BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT TO APPROPRIATE WATER NO. 63-32003, IN THE NAME OF MARLIN LANDOWNERS, L.L.C.	)	**PRELIMINARY ORDER**

On October 15, 2004, Sherfire Properties/Jim Shervik filed Application for Permit to Appropriate Water No. 63-32003 with the Idaho Department of Water Resources ("IDWR"). Application for permit no. 63-32003 seeks to appropriate 0.26 cfs for domestic purposes. John Minkoff protested the application. On January 27, 2006, James D. Shervik assigned application for permit no. 63-32003 to Marlin Landowners, LLC ("Marlin" or "applicant").

On February 16, 2006, IDWR conducted a hearing for the protest. John Marshall, Attorney at Law, appeared on behalf of Marlin. John Minkoff appeared representing himself.

During prehearing negotiations and preparation for the hearing, two consultants worked for Jim Shervik. Leavitt & Associates Engineers, Inc. ("Leavitt Engineers") appears to have been retained by Shervik to conduct general engineering for the subdivision development. Leavitt Engineers and Shervik requested water resources engineering expertise from SPF Water Engineering, L.L.C. ("SPF"). SPF wrote a report addressed to Mr. Reese Leavitt of Leavitt Engineers. The report was signed by Christian Petrich and Terry Scanlan. This report was distributed to the parties during hearing preparation. At the hearing, John Marshall did not offer the report, and objected to full admission of the document. Marshall argued the document was prepared for settlement negotiations, and that it was not intended as a formal document to be received into evidence at the contested case hearing. In contrast, Minkoff argued the report contained much technical information that needed to be reviewed by the hearing officer.

One of the authors of the report, Terry Scanlan, appeared as an expert witness at the hearing. Marshall agreed that Scanlan could testify about any of the technical portions of the report, but argued that the hearing officer should not consider discussion in the report of topics that might be deemed as offers of settlement. Minkoff had the opportunity to fully examine Scanlan at the hearing regarding all technical aspects of the report. At the end of the hearing, the hearing officer agreed to review pages 3 through 11 of the report, but determined that other portions of the report were more related to settlement negotiations than technical analysis. As a result, the hearing officer determined he would not consider pages 1, 2, and 11 through 14. In addition, the hearing officer determined all correspondence in the file related to settlement negotiations would also be removed from the file. The hearing officer stated that all other documentation in the file would be considered.

Following presentation of evidence and the admission of exhibits, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application to appropriate water no. 63-32003 proposes appropriation of water as follows:

Source:	Groundwater
Flow rate:	0.26 cfs
Purpose of Use:	Domestic (in-house use only)
Period of Use:	January 1 through December 31
Point of Diversion:	SW1/4SE1/4 and NW1/4SE1/4, Section 6, Township 2 North, Range 3 West, Boise-Meridian.
Place of Use:	The W1/2 of the SE1/4 of Sec. 6, Township 2 North, Range 3 West, Boise-Meridian.

2. The remarks section of application no. 63-32003 states "water is used for internal domestic use for thirty-six (36) homes only. External domestic uses provided by Wilder Irrigation District."

3. Marlin submitted information and testimony about water levels in six wells located within an approximate one-mile radius of the points of diversion proposed by application no. 63-32003. Locations of the wells for which data was presented are depicted in applicant's exhibit no. 4. Data for the wells are presented graphically on applicant's exhibit no. 5.

4. There are some discrepancies between the identified locations on applicant's exhibit no. 4 and the typed location on applicant's exhibit no. 5. Applicant's exhibit no. 4 locates a well within "02 No 3W-06DBA1." Applicant's exhibit no. 5 labels this point of diversion as 02 No 3W-06BBA1. The location on the applicant's exhibit no. 4 map shows the well in the NE1/4NW1/4SE1/4 of Section 6. The location on the map corresponds with the description on the map (applicant's exhibit no. 4: 02 North 03 W-06DBA1), not the description on applicant's exhibit no. 5. In addition, the caption for applicant's exhibit no. 5 reads "Water Levels in Township 2 N, Range 3 W, Section 6." Only two of the monitoring wells are located in Section 6. There are also water levels shown in Sections 7 of Township 2 North, Range 3 West, Sections 31 and 32 of Township 3 North, Range 3 West, and Section 1 of Township 2 North, Range 4 West.

5. The six wells for which water levels are depicted were chosen because water levels in the wells had been measured at least three times. Water levels measured in these wells showed declines beginning in the 1960s and 1970s. In the 1980s and 1990s, however, the data suggests that water levels in these wells have been stable or may have even risen slightly.

6. Steep water level declines in the 1960s and 1970s corresponded with the time of drilling of larger ground water irrigation wells. During the last 15 to 20 years, IDWR has not

approved significant new applications for drilling of irrigation wells in Canyon County, and specifically in the area where application no 63-32003 proposes construction of points of diversion.

7. The ground water underlying the proposed place of use is derived from percolation of surface water from Lake Lowell, water flowing in canals and ditches, and surface water irrigation. These sources provide recharge for the ground water aquifer. Stable water levels over the last 15 – 20 years establish that there is additional ground water in the aquifer to satisfy the proposed water use.

8. Protestant's exhibit K summarizes drilling activity for some of the owners of lots located in Knighten Hills Subdivision, a development located northwest of the development proposed by Marlin and adjacent to the Marlin proposed development. Many of the wells in the Knighten Hills Subdivision were drilled from 1976 through approximately 1978. Most of the redrilling occurred from 1980 through 1988, although one well owned by Colosky was redrilled in 1993. Redrilling required deepening of the wells from approximately 20 to 100 feet in depth. One exception was a well drilled for Morrison, which was originally at a depth of 165 feet, and was drilled to 365 feet.

9. Protestants' exhibit F is a summary of well problems in the Knighten Hills Subdivision prepared on January 3, 1993 by a person named Trish Valceschini. The summary recounts some of the well problems summarized in protestants' exhibit K. It also adds information about dropping water levels that did not require redrilling, but required lowering of the pump in existing wells. Finally, protestants' exhibit E, titled Overview of Hydrogeologic Conditions in the Knighten Hills Subdivision and Surrounding Area, was prepared by Timothy L. Mosko on May 7, 1994. The Mosko report discusses declines in water levels and also summarizes some of the well problems. Unfortunately, the data for monitoring wells included in the Mosko report that showed declines end in 1977 and approximately 1983. No further data is presented in the report.

10. At the end of the Mosko report, Timothy L. Mosko recommends several activities, including a water level study, a moratorium, restriction of use for new subdivisions to domestic use only, the drilling of a community well, and conducting an aquifer test. Over the past 15 years, there has been a defacto moratorium in place. The Treasure Valley Hydrologic Study added additional information to IDWR databases, which is presented in applicant's exhibit no. 5. Applicant's exhibit no. 5 does not show continuing declines in water levels.

11. Application no. 63-32003 proposes use of ground water for domestic in-house use only. The ground water will not be used for consumptive irrigation or other outdoor consumptive use.

12. Application no. 63-32003 proposes construction of a community well.

13. Although the development proposed by Marlin will incorporate a community well, the sewage needs of the residences will be served by individual septic systems. Most of the in-house use water will be delivered to the septic systems, which will ultimately discharge to the

ground water in the area. For the most part, the ground water diverted will be nonconsumptively used because it will be discharged back to the ground water. Nonetheless, the proposed method of sewage treatment could change in the future, resulting in additional consumption of water.

14. Average in house water use for homes in Treasure Valley varies from 200 – 250 gallons per day. At 250 gallons per day per home, 36 homes would be expected to use 9,000 gallons per day, or approximately 10.1 acre-feet per year.

15. The maximum flow requirement for 36 homes recommended by the Department of Environmental Quality is 0.12 cfs. A flow of 0.12 cfs is equivalent to 52 gallons per minute.

16. Terry Scanlan, expert witness for the applicant, computed expected drawdowns caused by pumping of the wells proposed by application no. 63-32003 using the Theis Equation. The Theis Equation is a commonly used scientific tool for analyzing the drawdowns caused by a well at various distances in a confined aquifer or semi-confined aquifer. The results of the computations are contained in applicant's exhibit nos. 6 through 9.

17. Each of the computations assumes a unique combination of a flow rate that will be pumped and a distance from the pumping well.

18. Applicant's exhibit nos. 6 and 7 assume a pumping rate of six gallons per minute (gpm). Six gallons per minute was derived by multiplying 250 gallons per day by the 36 homes (9,000 gallons per day) planned for development, and converting the time interval of a day (gallons per day) to a minute (gallons per minute). The computation assumes the flow rate of six gpm delivered to the subdivision continuously over an entire year. The total annual volume that would be diverted at six gpm (or 9,000 gallons per day) is 10.1 acre-feet. Applicant's exhibit no. 6 assumes a distance from the pumping well of 300 feet, which is the distance from the nearest proposed well to the closest Knighten Hills well. Applicant's exhibit no. 7 calculates a drawdown at 2,000 feet, which is the distance from the furthest proposed well to the nearest Knighten Hills well. After pumping at a constant rate of six gpm for an entire year, the computations show drawdowns of 0.45 feet in the nearest Knighten Hills well by pumping the closest proposed well to the Knighten Hills development, and 0.32 feet in the Knighten Hills well for pumping the proposed well farthest from the Knighten Hills development.

19. The computations in applicant's exhibit nos. 8 and 9 assume a flow rate of 52 gallons per minute. Fifty-two gpm equates to 0.12 cfs, less than half of the sought flow rate of 0.26 cfs proposed by application no. 63-32003.

20. The computations in applicant's exhibit no. 8 assume a flow rate of 52 gpm pumped from the well 2,000 feet away from the nearest Knighten Hills well. The Theis Equation computes a drawdown of 2.77 feet. The computations in applicant's exhibit no. 9 assume 52 gpm is pumped from a well 300 feet away from the nearest Knighten Hills well. The Theis Equation computes a drawdown of 3.9 feet in the nearest Knighten Hills well.

21. Scanlan testified that the relationship between drawdown and flow rate when using the Theis Equation is directly proportional. As a result, at a flow rate of 0.26 cfs diverted

continuously, pumping from the proposed well located 300 feet from the nearest Knighten Hills well could cause 8.75 feet of drawdown. Pumping from the proposed well located 2,000 feet from the nearest Knighten Hills well could cause 6.22 feet of drawdown.

22. Marlin or its predecessors have invested approximately 1.5 million dollars in preparing to develop the proposed subdivision. Marlin has sufficient capital to complete the project.

23. Marlin or its predecessors have constructed or installed many of the physical features and utilities for the subdivision.

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 burden of proof for the factors IDWR must consider in Idaho Code § 42-203A.

Reduction in Quantity of Water Available to Other Water Rights

3. The Department must determine whether the approval of application to appropriate water no. 63-32003 will reduce the quantity of water under existing water rights. This hearing officer interprets this language to mean that other water rights cannot be injured. The standard for determining whether a domestic water right is injured depends on when the domestic water right was perfected.

4. In 1951, the Idaho Legislature enacted legislation known as the Ground Water Act. In 1953, the Idaho Legislature amended the Ground Water Act. The 1953 Amendment recognized that ground water rights would be administered according to the prior appropriation

doctrine, but that prior water rights should not prevent the full economic development of the ground water resources of the State of Idaho, and that ground water appropriators would be required to pump from a "reasonable pumping level" established by the Department. In 1987, the Idaho Legislature amended the Ground Water Act again. The 1987 Amendment expressly stated that domestic water rights are subject to the reasonable economic pumping level standard. The 1987 Amendment became effective on July 1, 1987.

5. In *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), the Idaho Supreme Court determined that a later in time appropriator should be enjoined from pumping ground water for irrigation that almost immediately dried up a domestic well located nearby. The court held that the water right for the domestic well was perfected prior to the irrigation water right and before the reasonable pumping level standard was applied to domestic beneficial uses, and that the domestic water right holder was entitled to the protection of the ground water pumping level existing prior to pumping by the junior appropriator. The court held that the injunction was not permanent, and could be absolved upon full compensation to the senior appropriator by the junior appropriator for the cost of deepening the senior appropriator's well and payment of the costs of additional equipment and energy.

6. The Idaho Supreme Court stated in *Parker v. Wallentine*:

> Under the doctrine of prior appropriation, because Parker's domestic well was drilled prior to Wallentine's irrigation well, Parker has a vested right to use the water for his domestic well. <u>That right includes the right to have the water available at the historic pumping level or to be compensated for expenses incurred if a subsequent appropriator is allowed to lower the water table and Parker is required to change his method or means of diversion in order to maintain his right to use the water.</u>

103 Idaho 506, 512 (1982) (Emphasis added)

7. The Idaho Supreme Court went on to note that:

> Parker will not be deprived of any right to his use if water can be obtained for Parker by changing the method or means of diversion. The expense of changing the method or means of diversion, however, must be paid by the subsequent appropriator, Wallentine, so that Parker will not suffer any monetary loss. Thus, upon a proper showing by Wallentine that there is adequate water available for both he and Parker, it is within the inherent equitable powers of the court upon a proper showing and in accordance with the views herein expressed to enter a decree which fully protects Parker and yet allows for the maximum development of the water resources of the State.

103 Idaho at 514.

8. Under *Parker*, if (1) pumping of ground water by junior ground water appropriators causes declines in pumping water levels in wells of the senior water right holders

because of local well interference, and (2) the water rights held by the senior water right holders bear priority dates earlier than 1951, or July 1, 1987 for domestic water rights, the holders of the senior water rights are, at a minimum, entitled to compensation for the increased costs of diverting ground water caused by the declines in ground water levels.

9. The extent to which *Parker* protects water rights held by the owners of wells in Knighten Hills Subdivision, and particularly by protestant Jon Minkoff, depends on proof of injury and factual similarities to the facts of the *Parker* case.

10. In *Parker*, the owner of the domestic well was unable to divert water from the domestic well within minutes of when the junior priority water right holder began pumping ground water. The proof of the lowered water table caused by pumping from the irrigation well that resulted in inability to pump water from the domestic well was established through testimony about the effects of the initial pumping from the Wallentine well and by a pump test conducted by the parties and IDWR.

11. In an administrative hearing for an application to appropriate water, the applicant bears the burden of proving that the proposed change will not injure other water rights. If a protestant seeks the protection of *Parker* that would insulate him from the reasonable pumping level standard of the Ground Water Act, however, the protestant must come forward with evidence that: (1) he is the holder of a water right that is not subject to the Ground Water Act, and (2) his diversion equipment and facilities are capable of diverting his water right at the ground water levels at or about the time the application is being considered. Once the protestant comes forward with the information, the applicant ultimately bears the burden of proving that the amendment will not injure the protestant under the *Parker* standard.

12. The applicant is not required to protect Minkoff and other domestic water right holders against declines in water levels that occurred prior to the drilling and operation of the wells proposed by application no. 63-32003. The applicant should not be enjoined from constructing and pumping the proposed wells by a claim of injury to a water right caused by pumping water from other, earlier-constructed wells that has resulted in water level declines.

13. Minkoff established that some of the wells in the Knighten Hills Subdivision were drilled prior to the amendment of the Ground Water Act in 1987. To the extent a well was providing domestic water prior to 1987, an unrecorded domestic water right was perfected. These perfected domestic water rights would be entitled to protection against water level declines directly caused by a junior appropriator under the *Parker* standard.

14. Minkoff did not directly establish when homes associated with the wells drilled before 1987 were supplied domestic water from the wells. Because of the approximate ten year time span from when wells were drilled until 1987, the hearing officer can infer from the dates of well completion that several homes in the Knighten Hills Subdivision were constructed and receiving water from wells prior to 1987.

15. Minkoff also established that domestic residents are presently using the domestic wells in the Knighten Hills Subdivision.

16. Minkoff established the basic evidentiary requirements to invoke *Parker* protection.

17. The establishment of water rights entitled to *Parker* protection places on the applicant the burden of proving that its actions will not injure the water rights under the *Parker* standard. The applicant had the responsibility to gather and Minkoff and other homeowners seeking protection needed to provide information about domestic well depths, dynamic pumping levels, and depth of the pump intakes to determine whether pumping from the wells proposed by application no. 63-32003 would injure water rights entitled to protection from water level declines under *Parker*. This information and analysis was not provided at the hearing.

18. The hearing officer could require the submittal of additional information and analysis to determine injury when applying the *Parker* standard. In this case, however, the hearing officer is able to limit the appropriation of water to prevent injury to water rights entitled to *Parker* protection. As a result, this decision does not determine the respective burdens borne by the applicant and the protestant of coming forward with information for determination of injury under *Parker*.

19. If the flow rate and annual volume diverted from wells constructed by Marlin are limited to the small quantities assumed by the applicant's computations in applicant's exhibit nos. 6 and 7, the largest drawdown in a Knighten Hills well would be less than half of a foot. The most important of these quantities is the annual volume pumped. If the annual volume pumped is limited to 10.1 acre-feet, the maximum drawdowns in the Knighten Hills wells will approximate the drawdowns computed in applicant's exhibit nos. 6 and 7.

20. A maximum of one-half foot of drawdown is not sufficient reduction in water level to cause loss of the ability to divert water in the existing Knighten Hills wells or to measurably increase the cost of pumping water.

21. A flow rate of 0.12 cfs is sufficient to supply the needs of the proposed subdivision, except for possible fire protection flows. The flow rate of 0.26 cfs sought by application no. 63-32003 exceeds the in-house domestic demands of the proposed development. Limiting the flow rate will insure adherence to the volume limit.

Other Factors

22. The applicant established there is sufficient water for the purposes sought.

23. The applicant established that it has sufficient financial resources to construct the project and that many of the subdivision features have already been constructed.

24. The applicant established that it has invested significant resources in pursuing construction of the proposed development. Consequently, the application is filed in good faith, and is not filed for speculative purposes.

25. Appropriation of ground water for in-house use coupled with delivery of surface water for irrigation of the landscape associated with the homes results in a conservation of the ground water.

Local Public Interest

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

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

27. Limited diversion of ground water for domestic use is in the local public interest.

ORDER

IT IS HEREBY ORDERED that application to appropriate water no. 63-32003 is **Approved**, as follows:

1. The flow rate for permit no. 63-32003 is limited to 0.12 cfs for domestic use, and 0.26 cfs for fire protection, but is limited to a total flow rate of 0.26 cfs.

2. The total annual volume is limited to 10.1 acre-feet.

IT IS FURTHER ORDERED that permit no. 63-32003 is subject to the following conditions:

3. Proof of application of water to beneficial use shall be submitted on or before June 1, 2007.

4. Domestic use is for 36 homes and does not include lawn, garden, landscape, or other types of irrigation.

5. The domestic use authorized under this right shall not exceed 13,000 gallons per day per home.

6. 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.

7. Points of diversion are located within Lot 10, Block 2; and Lot 2, Block 3; West River Subdivision.

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

9 Water bearing zone to be appropriated is from 250 to 500 feet.

10. Only one well may be operated at a time under this water right except in case of a fire unless the Department expressly approves a method of measurement and reporting that insures adherence to annual volume limitations while water is pumped from both wells simultaneously.

11. Prior to diversion of water under this right, the water right holder must install an in-line measuring device in the mainline from its wells that will accurately measure the instantaneous flow from the wells, record the maximum flow rate for a given month, and will measure, total, and record the total volume of water diverted from the wells. The totalizer function of the measuring devices must be capable of totaling several years of volume diverted, and must not allow the operator to reset the volume totalizer. The measuring devices must be a propeller, ultrasonic, magnetic meter or another meter expressly approved by IDWR. The measuring devices must be calibrated after installation with an independent, reliable, portable measuring device that has been pre-calibrated to a known flow rate. The measuring devices must be recalibrated at least every three years after the first calibration.

12. The water right holder must read the measuring devices and record the information read at least monthly. The water right holder must read and record the maximum flow rate diverted from each well and the totalizer readings of volume diverted. The water right holder must also maintain records of the dates of measuring device calibration, the method of calibration, and who performed the calibration. These records must be maintained by the water right holder at all times and must be submitted to the Department at any time the Department requests the records.

13. Place of use is located within Lots 1-6, Block 1; Lots 1-12, Block 2; and Lots 1-18, Block 3; West River Subdivision.

14. The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

DATED this 3rd day of May, 2006.

GARY SPACKMAN
Hearing Officer