. Anderson's testimony on his additional drawdown analysis was vague. He stated that, in twenty years, the drawdown could be 1.32 feet at 1.5 miles from proposed well 4. Mr. Anderson did not testify about the diversion rate used to arrive at the stated drawdown.

39. Three of the protestants, Gary Payne and Dean and LeRoy Ward have water rights on Worm Creek. Prior to the hearing, Mr. Payne withdrew his protest, contingent on the following language being added to the Mitigation Plan:

*Black Bear will monitor the springs and seeps along Worm Creek Drainage to ensure no injury or impact to the historical flow of Worm Creek. These springs and seeps along the Creek are small perched springs that contribute to the natural flow of the Worm Creek. If the springs or seeps along Worm Creek dry up due to the pumping of Black Bear's proposed wells, Black Bear will replace the amount of water equal to the impact or injury of the well pumping. The replacement water will come from the wells or wastewater facility located in Worm Creek.*

*Furthermore, Black Bear will not capture, impede, or change the historical flow of Worm Creek drainage.*

## **LEGAL AUTHORITY / ANALYSIS**

1. Idaho Code § 42-203A(5) states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho . . . the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the ultimate burden of proof regarding all factors set forth in Idaho Code § 42-203A.

### **Injury to Existing Rights**

3. A proposed use will be determined to reduce the quantity of water under an existing water right if the amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less. (Rule 45.01.a.i of the Department's Water Appropriation Rules, IDAPA 37.03.08) "An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director." (Rule 45.01.a.iv)

4. The Retreat failed to establish that its proposed diversion will not reduce the quantity of water available under existing water rights and has not presented a plan that sufficiently mitigates for the potential injury to existing water rights.

5. The Wood 2008 Report raised a legitimate concern that the municipal springs, particularly Bloomington Spring, could be negatively impacted by pumping from proposed wells 1 and 2. Mr. Wood's analysis was based on a number of assumptions that, according to Mr. Wood's own admission, do not represent actual physical conditions. The aquifer is not uniform or level and does not stretch out infinitely in all directions. Mr. Wood's analysis also assumed a diversion rate



of 3000 gpm. After Mr. Wood's report was prepared, The Retreat amended its application and reduced the proposed diversion rate to 2.7 cfs (approximately 1200 gpm). The Retreat challenged Mr. Wood's assumptions as being incorrect, but did not produce any analysis of drawdown or injury applying better assumptions. It is the applicant's burden to prove that the proposed diversion will not negatively impact other water rights.

6. Even though Mr. Wood's analysis was based on assumptions that may overestimate the impact to Bloomington Spring, The Retreat was still put on notice in 2008 that pumping at proposed wells 1 and 2 posed a substantial threat to the flows at Bloomington Spring. One of Mr. Wood's drawdown scenarios, using the transmissivity value proposed by Mr. Clark (750 ft<sup>2</sup>/day), showed a potential drawdown at Bloomington Spring of 125 feet. Even if the actual drawdown at Bloomington Spring were 10% of this estimate (12.5 feet), it could still result in a significant impact to the flows of Bloomington Spring.

7. In addition to the concerns raised in the Wood 2008 Report, The Retreat's own consultants acknowledged that pump tests would be needed to verify the Bloomington Spring would not be impacted. Mr. Clark stated: "Prediction of any potential interference the Bear Mountain wells may have on Bloomington Spring prior to drilling the wells and conducting an actual pump test with monitoring of nearby wells or springs is difficult because of the heterogeneous fracture controlled nature of most carbonate aquifers." (Clark 2007 Memo, Applicant's Exhibit A, page 1). Mr. Anderson stated that test wells would "verify an adequate ground water supply to support the Resort without negatively impacting prior water rights in the area." (Mitigation Plan, Applicant's Exhibit A, page iv). Despite all of the information suggesting that pump testing would be needed to confirm nearby springs and creeks would not be impacted, The Retreat failed to conduct pump tests and has chosen, instead, to rely on a broad recharge water budget analysis performed by Mr. Clark.

8. Although two test wells were drilled in September and October 2007, very little data was obtained from the wells. The Well Driller's Reports filed by American Well Drilling vaguely described the geologic layers encountered. Although The Retreat's engineer and geologist were on site for part of the drilling, and examined the core samples as they were brought to the surface, no other information relating to the geology at the test well locations was made available to the Department or the public. Given the scope of the project proposed, The Retreat should have collected and provided better information relating to the geology at the test well locations, including the types of layers encountered and the specific condition of the water bearing layers.

9. A single, eight-hour pump test was performed on one of the test wells. The Retreat did not derive any information from the test and did not perform any subsequent tests on proposed wells 1 and 2. Given the scope of the project, the concerns outlined in the Wood 2008 Report, and Mr. Clark's assertion that pump testing would be required to know the actual impacts in a such a complicated geologic system, The Retreat should have conducted pump tests to determine the parameters of the aquifer and to develop an accurate prediction of impact to surrounding springs.

10. At the hearing, Mr. Anderson testified that a large-diameter ground water well would be needed to perform adequate pump tests and that the Department prevented The Retreat from

drilling a large-diameter test well. The Department did not prevent The Retreat from drilling test wells or conducting pump tests. Proposed wells 1 and 2 were approved and were constructed. Some degree of testing could have occurred on proposed wells 1 and 2. Further, the Department's requirement that The Retreat follow certain pre-conditions before drilling a large-diameter test well was not unreasonable. The fact that a large-diameter test well was not constructed is a result of a decision made by The Retreat.

11. The Retreat's Mitigation Plan does not sufficiently address potential impacts to the municipal springs. Rather than showing through pump tests that nearby springs would not be impacted, The Retreat has promised immediate curtailment if impact to the aquifer is measured. Mr. Anderson testified that proposed well 3 would be used to monitor ground water levels between proposed wells 1 and 2 and Bloomington Spring. He stated that if any decline in the ground water level is detected, diversions at proposed wells 1 and 2 would be reduced or terminated. This type of mitigation will not work because of timing constraints.

12. The significant drawdown at proposed well 2 during the 8-hour pump test conducted in 2007 suggests that transmissivity at the well is closer to the value proposed by Mr. Clark (750 ft<sup>2</sup>/day). If the transmissivity value is as low as that proposed by Mr. Clark, the impact from diversions at proposed wells 1 and 2 may take years to arrive at the monitoring well (proposed well 3). Similarly, the recovery benefit of reduced diversion at proposed wells 1 and 2 may take years to arrive at the monitoring well. Meanwhile, the impacts from the initial pumping could continue to propagate across the Bloomington Formation and eventually reach Bloomington Spring. Even if diversions from proposed wells 1 and 2 are terminated immediately at the time the impact is discernable at the monitoring well, it may take years before the water levels in the area recover. During this time, flows at Bloomington Spring would be reduced. Monitoring for impact and reducing diversion rates is not a viable alternative in an aquifer where the conductivity of the aquifer layers is estimated to be so low.

13. The Retreat's Mitigation Plan does not qualify to use the "simplified method" set forth in the BRGW Management Plan. (See BRGW Management Plan, pages 4 and 7) The Retreat's Mitigation Plan proposes to use replacement water from the Central Division to offset depletions in the Lower Division. Further, water users in the Lower Division protested the application and provided information that the proposed mitigation plan will not prevent injury to their water rights. Both of these items make it so that the simplified method is not available to The Retreat. According to the BRGW Management Plan, The Retreat must provide a complex analysis of injury to existing water rights and submit a plan that fully offsets any injury identified. The Retreat's Mitigation Plan fails to meet this level of specificity, particularly with regards to potential impact to nearby springs.

14. The Retreat failed to establish that diversion from proposed well 4 will not impact local water users. Although, the language agreed to between Mr. Payne and The Retreat is likely sufficient to mitigate impacts to water users within the Worm Creek drainage, water users located on Spring Creek and in the areas east of Spring Creek have not been addressed. The Retreat has not shown that the diversion of 2.7 cfs from proposed well 4 will not negatively impact Spring Creek. The drawdown analysis performed by Mr. Anderson shortly before the hearing was not offered into

evidence. Further, Mr. Anderson's testimony regarding the drawdown analysis was too vague to adequately address potential impacts to Spring Creek water rights. Because Spring Creek is largely fed by springs, even small reductions to the ground water levels could have a significant impact to the spring flows and creek flows. The Retreat's Mitigation Plan does not adequately address impacts to Spring Creek users. Replacement water into the Bear River from Pegram does not mitigate for reduced flows in Spring Creek.

### **Sufficiency of Water Supply**

15. The Retreat failed to establish that there is sufficient water available for diversion at the proposed well locations. The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible. (Rule 45.01.b of the Department's Water Appropriation Rules, IDAPA 37.03.08)

16. The testimony of Mr. Anderson and the reports from Mr. Clark suggest that proposed wells 1 and 2 will not have a sufficient supply of water. Mr. Anderson testified that after proposed well 2 was drilled they were only able to draw 100 gallons per minute out of the well. Mr. Clark's 2007 report proposes a transmissivity of 750 ft<sup>2</sup>/day. Such a low transmissivity would lead to a significant drawdown within the well casing. Mr. Anderson testified that the water level at the well dropped by more than 100 feet during the 8-hour pump test conducted in 2007. This information should have raised serious concerns regarding the availability of water at proposed wells 1 and 2 and should have prompted additional testing. The Retreat did not provide sufficient evidence at the hearing to show that there is adequate water available at proposed wells 1 and 2.

17. The Retreat failed to show that proposed well 4 has a sufficient supply of water. Mr. Wood, Mr. Anderson, and Mr. Clark all agree that the Salt Lake Formation may constitute a reliable source of ground water. The Retreat failed to show that proposed well 4 will actually tap into the Salt Lake Formation. Mr. Wood testified that proposed well 4 is actually located on a shallow layer of gravelly soils that is underlain by impermeable rock. Even if The Retreat were able to intersect the Salt Lake Formation (or the Wells Formation), it is likely that the well would be limited to a supply of water arising in a small, confined recharge area. Because no test well was drilled at the proposed well site, The Retreat was unable to show that the entire 2.7 cfs sought in the application would be available through proposed well 4. In fact, the Clark 2006 Report indicated that proposed well 4 could only serve as a back-up source.

### **Good Faith / Speculation**

18. In determining whether an application is not made in good faith or is made for delay or speculative purposes, the Department should analyze the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. (Rule 45.01.c of the Department's Water Appropriation Rules, IDAPA 37.03.08) An application will be found to have been made in good faith if the applicant has legal access to the property necessary to construct and operate the proposed project, the applicant is in the process of obtaining other permits needed, and there are no obvious impediments that prevent the successful completion of the project. (Rule 45.01.c.i-iii)

19. The Retreat did not provide any evidence that it has a current legal right to access to the Jensen property. The standards set forth in the Department's Water Appropriation Rules imply immediate legal access, not a promise to obtain access at some point in the future. The Department is unable to approve a permit when the applicant cannot show ownership of or a legal right to use the place of use described in the application. While it is reasonable that The Retreat may not want to purchase the Jensen property outright until primary financing is obtained and a water right is secured, it is difficult to understand why The Retreat has not entered into a short-term access/use arrangement in the interim. There are a number of ways to create a short-term legal right to use the property, including option contracts and leases.

20. The Retreat's ownership interest in the land under mortgage contract with DFCU has become clouded due to the pending foreclosure action. Although DFCU sent a letter supporting the water right application, the letter does not necessarily constitute evidence that the foreclosure action will be resolved. DFCU would likely support the water right application, regardless of the outcome of the foreclosure action, because a water right would increase the value of the property. The foreclosure action would need to be resolved before The Retreat could move forward with project construction.

21. The absence of a current access/use contract with Ms. Jensen and the existence of a pending foreclosure action by DFCU raise serious concerns about the intentions of The Retreat with respect to the application. These items constitute obvious impediments to the successful completion of the project. Therefore, The Retreat has not sufficiently established that the application was made in good faith and not for delay or speculative purposes.

#### **Sufficient Financial Resources**

22. An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding will be available for project construction or upon a financial commitment letter acceptable to the department. (Rule 45.01.d of the Department's Water Appropriation Rules, IDAPA 37.03.08)

23. Applicants are not required to have money in the bank, cash on hand, or financial contracts signed prior to obtaining a water right permit. If any of these circumstances exist, they may be offered as evidence of sufficient financial resources. However, they are not specifically required to obtain a water right permit. An applicant must only show that it is *reasonably probable* that financing will be available for project construction. With larger development projects, financing contracts are generally not signed until all of the necessary pre-construction permits are secured, including water right permits. Mr. Hugh Larratt-Smith, who has hired by The Retreat to pursue financing for the project, testified that The Retreat will be able to obtain the necessary financing to complete the project.

24. The 2009 LECG appraisal of the development, which incorporates the costs of resort construction, indicates that the resort development has the potential to be very profitable. The appraised value of the property than the current debts of The Retreat.



The LECG appraisal is valid today because it was completed after the economic downturn and accounted for a difficult financing market. The appraised value of the property is based on a number of assumptions, including an assumption that certain resort amenities will be completed. Even if some of the amenities proposed do not come into being, however, the appraised value of the property will likely still exceed the debt obligation related to the development. The Retreat has adequately shown that it is reasonably probable that funding will be available for project construction.

### **Local Public Interest**

25. Idaho Code §42-203A(5)(e) gives the Department the authority to deny an application for permit when the proposed water use would conflict with the local public interest as defined in 42-202B. "Local public interest" is defined in Section 42-202B(3) 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." This definition of "local public interest" was officially adopted in 2003 and supersedes the criteria set forth in the Department's Water Appropriation Rules (IDAPA 37.03.08.45.01.e).

26. Information related to job creation within Bear Lake County does not fall within the definition of "local public interest" and is not pertinent to the local public interest evaluation. Such information is not related to the effect of the proposed use on the public water resource.

27. Residents of the City of Bloomington rely on Bloomington Spring as their sole source of drinking water. Any reduction to the spring flow could lead to a limited supply of drinking water. A ground water application proposing to extract water from the Bloomington Formation within the same recharge basin as Bloomington Spring, which does not adequately address potential impacts to Bloomington Spring, is not within the local public interest. The primary local public interest in this case is that residents of the City of Bloomington maintain a reliable supply of drinking water from Bloomington Spring. The Retreat failed to prove this element.

### **Conservation of Water Resources**

28. Idaho Code §42-203A(5)(f) gives the Department the authority to deny an application for permit when the proposed water use is contrary to the conservation of water resources within the state of Idaho.

29. The uses of water proposed by The Retreat are not unreasonable. The application states that water will be used for municipal and irrigation purposes. The Mitigation Plan establishes that water will be used efficiently and conservatively within the resort. Irrigation, which accounts for the bulk of the water depletions at the resort, will be supplemented with wastewater from the municipal system. Therefore, The Retreat has sufficiently established that its proposed use of water is not contrary to the conservation of water resources within the state of Idaho.

## CONCLUSIONS OF LAW

1. Based on the evidence available, The Retreat failed to establish four of the elements set forth in Idaho Code § 42-203A(5): (1) that the proposed diversion will not reduce the quantity of water under existing rights, (2) that there is sufficient water available for the proposed use, (3) that the application was made in good faith and not for delay or speculative purposes, and (4) that the application is in the local public interest. Therefore, the application for permit should be denied without prejudice. The Retreat should be allowed to file and pursue a similar application in the future if it is able to develop or acquire sufficient evidence to support these four elements.

2. The Retreat was able to establish: (1) that it will be able to obtain financing to complete the project and (2) that the application is not contrary to the conservation of water resources within the state of Idaho. Because the facts related to these elements can change over time, particularly facts related to finances, these elements should not be considered conclusively determined in a future water right application.

## ORDER

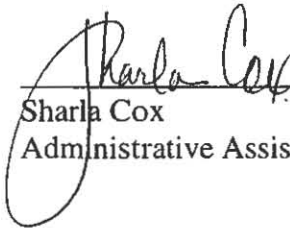
IT IS HEREBY ORDERED that Application for Permit No. 11-7582 in the name of The Retreat at Bear Lake dba Black Bear Resort is DENIED without prejudice.

Dated this 31<sup>st</sup> day of January, 2011.

  
James Cefalo  
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 31<sup>st</sup> day of January 2011, I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER DENYING APPLICATION FOR PERMIT to the person(s) listed below:

  
Sharla Cox  
Administrative Assistant

US MAIL

RE: APPLICATION FOR PERMIT NO. 11-7582

The Retreat at Bear Lake  
PO Box 651247  
Salt Lake City UT 84165

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Roger Reese  
21 N Main St  
Bloomington ID 83223

Dale Thornock  
PO Box 221  
Bloomington ID 83223

EA Hart Trust  
C/O Winston Hart  
PO Box 201  
Bloomington ID 83223

William Pettis  
PO Box 322  
Paris ID 83261

Bear Lake Water Inc  
C/O Claudia Cottle  
3539 Brighton Pt. Dr  
Salt Lake City UT 84121

Pacificorp  
C/O Claudia Conder  
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Daniel Richard Nelson  
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Rodney Wallentine and  
West Fork Irrigation Company  
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Bloomington ID 83223

Holden Kidwell Hahn & Crapo  
C/O Robert L Harris  
PO Box 50130  
Idaho Falls ID 83405-0130

Preston Montpelier Irrigation Co  
835 Alton Rd  
Montpelier ID 83254



## **EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER**

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

### **EXCEPTIONS AND BRIEFS**

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

### **REQUEST FOR HEARING**

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

### **ORAL ARGUMENT**

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

## **CERTIFICATE OF SERVICE**

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

## **FINAL ORDER**

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

## **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.