BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 65-22650 IN THE NAME OF FREDERICK &/OR GLORIA RINGEL	)))))	RECOMMENDED DECISION AND ORDER

STANDARD FOR DECISION

This matter came before the Idaho Department of Water Resources ("IDWR") on the application of Frederick and Gloria Ringel (the "Ringels" or "Applicants") to appropriate ground water in the Payette River drainage. Water right applications are processed under Idaho Code § 42-203A, which provides, in part, that:

> (5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. 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. Provided however, that minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be

appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

A water right applicant bears the burden of proof for the factors IDWR must consider under Section 42-203A, Idaho Code. Cantlin v. Carter, 88 Idaho 179, 187 (1964); Shokal v. Dunn, 109 Idaho 330, 339 (1985). IDWR has adopted rules setting forth the criteria for evaluating some of the statutory factors. IDAPA 37.03.08.045.

IDWR, having examined the application and the written record, and having reviewed the written testimony of the parties, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. Course of Proceedings.

1. On December 5, 2001, the Ringels submitted an application for a ground water right permit to irrigate property in Round Valley in the Payette River drainage. That application was assigned number 65-22650. The proposed water use was originally described as follows:

Source of Water:	Ground water.
Point(s) of Diversion:	SW ¼ NE ¼, and NW ¼ SE ¼ and SW ¼ SE ¼, in Sec. 6, T11N, R4E and the NW ¼ NE ¼ and NE ¼ NW ¼ and SW ¼ NE ¼ in Sec. 7 , T11N, R4E, B.M., Valley County, Idaho.
Use(s):	Irrigation of 402 acres.
Total Quantity:	8.04 cfs.
Period of Use:	April 15 – October 15.
Place of Use:	SW ¼ NE ¼, SE ¼ NE ¼, NE ¼ SE ¼, NW ¼ SE ¼, SW ¼ SE ¼, SE ¼ SE ¼, in Sec. 6, T11N, R4E and the NE ¼ NE ¼, NW ¼ NE ¼, SW ¼ NE ¼, SE ¼ NE ¼, NE ¼ NW ¼, SE ¼ NW ¼, NE ¼ SW ¼, NW ¼ SE ¼ in Sec. 7, T11N, R4E, B.M., Valley County, Idaho.

2. Notice of the December 5, 2001, Application was published in The McCall-Cascade Times Advocate, on January 16 and 23, 2002. Timely protests were received by IDWR from:

Kyle F. Ellis.

Ronald R. Zehr.

James E and Carolyn D. Kling.

Arley J. Weaver.

Larry Beskoon.

Michael Levins.

A protest filed by Emmett De Masters was rejected by IDWR for failure to timely pay the filing fee.

3. Prehearing conferences were held on Application No. 65-22650 as originally filed on May 20, 2002, and February 27, 2004. Following the second prehearing conference, an order was issued allowing for discovery, and a formal hearing was set for September 1 - 2, 2004. On July 16, 2004, the September hearing was cancelled at the request of the Ringels.

4. Immediately following the prehearing conference on February 27, 2004, the Ringels made handwritten amendments to application no. 65-22650. On September 16, 2004, the Ringels then submitted a formal Amended Application for Permit that incorporated the handwritten amendments (as amended, the "Application"). The Application describes the proposed water use as follows:

Source of Water:	Ground water.
Point of Diversion:	SW¼NE¼ Sec. 6, T11N R4E, B.M., Valley County, Idaho.
Use(s):	Irrigation of 4.5 acres.
Total Quantity:	0.09 cfs.
Period of Use:	April 15 – October 15.
Place of Use:	20 acres located in the SW¼SE¼, SE¼SE¼, Sec. 6, T11N, R4E, B.M., Valley County, Idaho.

5. The Director of IDWR formally appointed Peter Anderson as Hearing Officer in this matter on August 24, 2004.

6. On August 26, 2004, the Hearing Officer invited IDWR staff to file by October 15, 2005, a staff memorandum providing: (1) an analysis by IDWR staff of whether the Application should be granted and, if so, any proposed conditions; (2) a listing of applicable IDWR memoranda; (3) an analysis of the availability of ground water at the proposed point of diversion, or analysis of any studies related to the availability of ground water at the proposed point of diversion; and (4) a GIS map showing the proposed place of use and point of diversion. No staff memorandum was submitted.

7. A third prehearing conference was held on the Application on October 14, 2004, in Cascade Idaho. Protestants Michael Levins, Larry Beskoon, and Ronald Zehr did not attend this prehearing conference. James E. and Carolyn D. Kling were excused prior to the conference with the agreement of the Ringels.

8. A *Scheduling Order* issued on October 15, 2004, that established a time period for discovery (closing November 30, 2004), provided for the exchange of witness and exhibit lists (January 7, 2005), and set tentative hearing dates (January 27-28, 2005).

9. Individual *Notice*(s) *of Proposed Default Order* were issued on October 15, 2004, to Protestants Michael Levins, Larry Beskoon, and Ronald Zehr for their failure to attend the October 15, 2004, prehearing conference. They each were given seven days to respond to the *Notice.* On October 19, 2004, the Ringels filed a *Motion to Dismiss Beskoon, Levins and Zehr Protests* based upon their failure to attend the prehearing conference. On November 5, 2004, the Hearing Officer issued a *Recommended Default Order Denying Protest of Larry Beskoon* and *Recommended Default Order Denying Protest of Michael Levins.* On December 2, 2004, the Hearing Officer issued a *Recommended Default Order Denying Protest of Ronald Zehr.*

10. On October 19, 2004, a *Stipulation to Withdrawal of Protest* between Arley J. Weaver and the Ringels was filed with IDWR. On November 22, 2004, a *Stipulation to Withdrawal of Protest* between Michael Levins and the Ringels was filed with IDWR.

11. During a phone conference on January 5, 2005, between the Hearing Officer, Mr. Darrell Ellis and the attorneys for the Klings and Ringels, the parties agreed to modify the schedule in this matter and, in lieu of a formal hearing, to submit this matter to the Hearing Officer in writing. On January 7, 2004, the Hearing Officer issued an *Amended Scheduling Order* setting a date for the exchange of witness and exhibit lists (January 14, 2005); a deadline for the submission of written testimony and exhibits (January 28, 2005); a deadline for the Applicants to file rebuttal evidence (February 4, 2005); and the date for the submissions of written closing arguments (February 11, 2005).

12. On January 14, 200, Kyle Ellis filed his exhibits with IDWR.

13. On January 28, 2005, the Ringels filed affidavits and their exhibits with IDWR.

14. On February 4, 2005, Kyle Ellis filed a *Rebuttal Statement to Applicant's Affidavits.*

15. On February 9, 2005, James and Carolyn Kling filed their *Notice of Withdrawal of Protest.*

16. On February 12, 2005, the Ringels filed their *Memorandum in Support of Application for Permit No. 65-22650.* This matter was fully submitted to IDWR on February 11, 2005.

II. Evidence Considered.

17. Exhibits offered by the Ringels and admitted as part of the record are as follows:

Exhibit 1: January 5, 2005 Summary of Work – Howard R. Smith.

Exhibit 2: July 12, 2004 Geologic Report – Howard R. Smith.

Exhibit 3: October 4, 2004 Well Pump Test Report – Howard R. Smith.

Exhibit 4: November 8, 2004 Memo to Dave Ringel – Howard R. Smith.

Exhibit 5: November 15, 2004 Memo to Dave Ringel – Howard R. Smith.

Exhibit 6: Memo re: Ellis Items – Howard R. Smith.

Exhibit 7: Report re: Textural Analysis of soil samples – Glen H. Logan.

Exhibit 8: Survey Map of Distances of wells from proposed well – Dave Ringel.

Exhibit 9: Well Driller's Report – Ringel Well.

Exhibit 10: Well Driller's Report – Ellis Well.

Exhibit 11: Soil Sampling Report – Steven Hannula.

Exhibit 12: Map re: Soil sample locations – Steven Hannula.

Exhibit 13: Resume – Howard R. Smith.

18. Exhibits offered by Kyle Ellis and admitted as part of the record are as follows:

Exhibit 300: Protest of Application signed by Kyle F. Ellis.

Exhibit 301: IDWR Water Right Report for Water right No. 65-10774.

Exhibit 302-303: Letter dated October 4, 2004 to Charles Honsinger from Howard R. Smith, PG.

Exhibit 304-305: USGS, Water Science for Schools, "Water Q&A: USGS water data and measurements," questions 5 and 6.

Exhibit 306: Photograph taken 10/09/2004 at 16:00:47.

Exhibit 307: Photograph taken 10/09/2004 at 16:01:20.

Exhibit 308: Photograph taken 10/09/2004 at 16:14:36.

Exhibit 309: This photo shows the related location of the drying "pond" to the well listed as Exhibit #306.

Exhibit 310: USGS, Water Science for Schools, "How streamflow is measured (part 1)" with calculations.

19. The following affidavits were filed on behalf of the Ringels:

a. Affidavit of Fredrick D. Ringel.

b. Affidavit of Glen Logan.

c. Affidavit of Howard R. Smith.

III. Applicants and Intended Water Use under Application No. 65-22650.

20. The Ringels own approximately 681 acres of property in Valley County, Idaho. The Ringels farm and raise cattle on this property. Mr. Ringel is also a professional land surveyor and owns and operates Ringel & Associates, P.A., which has yearly revenues ranging from $300,00 to $600,000.

21. Frederick Ringel submitted deeds indicating that he owns property in an area of Idaho known as Round Valley, including the point of diversion and place of use described in the Application. The Ringels propose to divert 0.09 cfs (40.4 gallons per minute) of ground water for the irrigation of 4.5 acres of pasture and animal feed crops. This quantity corresponds with the restrictions of Idaho Code § 42-202(6). No annual volume of diversion was quantified in the Application.

22. The Ringels propose to pump the water from an existing well in the SW¼NE¼ Sec. 6, T11N R4E, B.M., (the "New Well") and pipe it approximately ½ mile, to 20 acres they own in the SW¼SE¼, SE¼SE¼, Sec. 6, T11N, R4E, B.M. Irrigation equipment would then apply the water to 4.5 acres. The estimated cost of the pipe and equipment needed to complete this appropriation of water is $4,500.00. Mr. Ringel intends to do all the labor necessary to complete

the appropriation with equipment he owns. No additional permits or approvals are needed to complete this appropriation. The Ringels intend to complete the appropriation immediately upon receiving a water right permit.

IV. Water Supply and Impact On Water Quantity Under Existing Water Rights.

23. The ground water well to be used under the Application will withdraw water from the Payette River Drainage, which is designated hydrologic basin 65 in IDWR records. Applicant's new well is shown as well #1 on the attachment to the Application and is shown in relation to other wells on Exhibit 8. See Affidavit of Fredrick D. Ringel, p. 2, ¶ 5. The New Well is 100 feet deep, with 12-inch casing to 55 feet and screening from 55 to 100 feet. The New Well penetrates water-bearing zones at 10-80 feet and 83-100 feet.

24. Two pump tests have been made on the New Well. The well driller's test, for an unspecified number of hours, indicates that the well will yield 40 gallons per minute (gpm) with an 80-foot drawdown. A 30-hour pump test on September 28, 2004, showed the well stabilizing with a 48.4-foot drawdown when pumped at a steady rate of 34-35 gpm. Immediately prior to the September 28, 2004, pump test the static water level in the well was 0.4 feet below the top of the well casing. After the September 28 test, water levels returned to 14.7 feet in 31 minutes following the cessation of pumping. IDWR staff reviewed and approved the basic methodology of the September 28, 2004, pump test.

25. Three water sources were monitored during the September 28, 2004, pump test: the "old Ringel well", the Ellis well nearest to the New Well, and Chipps Creek at its closest point to the New Well. The old Ringel well is 3,624 feet from the New Well. The Ellis well is 1,096 feet from the New Well. Chipps Creek, at its closest, is 385 feet from the New Well. No impact to the

wells or the creek was detected during, or a short time after, the test.[1] The wells and Chipps Creek location monitored during the pump test are described in Exhibit 3 and the well locations are shown on Exhibit 8.

26. In addition to monitoring nearby water sources during the pump test, Howard Smith, a geologist working for the Ringels, calculated the theoretical size of the cone of depression that would be created by pumping 40 gpm from the New Well. Mr. Smith's calculation predicted that the cone of depression would extend radially 506 feet from the New Well. This calculation predicts that the cone of depression would fall far short of the 1096-foot distance necessary to impact any water rights in the Ellis well. Water use under the Application would likely have no impact on the water level in the Ellis well.

27. Mr. Smith's calculation does, however, predict that the cone of depression would extend past the nearest location of Chipps Creek. Protestant Ellis apparently has a water right downstream from this location--water right no. 65-3854. Insufficient evidence was presented to make a determination regarding the parameters of this right. Nothing in the pump test report suggested that Chipps Creek formed a positive recharge boundary for the New Well. Further, the low permeability clay layer that apparently underlies Round Valley and overlays the aquifers in question likely perches Chipps Creek over the aquifer, which would severely mitigate any direct impact to the surface water flow caused by the pumping of the New Well. *Affidavit of Glen Logan.* Water use under the Application would likely have no impact on the water supply in Chipps Creek.

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[1]Mr. Ellis asserts that he measured the water level in his well at 47 inches below the top of the casing 26 hours after the pump test, and contrasts this measurement with the 36-inch measurement taken by geologist Howard R. Smith during the pump test. Mr. Ellis argues this 11 inch difference was caused by the delayed impact of the pump test. Given the distance of the Ellis well from the new well, the more likely explanation is the one given by Howard R. Smith—the differing methods of measuring the depth to water. Mr. Ellis used a tape measure, which did not reflect the height of Mr. Smith's float.

VI. Local Public Interest.

28. The Ringels proposed water use is very small. The impact of the water withdrawal will be localized, with no likely measurable impact on other water users or surface water features. The water used under the Application would either be consumptively used or returned to the public water supply. The Ringels water use will not prevent other water uses in the general area.

CONCLUSIONS OF LAW

Based upon the Findings of Fact, IDWR makes the following Conclusions of Law:

I. Quantity of Water Under Existing Rights.

1. The prior appropriation doctrine is the foundation of Idaho's water laws. Idaho Constitution, Art. XV, Sec. 3. The basic formulation of this doctrine is that during times of shortage a water right with a senior priority date is entitled to its water supply before a water right with a junior priority date. As a consequence, the water permitting statute does not allow a new water right applicant to receive a permit if "it will reduce the quantity of water under existing rights." Idaho Code § 42-203A. In other words, a new water user cannot claim there is a sufficient water supply for its use, if the claim is based upon water that is used by existing water rights. This rule is designed to ensure there is sufficient water for a proposed water use to be completed.

2. Water supplies are variable. A party applying for a permit is not required to show that the proposed use will never interfere with an existing water use. Occasional impacts on senior water rights are resolved by the application of the priority system. IDWR determines whether there is a reasonable probability that the applicant will find sufficient water to complete

the proposed water use without continuously interfering with senior water rights, but makes no guarantee that the applicant will never be shut off to protect senior water right holders. On the other hand, senior ground water users cannot block development of ground water resources by an unreasonable exercise of their own right.[2]

3. In the present case there is a reasonable probability that Ringel's proposed water use will not reduce the quantity of water under existing water rights. The Ellis well should not be impacted by the proposed use because of its distance from the new well. Chipps Creek should not be impacted by the proposed use because of its distance from the new well and because it is likely "perched" over the aquifer penetrated by the new well.

II. Adequacy of the Water Supply.

4. The Ringels have satisfied their burden to show that the water supply itself is sufficient for the purposes for which it is to be appropriated. The well driller's test and the September 28, 2004, pump test show that there is a reasonable probability that Ringels will be able to obtain an instantaneous flow 0.09 cfs from the new well. Conditioning the permit to limit the annual volume of water withdrawn from the aquifer to coincide with the field headgate requirement set forth in the "Consumer Irrigation Requirement, Field Headgate Requirement and Season of Use" map referenced in Application Processing Memo #52, will ensure that water from the new well is not wasted and that the impact of the new well on the aquifer will be limited.

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[2]This conclusion has some relevance to this Decision, in that Mr. Ellis is concerned that water flowing from his well from a pipe inserted in his well casing 42 inches below the top of the casing may cease if the Ringel's pumping has even a small impact on his well. Given the lack of any observed impact to the Ellis well during the pump test and limited size of the theoretical cone of depression, however, there was no need to reach a conclusion whether this method of diversion was reasonable.

III. Good Faith, Delay or Speculation.

5. IDWR's water appropriation rules provide the following regarding the determination of whether an application is made in good faith, or for delay or speculative purposes:

> c. Criteria for determining whether the application is made in good faith. The criteria requiring that the director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence. Speculation does not prevent an applicant from subsequently selling the developed project for a profit or from making a profit from the use of the water. An application will be found to have been made in good faith if:
>
> i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and
> ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and
> iii. There are no obvious impediments that prevent the successful completion of the project.

IDAPA 37.03.08.045.01.c. Subparagraphs i-iii of this Rule provide one method of evaluating the subjective intentions of a water right applicant, but are not an exclusive requirement.

6. The Ringels have legal access to the property necessary to complete the proposed water use. There are no other obvious impediments to this water use. The Ringels have sustained their burden to show that they intend to complete this water use with reasonable

diligence. Based upon their stated intent, a two-year time period is sufficient for the completion of the permitted work.

IV. Sufficiency of Financial Resources.

7. The Ringels have shown that it is reasonably probable that funding is available to complete this water use.

V. Local Public Interest.

8. IDWR's water appropriation rules provide the following regarding the evaluation of whether the Application conflicts with the local public interest:

> **e.** Criteria for determining whether the project conflicts with the local public interest. The director will consider the following, along with any other factors he finds to be appropriate, in determining whether the project will conflict with the local public interest:
>
> i. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;
>
> ii. The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed use; and
>
> iii. Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions.

IDAPA 37.03.08.045. To some extent these regulations may conflict with the new statutory formula for the "local public interest:"

> "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.

I.C. § 202B(3).

9. The Ringels submitted sufficient information regarding the proposed water use, to allow its water resource impact to be evaluated.

10. The requested water right would be diverted in an area where irrigated agriculture and ranching is an accepted part of the local economy. The proposed water use is relatively small. *See* I.C. § 42-111(1)(b) (definition of domestic purposes). The condition imposed by Conclusion 4 should ensure that impact on local water supplies will be minimal.

11. With the conditions stated in Conclusions 4 and 10 the Ringels have satisfied their burden of showing that approving the Application does not conflict with the local public interest.

VI. Conservation of Water Resources.

12. The proposed water use will occur in the Payette River Basin. The Ringels have satisfied their burden to show that the proposed water use is consistent with the conservation of water resources within the state of Idaho.

RECOMMENDED ORDER

Based upon these Findings of Fact and Conclusions of Law the Application is GRANTED. A permit will be issued with the following conditions:

1. IDWR's standard conditions, including those regarding well construction standards and measurement of diversions.
2. An annual volume of diversion limit, stated in acre-feet per annum, based upon the Idaho Department of Water Resources' field headgate requirement for this area stated in the "Consumer Irrigation Requirement, Field Headgate Requirement and Season of Use" map referenced in Application Processing Memo #52, shall be placed on the permit.
3. The time period for the completion of this water use shall be two years from the date of issuance of the permit.

PROCEDURAL RIGHTS

This is the Recommended Decision and Order of the Hearing Officer. It will not become final without action of the Director of the Idaho Department of Water Resources. Any party may file a petition for reconsideration of this recommended order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any 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.

Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the Director or Director's designee on any issue in the proceeding. If no party files exceptions to the recommended order with the Director or Director's designee, the Director or Director's designee will issue a final order within fifty-six (56) days after:

i. The last day a timely petition for reconsideration could have been filed with the hearing officer;

ii. The service date of a denial of a petition for reconsideration by the hearing officer; or

iii. The failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

Written briefs in support of or taking exceptions to this recommended order shall be filed with the Director or Director's designee. Opposing parties shall have fourteen (14) days to respond. The Director or Director's designee may schedule oral argument in the matter before

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

DATED this 17th day of February 2005.

PETER R. ANDERSON
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of February 2005, I mailed a true and correct copy of the foregoing **RECOMMENDED DECISION AND ORDER** on the following persons listed below by U.S. mail, postage prepaid and addressed as follows:

FREDERICK &/OR GLORIA RINGEL
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Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources