BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION TO APPROPRIATE WATER NO. 95-9360 IN THE NAME OF TALL PINE LAKEVIEW ESTATES, LLC	)))))	**ORDER DENYING PETITION FOR RECONSIDERATION, SECOND AMENDED PRELIMINARY ORDER, AND DEFAULT ORDER**

On September 28, 2006, Tall Pine Lakeview Estates, LLC ("Tall Pine"), filed an application to appropriate water with the Idaho Department of Water Resources ("IDWR" or "Department"). IDWR assigned water right no. 95-9360 to the application. IDWR published notice of the application on October 19 and 26, 2006. Application no. 95-9360 was protested by the following protestants: Max A. Palmer, Berniece J. Palmer, Josie Ehrlich, Karen Hayes, Cecil Hathaway, Kelsey Palmer, Kim Eadie, Anthony Venturino, James J. Boyes, Gerald J. Wiedenhoff, Cynthia M. Robinson and Tom McLennon, Lisa Palmer, John T. Montee, Edward M. Rollins, Darryl E. O'Sickey, Thomas H. Kosewic, Gary Harger, Lubertus Vanderbilt, Reka C. Schwarz, Melvin T. Schmidt, William W. Henry, Robert Finney, Clyde Zortman, Dane Hossley, and Kootenai Environmental Alliance.

On April 19, 2007, IDWR conducted a hearing for the protests. Mitchell Wright, a principal in Tall Pine, represented Tall Pine. The following protestants appeared representing themselves: Max A. Palmer, Berniece J. Palmer, Josie Ehrlich, Karen Hayes, Cecil Hathaway, Kim Eadie, Anthony Venturino, James J. Boyes, Gerald J. Wiedenhoff, Cynthia M. Robinson, Lisa Palmer, Edward M. and Marilyn Rollins, Darryl E. O'Sickey, Gary Harger, Lubertus Vanderbilt, Melvin T. Schmidt, Robert Finney, Clyde Zortman, Dane Hossley, and Barry Rosenberg for Kootenai Environmental Alliance. Kelsey Palmer, John T. Montee, Thomas H. Kosewic, Reka Schwarz, and William W. Henry did not appear at the hearing.

On August 2, 2007, the hearing officer denied application to appropriate water no. 95-9360 without prejudice. Furthermore, the hearing officer ordered that "the following must be completed before the Department would process another application to appropriate water for this project:

> 1. The applicant must file another application to appropriate water, describing all of the points of diversion from which the applicant proposes to divert water.

2. Prior to the publication of notice of the application by the Department, the applicant must complete a pumping test of the constructed wells that is proposed, performed, and analyzed by a licensed professional engineer or a licensed professional geologist. In completing the pumping test, the applicant must complete the following:

a. Submit a proposal for well pump testing and monitoring to the Department and the protestants to this contested case. The proposal must identify both wells and springs that will be monitored during the duration of the test. All wells proposed for production must be simultaneously pumped. The protestants to this contested case must have an opportunity to suggest changes to the proposed pump testing and monitoring. The Department must approve any proposal for well pump testing and monitoring. The applicant must notify the Department and the protestants to this contested case at least one week in advance of the date and time of the testing and monitoring.

b. Complete the pump test and initial monitoring, and analyze the data of the pump test in a written scientific report. The report must contain specific scientific conclusions drawn from the test.

c. Submit the report to the Department and all protestants to this contested case. The protestants to this contested case and the Department shall have a reasonable time to read the report and comment on the data, the methods of analysis, and the conclusions of the report. The Department may require additional data gathering and studies before publication of notice of the application.

The parties did not file a petition for reconsideration or exceptions to the preliminary order.

On September 10, 2007, Tall Pine filed a *Petition for Review of the Preliminary Order* in the District Court of the First Judicial District of the State of Idaho.

On February 5, 2008, District Judge Charles W. Hosack remanded the contested case back to IDWR "for the purpose of further consideration before the Department of Water Resources Hearing Officer… ."

Following the order of remand, Tall Pine amended application no. 95-9360. The amendment added two points of diversion not originally described by the application. Notice of the amendment was published in the Coeur d'Alene Press on February 21 and 28, 2008. The following individuals filed additional protests against application no. 95-9360 in response to the publication of notice of the amendment: Mark and Kathleen Johnson, Bruce Majeski, Peter J. Nichols, Elizabeth A. Gill and Bradford J. Scacco, Harry and Beth Hanes, and Melvin Lane and Tamara K. Pearson. These protestants were added to the group of protestants who originally protested application no. 95-9360.

On May 21, 2008, IDWR conducted a second hearing for protests against application no. 95-9360. John F. Magnuson, attorney at law appeared on behalf of Tall Pine.

Many of the protestants agreed at the outset of the hearing that Karen Hayes would be a spokesperson for the protestants and would be the sole examiner of witnesses. The following protestants represented themselves: Elizabeth Gill and Bradford J. Scacco, Cynthia M. Robinson and Tom McLennon, and Kootenai Environmental Alliance. Barry Rosenberg appeared on behalf of Kootenai Environmental Alliance.

On August 21, 2008, the hearing officer served a *Notice of Proposed Default Order* on the following protestants who did not appear at either the first or the second hearing, and did not designate a spokesperson at the hearing: Gary Harger, Robert Finney, Kelsey Palmer, John T. Montee, Thomas Kosewic, William W. Henry, Mark and Kathleen Johnson, Bruce Majeski, and Peter J. Nichols.

The *Notice of Proposed Default Order* notified the nonattending protestants that they had seven days to show cause why an order of default should not be entered dismissing them as parties to the contested case.

On August 27, 2008, John T. Montee submitted a letter to the hearing officer, asserting that he had been ill during the extended period over which the contested case had been pending and had been unable to attend the hearings. Montee's letter also asserted that water levels in his well had declined during a pump test conducted by the applicant in preparation for the second hearing. These assertions of fact were presented to the hearing officer after the close of the record.

On September 5, 2008, John Magnuson, attorney for the applicant Tall Pine filed an Objection to Consideration of John T. Montee's August 27, 2008 correspondence which objected to the acceptance of the "improper post-hearing argument."

The hearing officer assumes that John T. Montee was ill as stated in his August 27, 2008 letter. Nonetheless, Montee had ample opportunity during the pendency of the contested case to communicate his physical condition to the hearing officer, to make arrangements to be represented by counsel, or to appoint a spokesperson. His illness was not sudden requiring a surprise change of plans. The hearing officer determines that Montee's long term illness is not a showing of good cause, and that a default order should dismiss John T. Montee as a party.

The facts untimely asserted by Montee in his letter will not be considered by the hearing officer in this decision.

On September 16, 2008, the hearing officer issued an *Amended Preliminary Order and Default Order* approving application no. 95-9360 with conditions.

On September 30, 2008, protestant Karen Hayes submitted to IDWR a petition for reconsideration on behalf of the remaining protestants. The protestants signed the petition for

reconsideration. The petition for reconsideration refers to several documents not included in the record for the hearing. These documents were attached to the petition for reconsideration and are described as follows:

1. Beginning on page six of the appendix to the petition, an interoffice memorandum from Matthew Davis, Fisheries Biologist, Coeur D'Alene River Ranger District, U.S. Forest Service. The memorandum is dated June 5, 2008, although it is not signed and appears to be a draft document.

2. Beginning on page nine of the appendix to the petition, a letter to the hearing officer from Ranotta K. McNair, Forest Supervisor for the Idaho Panhandle National Forests. The McNair letter is dated June 6, 2008. IDWR received the McNair letter on June 13, 2008.

3. On page 13 of the appendix to the petition, a document titled "Lakes Highway District Resolution 2006-05."

4. On page 14 of the appendix to the petition, a document titled "Statement of Lisa Palmer," dated September 28, 2008.

5. On page 15 of the appendix to the petition, a memorandum from John T. Montee to the hearing officer, dated September 28, 2008.

These documents cannot be considered by the hearing officer without reopening the record and allowing further testimony and cross examination. Protestants had ample time to prepare for the hearing. The evidence was not presented at the time of the hearing, and the hearing officer should not now consider the information tardily submitted.

ANALYSIS OF PETITION FOR RECONSIDERATION

Impacts on Stump Creek Flows

Protestants argue that (a) the evidence at the hearing established the value of Stump Creek as spawning and rearing habitat for cutthroat trout; (b) pumping from ground water during the pump test diminished the flow in Stump Creek; and consequently, (c) Tall Pine was required to prove, under the local public interest factor, that the reduction would not negatively impact cutthroat populations in Stump Creek.

IDWR must evaluate the local public interest when considering an application to appropriate water. Maintaining a healthy population of cutthroat trout in Stump Creek is an interest "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." *See* Idaho Code § 42-202B(3).

A reduction of flows in Stump Creek caused by a proposed appropriation of water does not automatically disqualify the application under the local public interest. IDWR is charged

with balancing the positive interest of developing and using the water resources of the state with the local public interests that might be affected by the development and use of the water.

Pumping by Tall Pine at a rate of 25,000 gallons per day is approximately the equivalent of two domestic uses diverting at a maximum daily diversion of 13,000 gallons per day. *See* Idaho Code § 42-111. Idaho Code § 42-227 exempts these domestic uses diverted from ground water from having to file for a new water right. While Tall Pine did not construct wells for a use that would qualify as a domestic use defined by Idaho Code § 42-111, the comparison to the exemptions for domestic use illustrates the deminimus quantity of water authorized for appropriation by the September 16, 2008 amended preliminary order. If the entire 25,000 gallons per day were taken from Stump Creek at a continuous flow, the reduction in flows to Stump Creek would be approximately 0.04 cubit feet per second, equivalent to eighteen gallons per minute, or just over one quart of water per second. In this case, the hearing officer determines that the reductions in flow to Stump Creek would be insignificant to the total flows in Stump Creek. As a result, the benefit of developing the water resources of the state as proposed outweighed any minimal detrimental effects to Stump Creek.

Adequacy of Water Supply

Protestants argue that the water supply is insufficient for the purpose sought on two counts. First they argue that the flow rates of water authorized by the amended preliminary order are not shown to be sustainable by the pump tests conducted by Tall Pine. Second, they argue that the subdivision planning documents require more water than the flow authorized by the amended preliminary order.

The hearing officer carefully reviewed the pumping data from the pump test and conservatively estimated from the test the sustainable continuous flow rates that could be produced from the wells without overdrawing the system. These continuous flow rates will not be pumped all the time. The wells will be able to produce at higher flow rates during short periods of time when the daily demands are at their peak. During periods of low water use, very little water may be diverted from the wells. As a result, the total flow rate approved was in excess of the 30 gallons per minute peak identified by the planning documents. The findings and conclusions on the sufficiency of the water supply will not be changed.

Injury to Senior Water Rights

Protestants argue that the reduction in flow of Palmer Spring would injure other water rights. Protestants submitted a post hearing document from Lisa and Lester Palmer that the hearing officer cannot consider.

At the hearing, the protestants did not submit any proof of water rights. The hearing officer attempted to establish the existence of unrecorded water rights in Palmer Spring by questioning Max Palmer at the time he testified. The hearing officer determined that the existence of unrecorded water rights was uncertain. The hearing officer searched the records of IDWR and did not find any recorded water rights for Palmer Springs. If these water rights are

established in the future, the diversion and use of water by Tall Pine will be junior to these rights and will also be subject to a delivery call should the water rights be injured by Tall Pine.

Protestants' petition for reconsideration should be denied.

The conclusions of law will be amended to reflect the above analysis of the local public interest.

Following consideration of evidence presented at the hearing, and submittal by the parties of post hearing briefs, the hearing officer finds, concludes and orders as follows:

FINDINGS OF FACT

1. The amended application to appropriate water no. 95-9360 proposes appropriation of water as follows:

Source:	Groundwater
Purpose of Use:	Municipal
Flow Rate:	0.12 cubic feet per second ("cfs")
Period of Use:	Year-round

Points of Diversion:

Township 51N, Range 3W, Section 2, SWSENW[1] (test well No. 2)
Township 52N, Range 3W, Section 35, SWSWSE (test well No. 3)
Township 52N, Range 3W, Section 35, SESWSE (test well No. 4)
Township 52N, Range 3W, Section 35, NWSESE (test well No. 5).

Place of Use:

Township 51N, Range 3W, Section 2, NENW, SWNW, SENW
Township 52N, Range 3W, Section 35, SESW, SWSE, SESE

2. Application no. 95-9360 proposes municipal use of ground water for a 25-lot subdivision near Hayden Lake, Idaho. The applicant proposes to construct the subdivision on approximately 200 acres. The subdivision will be divided into large lots consistent with present local zoning. Tall Pine proposes a central water system that will deliver water to the lots in the subdivision.

3. Use of water within the subdivision would be limited to one half acre of irrigation and in-house use of the water. Regulations of the Department of Environmental Quality require that a minimum of 54 gallons per minute ("gpm") be provided to the subdivision. A flow rate of 54 gpm is equal to 0.12 cfs, the flow rate sought by application no. 95-9360.

[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.

4. Tall Pine constructed wells at the locations of the four points of diversion proposed by application no. 95-9360 in accordance with drinking water standards.

5. Applicant's Exhibit 2 describes the four constructed wells that are sought as points of diversion by application no. 95-9360. Each of the wells was test pumped for 24 hours. The following is a summary of the data collected as a result of the pump tests:

Test well No. 2:	Well is 300 feet deep. Yield of 11.0 gpm.
Test well No. 3:	Well is 250 feet deep. Yield of 48.0 gpm.
Test well No. 4:	Well is 400 feet deep. Yield of 8.5 gpm.
Test well No. 5:	Well is 200 feet deep. Yield of 40.0 gpm.

6. The application proposes diversion of water from granitic fractures that are confined by a shallower impervious strata. The confinement of the aquifer(s) causes ground water to rise above the level where it is encountered. As a result, the aquifer(s) encountered is under artesian pressure.

7. The amount of water that is available from individual wells in the granitic substrate depends on the size of the fractures, and the degree to which the granite is weathered.

8. The directness of the relationship between the fractures is unknown.

9. Springs in the area emit from the ground and discharge water under artesian pressure to surface water streams. One such spring, locally known as Palmer Spring, is located directly down gradient from test well no. 3 and is also in close proximity to test wells nos. 4 and 5.

10. Beginning on September 17, 2007, Tall Pine pumped water from test well no. 3, test well no. 4, and test well no. 5 for 96 hours until September 21, 2007. Beginning as early as September 13, 2007, and continuing as late as September 26, 2007 Tall Pine also monitored stream flows in Stump Creek and five nearby springs and measured water levels in five nearby wells to determine any changes in water flows or ground water levels resulting from the pump test. The information from the pump test is contained in Applicant's Exhibit 5-A and Applicant's Exhibit 6-A.

11. Tall Pine began pumping water simultaneously from test wells nos. 3, 4, and 5 at 11:15 a.m. on September 17, 2007. The pumping rates during the test are recorded in a table in Applicants Exhibit 5A on the first page of Appendix 2, titled "Pumping Well Data." The following are flow rates pumped from each of the well at the outset of pumping.

Test Well	Flow rate
Test well no. 3:	22.0 gpm
Test well no. 4:	4.5 gpm
Test well no. 5:	21.0 gpm
Total Flow Rate Pumped at beginning of test =	47.5 gpm

12. Production from test well no. 3 declined during the test. By approximately 12.00 noon on September 18, 2007, Tall Pine could only pump 13.5 gpm from test well no. 3. At approximately 3:00 pm on September 18, 2007, the pumping records show that Tall Pine increased its pumping from test well no 5 approximately 10 gpm to 30 gpm. Thereafter, Tall Pine reduced its pumping from test well no. 3 to approximately 12 gpm for the duration of the test, and pumping from test well no. 5 was reduced from 30 gpm to 25 gpm, five gpm more than Tall Pine had pumped from test well no. 5 during the first 27 hours of the test. The increase in flow rate from test well no. 5 was intended to partially offset the reductions in flow from test well no. 3.

13. The pumping from test wells nos. 3 - 5 concluded on September 21st at 12 noon. At the conclusion of the test, the following flow rates were being pumped from the test wells: Test well no. 3, 12.0 gpm; test well no. 4, 4.5 gpm, test well no. 5, 25.0 gpm. Total flow rate pumped at the end of the test was equal to 41.5 gpm.

Observation Wells

14. Water levels were measured before, during, and after pumping from the pumped wells in test wells nos. 3 - 5 and in five other wells: The Palmer well, the Seivert well, the Hayes well, the Harger well, and Tall Pines test well no. 2. Hydrographs for these water level measurements are found in pages 9 through 14 of Applicant's Exhibit 6-A.

15. Measurement of water levels in test wells nos. 3 - 5 during pumping showed significant ground water level declines and some delays in the recovery of ground water levels after pumping that will be discussed later in this decision.

16. Ground water levels in the Seivert, Hayes and Tall Pines No. 2 wells remained constant during the duration of data gathering and the pumping test.

17. Ground water level measurements in the Palmer well during the pump test showed an anomaly approximately five to six hours into the test. This anomaly resulted in a two foot decline in water levels. After about 11 hours of reduced water levels during the test, water levels in the Palmer well returned to approximately the pre-test levels for the remainder of the test. Whether this anomaly was the result of measurement error or some other phenomenon, the variation of two feet in ground water levels in the Palmer well is insignificant.

18. The hydrograph for the Harger well shows an increase in water levels of in excess of ten feet that coincide with the beginning of the pump test and ending of the pump test. It is possible that water was being diverted from the Harger well on both sides of actual pumping of the test wells during the pump test, and was not diverted during the pump test. On the other hand, the increase in water levels could be the result of data gathering error. If all other factors remain constant, test pumping should not increase water levels in the Harger well. As a result, the hearing officer discards the information from the Harger well as being unreliable.

19. Data gathered during the pump test period establishes that pumping from the test wells does not affect other wells in the vicinity.

Monitored Springs

20. Six surface water sources were monitored during the period of the pump test. Flows in Stump Creek were measured from September 13, 2007 through September 26, 2007. A hydrograph for the measurement is found on page 4 of Applicant's Exhibit 6-A.

21. The vertical axis of the hydrograph is labeled with incremental water levels. A measured water level is often referred to as a "stage." Water levels can be related to flow rates, but Tall Pine did not develop a flow – stage relationship. When data was gathered after the conclusion of the pump test, the water levels in Stump Creek on approximately September 24, 2007, actually dropped below zero. This does not mean that the Stump Creek was dry. The negative readings are a result of an artificial datum set at zero for the stream gage. The water levels dropped below the zero mark on the gage.

22. The stage vs. time hydrograph for Stump Creek is highly variable. The consultant for Tall Pine superimposed a straight down sloping line on the hydrograph attempting to approximate the hydrograph data over the period of the test. The hearing officer specifically finds that this straight line does not properly depict the variations in Stump Creek water levels and ignores various activities during the period of data gathering.

23. The Stump Creek hydrograph shows at least four distinct periods of record. The first period is from September 13, 2007 to the beginning of the test on September 17, 2007. During this approximate five-day period, a straight line drawn through the data would approximate a horizontal line showing steady flows.

24. At the beginning of the pump test on September 17, 2007 until the end of the pump test on September 21, 2007, water levels in Stump Creek declined. These declining water levels in Stump Creek are attributed to pumping. A depiction of the data during this time period can be represented by a straight line with a downward slope reflecting the declining water levels.

25. Following the end of the physical pumping of water, a period of rain and possible effects of pump discharge increased water levels and flows in Stump Creek . The increase in water levels is depicted from September 21 through September 24, 2007.

26. Data variations during the last period of measurement are difficult to attribute to any activity. It is possible that the declines are reflecting continuing results of pumping. Other factors may also have caused the declining water levels.

27. Page 5 of Applicant's Exhibit 6-A is a hydrograph of data collected for spring flows from Palmer Spring during the pump test period. The hydrograph shows declines in flows from the beginning of the test until almost 6:30 pm on September 17, 2007. Following the lowest measured flow of just over zero liters per minute, measured flows in the channel downstream of the spring increase dramatically as a result of discharge to the same channel from

pumping the wells. These discharges were discontinued on September 19th, and the flows diminished significantly, but never returned to the original flows.

28. The hearing officer finds that the only meaningful data depicted on the Palmer Springs hydrograph are measurements prior to discharge of pumped ground water into the channel when measurement included both the discharged ground water and surface water. In particular, the hearing officer finds that higher flows measured after the discharge of ground water into the channel was discontinued was a result of bank storage discharging to the channel that had been stored as a result of the significant pumped ground water being placed in the channel. Consequently, these data are not useful for determining the effects of pumping on Palmer Spring flows.

29. At the time well discharge influence on spring outflows was detected between the start of the pump test and 20:29 on September 17, 2007, the flows from Palmer Spring declined from approximately 2.5 liters per minute to almost zero.

30. Palmer Spring is located hydraulically down gradient from test wells nos. 3 -5. In addition, it is the closest spring to test well no. 5, which was pumped at a greater flow rate than the other two test wells. The location of monitoring for Stump Creek is also located hydraulically down gradient from the test wells.

31. Pumping from the test wells diminished flows in Palmer Spring and in Stump Creek.

32. Pumping from the test wells did not cause declines in flows from Hayes Spring no. 1, Hayes Windmill Spring, and Harger Spring.

33. Ground water underlying the area proposed for development is contained in the fractures of the weathered granite. Artesian flows in these fractures provide water to springs in the area. Previously constructed wells could also be affected by the proposed Tall Pine diversions if constructed in the same fractures. The pre-existing wells monitored during the test are located sufficient distances from the test wells that water levels in the pre-existing wells were not impacted by pumping the test wells. Water rights for other wells in the area will not be affected by pumping at the proposed points of diversion. Some spring flows and stream flows, particularly flows in Palmer Spring and Stump Creek, will be affected by pumping.

34. There are no recorded water rights on Palmer Spring or the drainage in which Palmer Spring runs. If beneficial use water rights are established in the future, pumping from the proposed wells will possibly injure these water rights.

35. No reductions in the quantity of water for water rights identifying Stump Creek as a source were alleged. There is no minimum stream flow to protect flows in Stump Creek from diminution.

Water Levels in the Pumped Test Wells

36. Applicant's Exhibit 5-A is titled *Hydrogeologic Evaluation* and contains data and information gathered during the pump test. Appendix 2 of the exhibit is titled "Pumping Well Data." The first page following the title page for Appendix 2 is a table of data for test wells nos. 3 -5.

37. Pump tests in largely homogenous aquifers having large areal boundaries characteristically demonstrate a drawdown in the production test well ground water levels during the beginning of the pump test followed by a leveling out of ground water levels and often a stable ground water level during the duration of the test. In addition, once the physical pumping of the pump test is completed, the recovery curve for ground water levels is often a mirror image of the drawdown curve during pumping.

38. Water levels in test well no. 4 most closely resemble pumping data for a homogeneous aquifer. This similarity is likely the result of the low pumping rate of 4.5 gpm.

39. Water levels in test well no. 3 declined during most of the pump test. After pumping water from test well no. 3 for almost four days and reducing pumping from 25 gpm to 12 gpm, water levels were relatively constant during the last six hours of the test. Pumping drew water levels down approximately 160 feet.

40. The data for test well no. 5 demonstrates continuing declines in ground water levels at a constant pumping rate of 20 gpm. On the line associated with a time of 15:00 and a date of September 18, 2007, the pumping rate was increased to 30 gpm resulting in a drop in water levels from 69.35 feet to 77.85. After a line of blank data at time 18:00, the next entry is for 21:00 at a pumping rate of 25.0 gpm. The water level in test well no. 5 rose to 75.00 feet, but, during the remainder of the test, declined at the constant pumping rate of 25 gpm. During the period of pumping at 25 gpm extending to the end of pumping ground water for the test, water levels in test well no. 5 dropped an additional ten feet and did not show any significant signs of stabilizing. After a recovery period of five days, water levels in test well no. 5 were still seven feet below the beginning water level. After more than a month, water levels were still 3.5 feet below the beginning water levels.

41. Pumping data for test well 5 shows that, at a diversion rate of 25 gpm, the withdrawal was exceeding the ability of the system to recharge. Furthermore, the data shows that the recharge into the fractured system is very slow after it is stressed. The long term sustainability of maintaining the pumping rate in test well no. 5 is questionable.

42. Pumping from test well no. 3 caused significant drawdowns. Water levels stabilized during the last six hours of the pump test. Given the large drawdowns during the pump test, diversion at flow rates exceeding 12.0 gpm would probably exceed the capacity of the well to sustain the pumping rate.

43. The pumping capacity of test well no. 2 during a 24 hour pumping test was 11 gpm. This information is contained in Applicant's Exhibit 2 and in finding of fact no. 5. The rate of 11 gpm is in the same range of production as the 24 hour pumping rate of 8.5 gpm from test well no. 4. If the sustainable pumping rate for test well no. 2 follows the proportional

reduction in the 24 hour pumping test rates for the other test wells to a lesser sustainable rate, test well no. 2 will not contribute a significant flow rate to the total sustainable rate of the wells.

44. Total flow rates for the pump tests varied from approximately 47.5 gpm at the beginning of the pump test to 41.5 gpm at the end of the test. The applicant characterizes these flow rates as 243 percent of the average annual flow rate based on an average flow rate of 1,000 gallons per day per residence. Application no. 95-9360 seeks an appropriation of 0.12 cfs or 54 gpm. This flow rate exceeds the tested flow rate by 10 to 25 percent. In addition, summertime demands when property owners are irrigating their property are often three to four times the demand during the winter months. These peak supply times are the critical comparative numbers, not an average use for the entire year. Sustained diversions at these critical rates during the summertime will cause declines in water levels that may not be recoverable. There is substantial risk that future homeowners will have an expectation of adequate water and that the water supply will be inadequate during the peak use periods of the year.

45. The flow rate of 12.0 gpm pumped from test well no. 3 and the flow rate of 4.5 gpm pumped from well no. 4 during the pump test are the sustainable flow rates demonstrated during the 96 hour pump test. The hearing officer cannot speculate to determine the additional water that might be contributed to the sustainable flow rate by test well no. 2 and test well no. 5, although the hearing officer recognizes that some additional water probably can be supplied from test well no. 2 and test well no. 3. Continuous pumping at a rate of 16.5 gpm (12 gpm plus 4.5 gpm) for 24 hours will cumulatively accrue 23,760 gallons in one day. For 25 homes, this volume is just less that the 25,000 gallons per day demand for 25 homes, an average of 1,000 gallons per day diverted for each home.

46. Idaho Independent Bank submitted documentation that it would support and provide financing for the project if the needed approvals are obtained.

47. The applicant has expended significant energy and funds in pursuing preliminary plat approval, and conducting other studies and approvals.

48. Water for homes is a reasonable use of water.

49. The development includes a portion of the drainage for Stump Creek, a tributary of Hayden Creek and Hayden Lake. Stump Creek is a valuable spawning habitat for cutthroat trout. Springs at the head of Stump Creek provide water for the flows in Stump Creek. Pumping from the proposed points of diversion could impact and reduce the flows of Stump Creek that support cutthroat trout.

50. The applicant proposes uses of water that are within the acceptable limitations of domestic use.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A 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, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; 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 the factors set forth in Idaho Code § 42-203A.

3. The applicant bore the burden of proving that the proposed use of water would not reduce the quantity of water under existing water rights. The applicant showed that its proposed diversion of water would not injure other water rights.

4. The applicant bore the burden of showing that the water supply was sufficient for the purpose sought. The data gathered by the applicant during the pump test establishes that the water supply cannot sustain the pumping rates sought by the applicant without limitation. There may be some lesser amount of water that could be appropriated that would not result in mining of the ground water. A pumping rate of at least 23,760 gallons per day can be sustained, and IDWR should recognize a total capacity approximation of 25,000 gallons per day as a limitation until Tall Pine gathers and submits additional data about sustainability. If 25 homes are built, the maximum volume that could be delivered to each home is 1,000 gallons per day. Recognizing that peak daily demands might require pumping at a rate higher than 16.5 gpm, the higher rate of diversion of 0.12 cfs (54 gpm) can be authorized provided the total diversion is limited to 25,000 gallons per day, or 0.077 acre-feet per day.

5. The applicant established it has sufficient financial resources to build the project.

6. The applicant established the application was not filed for purposes of delay, speculation, or in bad faith.

7. The applicant's data established that pumping from its wells would reduce the flows of water in Stump Creek. The amount of the depletion was not established however. It is unlikely that the full depletion of pumping ground water proposed by this application will be borne by Stump Creek. Nonetheless, the maximum possible depletion to Stump Creek, if its flows were diminished by the same flow rate that is diverted from ground water pumping, would be approximately one quart per second. A depletion of less than one quart per second would not have a significant affect on the total flows of Stump Creek.

8. There is no evidence to show that these minimal reductions in flows of Stump Creek would have any detrimental effect on the fisheries' resource.

9. The applicant established that the proposed use would be consistent with the principles of conservation of the waters of the State of Idaho.

DEFAULT ORDER

IT IS HEREBY ORDERED that Gary Harger, Robert Finney, Kelsey Palmer, John T. Montee, Thomas Kosewic, William W. Henry, Mark & Kathleen Johnson, Bruce Majeski, and Peter J. Nichols are dismissed as parties to the contested case.

ORDER

IT IS HEREBY ORDERED that the protestants' *Petition for Reconsideration* is **Denied.**

IT IS FURTHER ORDERED that Application to Appropriate Water #95-9360 is **Approved** subject to the following conditions:

Proof of application of water to beneficial use shall be submitted on or before **September 01, 2011.**

Subject to all prior water rights.

Place of use is within the area served by the public water supply system of Tall Pine Lakeview Estates. The place of use is generally located within Section 2, Township 51N, Range 3W, and Section 35, Township 52N, Range 3W, B.M.

A map depicting the place of use boundary for this water right at the time of this approval will be attached to the final permit document for illustration purposes.

Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.

The daily volume diverted in connection with this right is limited to 25,000 gallons (approximately 0.077 acre-feet) per day. Diversion in excess of 25,000 gallons per day or declines in ground water levels that do not recover annually is cause for the Department to limit the diversion in connection with this right to in-house use only.

Prior to the diversion and use of water, the right holder shall install and maintain measuring device(s), including data logger(s), at the authorized point(s) of diversion. The measuring devices, which shall meet Department specifications, shall measure and record the maximum daily instantaneous flow rate and the maximum daily volume of water diverted.

At least once a month the right holder shall measure and record water levels in the production wells and record whether the well was pumping at the time of the measurement. In addition, the right holder shall record and maintain records of all diversions from the well, identifying the total daily volume diverted by date. These records must be maintained and compiled into an annual record set and made available to the Department upon request. Annual record sets must be maintained for a minimum of ten years.

The right holder may petition the Department to increase the authorized total daily volume under this permit upon submitting at least two years of pumping data from the production wells establishing that the ground water resource will recharge annually at a rate that will sustain a greater daily volume withdrawal. The Department will review the data, and, if the Department finds the data supports a determination that pumping at the permitted rates and volumes can be sustained, the Department will hold a hearing regarding the petition to determine whether the water supply is sufficient to allow diversion of a higher daily volume of ground water, and that diversion of the greater daily volume of ground water withdrawal will not injure other water users. The Department will notify interested persons of the hearing, and the interested persons shall have an opportunity to fully participate as parties in the contested case hearing.

Failure of the right holder to comply with any condition of approval, including the requirement to maintain diversion records and provide them to the Department upon request, is cause for the Director to void this permit.

DATED this 18th day of December, 2008.

Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of December, 2008, a true and correct copy of the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following

Document(s) Served: **ORDER DENYING MOTION FOR RECONSIDERATION, SECOND AMENDED PRELIMINARY ORDER, AND DEFAULT ORDER** and an Explanatory Information Sheet to accompany a Preliminary Order when a hearing was held.

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