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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS TO)
APPROPRIATE WATER NOS. 63-32089 AND) **FINAL ORDER**
63-32090 IN THE NAME OF THE CITY)
OF EAGLE)
_____)

On January 19, 2005, the City of Eagle (“Eagle”) filed two applications for permits to appropriate water, numbered in the files of the Idaho Department of Water Resources (“IDWR” or “Department”) as 63-32089 and 63-32090. IDWR published notice of the applications in the Idaho Statesman on April 21 and 28, 2005. The applications were protested by the following individuals: Roy Barnett; Tim Cheney; City of Star; Dean and Jan Combe; Michael Dixon/Hoot Nanney Farms; Bill Flack; Bob and Elsie Hanson; Michael Heath; Charles Howarth; Corrin Hutton; Norma Mares; Michael McCollum; Charles Meissner, Jr.; LeRoy and Billie Mellies; Robyn and Del Morton; Frank and Elaine Mosman; Joseph, Lynn, and Mike Moyle; Eugene Muller; Tony and Brenda O’Neil; Bryan and Marie Pecht; Dana and Viki Purdy; Sam and Kari Rosti; Ronald Schreiner; Star Sewer and Water District; Jerry and Mary Taylor; United Water Idaho; and Ralph and Barbara Wilder.

IDWR conducted a prehearing conference on July 28, 2005. At the prehearing conference, Scott Reeser hand-delivered a letter to IDWR. In the letter, Scott Reeser asked to intervene in the contested case.

On September 13, 2005, IDWR issued an order granting Scott Reeser’s petition to intervene.

Several protestants failed to appear at the prehearing conference. IDWR mailed a notice of default to the non-appearing protestants. The following non-appearing protestants who failed to show good cause for non-appearance were dismissed as parties: Roy Barnett, Bryan and Marie Pecht, Del and Robin Morton, Tony and Brenda O’Neil, and Frank and Elaine Mosman.

The hearing officer conducted a second prehearing conference on October 18, 2005. At the prehearing conference, Eagle proposed to drill two wells for conducting a pump test. Eagle proposed to pump water from one of the wells and measure water levels in other wells in the vicinity of the pumped well to determine the impacts of pumping.

On December 22, 2005, IDWR approved two drilling permits to construct wells for the pump test.

On January 17, 2006, IDWR received a “notice of protest” from Bud R. Roundtree. IDWR interpreted the document as a petition to intervene.

On January 19, 2006, the hearing officer issued a *Notice of Hearing, Order Authorizing Discovery, and Prehearing Order*. The hearing officer scheduled the hearing for April 10 through April 14, 2006. On February 28, 2006, Eagle notified the hearing officer that the two test wells had not been constructed. The letter stated “the City of Eagle will not be able to get the pump test completed pursuant to the existing schedule.” As a result of the notice, the hearing officer canceled and continued the hearing. In the *Order Continuing Hearing and Canceling Prehearing Deadlines*, the hearing officer ordered the following:

...[U]pon completion of construction of the test wells, the City of Eagle shall arrange a time for the anticipated pump tests with the other parties. When the date(s) for the pump tests have been arranged, the City of Eagle shall notify the Department of the test date(s). After receiving notice of the test date(s), the Department will inquire about available dates for a hearing. The hearing will be scheduled no earlier than ninety days following the date of the test to allow the exchange of information and discovery previously authorized.

On July 11, 2006, the City of Eagle notified the hearing officer that “the pump test conducted by the City of Eagle has been completed.”

Sometime during late summer or the fall of 2006, Eagle submitted a report titled *City of Eagle – 7 Day Aquifer Test* to IDWR staff for review. The document is dated “June 2006,” but the test was not completed until June 19, 2006.

On September 6, 2006, the hearing officer issued a second *Notice of Hearing, Order Authorizing Discovery, and Prehearing Order*. The Notice of Hearing scheduled the hearing for December 6 through 8, 2006 and December 11 and 12, 2006. At the time of service of the notice of hearing, IDWR had not acted on the petition to intervene filed by Bud Roundtree. The record does not show that IDWR ever determined whether Roundtree should be allowed to intervene. Roundtree received notice of all the proceedings, however, and IDWR treated Roundtree as a full party to the contested case.

On November 7, 2006, Star Sewer & Water District withdrew its protest.

On November 13, 2006, protestants Joseph, Lynn, and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., and Charles Howarth filed a *Motion to Continue the Hearing*. On November 15, 2006, the above protestants filed an *Amended Motion to Continue Hearing*. The protestants filing the motion for continuance asserted: (1) various scheduling conflicts of the protestants; and (2) Eagle failed to “arrange a time for the anticipated pump test with the other parties” as required by the hearing officer’s March 10, 2006 *Order Continuing Hearing and Canceling Prehearing Deadlines*.

On November 20, 2006, the hearing officer denied the *Amended Motion for Continuance*. This order will not discuss the grounds for refusing the continuance based on scheduling conflicts. A discussion of the prearrangement of the pump test is germane, however.

In denying the request for a continuance on the grounds of failure to jointly conduct a pump test, the hearing officer wrote:

...The hearing officer intended that all the parties interested in the pump test have an opportunity to participate in the test. If Eagle failed to arrange the timing of the test with the parties, the hearing officer is dismayed that Eagle did not follow the dictates of the order.

Nonetheless, even assuming Eagle did not arrange a time for the pump test with the protestants as required by the hearing officer's March 10, 2006 order, the protestants have known that the City of Eagle completed its pump test since receiving the July 11, 2006 letter. The hearing officer also notified the protestants of the completion of the pump test in his August 16, 2006 letter and alluded to the completion of the test in his September 6, 2006 order. Failure of the city to fully coordinate the pump test with the protestants should have been raised as an issue at the time the protestants were notified that the pump test had been completed. Instead, the protestants waited until less than a month before the scheduled hearing to complain. Despite Eagle's failure, the protestants' inaction after learning of the completion of the pump test for approximately four months leads the hearing officer to surmise that the protestants were disinterested in participating actively in the pump test. Consequently, failure to coordinate the pump test is not grounds for postponing the hearing at this late date.

On November 22, 2006, protestants Joseph, Lynn, and Michael Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., and Charles Howarth filed a *Motion in Limine*. The protestants participating in the *Motion in Limine* argued that the "...data and results collected from the seven-day pump test conducted by the City of Eagle in May and June, 2006" should be excluded from the evidence "...because the Protestants were not provided an opportunity to collect data from their wells while the pump test was conducted."

On November 30, 2006, the hearing officer issued an *Order Denying Motion in Limine, Notice of Staff Memorandum, and Amended Notice of Hearing*. In the order, the hearing officer stated:

...The protestants had an opportunity to complain about their inability to participate in the test long in advance of the hearing. The protestants did not avail themselves of the opportunity and should not be allowed to raise the issue just prior to the hearing as a means of preventing consideration of technical information.

The *Motion in Limine* should be denied.

On November 29, 2006, Sean Vincent and Shane Bendixsen submitted a Department staff memorandum to the hearing officer that evaluated the pump test conducted for the City of Eagle test wells. A copy of the staff memorandum is enclosed with this document. The staff memorandum raises several issues about the procedures of the pump test and the analysis of the pump test data. The

questions raised by Department staff could seriously affect the credibility of the pump test evidence presented at the hearing.

The hearing officer will consider the Department staff memorandum as part of the evidence in this contested case. Because the analysis of the pump test submitted to Department staff was incomplete, the hearing officer will forward any additional evidence about the pump test received into evidence at the hearing to Department staff for further review to determine possible deficiencies. After the staff review, the hearing officer will distribute the results of the Department's post hearing review to the parties who will have an opportunity to submit additional comments and possibly to request supplemental hearings about the document. This process **will delay** the ultimate consideration of the applications.

The November 30, 2006 order also delayed commencement of the hearing by one day.

A hearing for the contested case was conducted on December 7 and 8, 2006, and resumed on December 11 and 12, 2006. At the end of the day on December 12, 2006, the presentation of evidence was not complete. As a result, additional evidence was presented the morning of December 18, 2006.

Bruce Smith and Tammy Zokan, attorneys at law, appeared on behalf of Eagle. Charles Honsinger and Jon Gould, attorneys at law, appeared on behalf of Joseph, Lynn, and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanney Farms. Sam Rosti, Corrin & Terry Hutton, Mary Taylor, and Jan Combe appeared individually representing themselves.

On December 20, 2006, the hearing officer issued a request for staff memorandum to Hal Anderson, Rick Raymondi, Sean Vincent, and Shane Bendixsen. The request for staff memorandum stated the following:

Sean Vincent (Vincent) and Shane Bendixsen (Bendixsen) reviewed a technical document titled *City of Eagle, Idaho 7-Day Aquifer Test* prepared by Chris H. Duncan of Holladay Engineering Company. After the review, Vincent and Bendixsen issued a staff memorandum dated November 29, 2006. In the memorandum Vincent and Bendixsen stated that "the scope of the data collection was adequate, but the aquifer test analysis is incomplete."

The request for staff memorandum recited some of the procedural background, and further stated:

At a hearing conducted on December 7-8, 11-12, and 18, 2006, the City of Eagle presented additional analysis of the aquifer test data. In addition, the City of Eagle called Vincent to testify regarding the November 29, 2006 staff memorandum.

...

THEREFORE, the hearing officer invites department staff to augment the November 29, 2006 staff memorandum regarding the above captioned matter, which could include, without limitation:

1. A full scrutiny of the methods of gathering data, the data presented, and results of the aquifer test contained in the *City of Eagle, Idaho 7-Day Aquifer Test* report dated June 2006.
2. Presentation and analysis of additional data available to department staff to enhance the hearing officer's understanding of the hydrogeology and aquifers in the vicinity of the proposed appropriations of water, including, but not limited to data related to aquifer tests performed for the Lexington Hills well and the Floating Feather well.
3. An independent analysis of Eagle's 7-Day Aquifer Test data using commonly accepted scientific methods in the field of geology, hydrogeology, and engineering.
4. A technical review and critic (sic) of any information and analysis of data presented as evidence during the contested case hearing conducted on December 7-8, 11-12, and 18, 2006.

On February 27, 2007 (date on the document was February 27, 2006), Sean Vincent of IDWR submitted to the hearing officer a staff memorandum titled *Review of Addendum to City of Eagle, Idaho 7-Day Aquifer Test Report*. Attached to the staff memorandum was a document titled *Addendum to City of Eagle 7-Day Aquifer Test Report*.

In the staff memorandum, Vincent states that "the Addendum adequately addresses comments made in a previous memo to you dated November 29, 2006."

On March 13, 2007, Eagle mailed copies of the written addendum reviewed by IDWR staff to the parties who attended the December hearing.

On March 27, 2007, the hearing officer mailed a copy of the staff memorandum written by Vincent to the parties who attended the December hearing. The hearing officer also served a *Notice of Consideration of Additional Evidence and Post Hearing Order* on the parties. The document informed the parties that the hearing officer would consider the information in the addendum and the staff memorandum, and granted the parties until April 25, 2007 to review documents and to submit technical comments about the addendum to the hearing officer and/or request a supplemental hearing.

On March 27, 2007, the hearing officer issued an order dismissing the following parties from the contested case: Michael McCollum, Michael and Nancy Heath, Tim Cheney, Bob & Elsie Hanson, Bill Flack, Ronald Schreiner, City of Star, Scott and Nancy Reeser, Bud Roundtree, Ralph and Barbara Wilder, and Norma Mares.

On April 24, 2007, Mary Taylor submitted written comments to Eagle's addendum.

On April 25, 2007, protestants Joseph, Lynn, and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanny Farms, Inc., submitted comments to Eagle's addendum and the IDWR staff memorandum.

On July 17, 2007, the hearing officer issued a preliminary order approving applications nos. 63-32089 and 63-32090. On July 18, 2007, the preliminary order was served on the parties by mailing a copy of the preliminary order to each of the parties via the United States Postal Service.

The following parties filed timely petitions for reconsideration: United Water Idaho; Joseph, Lynn and Mike Moyle ("Moyles"), Eugene Muller, Dana and Viki Purdy, Charles W. Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanney Farms, Inc., all represented by Ringert Clark Chartered; Mary Taylor; and the City of Eagle. In addition, the hearing officer received individual comments from Mike Moyle, Eugene Muller, and Charles Howarth.

On August 2, 2007, United Water Idaho filed a *Withdrawal of Petition for Reconsideration*.

On August 14, 2007, Ringert Clark Chartered withdrew as counsel for Dana and Viki Purdy. Dana & Viki Purdy are parties now representing themselves.

On August 21, 2007, the hearing officer issued an order granting the petitions for reconsideration, stating that the merits of the petition would be addressed expeditiously.

On October 4, 2007, the hearing officer addressed the petitions for reconsideration by issuing an *Amended Preliminary Order*.

On October 17, 2007, Moyles filed a "Petition for Reconsideration of Amended Preliminary Order." Because the *Amended Preliminary Order* responded to previously filed petitions for reconsideration, the Director will consider the petition for reconsideration filed by Moyles as exceptions to the hearing officer's order.

On October 18, 2007, the City of Eagle filed exceptions with the Director.

EXCEPTIONS

The following is a summary of the issues raised by the exceptions. Some of the issues will be resolved summarily in the response following the statement of each issue. If the issue is stated without immediate written analysis, the issue will be analyzed in greater detail in the text following the statement of the issues. If an issue is analyzed in the text following the full statement of the issues, the issue heading will refer to one or more of the identified numbered issues. Numbered findings of fact or conclusions of law in the following statement of issues and analysis all refer to numbers assigned in the *Amended Preliminary Order*. Findings and conclusions in this final order have been renumbered because of amendments to the original text.

Issues Raised by the City of Eagle

Eagle took exception to the *Amended Preliminary Order* as follows:

1. The record supported approval by IDWR of a permit appropriating water for future anticipated municipal needs.

2. IDWR does not have the authority to change the nature of use sought by Eagle's application (municipal) to another nature of use.

3. Reduction in artesian pressure does not constitute injury to a water right, and mitigation for the reduction in artesian pressure is not required by *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

4. The hearing officer failed to designate and fix the record at the time of the hearing, denying Eagle due process.

5. The hearing officer considered information not part of the evidentiary record, denying Eagle due process. This information included comments filed by Mike Moyle, Eugene Muller, and Charles Howarth.

6. The *Amended Preliminary Order* imposes obligations in excess of IDWR's authority. The Director assumes this exception includes the issues of changing a portion of the municipal application to fire protection as a beneficial use, reporting of water use during the permit development period, and construction of observation wells.

7. The *Amended Preliminary Order* failed to identify the portions of the record upon which the findings were based.

Response: The hearing officer is not required to reference all testimony and documentary evidence in the record upon which the decision is based.

8. The hearing officer considered issues not raised by protestants.

Response: Eagle does not specifically identify the issues it alleges were improperly considered, and, as a result, the Director cannot respond to this exception.

9. The applications seek water for 2,000 water connections within Block One of the western expansion area, not directly for the Legacy or Eaglefield developments.

Response: The final order corrects this distinction.

10. A reference in Finding of Fact no. 11 to the "existing Eagle municipal water system" is ambiguous because it does not describe the "existing Eagle municipal water system."
Response: Eagle owns and operates a municipal water system and proposes to expand the municipal water system mainlines and trunk lines to serve additional development including the Legacy and Eaglefield developments. The reference to the "existing Eagle municipal water system" is general but is not ambiguous. The finding of fact was not changed.

11. The coefficients 0.116 and 0.5 multiplied by the Theis equation draw downs to obtain shallow and intermediate aquifer responses, respectively, were not arbitrary numbers “with no basis in scientific or technical literature or derived from actual data.”

12. The phrase “nearby wells” in Finding of Fact no. 30 is not defined.

Response: The word nearby was stricken from the text.

13. Use of the word “some” in Finding of Fact no. 32 implies that the hearing officer consulted information not in the record.

Response: The finding of fact was amended to identify other sources of information.

14. There is no basis for Finding of Fact no. 35 stating: “The relationship between the rate of pumping and the draw downs is linear. In other words, a change in the pumping rate will result in a proportional change in the draw down.”

Response: An administrative agency is entitled to apply its own expertise in evaluating evidence presented during the hearing for a contested application. A change in the pumping rate will result in a proportional change in the draw down. Nonetheless, this final order relies on simulated draw downs directly calculated using the Theis equation at a pumping rate of 2.23 cfs for various radial distances from the pumping well. Average values for storativity and transmissivity were taken from Eagle Exhibit no. 14, titled *City of Eagle, Idaho 7-Day Aquifer Test*. A table of these values replaces the table of similar values previously calculated by extrapolation.

15. There is no basis in the record for Findings of Fact nos. 38 and 39.

Response: The facts set forth in Findings of Fact nos. 38 and 39 were taken directly from the testimony of Mike Moyle, and were not changed.

16. Finding of Fact no. 40 improperly infers that mink died as a result of pumping by Eagle.

Response: The facts contained in Finding of Fact no. 40 were taken from the testimony of Mike Moyle and were not changed. The finding does not refer to pumping activity by Eagle.

17. Findings of Fact nos. 41, 49, 53, and 55 are arbitrary and capricious and the use of the table in Finding of Fact no. 36 cannot be used to establish the facts stated therein.

Response: The Director assumes that Eagle takes exception to the drawdown values contained in the table found in Finding of Fact no. 36. The draw down values were recalculated using the Theis equation as described in paragraph 14 above. Findings of fact referring to the draw down values were amended.

18. Finding of Fact no. 58 is not supported by the record.

Response: The location of the Taylor well in the City of Star was estimated from the water right information for claim no. 63-5040 submitted by Taylor. The range of distance was determined by measuring the distance from the most westerly well proposed by Eagle to both the nearest and farthest boundaries of the quarter-quarter section in which the point of diversion for claim no. 63-5040 was claimed. Draw downs for the distance were taken from the amended table in the findings of fact.

Moyles took exception to the *Amended Preliminary Order* as follows:

19. *Parker v. Wallentine* requires compensation to senior water right holders when pumping by a junior water right holder causes declines in artesian pressures.

Response: See response to issue no. 3 in the text below. This final order holds that Moyles' non-domestic water rights do not create a right to maintenance of historical water levels or pressures.

Discussion of Issues Raised by Exceptions

Future Anticipated Needs for a Municipality (Issue no. 1)

Because of the unique obligations of a municipal water provider to the patrons served by the provider's municipal water system, the law allows municipal providers to obtain water rights for "reasonably anticipated future needs" for which full completion of works and beneficial use is not required. Idaho Code § 42-202(2) states:

An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made.

To appropriate water for reasonably anticipated future needs, the municipal provider carries an extra evidentiary burden to establish the "planning horizon" for the municipality or municipalities served, and to submit "population and other planning data" in support of the anticipated needs within the planning horizon. If a municipal provider seeks a water right for reasonably anticipated future needs, the planning horizon and supporting data cannot be inconsistent with the comprehensive land use plans. Furthermore, water rights for reasonably anticipated future needs cannot be granted to a municipal provider in areas "overlapped by conflicting comprehensive land use plans."

The intent of a municipality to seek water rights for reasonably anticipated future needs should be documented with the application for a municipal use. The original applications nos. 63-32089 and 63-32090 did not expressly state whether the applications sought a portion of the proposed appropriation for reasonably anticipated future needs. As a result, on February 8, 2005, a letter written by Lori Graves of IDWR stated:

Other information that must be provided for each application includes the following:

...

4. Clarification that the applications are or are not for reasonably anticipated future needs. If they are, please specify and justify the planning horizon.

In a response to the IDWR inquiry, on March 7, 2005, Chris Duncan of Holliday Engineers, wrote the following:

Clarification that the applications are or not for reasonable anticipated future needs.

The requested appropriation reflects an immediate need to supply municipal water service in Block 1 of the City of Eagle Municipally Owned Water System Amended Master Plan. Construction is anticipated to begin in 2005.

Eagle expressly stated in its initial documents supporting its applications that it was seeking to appropriate water for its immediate needs.

During the hearing, Eagle submitted evidence about the flow rate necessary to provide municipal water for 2,000 water connections within Block 1 of the Eagle Master Plan. Eagle also presented evidence that it projected the 2,000 connections would be completed within five years. Eagle Exhibit 7 graphically depicts a one hour peak demand of 2.23 cfs for general municipal use and an additional 6.68 cfs for fire protection for the 2,000 connections, or the full 8.91 cfs sought by the applications.

During Bruce Smith's direct examination of Vern Brewer, also of Holliday Engineers, the following exchange was recorded:

Bruce Smith: "Are you familiar with the term 'future needs water rights?'"

Vern Brewer: "Yes, I am."

Bruce Smith: "In terms of the water that is being applied for right now on these two applications, are these future needs water rights?"

Vern Brewer: "No, they are not."

Bruce Smith: "Are they for current use?"

Vern Brewer: "Correct."

Bruce Smith: "Current being five years?"

Vern Brewer: "Yes, as demonstrated on Exhibit 7, they are for the first block of roughly 2,000 homes which will be projected to be built out in about five years."

Eagle consistently maintained throughout the pendency of the applications that the applications did not seek appropriation of water for reasonably anticipated future needs. Even if

the exhibits received into evidence contained some information regarding population projections, the planning horizon, and water needs in the future, Eagle did not rely on the information to make a case for an appropriation of water for reasonably anticipated future needs. On the other hand, the protestants and the hearing officer understood that the applications only proposed appropriation of water for current needs. Eagle cannot now assert that the applications sought more than was represented.

The hearing officer quoted statutory language prohibiting approval of a municipal water right for reasonably anticipated future needs when there are conflicting comprehensive plans for the area. The amended preliminary order's refusal to approve a municipal water right for reasonably anticipated future needs for Eagle was not based on a conflict between comprehensive plans. Any discussions of conflicting impact areas for Eagle and the City of Star have been eliminated.

Authority to change the nature of use sought by Eagle's applications (municipal) to another nature of use. (Issue no. 2)

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 therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

Eagle did not seek an appropriation for reasonably anticipated future needs. Eagle's own testimony established that it was seeking an appropriation for 2.23 cfs for peak one hour demand and 6.68 cfs for fire protection that would serve Eagle's five year development needs. IDWR approves permits for a development period of up to five years.

The statutory identification of many sub-uses within the municipal use umbrella, including fire protection, does not prohibit the Department from limiting the uses, if necessary, to satisfy the criteria it must consider under Idaho Code § 42-203A or to ensure that other statutory provisions are satisfied or are not violated. Recognizing the entire 6.68 cfs for fire protection within the broad municipal definition would create a de facto water right for reasonably anticipated future needs. The fire protection portion of the appropriation should be separately identified and limited as water

that can only be used to fight a fire or prevent an existing fire from spreading. As a result, the hearing officer correctly approved the applications in part and granted a municipal permit for a smaller quantity of water by limiting the extra 6.68 cfs to a fire protection use.

Injury resulting from reduction in artesian pressure and mitigation for the reduction in artesian pressure. (Issue no. 3)

Eagle asserts that *Parker v. Wallentine* does not protect artesian pressure, but only protects water levels in a well that must be pumped to lift the water to the surface.

This order re-examines whether the protection of ground water pumping levels discussed in *Parker* extends to water rights that authorize diversion of ground water for non-domestic uses. This order concludes that water rights authorizing diversion of ground water for non-domestic uses, bearing priority dates earlier than the 1953 amendment to the Ground Water Act, including portions of water rights authorizing diversion of ground water from artesian wells owned by Moyles, do not create a right to protection of historic ground water levels. Water rights authorizing non-domestic uses are subject to reductions in ground water levels provided the ground water levels do not decline below reasonable pumping levels.

Moyles' wells provide water by artesian pressure for non-domestic and domestic uses. This order must address the question raised by Eagle of whether *Parker* protects artesian pressures for domestic uses. *Parker* states:

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. 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.

The first portion of the second sentence quoted above states that "historic pumping level[s]" are protected, but when discussing compensation, the Supreme Court states the protection is afforded if the subsequent appropriator lowers the water table and the senior appropriator is "required to change his method or means of diversion in order to maintain his right to use the water."

Where the artesian pressure raises water levels in a well, but not to the elevation of ground surface, the water user must pump water from the well to extract it for beneficial use. These artesian conditions would directly qualify as an "historic pumping level" under *Parker*. Adoption of Eagle's argument would protect artesian pressures that did not cause water levels to rise above ground surface but would exclude from protection artesian pressures that caused water to free flow at ground surface. Determining *Parker* protection based on whether a well is a pumped artesian well or a free flowing artesian well is not a reasonable distinction.

If all artesian pressures were not protected under *Parker*, IDWR would have difficulty subtracting out the portion of ground water surface elevation caused by artesian pressure and only protecting the non-artesian water levels.

Finally, if water has historically free flowed from an artesian well, and artesian pressure is the means by which water was diverted and distributed for the beneficial use, a reduction in artesian pressure caused by a subsequent appropriator that diminishes the flow will result in a significant and probably costly change in the water user's method or means of diversion in order to "maintain his right to use the water."

Parker protects historic ground water levels for qualifying domestic uses, whether or not they are caused by artesian pressure. Eagle's citation to *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 759 P.2d 891 (1988) is misplaced. The decision obliquely refers to a proposed conclusion in a draft IDWR order stating, "reduction in the artesian pressure was not considered an injury." The facts leading to this statement are not included with the Supreme Court decision, and the Supreme Court did not consider the issue. *Collins Bros. Corp.* did not address the issue of whether or not artesian pressure is protected under *Parker*.

Establishing the record at the time of the hearing and post hearing information considered by the hearing officer (Issue nos. 4 and 5)

During the hearing, the hearing officer informed the parties that IDWR staff would review the hearing record, particularly the technical information offered into the record by Eagle, and would analyze the information in a supplemental staff memorandum. Although unsolicited by the hearing officer, Eagle prepared and submitted additional technical documentation (titled *Addendum to City of Eagle 7-Day Aquifer Test Report*) to IDWR staff about its pump tests. Sean Vincent of IDWR wrote an additional staff memorandum to the hearing officer regarding both the evidence presented at the hearing and the additional information submitted by Eagle. The additional staff memorandum was submitted to the hearing officer. Eagle distributed its addendum to the parties.

On March 27, 2007, the hearing officer mailed a copy of the staff memorandum written by Vincent to the parties who attended the December hearing. The hearing officer also served a *Notice of Consideration of Additional Evidence and Post Hearing Order* on the parties. The document informed the parties that the hearing officer would consider the information in Eagle's addendum and the staff memorandum, and granted the parties until April 25, 2007 to review the documents and to submit technical comments about the addendum to the hearing officer and/or request a supplemental hearing. Additional comments were received from the parties.

Eagle now argues that the hearing officer improperly considered its post hearing addendum that it asked IDWR staff to review and make a part of the supplemental staff memorandum submitted to the hearing officer. Eagle also argues that the hearing officer improperly considered comments to the addendum and staff memorandum.

The *Notice of Consideration of Additional Evidence and Post Hearing Order* granted a time period for the parties to review the additional documents, submit technical comments, and/or

request a hearing. These post hearing procedures were recognized as affording sufficient due process in the case previously cited by Eagle, *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 759 P.2d 891 (1988). Furthermore, written comments submitted by Mike Moyle, Eugene Muller, and Charles Howarth can be characterized as argument and restatement of the record rather than additional factual evidence.

The hearing officer considered additional evidence because Eagle submitted the addendum to the original pump test report, and implicitly requested consideration of the additional evidence. The additional evidence contained in the addendum and the amended staff memorandum enhanced the evidence already submitted by Eagle, and did not act to the prejudice of Eagle. The post hearing procedures afforded Eagle necessary due process.

Conditions Requiring Construction/Identification of Monitoring Wells and Measurement and Reporting of Beneficial Use (Issue no. 6)

The *Addendum to City of Eagle 7-Day Aquifer Test Report* submitted by Eagle, suggested that Eagle be required to monitor water levels during the development period. The hearing officer adopted Eagle's own recommendation to verify that the water supply is sufficient and to ensure that its pumping does not injure other water rights. This final order amends the previously ordered number and nature of observation wells.

IDWR has the authority to condition approvals and is also expressly given the authority to require measurement and reporting in Chapter 7, Title 42 of the Idaho Code. Measurement and reporting of beneficial use is a reasonable requirement and will assist IDWR at the time of examination to determine the extent of beneficial use.

Basis for Multipliers in Eagle Exhibit 24 to Determine Draw Downs in Shallow and Intermediate Aquifers (Issue no. 11)

The hearing officer questioned Chris Duncan about the basis for the coefficient multipliers of 0.116 and 0.50 to determine draw downs in the shallow and intermediate aquifers, respectively. Duncan stated that 0.116 was derived from one measured response in monitoring well no. 10, completed in the shallow aquifer, during the pump test. A plot of the water level elevations for monitoring well no. 10 is contained in Appendix C.6 of Exhibit 14. Duncan testified the difference in pumping and the post recovery non-pumping elevation in well no. 10 was approximately 3/10 of a foot, or between three and four inches. This small amount of ground water level fluctuation could have been caused by a variety of factors and could have been easily influenced by other pumping from the shallow aquifer. In its addendum to the pump test report, Eagle stated: "The minor draw down in Well no. 10 is attributed to interference from another well . . ."

In addition, water levels in Well no. 10 declined most during the recovery period, not during the seven-day period when the test wells were being pumped, raising doubt about whether pumping from the deep aquifer had any effect on the shallow aquifer. Duncan testified that his own calculations, although not in evidence, would not show any effect on the shallow aquifer by pumping from the deep aquifer.

Finally, water levels in another well completed in the shallow aquifer (monitoring well no. 9) showed no declines in water level during the pump test (Exhibit 14, Appendix C5).

The hearing officer found the relationship between the draw down in monitoring well no. 10 and the calculated drawdown in the deep aquifer to be unreliable, and found that pumping from the deep aquifer would not cause draw downs in the shallow aquifer. The findings will be amended to reflect this reasoning, but the determination of no influence will not be changed.

Duncan testified that, during the pump test, there were no monitoring wells with production zones completed in the intermediate aquifer. Duncan stated that the 0.50 coefficient multiplier was a professional estimate, and was not derived from data. Based on evidence presented at the hearing, the hearing officer found that there is a hydraulic relationship between the intermediate and the deep aquifers. Eagle did not prove that modeled declines in water levels/pressures caused by pumping water from the deep aquifer diminished by 50% in the intermediate zone. Because of failure to prove the extent of the hydraulic relationship between the deep and intermediate aquifers, the hearing officer determined that pumping ground water from the deep aquifer would directly affect both the intermediate and deep aquifers uniformly. Finding of Fact no. 29 was not changed.

Requirement for Moyles to Test Pressure and Flow (Issue no. 19)

Moyles established they own water rights entitled to *Parker* protection. Based on evidence presented by Eagle, pumping by Eagle will cause a decline in artesian pressures in Moyles' wells. Moyles rely on the artesian pressure to deliver domestic water. Although the artesian pressures in Moyles' wells are entitled to Parker protection, the reduction in flow rate caused by the decline in artesian pressure, or degree of injury, is not yet known. The declines in pressure head could result in injury or no injury because the pressure decline may only cause an insignificant reduction in flow. Because of this uncertainty, Moyles must test the flow response to artesian head reductions as set forth herein.

Having considered the evidence presented at the hearing, and the information subsequently submitted to the hearing officer, the Director finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On January 19, 2005, the City of Eagle submitted two applications to appropriate water to IDWR. IDWR assigned application numbers 63-32089 and 63-32090 to the applications.

2. Application to appropriate water no. 63-32089 proposes the following:

Source:		Groundwater
Flow Rate:		4.0 cfs
Purpose of Use:		Municipal
Proposed Priority:		January 19, 2005
Period of Use:		Jan. 1 through Dec. 31
Points of Diversion:		
Township 04 North, Range 01 West,	Section 10	NWNE ¹
	Section 11	SEnw
	Section 10	NWNw
	Section 11	NWSE (two wells)
Place of Use:		The municipal service area for the City of Eagle.

3. Application no. 63-32090 proposes the following:

Source:		Groundwater
Flow Rate:		4.91 cfs
Purpose of Use:		Municipal
Proposed Priority:		January 19, 2005
Season of Use:		Jan. 1 through Dec. 31
Points of Diversion:		
Township 04 North, Range 01 West,	Section 10	NWNE
	Section 11	SEnw
	Section 10	NWNw
Place of Use:		The municipal service area for the City of Eagle.

4. The two applications identify eight possible separate well locations. The three points of diversion listed in application no. 63-32090 duplicate locations described in application no. 63-32089. Eagle only intends to construct a maximum of five wells.

5. Eagle owns and operates a municipal water system that serves a geographical area within a portion of the municipal boundaries of the City of Eagle. The Public Utilities Commission granted Eagle a certificated area of service for the Eagle municipal water system that also includes lands outside of the city boundaries. The certificated area for service by the Eagle

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 Ada County.

municipal water system is depicted in Eagle Exhibit 6 and is color-coded in pink. Eagle Exhibit 6 also shows locations of the five wells proposed by the applications.

6. A portion of Eagle's service area is located west of Linder Road, east of Highway 16, and north of Highway 44 to the edge of the foothills bounded on the north by Homer Road. This area will be referred to in this decision hereinafter as the "western expansion area."

7. Within the western expansion area, Block 1 (described in chapter 6 of Eagle Exhibit 5) will contain approximately 2,000 customer hookups to Eagle's municipal water system.

8. Two housing developments named Eaglefield and Legacy are currently proposed for construction within Block 1 of the western expansion area. The developers of Eaglefield and Legacy propose construction of approximately 2,200 homes. The homes will be constructed on approximately 800 to 900 acres in Sections 2, 3, 9, 10, and 11, Township 4 North, Range 1 West.

9. Eagle predicts that the development for the 2,200 homes will be complete within five years, although all of the homes may not be built by that time.

10. Developers proposing construction of residential housing within Eagle are required to dedicate sufficient ground water or surface water rights to the proposed developed lands to provide irrigation demands within the subdivision. When surface water is the traditional method of irrigating the lands prior to development, the developer is required to install a separate system from Eagle's municipal water system for delivery of surface water for irrigation.

11. The applications propose delivery of water primarily for in-house use in the 2,000 connections projected by the Eagle Master Plan (Eagle Exhibit 5). The peak one-hour demand for in-house use in 2,000 residential units is 2.23 cfs. In addition, Eagle is required to supply the development with 6.68 cfs for fire protection. The total projected instantaneous demand is 8.9 cfs, the rounded, combined flow rate sought by the two applications.

12. The applications do not seek to appropriate water for reasonably anticipated future needs of Eagle, but seek to appropriate sufficient water to meet the needs of 2,000 connections to the Eagle City municipal water system during the next five years.

13. The developers of the proposed subdivisions must pay for the five proposed wells and internal delivery system within the development. In addition, Eagle has set aside monies in its budget for construction of main lines and trunk lines to connect with the existing Eagle municipal water system. Eagle also has the power to levy assessments against its water users for payment of additional improvements. Finally, Eagle has the authority to form a Local Improvement District (LID) and issue bonds to be repaid by future assessments.

14. Eagle does not presently intend to employ any water storage to meet peak demands. Storage to supply short-term peak demands and fire flow demands could be a component of future use, however. Eagle Exhibit 6 identifies the location of a future storage tank at the northern boundary of the western expansion area.

15. In May 2006, Eagle constructed two wells within the proposed development property. Both of the wells were constructed according to Idaho Department of Environmental Quality standards.

16. The first well was constructed in the SENW, Section 11, Township 4 North, Range 1 West. This well will be referred to hereafter as Well no. 1 or the "Legacy Well." The second well was constructed in the NWSE, Section 11, Township 4 North, Range 1 West. This well will be referred to hereafter as Well no. 2, or the "Eaglefield Well."

17. An aquifer pump test was conducted from approximately May 25 through June 19, 2006, by pumping the Eaglefield Well (also referred to hereafter as "pumping well") and monitoring water levels in other wells (each of the wells is hereafter referred to as "observation well" or "monitoring well"). The test was conducted in three separate phases. Background testing was conducted for seven days prior to the pump test. A seven-day constant rate pump test commenced on June 2 and ended on June 9 at a pumping rate of 1,580 gallons per minute ("gpm"). Following pumping, water levels were measured in the pumping well and the monitoring wells for seven days following the end of the pumping period to determine recoveries of ground water levels without pumping.

18. Eagle monitored the water levels in eight wells. One of the monitoring wells was the pumping well (Eaglefield Well). Water levels in the Legacy Well were monitored. Water levels in six other privately owned wells were also monitored. Other parties to this contested case were not given an opportunity to participate in the test and monitor their own wells during the test.

19. Eagle submitted to IDWR a report titled *City of Eagle, Idaho 7-Day Aquifer Test*. The report was received into evidence as Eagle Exhibit 14. Copies of the aquifer test were made available to the parties.

20. IDWR staff reviewed the report. In a staff memorandum dated November 29, 2006, staff found several deficiencies in the report. The staff memorandum stated, among other things, the following:

a. A higher pumping rate than was originally proposed for the lower yielding Monitoring Well # 1 (Legacy Well) could and should have been used to stress the system. If Eagle had done so, the effect on other nearby wells and possible boundary conditions would have been more clearly identified.

b. Site hydrogeology should have been consulted to determine whether the test data and conceptual models were reasonable.

c. Other factors such as water level trends, barometric pressure fluctuations, and fluctuations caused by nearby pumping wells should have been examined and used to correct and/or interpret the test data.

d. Tables should have been prepared to identify the various wells and their construction characteristics. Methods of analysis other than the Theis Equation should have been

employed. This would have verified the results of the Theis estimates. Use of other methods would have better analyzed the water level recovery data.

- e. Significant differences in the values estimated for storativity were not well explained.
- f. Some water levels recovered to an elevation higher than the initial static water level.

21. The above deficiencies were discussed at the hearing. As a result of these concerns, the hearing officer requested additional analysis of data and information following the conclusion of the presentation of evidence.

22. Ground water levels measured in a monitoring well owned by Ricks (referred to as Monitoring Well no. 6 in *City of Eagle, Idaho 7-Day Aquifer Test*) showed some signs of a boundary condition. The Ricks well began a steeper decline in water levels approximately four to five days into the pump test. Because the rate of pumping of the Eaglefield Well was not as high as it could have been, and because the pumping test was of somewhat short duration, this possibility of boundary conditions was never explored.

23. In an addendum to its original report submitted to the hearing officer after the hearing, Eagle addressed some of the concerns raised by IDWR staff. As a result, IDWR staff issued a supplemental staff memorandum dated February 27, 2007. The author of the supplemental memorandum, Sean Vincent, wrote the following:

1. The water level and aquifer test data presented in the Addendum generally support the authors' primary conclusion (i.e., the deep sand layers that are targeted for production have sufficient capacity for additional withdrawals). The fact that static water levels in the deep system near the area of proposed development are above land surface and appear to be relatively stable suggest that the deep aquifer system is not currently in a state of overdraft.
2. An exception to the relatively stable water level trend described above is the hydrograph for Well 04N01W-31AAA1, which is located approximately 5 miles southwest of the area of proposed development. The water level in this well has declined by approximately 10 to 15 feet since 1970. Because the aquifer strata are dipping, however, this 462-foot deep well may not be producing from the same aquifer system that is targeted for the development by the City of Eagle.
3. The inclusion of a conceptual hydrogeologic model, hydrographs for area wells, and additional analyses using the Cooper-Jacob (1946) and Theis (1935) residual drawdown methods, significantly improves the value of the aquifer test as a basis for evaluating the water supply.

4. As discussed in the Addendum, semilogarithmic plots of drawdown and residual drawdown suggest that both positive (recharge) and negative (finite aquifer) boundaries affected the test data. The observed behaviors are consistent with the conceptual model of a finite, confined aquifer that receives recharge from the surrounding uplands. Given the available data, application of the Theis (1935) solution to estimate the aquifer properties is appropriate for this hydrologic setting.
5. The Addendum also includes calculations for estimating potential impacts to existing wells. The calculations, which also are based on the Theis (1935) solution, are conservative in that they neglect to account for aquifer recharge but non-conservative in that they are premised on the assumption of an infinite aquifer.
6. The 1-year timeframe for evaluating impacts to existing wells is appropriate, in my opinion, and is consistent with guidance for determining yield for public drinking water supply wells (IDEQ, 2007). The ranges of transmissivity and storativity values used to estimate drawdown also are appropriate based on available information.
7. I verified that the drawdown estimates presented in Table 4 of the Addendum were calculated correctly using the series approximation of the Theis (1935) solution and the assumed input values.
8. Although the data analysis provides the basis for estimating hydraulic properties for the target aquifer system, the aquifer test was not of sufficient duration to definitively evaluate aquifer boundary conditions and long-term impacts associated with pumping. As recommended in the Addendum (Recommendations 15 and 16), a long-term water level and discharge rate monitoring program should be implemented if the water right applications are approved in order to evaluate water level trends as affected by pumping. Dedicated upgradient and downgradient monitoring wells that are completed in the deep aquifer system within the zone of influence of the aquifer test are recommended.

24. The Director adopts the Vincent analysis text quoted above as findings of fact. The Director specifically finds that “static water levels in the deep system near the area of the proposed development are . . . relatively stable and suggest that the deep aquifer is not currently in a state of overdraft.” The Director also specifically finds that the evaluation of draw downs in other wells from pumping by Eagle using the Theis analysis is reasonable.

25. Ground water underlying the location of the proposed wells resides in three aquifers separated by discontinuous clay aquitards. The discontinuity of the impervious clay strata allows some communication between the aquifers. This communicative relationship between the aquifers will be discussed in subsequent findings.

26. The shallow aquifer is a water table aquifer extending from land surface to approximately 100 feet below land surface. The intermediate aquifer is generally found from 100-200 feet below ground surface and is at least semi-confined. The deep aquifer is located at depths below approximately 200 feet and is under artesian pressure. There may also be deeper aquifers, including geothermal aquifers.

27. Two of the monitoring wells are completed in the shallow aquifer. Eagle Exhibit 14 shows that three of the monitoring wells are completed in the intermediate aquifer, although Chris Duncan testified that none of the observation wells were completed in the intermediate aquifer. The Eaglefield Well, the Legacy Well, and one of the United Water wells are completed in the deep aquifer. Evidence at the hearing established that a United Water intermediate aquifer monitoring well and a United Water deep aquifer monitoring well were completed within the same borehole. Upon construction, United Water nested strings of casing inside a single well. The casing for the monitoring well identified as having been constructed into the deep aquifer commingled the intermediate and deep aquifers together, resulting in a mixing of water from the intermediate and deep aquifers, and also mixing the pressures of the two zones. This commingling probably skewed the data gathered from the United Water deep aquifer well. As a result, the only direct measurements of draw downs of a monitoring well completed in the deep aquifer caused by pumping are the measurements of draw downs for the Legacy well.

28. Eagle Exhibit 8 is a summary of the potential effects on the protestants' wells of pumping the proposed Eagle wells at various flow rates.

29. Eagle Exhibit 24 contains information about the protestants' wells and tables estimating draw downs using the Theis equation at various radial distances from a producing well in the three different aquifers: the shallow aquifer, the intermediate aquifer, and the deep aquifer.

30. Table 1 of Eagle Exhibit 24 is a modeled estimate of potential draw downs in the shallow aquifer caused by continuous pumping of the Eaglefield Well at various flow rates and distances from the Eaglefield Well. The estimates were calculated by multiplying modeled Theis equation draw downs in the deep aquifer by 0.116. The 0.116 multiplier was computed by dividing a 3/10 of a foot drawdown in monitoring well no. 10 by the computed Theis draw down in the deep aquifer at the same location as well no. 10. The coefficient multiplier is derived from data gathered from only a single monitoring well (monitoring well no. 10) showing an almost insignificant draw down of 3 to 4 inches. Water levels in well no. 10 declined most during the recovery period, not during the seven day period when the Eaglefield well was being pumped, raising doubts about the relationship between pumping and the measured declines. The minimal water level declines in monitoring well no. 10 were most likely caused by pumping water from another nearby well constructed in the shallow aquifer. As a result, the coefficient is disregarded as being unreliable.

31. There are substantial aquitards between the deep and shallow aquifers that significantly reduce the hydraulic communication from the deep to the shallow aquifer. Pumping from the deep aquifer causes little or no effect on the shallow aquifer.

32. Table 2 of Eagle Exhibit 24 is a modeled estimate of potential draw downs in the intermediate aquifer caused by continuous pumping of the Eaglefield Well at various flow rates and distances from the Eaglefield Well. The draw downs were calculated by multiplying the modeled Theis equation draw down values for the deep aquifer by 0.5. The 0.5 multiplier has no basis in technical literature or data analysis.

33. There is a hydraulic relationship between the intermediate aquifer and the deep aquifer from which Eagle proposes to produce water. Although the relationship may be limited by the separation from the deep aquifer, the degree of the limitation was not established by the record. As a result, the Director assumes the full Theis equation draw downs will occur in the intermediate aquifer without applying a fractional multiplier, and will use a modification of Table 3 of Eagle Exhibit 24 to determine the impacts of pumping the proposed wells on wells constructed in the intermediate aquifer.

34. Table 3 of Eagle Exhibit 24 contains results of a direct Theis equation calculation of draw downs caused by continuous pumping of the Eaglefield Well at various flow rates and distances from the Eaglefield Well. Pumping from the deep aquifer will directly affect other water users diverting from the deep aquifer as predicted by Eagle Exhibit 24.

35. Water residing in the intermediate and deep aquifers in the area of proposed well construction is under artesian pressure. Artesian pressure in the deep aquifer causes water to rise above land surface in some wells constructed with a production zone in the deep aquifer. These artesian pressures have been used by some of the protestants to supply water to their beneficial uses.

36. The following is a table of the active protestants' names, water right priorities/dates of construction, and the depths of their wells. Most of this information is taken from Eagle Exhibit 24. Additional information was added from testimony, protestants' water right exhibits, or scaling distances from maps provided as exhibits.

Protestant	Water Right	Priority - Construction	Distance from Nearest Proposed Eagle Well	Comments
Dean & Jan Combe	63-2858A	8/5/1956	5,900 ft	Well is 65 feet deep
Mike Dixon	63-2957 63-2958 63-31988	8/28/1953 8/28/1953 3/1/1976		No information about the depth or number of wells was presented at the hearing
Charles Howarth	Domestic (not recorded)	2002	1,399 ft	Well is 333 feet deep
Corrin & Terry Hutton	Domestic		11,992 ft	Well is 115 feet deep
Charles W. Meissner	Three wells. Well logs for	July 1981 July 1970	4,800 ft	Well is 90 feet deep Well is 103 feet deep

	two of the wells. No recorded water rights.			
Mike Moyle	63-2546 63-2609	12/12/1939 2/15/1944	5,643 ft to 7,200 ft	Six wells, all completed in the deep aquifer
Eugene Muller	63-22650	7/25/1887	3,286 ft	Well was initially completed in the shallow aquifer. The well was redrilled in 1979, and now the production zone is in the deep aquifer
Dana & Viki Purdy	63-2920 63-15680 63-22652	1/2/1953 6/1/1900 6/1/1967	3,390 ft 2,700 ft approx.2,640 ft	Well is 90 feet deep Well is 250 feet deep Well is 120 feet deep
Sam & Kari Rosti	Domestic (not recorded) 63-11715	1980 1992	3,444 ft	Well is 255 feet deep Well is 445 feet deep
Jerry & Mary Taylor	63-5040 63-2858B 63-17523 63-3296 63-32189	3/1/1941 6/10/1951 6/1/1960 6/5/1962 3/31/1976	2-3 miles	Artesian, free flowing Other wells completed in the shallow aquifer

37. Given Eagle's projected growth, 2.23 cfs is the flow rate needed for Eagle's anticipated expansion. The residual flow of 6.68 cfs is for occasional and sporadic fire protection use.

38. Pumping of Eagle's proposed wells at a rate of 2.23 cfs will reduce the artesian pressure in wells constructed in the deep aquifer. Pumping will also reduce artesian pressures in wells constructed in the intermediate aquifer.

39. Department staff calculated the draw downs using the Theis equation at a pumping rate of 2.23 cfs for various radial distances from the pumping well. Values for storativity and transmissivity were taken from Eagle Exhibit no. 14, titled *City of Eagle, Idaho 7-Day Aquifer Test*. The storage coefficient used was derived from the average value presented in the original aquifer test documentation at 5.53×10^{-3} and an average aquifer transmissivity value of 18,700 ft²/day for 365 days. The modeled draw downs are as follows:

Distance from Pumping Well (ft)	Calculated Water Level Draw Down from Pumping 2.23 cfs for 365 Days (ft)	Distance from Pumping Well (ft)	Calculated Water Level Draw Down from Pumping 2.23 cfs for 365 Days (ft)
1,200	6.23	4,500	4.07
1,400	5.98	5,000	3.9
1,600	5.76	6,000	3.6
1,800	5.57	7,000	3.35
2,000	5.4	8,000	3.13
2,500	5.03	9,000	2.94
3,000	4.73	10,000	2.77
3,500	4.48	15,000	2.13
4,000	4.26		

Moyles

40. Joseph, Lynn, and Mike Moyle own six wells constructed in the deep aquifer that flow under artesian pressure. Four of the wells are described as points of diversion by water rights nos. 63-2546 and 63-2609, bearing priority dates of 1939 and 1943, respectively. These water rights have been decreed in the Snake River Basin Adjudication. A fifth well is the point of diversion for an unrecorded domestic use for a home built by Joseph and Lynn Moyle in approximately 1970. The sixth well was constructed in 1997 to supply water to Mike Moyle's home.

41. Moyles have measured the closed-in pressure in the wells at 10 pounds per square inch ("psi"). Ten psi correlates to a water level or pressure head of approximately 23 feet. The flowing artesian wells have supplied stock water for as many as 43,000 mink on Moyles' property. In addition, Moyles' wells have provided, by artesian pressure, irrigation water and water for commercial refrigeration and cooling. Finally, the flowing artesian wells provide domestic water for several homes. In some locations, small, relief pumps at the location of the water use increase the pressure for commercial and domestic uses.

42. The four Moyle wells described by decreed or claimed water rights are remote from an electrical supply. As a result, pumping the wells would require a substantial expenditure to provide electrical power or other means of operating a water pump if the artesian pressure declines are large enough that the flow is significantly diminished.

43. As artesian pressure declines, the flow from the artesian wells will decrease. During the end of June 2006 or the first part of July 2006, the pressure dropped in some of the artesian wells. Moyles discovered that artesian water was not flowing to the end of the water lines providing drinking water for the mink. As a result, some of their mink died from lack of water.

44. If Moyles' nearest well is approximately 5,643 feet away from a new well pumping continuously at a flow rate of 2.23 cfs, the table in Finding of Fact no. 39 predicts a decline in

artesian pressure of approximately 3.6 to 3.9 feet. A reduction from an artesian pressure head of 23 feet down to approximately 19 feet may reduce the flow needed to supply the domestic, commercial, stockwater, and irrigation needs for Moyles.

Muller

45. Eugene Muller holds water right no. 63-22650 for domestic and stockwater uses. The original well was constructed to a depth of 70 feet, and the production zone was in the shallow aquifer. In 1979, the well could no longer provide water for Muller's beneficial use, and Muller drilled a new well in the deep aquifer. The new well is a flowing artesian well.

46. Muller testified that water flowed from the original well. His testimony is inconsistent with the described characteristics of the shallow aquifer. Nonetheless, any loss of pressure or water level in the original well occurred prior to 1979 when the original well failed, requiring construction of a new well in the deep aquifer.

Howarth

47. In approximately 2001 or 2002, Charles Howarth constructed a domestic well in the deep aquifer. The domestic well is under artesian pressure, maintaining a closed in pressure of 3 to 7 psi.

Meissner

48. Charles Meissner, Jr. owns three wells. One of the wells is completed in the shallow aquifer at a depth of 90 feet.

49. A second well was constructed to a depth in excess of 103 feet (See Protestants Exhibit 404, second page) in 1970, and is used for domestic and stockwater purposes. This well will be referred to as the "Double R Cattle Well." The well casing is not perforated, and the water in the well is derived from the bottom of the casing. The casing passes through a significant layer of clay from 70 to 85 feet in depth that probably acts as an aquitard. The water underlying the aquitard is under artesian pressure, but the water does not flow above land surface. The production zone for the well is completed in the intermediate aquifer.

50. The table contained in Finding of Fact no. 39 establishes that, at a distance of 4,800 feet from the nearest proposed Eagle well and at a continuous pumping rate of 2.23 cfs for one year, water levels in the Double R Cattle Well will decline approximately four feet.

51. The depth and other information about Meissner's third well was not presented, except Meissner speculated that the well has collapsed.

Purdy

52. Dana and Viki Purdy hold water right no. 63-2920 authorizing irrigation from ground water. The point of diversion is a well approximately 90 feet deep. Purdys pump

supplemental ground water for irrigation when surface water is not available for irrigation. The water right for the irrigation well bears a priority date of 1953, but the well is constructed in the shallow aquifer.

53. Water right no. 63-15680 authorizes use of water for domestic and stockwater purposes and bears a priority date of June 1, 1900. The well is constructed to a depth of 250 feet. Viki Purdy testified that the well has been in place during several decades she has lived on the Purdy farm and that the well had not been worked on or replaced. Water in the well is under artesian pressure but does not free flow. The production zone for this well is most likely completed in the deep aquifer.

54. The table contained in Finding of Fact no. 39 establishes that, at a distance of 2,700 feet from the nearest proposed Eagle well and at a continuous pumping rate of 2.23 cfs for one year, water levels in the well for water right no. 63-15680 will decline approximately five feet.

55. Water right no. 63-22652 authorizes domestic and stockwater uses, and bears a priority date of June 1, 1967. The point of diversion for water right no. 63-22652 is a well drilled to a depth of 120 feet. The well is constructed in the intermediate aquifer. Water in the well is under artesian pressure, but water does not free flow at ground surface. The well was constructed in 1966.

56. The table contained in Finding of Fact no. 39 establishes that, at an approximate distance of 2,640 feet from the nearest proposed Eagle well and at a continuous pumping rate of 2.23 cfs for one year, water levels in the well for water right no. 63-22652 will decline approximately five feet.

57. A well log for another well associated with a home owned by Dana Purdy's mother was received into evidence. The well was drilled in 1991.

Taylor

58. Jerry and Mary Taylor own several water rights. Three of the water rights authorize a total irrigation of 17 to 18 acres. Another water right authorizes domestic use. The Taylor wells described by these four water rights are completed in the shallow aquifer.

59. Claim no. 63-5040 is for a domestic/commercial use in the City of Star. The point of diversion described by claim no. 63-5040 is in excess of two miles (between 10,000 and 15,000 feet) away from the nearest well proposed for construction by Eagle. Water levels in the well identified by claim no. 63-5040 would decline by two to three feet after pumping the nearest proposed Eagle well at a continuous pumping rate of 2.23 cfs for one year.

Combe

60. Dean and Jan Combe hold a water right for a domestic use from a well with a priority date of August 5, 1956. The well is 65 feet deep, and is completed in the shallow aquifer.

Rosti

61. Sam and Kari Rosti own a domestic well drilled in 1980. In addition, they own a 445 foot deep irrigation well completed in the deep aquifer drilled in 1992.

Boise River

62. Diversion of water from the deep aquifer would have little or no effect on the Boise River in the reach from Lucky Peak to just below Star Bridge. The flows of the Boise River in this zone are affected primarily by water residing in the shallow aquifer. Water in the deeper zones is separated by an aquatard or several aquatards. Water in the deep aquifer migrates westerly toward the Snake River.

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. Idaho Code § 42-111 defines the phrase “domestic purposes.” Stockwater use of up to 13,000 gallons a day is recognized as use of water for domestic purposes.

4. In 1951, the Idaho Legislature enacted legislation known as the Ground Water Act. The Ground Water Act, as amended, is currently codified in Idaho Code §§ 42-226 through 42-237g. Section 1 of the 1951 Ground Water Act provided as follows:

SECTION 1. GROUND WATERS ARE PUBLIC WATER. -- It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined. All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.

1951 Idaho Sess. Laws, ch. 200, § 1, p. 423 (approved Mar. 19, 1951) (emphasis added).

5. Section 2 of the 1951 Ground Water Act provided an exception for ground water rights for domestic purposes:

SECTION 2. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. – The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be in any way affected by this act; providing such wells and withdrawal devices are subject to inspection by the department of reclamation and the department of public health. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.

Id., § 2, p. 424.

6. Importantly, with respect to the administration of all non-excepted rights to the use of ground water, Section 4 of the 1951 Ground Water Act provided that, “the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act.” *Id.*, § 4, p. 424 (currently codified at Idaho Code § 42-229).

7. In 1953, the Idaho Legislature amended Section 1 of the 1951 Ground Water Act, adding the italicized language below relating to the full economic development of the resource at the end of the first sentence of the section:

SECTION 1. GROUND WATERS ARE PUBLIC WATER. -- It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined *and, while the doctrine of “first in time is first in right” is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer as herein provided.* All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their

appropriation and allotment to those diverting the same for beneficial use. All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.

1953 Idaho Sess. Laws, ch. 182, § 1, p. 278 (approved Mar. 12, 1953) (italics in original) (emphasis added).

8. 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. The “reasonable pumping level” provision applied to “all rights to the use of ground water, whenever or however acquired or to be acquired ... unless specifically excepted” from the Ground Water Act. Idaho Code § 42-229.

9. In 1978, the Idaho Legislature amended the Ground Water Act again. The 1978 amendment modified Section 2 of the 1951 Ground Water Act, now codified as Idaho Code § 42-227, to emphasize that domestic wells are exempt from the permit requirements of Idaho Code § 42-229, by striking the words “in any way affected by this act,” and substituting the words “subject to the permit requirement under section 42-229, Idaho Code”:

AN ACT
RELATING TO DOMESTIC WELL REGULATIONS; AMENDING SECTION
42-227, IDAHO CODE, TO CLARIFY THAT DOMESTIC WELLS ARE
EXEMPT FROM THE PROVISIONS OF SECTION 42-229, IDAHO
CODE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-227, Idaho Code, be, and the same is hereby amended to read as follows:

42-227. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be ~~in any way affected by this act~~ subject to the permit requirement under section 42-229, Idaho Code; providing such wells and withdrawal devices are subject to inspection by the department of water resources and the department of health and welfare and providing further that the drilling of such wells shall be subject to the licensing provisions of section 42-238, Idaho Code. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.

Approved March 29, 1978.

1978 Idaho Sess. Laws, ch. 324, § 1, p. 819.

10. In 1987, the Idaho Legislature amended the Ground Water Act to address concerns involving the administration of rights to the use of low temperature geothermal ground water resources, most specifically to restrict its use for non-heating purposes by the addition of Idaho Code § 42-233. 1987 Idaho Sess. Laws, ch. 347, § 3, p. 741. The 1987 amendments also added the following language to Idaho Code § 42-226 relating to reasonable pumping levels: “In determining a reasonable ground water pumping level or levels, the director of the department of water resources shall consider and protect the thermal and/or artesian pressure values for low temperature geothermal resources and for geothermal resources to the extent that he determines such protection is in the public interest.” The 1987 act also amended what originally was the last sentence of Section 1 of the 1951 Ground Water Act, later codified as Idaho Code § 42-226, to read as follows:

~~All This act shall not affect the rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed its enactment.~~

1987 Idaho Sess. Laws, ch. 347, § 1, at 743.

11. The effect of this latter amendment to Idaho Code § 42-226 under the 1987 act was to make the new restriction on the use of geothermal rights prospective only. Thus, all pre-1987 geothermal water rights for non-heating purposes remain unaffected by the restriction in the 1987 act. The 1987 amendment to Idaho Code § 42-226 does not have the effect of exempting all pre-1951 ground water rights from administration under the Ground Water Act. Section 4 of the 1951 Ground Water Act, codified at Idaho Code § 42-229, continues to provide that, “the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act.”

12. The constitutional and common law principles upon which Idaho Code § 42-226 is based, date from the early part of the twentieth century. Art. 15, §§ 1, 3, and 7, Idaho Const.; Idaho Code § 42-101; *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915) (“It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes.”); *Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 191 (1900) (“It is the policy of the law to prevent wasting of water.”).

13. In *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), the Idaho Supreme Court noted:

. . . [T]he original version of what is now I.C. § 42-226 was enacted in 1951. 1951 Idaho Sess.Laws, ch. 200, § 1, p. 423. *Both the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute.* Therefore, we fail to see how I.C. § 42-226 in any way affects the director’s duty to distribute water to

the Mussers, whose priority date is April 1, 1892. 125 Idaho 392, 396, 871 P.2d 809, 813 (1994) (emphasis added).

14. The legislative history of the Ground Water Act demonstrates that the Idaho Supreme Court in *Musser* was incorrect when it noted that, “Both the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute.” As stated above, the 1951 Ground Water Act provided: “All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.” 1951 Idaho Sess. Laws, ch. 200, § 1. The 1951 Ground Water Act also provided that, “the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act.” *Id.*, § 4.

15. It was only in 1987 that the Legislature in acting to address concerns involving the administration of rights to the use of low temperature geothermal ground water resources amended what originally was the last sentence of Section 1 of the 1951 Ground Water Act, later codified as Idaho Code § 42-226, to read as follows:

~~All This act shall not affect the rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed its enactment.~~

1987 Idaho Sess. Laws, ch. 347, § 1, at 743.

16. Again, the effect of this change is that all pre-1987 geothermal water rights for non-heating purposes remain unaffected by the restriction regarding low temperature geothermal water in the 1987 act. The 1987 amendment to Idaho Code § 42-226 does not have the effect of exempting all pre-1951 ground water rights from administration under the Ground Water Act. Section 4 of the 1951 Ground Water Act, codified at Idaho Code § 42-229, continues to provide that, “the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act.”

17. The understanding that only a limited class of water rights are “excepted” from the provisions of the Ground Water Act is consistent with the Idaho Supreme Court’s decision in *Baker v. Ore-Ida Foods, Inc*, 95 Idaho 575, 513 P.2d 627 (1973). There, senior ground water users who held six irrigation water rights with priority dates of 1948, 1950, and 1959, brought an action in district court to enjoin junior ground water irrigators from pumping until such time as the senior wells resumed normal production. *Id.* at 577, 513 P.2d at 629. During trial, it was established that ground water pumping by juniors and seniors resulted in withdrawals from the aquifer in excess of the reasonably anticipated rate of future natural recharge, resulting in mining of the aquifer. *Id.* Because pumping by senior ground water irrigators did not exceed the reasonably anticipated rate of future natural recharge, the district court entered an order enjoining junior ground water irrigators from pumping and assigned further administration to the Department. *Id.* at 578, 513 P.2d at 630. In affirming the district court, the Idaho Supreme Court framed two issues on appeal:

This Court must for the first time, interpret our Ground Water Act (I.C. § 42-226 et seq.) as it relates to withdrawals of water from an underground aquifer in excess of the annual recharge rate. We are also called upon to construe our Ground Water Act's policies of promoting "full economic development" of underground water resources and maintaining "reasonable pumping levels."

Id. at 576, 513 P.2d at 628.

18. In response to the issue of reasonably anticipated rate of future natural recharge, the Court first examined its prior decisions on maintenance of water table levels, particularly *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933), which found "that a senior appropriator of ground water is forever protected from any interference with his method of diversion. Under *Noh* the only way that a junior can draw on the same aquifer is to hold the senior harmless for any loss incurred as a result of the junior's pumping. If the costs of reimbursing the senior become excessive, junior appropriators could not afford to pump." *Id.* at 581, 513 P.2d at 633. In analyzing the Ground Water Act, the Court stated that the Act "forbids 'mining' of the aquifer." *Id.* at 583, 513 P.2d at 635. Therefore, ground water withdrawals by juniors are permitted under the Ground Water Act, provided that the "reasonably anticipated rate of future natural recharge" is not exceeded. *Id.* "Where the clear implication of a legislative act is to change the common law rule we recognize the modification because the legislature has the power to abrogate the common law. We hold *Noh* to be inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest. *Noh* is further inconsistent with the Ground Water Act." *Id.* (internal citations omitted).

19. In response to the Act's requirement of "full economic development" of the State's underground water resources, the Court found that "the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. Art. 15, § 7. Full economic development of Idaho's ground water resources will benefit all of our citizens." *Id.* at 584, 513 P.2d at 636.

20. While full economic development was prescribed by the Ground Water Act, the Court stated that the Act did protect holders of senior ground water rights through the maintenance of "reasonable pumping levels," but did not state that the senior irrigation wells that pre-dated the enactment of the Ground Water Act were excepted:

In the enactment of the Ground Water Act, the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water in order to promote full economic development of the resource. The legislature has said that when private property rights clash with the public interest regarding our limited ground water supplies, in some instances at least, the private interests must recognize that the ultimate goal is the promotion of the welfare of all our citizens. *See Clark*, 5 Water and Water Rights, § 446 at 474 (1972). We conclude that our legislature attempted to protect historic water rights while at the same time promoting full development of ground water. Priority rights in ground water are and will be protected insofar as they comply

with reasonable pumping levels. Put otherwise, although a senior may have a prior right to ground water, if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected.

Id. at 584, 513 P.2d at 636.

21. Under the Ground Water Act as affirmed by *Baker*, full economic development of Idaho's underground water resources is required. Unless a water right is specifically excepted under Idaho Code § 42-229, holders of senior ground water rights are protected if junior ground water diversions exceed the reasonably anticipated rate of future natural recharge, or if pumping levels become unreasonable.²

22. In this case, there is no evidence that diversions have exceeded the reasonably anticipated rate of future natural recharge or that pumping levels are unreasonable.

23. 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 uses by the Legislature in 1978, 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 compensation by the junior appropriator for the expenses incurred by the senior appropriator.

24. In *Parker*, the Court stated:

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. 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. See *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933).

Id. at 512, 650 P.2d at 654 (emphasis supplied). The 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

² In the contested administrative case *In the Matter of Application to Amend Permit to Appropriate Water no. 63-12448 in the Name of the City of Eagle* (Sept. 22, 2005), IDWR determined that two water rights authorizing non-domestic uses were entitled to protection of historic pumping levels under *Parker*. This order determines that water rights authorizing non-domestic uses that bear priority dates earlier than the 1953 amendment to the ground water act do not create a right to protection of historic ground water levels. The holding in this order supercedes the previous holding in the decision for application to amend permit no. 63-12448.

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.

Id. at 514, 650 P.2d at 656.

25. Under *Parker*, if (1) pumping of ground water by junior ground water appropriators causes declines in pumping water levels in the wells of holders of senior-priority domestic water rights because of local well interference, and (2) the water rights held by the senior domestic water right holders bear priority dates earlier than 1978, the holders of the senior domestic water rights are entitled to compensation for the increased costs of diverting ground water caused by the declines in ground water levels. The maintenance of historic pumping levels that was discussed in *Noh* and relied upon in *Parker* to protect senior-priority domestic ground water rights cannot be extended to non-excepted ground water rights, such as those for irrigation. Idaho Code § 42-229. As stated in *Baker*, *Noh* has been superseded by the Ground Water Act: "We hold *Noh* to be inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest. *Noh* is further inconsistent with the Ground Water Act." 95 Idaho 581, 513 P.2d at 633. "Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels. Put otherwise, although a senior may have a prior right to ground water, if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected." *Id.* at 584, 513 P.2d at 636.

26. The extent to which *Parker* provides protection to the protestants' water rights depends on proof of injury and similarities to the facts of the *Parker* case.

27. In *Parker*, the owner of the domestic well was unable to divert water from the domestic well within minutes of when the junior priority 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 the Department.

28. In an administrative hearing for an application to appropriate water, the applicant bears the burden of proving that the proposed use of water will not injure other water rights. If a protestant seeks the protection of *Parker* that would insulate the protestant from the reasonable pumping level standard of the Ground Water Act, however, the protestant must come forward with evidence that: (1) the protestant is the holder of a domestic water right that is not subject to the reasonable pumping standard of the Ground Water Act, and (2) the protestant's diversion equipment and facilities are capable of diverting the protestant's 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

proposed use of water will not injure the protestant under the *Parker* standard. If there are additional facts necessary to establish the extent of injury that can most equitably be provided by the party seeking *Parker* protection, the party seeking *Parker* protection may be required to provide the factual information.

29. Pumping of 2.23 cfs will not cause water level declines in area wells below a level that is reasonable.

30. The following describes how *Parker* applies to each of the active protestants.

Moyle

31. The priority dates of two water rights held by Moyle predate the 1953 amendment of the Ground Water Act subjecting subsequent appropriations of water to the reasonable pumping level standard. Only the portions of Moyles water rights authorizing a domestic use are entitled to maintenance of historical pumping levels. In addition, Moyles also hold an unrecorded domestic water right bearing a priority date earlier than 1978. Moyles are entitled to protection of their historical water levels for the domestic uses from the four wells recorded by their decreed water rights and in one other domestic well associated with a home owned by Joseph and Lynn Moyle. Evidence presented established that Moyles were receiving water under artesian pressure at the time Eagle filed its applications and during the summer preceding the hearing.

32. In order to avail themselves of the benefits of *Parker*, on or before August 1, 2008, Moyles must begin semiannual measurements of the static water levels/pressures and artesian flow rates for the domestic uses receiving *Parker* protection. Moyles must allow Eagle the opportunity to observe or independently measure flow rates and water levels in the well. If Moyles monitor static water levels/pressures and artesian flow rates for the domestic uses from their wells, and water levels/pressures or artesian flows decline from the wells for the domestic uses after Eagle begins pumping water, Moyles may petition the Department for a determination of material injury. After comparison of Moyles' monitoring data with monitoring data gathered by Eagle, IDWR will determine whether Eagle must compensate Moyles for the declines.

Muller

33. The priority date for water right no. 63-22650 (1887), owned by Eugene Muller, predates the 1953 amendment to the Ground Water Act that subjects water rights to the reasonable pumping level standard. The original well for water right no. 63-22650 was constructed in the shallow aquifer. In 1979 Muller constructed a new well in the deep aquifer. *Parker* would only protect Muller's water right from injury to water levels in the shallow aquifer. The Director determines that pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. Any water levels (or pressures) in a new well constructed in 1979 are subject to the reasonable pumping level standard established by the 1978 amendment to the Ground Water Act as it relates to domestic water rights.

Howarth

34. Charles Howarth constructed a domestic well in the deep aquifer in approximately 2001 or 2002. The domestic well is under artesian pressure, maintaining 3 to 7 psi of pressure. Howarth's well is subject to the reasonable pumping level standard established by the 1978 amendment to the Ground Water Act as it relates to domestic water rights.

Meissner

35. One of Meissner's three wells derives water from the shallow aquifer. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer.

36. The Double R Cattle Well is a domestic well and is entitled to *Parker* protection because its use predates the recognition of reasonable ground water pumping levels under the 1978 amendment to the Ground Water Act.

37. The Double R Cattle Well is completed in the intermediate aquifer. Because Eagle did not satisfy its burden of proving the relationship between the intermediate and the deep aquifer, the Director will assume that the Theis equation draw downs apply directly to the intermediate aquifer. To avail himself of the benefits of *Parker*, on or before August 1, 2008, Meissner must begin semiannual measurements of the static water levels in the Double R Cattle Well. Meissner must allow Eagle the opportunity to observe or independently measure water levels in the Meissner well. If Meissner monitors static water levels in his well and water levels decline in the well after Eagle begins pumping water, Meissner may petition the Department for a determination of material injury. After comparison of Meissner's monitoring data with monitoring data gathered by Eagle, IDWR will determine whether Eagle must compensate Meissner for the declines.

38. The depth of the third Meissner well is unknown. Meissner had the burden to show that he holds a water right for a third well bearing a priority date that would qualify for *Parker* protection. Meissner did not satisfy his burden of proof for the third well.

Purdy

39. Dana and Viki Purdy own an irrigation well that is approximately 90 feet deep and is pumped to supply supplemental ground water for irrigation when surface water is not available. The water right for the irrigation well bears a priority date of 1953. Pumping from the deep aquifer will not injure water right no. 63-2920 because Purdys divert ground water from the shallow aquifer. The water level in the Purdy irrigation well is not entitled to *Parker* protection.

40. The well for water right no. 63-15680 is a domestic well entitled to *Parker* protection of ground water levels.

41. The point of diversion for water right no. 63-15680 is a well drilled to a depth of 250 feet. The well is probably completed in the deep aquifer, although the well does not free flow at land surface. In order to avail themselves of the benefits of *Parker*, on or before August

1, 2008, Purdys must begin semiannual measurements of the static water levels in the well for water right no. 63-15680. Purdys must allow Eagle the opportunity to observe or independently measure water levels in the well. If Purdys monitor static water levels in their well and water levels decline in the well after Eagle begins pumping water, Purdys may petition the Department for a determination of material injury. After comparison of Purdys' monitoring data with monitoring data gathered by Eagle, IDWR will determine whether Eagle must compensate Purdys for the declines.

42. Water right no. 63-22652 authorizes domestic and stockwater use, and bears a priority date of June 1, 1967. The well for water right no. 63-22652 is a domestic well entitled to *Parker* protection of ground water levels.

43. The point of diversion for water right no. 63-22652 is a well drilled to a depth of 120 feet. The well is constructed in the intermediate aquifer. Water in the well is under artesian pressure, but water does not free flow at ground surface. The well was constructed in 1966. To avail themselves of the benefits of *Parker*, on or before August 1, 2008, Purdys must begin semiannual measurements of the static water levels in the well for water right no. 63-22652. Purdys must allow Eagle the opportunity to observe or independently measure the water levels in their well. If Purdys monitor static water levels in their well and water levels decline in the well after Eagle begins pumping water, Purdys may petition the Department for a determination of material injury. After comparison of Purdys' monitoring data with monitoring data gathered by Eagle, IDWR will determine whether Eagle must compensate Purdys for the declines.

44. Purdys also presented evidence about a well supplying water to Dana Purdy's mother's home. This well was drilled after domestic wells were subjected to the reasonable pumping level standard.

Taylor

45. All but one of the Taylor wells are completed in the shallow aquifer. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. The water levels in the shallow Taylor wells are not entitled to *Parker* protection.

46. The domestic portion of water right no. 63-5040 is entitled to *Parker* protection. The well is located in excess of two miles away from the nearest proposed Eagle well.

47. Water free flows under artesian pressure from the well described as a point of diversion for water right no. 63-5040. The well is probably constructed in the deep aquifer. To avail themselves of the benefits of *Parker*, on or before August 1, 2008, Taylors must begin semiannual measurements of the static water levels/pressures and artesian flow rates for the domestic uses receiving *Parker* protection under water right no. 63-5040. Taylors must allow Eagle the opportunity to observe or independently measure the flow rates and water levels/pressures in their well. If Taylors monitor static water levels/pressures and artesian flow rates for the domestic uses from their well and water levels/pressures or artesian flows decline in the well after Eagle begins pumping water, Taylors may petition the Department for a determination of material injury. After comparison of Taylors' monitoring data with monitoring

data gathered by Eagle, IDWR will determine whether Eagle must compensate Taylors for the declines.

Combe

48. The Combe well is 65 feet deep, and within the shallow aquifer. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. The water level in the Combe well is not entitled to *Parker* protection.

Rosti

49. Rostis own a domestic well drilled in 1980. The Rosti domestic well was drilled after the 1978 amendment to the Ground Water Act that subjected domestic wells to the reasonable pumping level. The Rosti domestic well is not entitled to *Parker* protection of ground water levels.

50. The Rosti irrigation well completed in the deep aquifer was drilled in 1992. The Rosti irrigation well was constructed after the 1953 amendment to the Ground Water Act. The Rosti irrigation well is not entitled to protection unless ground water levels decline below a reasonable pumping level.

51. Water levels and pressures are not declining significantly in the area where water is sought for appropriation. Nonetheless, IDWR staff raised concerns about limitations of the pump test. Furthermore, in its addendum to the pump test report, Eagle recognized some of the uncertainties about sufficiency of the water supply and injury and recommended further ground water monitoring. IDWR staff recommended the construction/identification by Eagle of two observation wells, one up-gradient and one down-gradient of the proposed wells. After further analysis, the Director determines the water level responses to pumping by Eagle can be more accurately determined by locating observation wells near one or both of the presently constructed production wells and also by identifying one additional well at a more remote location. Eagle must develop a monitoring, recording, and reporting plan for the observation wells.

52. By compensating the protestants entitled to protection of water levels/pressures under *Parker*, and by monitoring ground water levels during pumping, the proposed appropriation by Eagle will not injure other water users.

53. There is sufficient water for the purposes sought by Eagle's applications. The additional monitoring of the two dedicated observation wells will ensure that the deep aquifer in the area is not overappropriated.

54. By limiting the appropriation to 2.23 cfs for municipal use and 6.68 cfs for fire protection, the application is not filed in bad faith or for purposes of speculation or delay.

55. Eagle has sufficient monetary resources to complete the project.

56. The proposed project is in the local public interest.

57. The proposal conserves the water resources of the state of Idaho because irrigation and other outside uses of water will be provided primarily by other water rights.

ORDER

IT IS HEREBY ORDERED that applications to appropriate water nos. 63-32089 and 63-32090 are **Approved** subject to the limitations and conditions set forth below.

IT IS FURTHER ORDERED that the beneficial uses and flow rates authorized are as follows:

Application no. 63-32089

Municipal	2.23 cfs
Fire Protection	1.77 cfs

Application no. 63-32090

Fire Protection	4.91 cfs
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Total	8.91 cfs
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IT IS FURTHER ORDERED that the approved applications to appropriate water nos. 63-32089 and 63-32090 are subject to the following conditions:

Proof of application of water to beneficial use shall be submitted for both permits on or before **March 1, 2013**.

In connection with the proof of beneficial use submitted for this permit, the permit holder shall also submit a report showing the total annual volume, the maximum daily volume, and the maximum instantaneous rate of flow diverted from the points of diversion authorized for these permits during the development period. The report shall also show the maximum instantaneous rate of diversion, either measured or reasonably estimated by a qualified professional engineer, geologist, or certified water rights examiner, for the entire City of Eagle municipal water system. The report shall also describe and explain how flows diverted under these permits provide an additional increment of beneficial use of water for the City of Eagle municipal water system as opposed to an alternative point of diversion for prior water rights already held and used by the City of Eagle for its municipal water system.

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.

Subject to all prior water rights.

Place of use is within the service area of the City of Eagle municipal water supply system as provided for under Idaho law.

Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department as part of the diverting works.

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

Domestic uses from four flowing artesian wells identified as points of diversion for water right nos. 63-2546 and 63-2609 and an unrecorded domestic use of ground water for the home presently owned by Joseph and Lynn Moyle are entitled to *Parker* protection. In order to avail themselves of *Parker* protection, however, on or before August 1, 2008, Moyles must initiate semiannual measurement of static water levels/pressures and semiannual testing of artesian pressure flow for each of their domestic uses to determine the reduction in delivered flow for their domestic uses. Moyles must prepare a written proposal of how the tests will be conducted and submit the proposal to the Department and the water right holder. The Department must approve the test proposal. Moyle must notify the Department and the water right holder of the date and time of the tests, and Moyles must allow the water right holder and the Department to participate in the tests.

If Moyles monitor static water levels/pressures and flow rates for the domestic uses from their wells, and water levels/pressures decline in the wells causing a reduction in flow rates for the domestic uses after the right holder begins pumping water, Moyles may petition the Department for a determination of material injury. After comparison of Moyles' monitoring data with monitoring data gathered by the right holder, IDWR will determine whether the right holder must compensate Moyles for the declines.

To avail himself of the benefits of *Parker*, on or before August 1, 2008, Meissner must begin semiannual measurements of the static water levels in the Double R Cattle Well. Meissner must allow the right holder the opportunity to observe or independently measure water levels in the Meissner well. If Meissner monitors static water levels in his well and water levels decline in the well after the right holder begins pumping water, Meissner may petition the Department for a determination of material injury. After comparison of Meissner's monitoring data with monitoring data gathered by the right holder, IDWR will determine whether the right holder must compensate Meissner for the declines.

To avail themselves of the benefits of *Parker*, on or before August 1, 2008, Purdys must begin semiannual measurements of the static water levels in the well for water right no. 63-15680. Purdys must allow the right holder the opportunity to observe or independently measure the water levels in their well. If Purdys monitor static water levels in their well and water levels decline in the well after the right holder begins pumping water, Purdys may petition the Department for a determination of material injury. After comparison of Purdys' monitoring data with monitoring data gathered by the right holder, IDWR will determine whether the right holder must compensate Purdys for the declines.

To avail themselves of the benefits of *Parker*, on or before August 1, 2008, Purdys must begin semiannual measurements of the static water levels in the well for water right no. 63-22652.

Purdys must allow the right holder the opportunity to observe or independently measure the water levels in their well. If Purdys monitor static water levels in their well and water levels decline in the well after the right holder begins pumping water, Purdys may petition the Department for a determination of material injury. After comparison of Purdys' monitoring data with monitoring data gathered by the right holder, IDWR will determine whether the right holder must compensate Purdys for the declines.

Domestic use from Taylors' flowing artesian well identified as points of diversion for water right nos. 63-5040 is entitled to *Parker* protection. In order to avail themselves of *Parker* protection, however, on or before August 1, 2008, Taylors must initiate semiannual measurement of static water levels/pressures and semiannual testing of artesian pressure flow for their domestic use to determine the reduction in delivered flow for their domestic use. Taylors must prepare a written proposal of how the tests will be conducted and submit the proposal to the Department and the water right holder. The Department must approve the test proposal. Taylors must notify the Department and the water right holder of the date and time of the tests, and Taylors must allow the water right holder and the Department to participate in the tests.

If Taylors monitor static water levels/pressures and flow rates for the domestic uses from their wells, and water levels/pressures decline in the wells causing a reduction in flow rates for the domestic uses after the right holder begins pumping water, Taylors may petition the Department for a determination of material injury. After comparison of Taylors' monitoring data with monitoring data gathered by the right holder, IDWR will determine whether the right holder must compensate Taylors for the declines.

Prior to diversion of water under this right, the right holder shall construct/identify four observation wells for future monitoring. Three wells shall be located in close proximity to one or both of the production wells. One of the wells shall be completed in the shallow aquifer, one in the immediate aquifer, and one in the deep aquifer. A fourth observation well shall be located at a more remote distance from the production wells. The completion interval for the fourth well shall be in the deep aquifer. The location and design of the observation must be approved by the Department prior to construction or designation of the observation wells. Each observation well must be constructed so that ground water in the well is derived only from one aquifer zone, and must also be constructed so that water levels in each well can be easily measured.

Prior to diversion of water under this right, the right holder shall develop and the Department must approve, a monitoring, recording, and reporting plan for the observation wells.

The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.

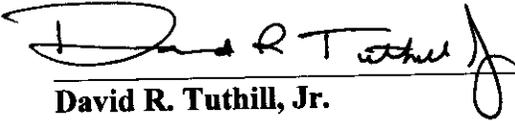
The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a

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.

The wells constructed at the points of diversion shall be constructed in accordance with the rules of the Idaho Department of Water Resources regarding well construction standards and measurement of diversions and the rules of the Department of Environmental Quality for Public Drinking Water Systems, IDAPA 58.01.08.

IT IS FURTHER ORDERED that the request for oral argument filed by Eagle is **Denied**.

Dated this 26th day of February, 2008.



David R. Tuthill, Jr.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of February, 2008, a true and correct copy of the foregoing document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Final Order and Explanatory Sheet for "Responding to Final Orders..." when a hearing was held.

JERRY & MARY TAYLOR
3410 HARTLEY
EAGLE ID 83616

CORRIN & TERRY HUTTON
10820 NEW HOPE RD
STAR ID 83669

SAM & KARI ROSTI
1460 N POLLARD LN
STAR ID 83669

LEEROY & BILLIE MELLIES
6860 W STATE ST
EAGLE ID 83616

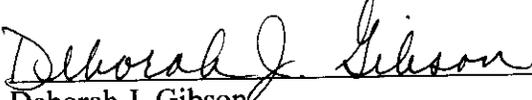
DEAN & JAN COMBE
6440 W BEACON LIGHT
EAGLE ID 83616

BRUCE M SMITH
MOORE SMITH BUXTON TURKE
225 N 9TH STE 420
BOISE ID 83702

JOHN M MARSHALL
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720

CHARLES L HONSINGER
DANIEL V STEENSON
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773

DANA & VIKI PURDY
5926 FLOATING FEATHER
EAGLE ID 83616


Deborah J. Gibson
Administrative Assistant

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS TO)	
APPROPRIATE WATER NOS. 63-32089 AND)	
63-32090 IN THE NAME OF THE CITY)	AMENDED PRELIMINARY
OF EAGLE)	ORDER
_____)	

On January 19, 2005, the City of Eagle (“Eagle”) filed two applications for permit to appropriate water, numbered in the files of the Idaho Department of Water Resources (“IDWR” or “Department”) as 63-32089 and 63-32090. IDWR published notice of the applications in the Idaho Statesman on April 21 and 28, 2005. The applications were protested by the following individuals: Roy Barnett, Tim Cheney, City of Star, Dean and Jan Combe, Michael Dixon/Hoot Nanney Farms, Bill Flack, Bob and Elsie Hanson, Michael Heath, Charles Howarth, Corrin Hutton, Norma Mares, Michael McCollum, Charles Meissner, Jr., LeRoy and Billie Mellies, Robyn and Del Morton, Frank and Elaine Mosman, Joseph, Lynn, and Mike Moyle, Eugene Muller, Tony and Brenda O’Neil, Bryan and Marie Pecht, Dana and Viki Purdy, Sam and Kari Rosti, Ronald Schreiner, Star Sewer and Water District, Jerry and Mary Taylor, United Water Idaho, and Ralph and Barbara Wilder.

IDWR conducted a prehearing conference on July 28, 2005. At the prehearing conference, Scott Reeser hand-delivered a letter to IDWR. In the letter, Scott Reeser asked to intervene in the contested case.

On September 13, 2005, IDWR issued an order granting Scott Reeser’s petition to intervene.

Several protestants failed to appear at the prehearing conference. IDWR mailed a notice of default to the non-appearing protestants. The following non-appearing protestants who failed to show good cause for non-appearance were dismissed as parties: Roy Barnett, Bryan and Marie Pecht, Del and Robin Morton, Tony and Brenda O’Neil, and Frank and Elaine Mosman.

The hearing officer conducted a second prehearing conference on October 18, 2005. At the prehearing conference, Eagle proposed to drill two wells for conducting a pump test. Eagle proposed to pump water from one of the wells and measure water levels in other wells in the vicinity of the pumped well to determine the impacts of pumping.

On December 22, 2005, IDWR approved two drilling permits to construct wells for the pump test.

On January 17, 2006, IDWR received a “notice of protest” from Bud R. Roundtree. IDWR interpreted the document as a petition to intervene.

On January 19, 2006, the hearing officer issued a *Notice of Hearing, Order Authorizing Discovery, and Prehearing Order*. The hearing officer scheduled the hearing for April 10 through April 14, 2006. On February 28, 2006, Eagle notified the hearing officer that the two test wells had not been constructed. The letter stated “the City of Eagle will not be able to get the pump test completed pursuant to the existing schedule.” As a result of the notice, the hearing officer canceled and continued the hearing. In the *Order Continuing Hearing and Canceling Prehearing Deadlines*, the hearing officer ordered the following:

...[U]pon completion of construction of the test wells, the City of Eagle shall arrange a time for the anticipated pump tests with the other parties. When the date(s) for the pump tests have been arranged, the City of Eagle shall notify the Department of the test date(s). After receiving notice of the test date(s), the Department will inquire about available dates for a hearing. The hearing will be scheduled no earlier than ninety days following the date of the test to allow the exchange of information and discovery previously authorized.

On July 11, 2006, the City of Eagle notified the hearing officer that “the pump test conducted by the City of Eagle has been completed.”

Sometime during late summer or the fall of 2006, Eagle submitted a report titled *City of Eagle – 7 Day Aquifer Test* to IDWR staff for review. The document is dated “June 2006,” but the test was not completed until June 19, 2006.

On September 6, 2006, the hearing officer issued a second *Notice of Hearing, Order Authorizing Discovery, and Prehearing Order*. The Notice of Hearing scheduled the hearing for December 6 through 8, 2006 and December 11 and 12, 2006. At the time of service of notice of hearing, IDWR had not acted on the petition to intervene filed by Bud Roundtree. The record does not show that IDWR ever determined whether Roundtree should be allowed to intervene. Roundtree received notice of all the proceedings, however, and IDWR treated Roundtree as a full party to the contested case.

On November 7, 2006, Star Sewer & Water District withdrew its protest.

On November 13, 2006, protestants Joseph, Lynn, and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., and Charles Howarth filed a *Motion to Continue the Hearing*. On November 15, 2006, the above protestants filed an *Amended Motion to Continue Hearing*. The protestants filing the motion for continuance asserted: (1) various scheduling conflicts of the protestants; and (2) Eagle failed to “arrange a time for the anticipated pump test with the other parties” as required by the hearing officer’s March 10, 2006 *Order Continuing Hearing and Canceling Prehearing Deadlines*.

On November 20, 2006, the hearing officer denied the *Amended Motion for Continuance*. This order will not discuss the grounds for refusing the continuance based on scheduling conflicts. A discussion of the prearrangement of the pump test is germane, however.

In denying the request for a continuance on the grounds of failure to jointly conduct a pump test, the hearing officer wrote:

...The hearing officer intended that all the parties interested in the pump test have an opportunity to participate in the test. If Eagle failed to arrange the timing of the test with the parties, the hearing officer is dismayed that Eagle did not follow the dictates of the order.

Nonetheless, even assuming Eagle did not arrange a time for the pump test with the protestants as required by the hearing officer's March 10, 2006 order, the protestants have known that the City of Eagle completed its pump test since receiving the July 11, 2006 letter. The hearing officer also notified the protestants of the completion of the pump test in his August 16, 2006 letter and alluded to the completion of the test in his September 6, 2006 order. Failure of the city to fully coordinate the pump test with the protestants should have been raised as an issue at the time the protestants were notified that the pump test had been completed. Instead, the protestants waited until less than a month before the scheduled hearing to complain. Despite Eagle's failure, the protestants' inaction after learning of the completion of the pump test for approximately four months leads the hearing officer to surmise that the protestants were disinterested in participating actively in the pump test. Consequently, failure to coordinate the pump test is not grounds for postponing the hearing at this late date.

On November 22, 2006, protestants Joseph, Lynn, and Michael Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., and Charles Howarth filed a *Motion in Limine*. The protestants participating in the *Motion in Limine* argued that the "...data and results collected from the seven-day pump test conducted by the City of Eagle in May and June, 2006" should be excluded from the evidence "...because the Protestants were not provided an opportunity to collect data from their wells while the pump test was conducted."

On November 30, 2006, the hearing officer issued an *Order Denying Motion in Limine, Notice of Staff Memorandum, and Amended Notice of Hearing*. In the order, the hearing officer stated:

...The protestants had an opportunity to complain about their inability to participate in the test long in advance of the hearing. The protestants did not avail themselves of the opportunity and should not be allowed to raise the issue just prior to the hearing as a means of preventing consideration of technical information.

The *Motion in Limine* should be denied.

On November 29, 2006, Sean Vincent and Shane Bendixsen submitted a Department staff memorandum to the hearing officer that evaluated the pump test conducted for the City of Eagle test wells. A copy of the staff memorandum is enclosed with this document. The staff memorandum raises several issues about the procedures of the pump test and the analysis of the pump test data. The

questions raised by Department staff could seriously affect the credibility of the pump test evidence presented at the hearing.

The hearing officer will consider the Department staff memorandum as part of the evidence in this contested case. Because the analysis of the pump test submitted to Department staff was incomplete, the hearing officer will forward any additional evidence about the pump test received into evidence at the hearing to Department staff for further review to determine possible deficiencies. After the staff review, the hearing officer will distribute the results of the Department's post hearing review to the parties who will have an opportunity to submit additional comments and possibly to request supplemental hearings about the document. This process **will delay** the ultimate consideration of the applications.

The November 30, 2006 order also delayed commencement of the hearing by one day.

A hearing for the contested case was conducted on December 7 and 8, 2006, and resumed on December 11 and 12, 2006. At the end of the day on December 12, 2006, the presentation of evidence was not complete. As a result, additional evidence was presented the morning of December 18, 2006.

Bruce Smith and Tammy Zokan, attorneys at law, appeared on behalf of Eagle. Charles Honsinger and Jon Gould, attorneys at law, appeared on behalf of Joseph, Lynn, and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanney Farms. Sam Rosti, Corrin & Terry Hutton, Mary Taylor, and Jan Combe appeared individually representing themselves.

On December 20, 2006, the hearing officer issued a request for staff memorandum to Hal Anderson, Rick Raymondi, Sean Vincent, and Shane Bendixsen. The request for staff memorandum stated the following:

Sean Vincent (Vincent) and Shane Bendixsen (Bendixsen) reviewed a technical document titled *City of Eagle, Idaho 7-Day Aquifer Test* prepared by Chris H. Duncan of Holladay Engineering Company. After the review, Vincent and Bendixsen issued a staff memorandum dated November 29, 2006. In the memorandum Vincent and Bendixsen stated that "the scope of the data collection was adequate, but the aquifer test analysis is incomplete."

The request for staff memorandum recited some of the procedural background, and further stated:

At a hearing conducted on December 7-8, 11-12, and 18, 2006, the City of Eagle presented additional analysis of the aquifer test data. In addition, the City of Eagle called Vincent to testify regarding the November 29, 2006 staff memorandum.

THEREFORE, the hearing officer invites department staff to augment the November 29, 2006 staff memorandum regarding the above captioned matter, which could include, without limitation:

1. A full scrutiny of the methods of gathering data, the data presented, and results of the aquifer test contained in the *City of Eagle, Idaho 7-Day Aquifer Test* report dated June 2006.
2. Presentation and analysis of additional data available to department staff to enhance the hearing officer's understanding of the hydrogeology and aquifers in the vicinity of the proposed appropriations of water, including, but not limited to data related to aquifer tests performed for the Lexington Hills well and the Floating Feather well.
3. An independent analysis of Eagle's 7-Day Aquifer Test data using commonly accepted scientific methods in the field of geology, hydrogeology, and engineering.
4. A technical review and critic (sic) of any information and analysis of data presented as evidence during the contested case hearing conducted on December 7-8, 11-12, and 18, 2006.

On February 27, 2007 (date on the document was February 27, 2006), Sean Vincent of IDWR submitted to the hearing officer a staff memorandum titled *Review of Addendum to City of Eagle, Idaho 7-Day Aquifer Test Report*. Attached to the staff memorandum was a document titled *Addendum to City of Eagle 7-Day Aquifer Test Report*.

In the staff memorandum, Vincent states that "the Addendum adequately addresses comments made in a previous memo to you dated November 29, 2006."

On March 13, 2007, Eagle mailed copies of the written addendum reviewed by IDWR staff to the parties who attended the December hearing.

On March 27, 2007, the hearing officer mailed a copy of the staff memorandum written by Vincent to the parties who attended the December hearing. The hearing officer also served a *Notice of Consideration of Additional Evidence and Post Hearing Order* on the parties. The document informed the parties that the hearing officer would consider the information in the addendum and the staff memorandum, and granted the parties until April 25, 2007 to review documents and to submit technical comments about the addendum to the hearing officer and/or request a supplemental hearing.

On March 27, 2007, the hearing officer issued an order dismissing the following parties from the contested case: Michael McCollum, Michael and Nancy Heath, Tim Cheney, Bob & Elsie Hanson, Bill Flack, Ronald Schreiner, City of Star, Scott and Nancy Reeser, Bud Roundtree, Ralph and Barbara Wilder, and Norma Mares.

On April 24, 2007, Mary Taylor submitted written comments to Eagle's addendum.

On April 25, 2007, protestants Joseph, Lynn, and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanny Farms, Inc., submitted comments to Eagle's addendum and the IDWR staff memorandum.

On July 17, 2007, the hearing officer issued a preliminary order approving applications nos. 63-32089 and 63-32090. On July 18, 2007, the preliminary order was served on the parties by mailing a copy of the preliminary order to each of the parties via the United States Postal Service.

The following parties filed timely petitions for reconsideration: United Water Idaho; Joseph, Lynn and Mike Moyle (Moyle), Eugene Muller, Dana and Viki Purdy, Charles W. Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanney Farms, Inc., all represented by Ringert Clark Chartered; Mary Taylor; and the City of Eagle. In addition, the hearing officer received individual comments from Mike Moyle, Eugene Muller, and Charles Howarth.

On August 2, 2007, United Water Idaho filed a *Withdrawal of Petition for Reconsideration*.

On August 14, 2007, Ringert Clark Chartered withdrew as counsel for Dana and Viki Purdy. Dana & Viki Purdy are parties now representing themselves.

On August 21, 2007, the hearing officer issued an order granting the petitions for reconsideration, stating that the merits of the petition would be addressed expeditiously.

PETITIONS FOR RECONSIDERATION

Statement of Issues

The following is a summary of the issues raised by the petitioners for reconsideration. Some of the issues will be resolved summarily in the response following statement of the issue. If the issue is stated without immediate written analysis, the issue will be analyzed in greater detail in the text following the statement of the issues. If the analysis of an issue is discussed in the text following full statement of the issues, the discussion will refer to one or more of the following numbered issues.

Issues Raised by Moyles, Eugene Muller, Charles W. Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanney Farms, Inc. by Ringert Clark Chartered

Ringert Clark Chartered raised the following issues for reconsideration:

1. The printed permit must be included with the preliminary order.
Response: This is not a requirement of the law. A printed permit document is issued as the final disposition of the application processes. If the provisions of the permit differ from those of the final order, the inconsistent provisions on the printed permit would be invalid.

2. A new and adequate pump test must be conducted by the City of Eagle before IDWR can adequately evaluate the factors of injury and the sufficiency of the water supply.

3. The preliminary order and written permit should limit the quantity appropriated to 2.23 cfs for municipal purposes and 6.68 for fire protection.

4. The preliminary order must establish a reasonable ground water pumping level before it can determine whether projected declines in ground water levels will fall below the reasonable pumping level.

Issues Raised by Michael Moyle

5. Eagle's failure/refusal to apprise the parties of the time and place of the aquifer test should have caused the hearing officer to delay the hearing/decision or to deny the application.

6. Eagle did not establish that there is sufficient ground water for the purposes sought by the applications, and did not prove that "the anticipated average rate of future natural recharge" will satisfy the proposed appropriation and existing water rights.

7. IDWR must establish a reasonable pumping level.

8. The hearing officer improperly excluded information about declines in the aquifer based on legal technicalities.

Response: The hearing officer is unaware of ground water data that was offered and excluded. Without additional information, the hearing officer cannot address this issue.

9. No evidence was submitted about the monitoring of the well construction.

Response: Staff at IDWR's Western Region oversaw well construction. Some information about Department oversight may be available, but it was not made a part of the record. Concern about method and adequacy of construction was not raised as an issue at the hearing. As a result, the adequacy of construction is not an issue presently before the hearing officer.

10. Eagle is "gunning for our aquifer," and intends to expand into the north foothills.

Response: Surface and ground water within the state of Idaho is owned by the state of Idaho. Water right holders have a property right to the use of the waters of the state of Idaho within the limitations of their water rights. The use of the word "our" must be interpreted as meaning the aquifer owned by the state and its collective citizens. IDWR is charged with analyzing the applications to appropriate water pending before it to determine whether there is water available for appropriation and whether the proposed diversion and use of water will injure other water rights.

11. United Water and Star Water have the physical facilities to provide municipal water to the Legacy and Eaglefield developments.

Response: This assertion of fact is not supported by facts in the record.

12. IDWR has approved new permits to appropriate water from ground water for municipal and domestic uses, but has not approved consumptive uses proposed by other applications to appropriate water.

Response: IDWR is not prevented from considering an application to appropriate water for municipal uses out of chronological sequence. An approved water right may be subject to curtailment if other earlier-in-time filed applications are approved and there is insufficient water to satisfy all water rights.

13. A study must be conducted to determine the direction of ground water flow prior to approving Eagle's applications.

14. Because of conjunctive management problems in the Eastern Snake Plain Aquifer, Eagle's applications should not be approved.

Response: The evidence at the hearing did not establish any factual relationship or similarities between ground water in the Treasure Valley and the Eastern Snake Plain Aquifer.

Issues Raised by Charles Howarth and Eugene Muller

15. The City of Eagle's failure/refusal to apprise the parties of the time and place of the aquifer test should have caused the hearing officer to delay the hearing/decision or to deny the application.

Charles Howarth and Eugene Muller also requested oral argument.

Issues Raised by Mary Taylor

16. The evidence establishes that the aquifer test conducted during 2006 resulted in water declines in a well owned by Taylor.

17. Taylor's well associated with water right no. 63-5040 is entitled to protection from ground water level declines under *Parker v. Wallentine*.

Response: The hearing officer recognizes water right no. 63-5040 is entitled to ground water level protection under *Parker v. Wallentine*. The well identified by water right no. 63-5040 is located in the City of Star, several miles from the proposed wells. Ground water levels in the Taylor well will not decline sufficiently as a result of the pumping as proposed by Eagle to require compensation.

18. Taylor compared the depth of her wells and the Parker well, and also compared the depth of the wells drilled by Eagle and the Wallentine well. Because there is some similarity in these depths comparisons, Taylor argues that she is entitled to the same water level protection given to Parker.

Response: The analysis of data for wells and aquifers is much more complex than a comparison of the depth of well construction. Aquifer composition and geologic separations of aquifers vary widely. The distance between wells that may be interfering with each other is also extremely important. In *Parker*, water was not available from the Parker domestic well when the new

Wallentine irrigation well was in operation. Taylor's factual allegations to establish injury are incomplete and do not justify further analysis.

19. Reference to "shallow aquifer" in discussion of the Muller well is incorrect.
Response: The hearing officer does not understand this argument by Taylor.

20. United Water and Star Sewer and Water have been assigned to provide municipal water to the Legacy and Eaglefield developments.
Response: As discussed, the record is devoid of facts related to this issue.

21. The hearing officer improperly determined that the proposed appropriation would not injure other water rights.
Response: This amended preliminary order reduces the flow rate and, by limiting the flow rate, also reduces the total volume of water that can be appropriated by Eagle. The analysis supports the conclusion that, with conditions to protect other right holders, the approval of the application will not injure other water rights.

22. Because of conjunctive management problems in the Eastern Snake Plain Aquifer, the City of Eagle's applications should not be approved.
Response: The evidence at the hearing did not establish any factual relationship or similarities between ground water in the Treasure Valley and the Eastern Snake Plain Aquifer.

Issue Raised by the City of Eagle

23. Mitigation should not be required prior to actual demonstration of injury to water rights.

Discussion of Issues for Reconsideration

The preliminary order and written permit should limit the quantity appropriated to 2.23 cfs for municipal purposes and 6.68 cfs for fire protection (Issue no. 3).

The preliminary order approved the total flow rate of 8.91 cfs for municipal purposes. The evidence at the hearing established that 2.23 cfs is the flow rate needed, within the next five years, to satisfy the regularly and continuously provided (at least seasonally provided) municipal uses expressly defined by Idaho Code § 42-202B(6) as "residential, commercial, industrial, irrigation of parks and open space . . ." Idaho Code § 42-202B(6) also authorizes use of water under a municipal water right for purposes related to "residential, commercial, industrial, [and] irrigation of parks and open space." The initial question is whether "related purposes" includes fire protection.

Codification of the words residential, commercial, and industrial might be construed to mean only use of water for those purposes. The broad mandate for a municipal provider, however, is to provide water for an umbrella of sub-uses within the service area that include all the water needs for the residential, commercial, industrial, and other activities within the municipal service area. The term "related purposes" includes fire protection.

The short-term water demand on a municipal system for fighting a fire is significantly greater than the water demand for the water uses that are regularly and continuously provided by the municipal provider. The significant additional water demand required for fighting a fire is reflected in the proportional parts of the total flow of 8.91 cfs sought by Eagle's applications dedicated to regular and continuous uses (2.23 cfs) and fire fighting (6.68 cfs). In addition, the spike in water demand for fighting a fire is both short in duration and infrequent.

When a permit to appropriate water is approved by IDWR, proof of completion of works and beneficial use of the water must be accomplished within five years, except in limited circumstances when the permit holder can obtain an extension of time for filing proof by showing good cause for non-completion, or where there are other specific factual circumstances that allow extensions for the filing of proof of beneficial use. Because of the unique obligations of municipal water providers, however, the law allows municipal providers to obtain water rights for "reasonably anticipated future needs" for which full completion of works and beneficial use is not required. To appropriate water for reasonably anticipated future needs, the municipal provider carries an extra evidentiary burden to establish the "planning horizon" for the municipality or municipalities served, and submit "population and other planning data" in support of the anticipated needs within the planning horizon. If a municipal provider seeks a water right for reasonably anticipated future needs, the planning horizon and supporting data cannot be inconsistent with the comprehensive land use plans. Furthermore, water rights for reasonably anticipated future needs cannot be granted to a municipal provider in areas "overlapped by conflicting comprehensive land use plans."

Eagle admitted at the hearing that the applications do not seek appropriation of water for "reasonably anticipated future needs." Eagle did not submit evidence about a planning horizon nor did Eagle submit any underlying data about planning and population within the planning horizon. Furthermore, testimony established that the area sought to be served by water under Eagle's proposed appropriation is within both the impact areas of the City of Eagle and the City of Star.

The Department recognizes the need for the municipal provider to provide fire protection water flows. The Department also recognizes it cannot allocate, through an approved permit to appropriate water, a substantial quantity of ground water to the municipal provider for fire protection that could become a significant additional block of water ostensibly reserved for reasonably anticipated future needs, particularly where the applicant has not sought water for reasonably anticipated future needs and offered no evidence to support the appropriation of additional water.

The statutory identification of many sub-uses within the municipal use umbrella, including fire protection, does not prohibit the Department from limiting the uses, if necessary, to satisfy the criteria it must consider under Idaho Code § 42-203A or to insure that other statutory provisions are satisfied or are not violated. Recognizing the entire 6.68 cfs for fire protection within the broad municipal definition would create a de facto water right for reasonably anticipated future needs. The fire protection portion of the appropriation should be separately identified and limited as water that can only be used to fight a fire or prevent an existing fire from spreading.

Mitigation Prior to Demonstration of Injury (Issue no. 23)

Eagle argues that a senior water right holder must actually be injured by Eagle's diversion of water prior to Eagle having to provide mitigation for the injury. This argument assumes that Eagle would not be required to construct and install the necessary backup systems prior to demonstration of injury.

The degree to which Eagle must be prepared to immediately provide service depends both on the certainty of the possible injury and the severity of the injury that might occur. In the previous decision, Eagle's own modeling concluded that, at a continuous pumping rate of 8.9 cfs for a year, the measured pressure of 21 feet in the Moyle wells would decline by 17 feet to a pressure of four feet. A decline of 17 feet of pressure from 21 feet to four feet would cause water delivery shortages in the Moyle delivery systems. Short-term shortages could result in the death of large numbers of mink, loss of agricultural crops, and loss in domestic water supplies. The large drop in artesian pressures and the small residual pressure after the decline coupled with the immediate need for replacement water all dictated that Eagle be immediately ready and able to supply water to Moyles when the artesian pressure will no longer deliver water to Moyles for their beneficial uses.

This amended decision reduces the flow rate that can continuously be diverted by Eagle from 8.9 cfs to 2.23 cfs. The reduction in artesian pressure caused by continuously pumping 2.23 cfs is approximately four feet. A smaller pressure head reduction of four feet and a larger residual pressure head of approximately 17 feet are facts that do not compel the hearing officer to determine that the pressure declines will cause Moyles water rights to be undeliverable or will result in a significant decline in delivered flow, causing severe injury. As a result, this amended decision requires Moyles to test the effects of the smaller reduction in pressure head of four feet on the water delivered for Moyles' beneficial uses. The reduction in pressure can be simulated by causing a head loss through a valve or other fixture equal to the predicted four feet of artesian head loss resulting from Eagle's pumping. The difference between the flow rates delivered before and after the artificial reduction in pressure must be measured. If Moyles' test demonstrates a reduction in delivered flow for the beneficial uses of water resulting from the reduction in head of four feet, Eagle must be ready to supply to Moyles the loss of the flow rate caused by the reduction in pressure.

Moyle must complete the test by a date certain to insure that reductions in artesian pressure and corresponding flow rates are proximate in time to the approval of these permits for Eagle. Eagle must be informed and have an opportunity to participate in the test.

Failure of Eagle to Coordinate the Aquifer Test with the Protestants (Issues nos. 5 and 15)

The preliminary order issued on July 17, 2007 exhaustively explains the joint responsibilities neglected by both Eagle and the protestants related to the testing of the aquifer. Eagle did not properly apprise the protestants of the timing of the test. It is not clear whether this failure was due to faulty communication by Eagle and its consultants, or whether Eagle purposely determined not to communicate.

In contrast, the protestants received actual notice of completion of the test, and did not timely raise the lack of coordination as an issue until the eve of the hearing. Most legitimate legal causes of action are assigned time periods within which the cause of action must be brought. The hearing officer will not determine the legitimacy of a complaint about failure to coordinate, but only need hold that the protestants, with full knowledge that the test had been conducted, waited for months before asking, on the threshold of the hearing, for further testing, a continuance, and limitation of evidence. The facts imply that the protestants were raising the issue primarily for the purpose of delaying consideration of Eagle's applications. Equity dictates that the time for raising this issue had passed. The hearing officer will not amend his original determination.

Adequacy of the Aquifer Test (Issues nos. 2, 6, and 13)

Following the hearing, Eagle submitted additional evidence and analysis about the aquifer test, and Sean Vincent of the Department analyzed the additional information. Vincent concluded that, while the test could have been conducted in a way that would produce more meaningful data, the test was sufficient to define the characteristics of the aquifer and to estimate the impact of pumping on other wells in the area. Vincent also determined that there was adequate water residing in the production aquifer to satisfy the withdrawals sought by Eagle's applications. The conclusions by Vincent were incorporated by reference as findings of fact in the July 17, 2007 preliminary order. Vincent's conclusions are consistent with the testimony of Christian Petrich and Chris Duncan. Eagle satisfied its burden of proof regarding injury and sufficiency of the water supply. No additional pump test is necessary. (Issue no. 2).

The hearing officer did not expressly determine, nor is he required to determine, whether, after full development, the total withdrawals from the aquifer would exceed the average annual rate of recharge. Nonetheless, the hearing officer must make a similar determination of whether the water supply is sufficient for the purpose sought by the application. The hearing officer held, based on the evidence presented, that there is sufficient unappropriated water to supply the proposed use of water. While there may be some minor water level declines caused by this proposed use of water, the water level response to pumping will reach an equilibrium that is sustainable. (Issue no. 6).

Evidence to support an appropriation of ground water is never completely certain. There is always additional data that can be gathered through more extensive studies that can further assist the Department in determining the extent of a ground water aquifer. In contrast, the Department receives applications for the use of water and must make decisions about whether the proposed withdrawals and uses of water can be approved. It is more likely than not that there is sufficient water for the purpose sought, regardless of whether the ground water is flowing in the direction of the Payette River or the Boise River. (Issue no. 13).

Reasonable Pumping Level (Issues nos. 4 and 7).

Idaho Code § 42-230 states that the Department may establish reasonable pumping levels for the protection of existing water rights. The hearing officer recognizes that reasonable pumping levels have not been routinely established in the State of Idaho.

The non-establishment of a reasonable pumping level does not prohibit the Department from determining whether declines anticipated by a proposed appropriation will be sufficiently small and consequently holding that the pumping levels will remain within the reasonable range for existing right holders. Pumping the quantities of water sought by Eagle will not result in significant overall water declines in the production aquifer. The hearing officer need not establish a reasonable pumping level based on the evidence of sustainability of the aquifer presented into evidence.

Taylor Evidence of Interference During the Aquifer Test (Issue no. 16).

During its aquifer test, Eagle pumped from June 2 through June 9, 2006. Mary Taylor measured the water level in her irrigation well on June 25, 2006. The water level was measured at 75.82 feet. On August 8, the water level in the well was measured again, and the ground water level was 69.10 feet below ground surface. On October 11, 2006, the ground water level was measured at 62.12 feet below ground level.

The person who measured two of the ground water levels stated in a November 6, 2006 letter to Mary Taylor:

The difference in the two measurements is most likely due to the [Taylor] pump running at the time of the August measurement. At the time, I observed 35-40 sprinklers watering your yard and alfalfa field. During the October measurement, I did not observe any irrigation occurring.

The ground water level in Mary Taylor's irrigation well on June 25, 2006 was measured three weeks after Eagle's pumping ceased. It is unlikely the effects of pumping by Eagle predating the measurement by three weeks could be measured.

Furthermore, Taylor did not provide any background water level measurements for her irrigation well from 1999 to the June 25, 2006 measurement, but arbitrarily assumed water levels remained constant at approximately 58 feet below ground level for seven years until the test by Eagle. Finally, the production zone for Taylor's irrigation well is completed in the shallow aquifer. All of the evidence, both from the aquifer test and from the expert witnesses, concluded that pumping by Eagle would not significantly affect the shallow aquifer.

The hearing officer is reasonably certain that the declines in Taylor's irrigation well is a result of pumping by Taylor, perhaps combined with the effects of withdrawals of ground water pumped by other users from the shallow aquifer and not a result of pumping from the deep aquifer by Eagle during its aquifer test.

Having considered the evidence presented at the hearing, and the information subsequently submitted to the hearing officer, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On January 19, 2005, the City of Eagle submitted two applications to appropriate water to IDWR. IDWR assigned application numbers 63-32089 and 63-32090 to the applications.

2. Application to appropriate water no. 63-32089 seeks the following:

Source:		Groundwater
Flow Rate:		4.0 cfs
Purpose of Use:		Municipal
Proposed Priority:		January 19, 2005
Period of Use:		Jan. 1 through Dec. 31
Points of Diversion:		
Township 04 North, Range 01 West,	Section 10	NWNE ¹
	Section 11	SEnw
	Section 10	NWNw
	Section 11	NWSE (two wells)
Place of Use:		The municipal service area for the City of Eagle.

3. Application no. 63-32090 proposes the following:

Source:		Groundwater
Flow Rate:		4.9 cfs
Purpose of Use:		Municipal
Proposed Priority:		January 19, 2005
Season of Use:		Jan. 1 through Dec. 31
Points of Diversion:		
Township 04 North, Range 01 West,	Section 10	NWNE
	Section 11	SEnw
	Section 10	NWNw
Place of Use:		The municipal service area for the City of Eagle.

4. The two applications identify eight possible separate well locations. The three points of diversion listed in application no. 63-32090 duplicate locations described in application no. 63-32089. Eagle only intends to construct a maximum of five wells.

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 Ada County.

5. Eagle owns and operates a municipal water system that serves a geographical area within the municipal boundaries of the City of Eagle. The certificated area of service for the Eagle municipal water system also includes lands outside of the city boundaries. The certificated area for service by the Eagle municipal water system is depicted in Eagle Exhibit 6 and is color-coded in pink. Eagle Exhibit 6 also shows locations of the five wells proposed by the applications.

6. A portion of Eagle's service area is located west of Linder Road, east of Highway 16, and north of Highway 44 to the edge of the foothills bounded on the north by Homer Road. This area will be referred to in this decision hereinafter as the "western expansion area."

7. Two housing developments named Eaglefield and Legacy are currently proposed for construction in the western expansion area. The combined number of homes proposed for the development is approximately 2,000 homes. The homes will be constructed on approximately 800 to 900 acres in Sections 2, 3, 9, 10, and 11, Township 4 North, Range 1 West.

8. Eagle predicts that the development for the 2,000 homes will be complete within five years, although all of the homes may not be built by that time.

9. Developers proposing construction of residential housing within Eagle are required to dedicate sufficient ground water or surface water rights to the proposed developed lands to provide irrigation demands within the subdivision. When surface water is the traditional method of irrigating the lands prior to development, the developer is required to install a separate system from Eagle's municipal water system for delivery of surface water for irrigation.

10. The applications propose delivery of water primarily for in-house use in the 2,000 homes projected for construction. The peak one-hour demand for in-house use in 2,000 residential units is 2.23 cfs. In addition, Eagle is required to supply the development with 6.68 cfs for fire protection. The total projected instantaneous demand is 8.9 cfs, the combined flow rate sought by the two applications.

11. The developers of the proposed subdivisions must pay for the five proposed wells and internal delivery system within the development. In addition, Eagle has set aside monies in its budget for construction of main lines and trunk lines to connect with the existing Eagle municipal water system. Eagle also has the power to levy assessments against its water users for payment of additional improvements. Finally, Eagle has the authority to form a Local Improvement District (LID) and issue bonds to be repaid by future assessments.

12. Eagle does not presently intend to employ any water storage to meet peak demands. Storage to supply short-term peak demands and fire flow demands could be a component of future use, however. Eagle Exhibit 6 identifies the location of a future storage tank at the northern boundary of the western expansion area.

13. In May 2006, Eagle constructed two wells within the proposed development property. Both of the wells were constructed according to Idaho Department of Environmental Quality standards.

14. The first well was constructed in the SENW, Section 11, Township 4 North, Range 1 West. This well will be referred to hereafter as Well no. 1 or the “Legacy Well.” The second well was constructed in the NWSE, Section 11, Township 4 North, Range 1 West. This well will be referred to hereafter as Well no. 2, or the “Eaglefield Well.”

15. An aquifer pump test was conducted from approximately May 25 through June 19, 2006, by pumping the Eaglefield Well and monitoring water levels in other wells. The test was conducted in three separate phases. Background testing was conducted for seven days prior to the pump test. A seven-day constant rate pump test commenced on June 2 and ended on June 9 at a pumping rate of 1,580 gallons per minute (“gpm”). Following pumping, water levels were measured for seven days following the end of the pumping period to determine recoveries of ground water levels without pumping.

16. Eagle monitored the water levels in eight wells. One of the monitoring wells was the pumping well (Eaglefield Well). Water levels in the Legacy Well were monitored. Water levels in six other privately owned wells were also monitored. Other parties to this contested case were not given an opportunity to participate in the test and monitor their own wells during the test.

17. Eagle submitted to IDWR a report titled *City of Eagle, Idaho 7-Day Aquifer Test*. The report was received into evidence as Eagle Exhibit 14. Copies of the aquifer test were made available to the parties.

18. IDWR staff reviewed the report. In a staff memorandum dated November 29, 2006, staff found several deficiencies in the report. The staff memorandum stated, among other things, the following:

a. A higher pumping rate than was originally proposed for the lower yielding Monitoring Well # 1 (Legacy Well) could and should have been used to stress the system. If Eagle had done so, the effect on other nearby wells and possible boundary conditions would have been more clearly identified.

b. Site hydrogeology should have been consulted to determine whether the test data and conceptual models were reasonable.

c. Other factors such as water level trends, barometric pressure fluctuations, and fluctuations caused by nearby pumping wells should have been examined and used to correct and/or interpret the test data.

d. Tables should have been prepared to identify the various wells and their construction characteristics. Methods of analysis other than the Theis Equation should have been employed. This would have verified the results of the Theis estimates. Use of other methods would have better analyzed the water level recovery data.

e. Significant differences in the values estimated for storativity were not well explained.

f. Some water levels recovered to an elevation higher than the initial static water level.

19. The above deficiencies were discussed at the hearing. As a result of these concerns, the hearing officer allowed additional analysis of data and information following the conclusion of the presentation of evidence.

20. Ground water levels measured in a well owned by Ricks (referred to as Monitoring Well no. 6 in *City of Eagle, Idaho 7-Day Aquifer Test*) showed some signs of a boundary condition. The Ricks well began a steeper decline in water levels approximately four to five days into the pump test. Because the rate of pumping of the Eaglefield Well was not as high as it could have been, and because the pumping test was of somewhat short duration, this possibility of boundary conditions was never explored.

21. In an addendum to its original report submitted to the hearing officer after the hearing, Eagle addressed some of the concerns raised by IDWR staff. As a result, IDWR staff issued a supplemental staff memorandum dated February 27, 2007. The author of the supplemental memorandum, Sean Vincent, wrote the following:

1. The water level and aquifer test data presented in the Addendum generally support the authors' primary conclusion (i.e., the deep sand layers that are targeted for production have sufficient capacity for additional withdrawals). The fact that static water levels in the deep system near the area of proposed development are above land surface and appear to be relatively stable suggest that the deep aquifer system is not currently in a state of overdraft.
2. An exception to the relatively stable water level trend described above is the hydrograph for Well 04N01W-31AAA1, which is located approximately 5 miles southwest of the area of proposed development. The water level in this well has declined by approximately 10 to 15 feet since 1970. Because the aquifer strata are dipping, however, this 462-foot deep well may not be producing from the same aquifer system that is targeted for the development by the City of Eagle.
3. The inclusion of a conceptual hydrogeologic model, hydrographs for area wells, and additional analyses using the Cooper-Jacob (1946) and Theis (1935) residual drawdown methods, significantly improves the value of the aquifer test as a basis for evaluating the water supply.
4. As discussed in the Addendum, semilogarithmic plots of drawdown and residual drawdown suggest that both positive (recharge) and negative (finite aquifer) boundaries affected the test data. The observed behaviors are consistent with the conceptual model of a finite, confined aquifer that receives recharge from the surrounding uplands. Given the available data,

application of the Theis (1935) solution to estimate the aquifer properties is appropriate for this hydrologic setting.

5. The Addendum also includes calculations for estimating potential impacts to existing wells. The calculations, which also are based on the Theis (1935) solution, are conservative in that they neglect to account for aquifer recharge but non-conservative in that they are premised on the assumption of an infinite aquifer.
6. The 1-year timeframe for evaluating impacts to existing wells is appropriate, in my opinion, and is consistent with guidance for determining yield for public drinking water supply wells (IDEQ, 2007). The ranges of transmissivity and storativity values used to estimate drawdown also are appropriate based on available information.
7. I verified that the drawdown estimates presented in Table 4 of the Addendum were calculated correctly using the series approximation of the Theis (1935) solution and the assumed input values.
8. Although the data analysis provides the basis for estimating hydraulic properties for the target aquifer system, the aquifer test was not of sufficient duration to definitively evaluate aquifer boundary conditions and long-term impacts associated with pumping. As recommended in the Addendum (Recommendations 15 and 16), a long-term water level and discharge rate monitoring program should be implemented if the water right applications are approved in order to evaluate water level trends as affected by pumping. Dedicated upgradient and downgradient monitoring wells that are completed in the deep aquifer system within the zone of influence of the aquifer test are recommended.

22. The hearing officer adopts the Vincent analysis text quoted above as findings of fact. The hearing officer specifically finds that “static water levels in the deep system near the area of the proposed development are . . . relatively stable and suggest that the deep aquifer is not currently in a state of overdraft.” The hearing officer also specifically finds that the evaluation of draw downs in other wells from pumping by Eagle using the Theis analysis is reasonable.

23. Ground water underlying the location of the proposed wells resides in three aquifers separated by discontinuous clay aquatards. The discontinuity of the impervious clay strata allows some communication between the aquifers. This communicative relationship between the aquifers will be discussed in subsequent findings.

24. The shallow aquifer is a water table aquifer extending from land surface to approximately 100 feet below land surface. The intermediate aquifer is generally found from 100-200 feet below ground surface and is at least semi-confined. The deep aquifer is located at depths below approximately 200 feet and is under artesian pressure. There may also be deeper aquifers, including geothermal aquifers.

25. The production zones for two of the test wells are completed in the shallow aquifer. The production zones for three of the test wells are completed in the intermediate aquifer. The Eaglefield Well, the Legacy Well, and one of the United Water wells are completed in the deep aquifer. Evidence at the hearing established that a United Water intermediate aquifer well and a United Water deep aquifer well were completed within the same borehole. Upon construction, United Water nested strings of casing inside a single well. The casing for the monitoring well identified as having been constructed into the deep aquifer monitoring well commingled the intermediate and deep aquifers together, resulting in a mixing of water from the intermediate and deep aquifers, and also mixing the pressures of the two zones. This commingling probably skewed the data gathered from the United Water deep aquifer well. As a result, the only direct measurements of draw downs in the deep aquifer caused by pumping are the measurements of draw downs for the Legacy well.

26. Eagle Exhibit 8 is a summary of the potential effects on the protestants' wells of pumping the proposed Eagle wells at various flow rates.

27. Eagle Exhibit 24 contains information about the protestants' wells and tables estimating draw downs using the Theis equation at various radial distances from a producing well in the three different aquifers, the shallow aquifer, the intermediate aquifer, and the deep aquifer.

28. Table 1 of Eagle Exhibit 24 is an estimate of potential draw down in the shallow aquifer based on various pumping rates and distance from the pumping well. The estimates were calculated by multiplying Theis equation draw downs by a multiplier of 0.116. The 0.116 multiplier is an arbitrary number that has no basis in scientific or technical literature nor is it derived from actual data. Nonetheless, there is limited communication between the shallow, intermediate, and deep aquifers, and the separation between the shallow aquifer and the deep aquifer production zone significantly reduces the communication. The hearing officer determines there is little effect on the shallow aquifer by pumping from the deep aquifer.

29. Table 2 of Eagle Exhibit 24 is an estimate of potential draw downs in the intermediate aquifer resulting from continuous pumping at various flow rates and distances from the deep aquifer. The draw downs were calculated by multiplying the Theis equation draw down values by 0.5. The 0.5 multiplier has no basis in technical literature or data analysis. The hearing officer determines there is a direct hydraulic relationship between the intermediate aquifer and the deep aquifer from which Eagle proposes to produce water. Although the direct relationship may be limited by the separation from the deep aquifer, the degree of the limitation was not established. As a result, the hearing officer assumes the full Theis equation draw downs will occur in the intermediate aquifer without applying a fractional multiplier, and will use a modification of Table 3 of Eagle Exhibit 24 to determine the impacts of pumping the proposed wells on wells constructed in the intermediate aquifer.

30. Table 3 of Eagle Exhibit 24 contains results of a direct Theis equation calculation of draw downs at various flow rates and distances from the pumping well for continuous pumping over a period of 365 days. Pumping from the deep aquifer will directly and adversely affect other nearby water users diverting from the deep aquifer.

31. Water residing in the intermediate and deep aquifers in the area of proposed well construction is under artesian pressure. Artesian pressure in the deep aquifer causes water to rise above land surface in wells constructed with a production zone in the deep aquifer. These artesian pressures have been used by some of the protestants to supply water to their beneficial uses.

32. The following is a table of the active protestants' names, water right priorities/date of construction, and the depth of their wells. Some of this information is taken from Eagle Exhibit 24.

Protestant	Water Right	Priority - Construction	Distance from Nearest Proposed Eagle Well	Comments
Dean & Jan Combe	63-2858A	8/5/1956	5,900 ft	Well is 65 feet deep
Mike Dixon	63-2957 63-2958 63-31988	8/28/1953 8/28/1953 3/1/1976		No information about the depth or number of wells was presented at the hearing
Charles Howarth	Domestic (not recorded)	2002	1,399 ft	Well is 333 feet deep
Corrin & Terry Hutton	Domestic		11,992 ft	Well is 115 feet deep
Charles W. Meissner	Three wells. Well logs for two of the wells. No recorded water rights.	July 1981 July 1970	4,800 ft	Well is 90 feet deep Well is 103 feet deep
Mike Moyle	63-2546 63-2609	12/12/1959 2/15/1944	5,643 ft to 7,200 ft	Six wells, all completed in the deep aquifer
Eugene Muller	63-22650	7/25/1887	3,286 ft	Well was initially completed in the shallow aquifer. The well was redrilled in 1979, and now the production zone is in the deep aquifer
Dana & Viki Purdy	63-2920 63-15680 63-22652	1/2/1953 6/1/1900 6/1/1967	3,390 ft 2,700 ft approx.2,640 ft	Well is 90 feet deep Well is 250 feet deep Well is 120 feet deep
Sam & Kari Rosti	Domestic (not recorded) 63-11715	1980 1992	3,444 ft	Well is 255 feet deep Well is 445 feet deep

Jerry & Mary Taylor	63-5040	3/1/1941	5,997 ft.	Wells completed in the shallow aquifer
	63-2858B	6/10/1951		
	63-17523	6/1/1960		
	63-3296	6/5/1962		
	63-32189	3/31/1976		

33. Given Eagle’s projected growth, 2.23 cfs is the flow rate needed for the near continuous water demand for Eagle’s anticipated expansion. The residual flow of 6.68 cfs is for the occasional and sporadic fire protection use.

34. Pumping of Eagle’s proposed wells at a rate of 2.23 cfs will reduce the artesian pressure in wells constructed in the deep aquifer. Pumping will also reduce artesian pressures in wells constructed in the intermediate zone.

35. The relationship between the rate of pumping and the draw downs is linear. In other words, a change in the pumping rate will result in a proportional change in the draw down.

36. The draw downs at various distances in Table 3 of Eagle Exhibit 24 can be extrapolated to determine draw downs at various distances if Eagle continuously pumped 2.23 cfs for 365 days. The proportional draw downs are as follows:

Distance from Pumping Well (ft)	Calculated Water Level Draw Down from Pumping 2.23 cfs for 365 Days (ft)	Distance from Pumping Well (ft)	Calculated Water Level Draw Down from Pumping 2.23 cfs for 365 Days (ft)
1,200	6.19	4,500	4.03
1,400	5.93	5,000	3.87
1,600	5.70	6,000	3.87
1,800	5.52	7,000	3.32
2,000	5.35	8,000	3.11
2,500	5.00	9,000	2.92
3,000	4.69	10,000	2.75
3,500	4.43	15,000	1.36
4,000	4.23		

Moyles

37. Joseph, Lynn, and Mike Moyle own six wells constructed in the deep aquifer that flow under artesian pressure. Four of the wells are described as points of diversion by water rights nos. 63-2546 and 63-2609, bearing priority dates of 1939 and 1943, respectively. A fifth well is the point of diversion for an unrecorded domestic use for a home built by Joseph and Lynn Moyle

in approximately 1970. The sixth well was constructed in 1997 to supply water to Mike Moyle's home.

38. Moyles have measured the closed-in pressure in the wells at 10 pounds per square inch ("psi"). Ten psi correlates to a water level or pressure head of approximately 21 feet. The flowing artesian wells have supplied stock water for as many as 43,000 mink on the Moyle property. In addition, the Moyle wells have provided, by artesian pressure, irrigation water and water for commercial refrigeration and cooling. Finally, the flowing artesian wells provide domestic water for several homes. In some locations, small, relief pumps increase the pressure for commercial and domestic uses.

39. The four Moyle wells described by decreed or claimed water rights are remote from an electrical supply. As a result, pumping the wells would be difficult if the artesian pressure is lost.

40. As artesian pressure declines, the flow from the artesian wells will decrease. During the end of June 2006 or the first part of July 2006, the pressure dropped in some of the artesian wells. Moyles discovered that artesian water was not flowing to the end of the water lines providing drinking water for the mink. As a result, some of the mink died from lack of water.

41. If Moyles' nearest well is approximately 5,643 feet away from a new well pumping continuously at a flow rate of 2.23 cfs, the table in Finding of Fact no. 36 predicts a decline in artesian pressure of approximately 3.9 feet. A reduction from an artesian pressure head of 21 feet down to 17.1 feet may reduce the flow needed to supply the domestic, commercial, stockwater, and irrigation needs for Moyles.

42. The flow rate discharging from an artesian well will generally change as a function of the square root of the changed pressure head reading divided by the original pressure head reading. Because the relationship between change in head and flow is not linear, the reduction in flow at the well head will be smaller than the corresponding reduction in pressure head.

43. Other factors may be more important than the actual change in flow at the well head, however. For instance, (1) a delivery system could be long enough that friction losses and other minor losses within the system could significantly reduce the flow discharging at a point of delivery, or (2) the elevation from the well head to the point of delivery might increase enough that a small change in pressure head at the well could cause water to cease flowing at the point of delivery.

Muller

44. Eugene Muller holds water right no. 63-22650. The original well was constructed to a depth of 70 feet, and the production zone was in the shallow aquifer. In 1979, the well could no longer provide water for Muller's beneficial use, and Muller dug a new well in the deep aquifer. The new well is a flowing artesian well.

45. Muller testified that water flowed from the original well. His testimony is inconsistent with the described characteristics of the shallow aquifer. Nonetheless, any loss of pressure or water level in the original well occurred prior to 1979 when the original well failed, requiring construction of a new well in the deep aquifer.

Howarth

46. In approximately 2001 or 2002, Charles Howarth constructed a domestic well in the deep aquifer. The domestic well is under artesian pressure, maintaining 3 to 7 psi of pressure.

Meissner

47. Charles Meissner, Jr. owns three wells. One of the wells is completed in the shallow aquifer at a depth of 90 feet.

48. A second well was constructed to a depth in excess of 103 feet (See Protestants Exhibit 404, second page) in 1970, and is used for domestic and stockwater purposes. This well will be referred to as the "Double R Cattle Well." The well casing is not perforated, and the water in the well is derived from the bottom of the casing. The casing passes through a significant layer of clay from 70 to 85 feet in depth that probably acts as an aquatard. The water underlying the aquatard is under artesian pressure, but the water does not flow above land surface. The production zone for the well is completed in the intermediate aquifer.

49. The table contained in Finding of Fact no. 36 establishes that, at a distance of 4,800 feet from the nearest proposed Eagle well and at a continuous pumping rate of 2.23 cfs, water levels in the Double R Cattle Well will decline approximately four feet.

50. The depth and other information about Meissner's third well was not presented, except Meissner speculated that the well has collapsed.

Purdy

51. Dana and Viki Purdy hold water right no. 63-2920 authorizing irrigation from ground water. The point of diversion is a well approximately 90 feet deep. Purdys pump supplemental ground water for irrigation when surface water is not available for irrigation. The water right for the irrigation well bears a priority date of 1953, but is constructed in the shallow aquifer.

52. Water right no. 63-15680 authorizes use of water for domestic and stockwater purposes and bears a priority date of June 1, 1900. The well is constructed to a depth of 250 feet. Viki Purdy testified that the well has been in place during several decades she has lived on the Purdy farm and that the well had not been worked on or replaced. Water in the well is under artesian pressure but does not free flow. The production zone for this well is most likely completed in the deep aquifer.

53. The table contained in Finding of Fact no. 36 establishes that, at a distance of 2,700 feet from the nearest proposed Eagle well and at a continuous pumping rate of 2.23 cfs, water levels in the well for water right no. 63-15680 will decline approximately five feet.

54. Water right no. 63-22652 authorizes a stockwater use, and bears a priority date of June 1, 1967. The point of diversion for water right no. 63-22652 is a well drilled to a depth of 120 feet. The well is constructed in the intermediate aquifer. Water in the well is under artesian pressure, but water does not free flow at ground surface. The well was constructed in 1966.

55. The table contained in Finding of Fact no. 36 establishes that, at an approximate distance of 2,640 feet from the nearest proposed Eagle well and at a continuous pumping rate of 2.23 cfs, water levels in the well for water right no. 63-22652 will decline approximately five feet.

56. A well log for another well associated with a home owned by Dana Purdy's mother was received into evidence. The well was drilled in 1991.

Taylor

57. Jerry and Mary Taylor own several water rights. Three of the water rights authorize a total irrigation of 17 to 18 acres. Another water right authorizes domestic use. The Taylor wells described by these four water rights are completed in the shallow aquifer.

58. Claim no. 63-5040 is for a domestic/commercial use in the City of Star. The point of diversion described by claim no. 63-5040 is in excess of two miles (between 10,000 and 15,000 feet) away from the nearest well proposed for construction by Eagle. The well is sufficiently distant from the proposed Eagle wells that water levels in the well identified by claim no. 63-5040 would decline by, at most, one to two feet.

Combe

59. Dean and Jan Combe hold a water right for a domestic use from a well with a priority date of August 5, 1956. The well is 65 feet deep, and is completed in the shallow aquifer.

Rosti

60. Sam and Kari Rosti own a domestic well drilled in 1980. In addition, they own a 445 foot deep irrigation well completed in the deep aquifer drilled in 1992.

Boise River

61. Diversion of water from the deep aquifer would have little or no effect on the Boise River in the reach from Lucky Peak to just below Star Bridge. The flows of the Boise River in this zone are affected primarily by water residing in the shallow aquifer. Water in the deeper zones is separated by an aquatard or several aquatards. Water in the deep aquifer migrates westerly toward the Snake River.

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. Idaho Code § 42-111 defines the phrase “domestic purposes.” Stockwater use of up to 13,000 gallons a day is recognized as use of water for domestic purposes.

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 1978, the Idaho Legislature amended the Ground Water Act again. The 1978 amendment expressly stated that domestic water rights are subject to the reasonable economic pumping level standard.

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 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. 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.

103 Idaho 506, 512 (1982) (emphasis supplied). 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.

7. 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 1953, or 1978 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.

8. The extent to which *Parker* provides protection to the protestants' water rights depends on proof of injury and similarities to the facts of the *Parker* case.

9. In *Parker*, the owner of the domestic well was unable to divert water from the domestic well within minutes of when the junior priority 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 the Department.

10. In an administrative hearing for an application to appropriate water, the applicant bears the burden of proving that the proposed use of water will not injure other water rights. If a protestant seeks the protection of *Parker* that would insulate the protestant from the reasonable pumping level standard of the Ground Water Act, however, the protestant must come forward

with evidence that: (1) the protestant is the holder of a water right that is not subject to the reasonable pumping standard of the Ground Water Act, and (2) the protestant's diversion equipment and facilities are capable of diverting the protestant's 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 proposed use of water will not injure the protestant under the *Parker* standard. If there are additional facts necessary to establish the extent of injury that can most equitably be provided by the party seeking *Parker* protection, the party seeking *Parker* protection may be required to provide the factual information.

11. Pumping of 2.23 cfs will not cause water level declines in area wells below a level that is reasonable.

12. The following describes how *Parker* applies to each of the active protestants.

Moyles

13. The priority dates of water rights held by Moyle predate the 1953 amendment of the Ground Water Act subjecting subsequent appropriations of water to the reasonable pumping level standard. Moyles are entitled to protection of their historical water levels in the four wells recorded by their water rights and in one other domestic well associated with a home owned by Joseph and Lynn Moyle. Evidence presented established that Moyles were receiving water under artesian pressure at the time Eagle filed its applications and during the summer preceding the hearing.

14. In order to avail themselves of *Parker* protection, on or before August 1, 2008, Moyles must test each of their wells to determine the actual reduction in delivered flow for their beneficial uses resulting from a pressure head reduction of four feet, or a direct pressure reduction of approximately 1.7 pounds per square inch. Moyles must notify Eagle when the tests will be conducted, must submit a plan for conducting the test to Eagle and the Department, and Moyles must allow Eagle to participate in the tests.

15. Following the results of the tests, Eagle must (a) be ready and able to supply the tested loss of water flow in the Moyle wells for uses of ground water from the five Moyle wells entitled to *Parker* protection at no cost to Moyles except the cost for incidental electricity that adds pressure to the water supply for domestic and commercial uses; or (b) acquire all or a portion of the water rights from Moyles corresponding to the tested loss of flow, possibly through condemnation. Following a determination of the loss of water flow resulting from a reduction in pressure, if Eagle decides not to acquire all or a portion of Moyle's water rights, Eagle must complete one of the following: (a) physically connect Moyle's water delivery system to Eagle's municipal water system; or (b) with Moyles' consent, place the necessary pumps in the Moyle wells and/or delivery system, supply the power for the pumps, construct or install any other physical features, including running power to the wells, and at the same time, insure the water supply to Moyles' beneficial uses is not interrupted; or (c) drill new wells that will supply the water to Moyles' beneficial uses and construct and install all necessary features. Eagle must

pay all construction and equipment costs, maintenance, and power costs, except for the electricity costs described above to add additional pressure for domestic and commercial uses.

Muller

16. The priority date for water right no. 63-22650 (1887), owned by Eugene Muller, predates the 1953 amendment to the Ground Water Act that subjects water rights to the reasonable pumping level standard. The original well for water right no. 63-22650 was constructed in the shallow aquifer. In 1979 Muller constructed a new well in the deep aquifer. *Parker* would only protect Muller's water right from injury to water levels in the shallow aquifer. The hearing officer determines that pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. Any water levels (or pressures) in a new well constructed in 1979 are subject to the reasonable pumping level standard established by the 1978 amendment to the Ground Water Act as it relates to domestic water rights.

Howarth

17. Charles Howarth constructed a domestic well in the deep aquifer in approximately 2001 or 2002. The domestic well is under artesian pressure, maintaining 3 to 7 psi of pressure. Howarth's well is subject to the reasonable pumping level standard established by the 1978 amendment to the Ground Water Act as it relates to domestic water rights.

Meissner

18. One of Meissner's three wells derives water from the shallow aquifer. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer.

19. The Double R Cattle Well is a domestic well and is entitled to *Parker* protection because its use predates the recognition of reasonable ground water pumping levels under the 1978 amendment to the Ground Water Act.

20. The Double R Cattle Well is completed in the intermediate aquifer. Because Eagle did not satisfy its burden of proving the relationship between the intermediate and the deep aquifer, the hearing officer will assume that the Theis equation draw downs apply directly to the intermediate aquifer. Under *Parker*, Eagle must compensate Meissner for the additional costs of pumping resulting from declines in water levels caused by Eagle's pumping. To avail himself of the benefits of *Parker*, on or before August 1, 2008, Meissner must semiannually measure static water levels in the Double R Cattle Well. Meissner must allow Eagle the opportunity to observe or independently measure water levels in the Meissner well. If Meissner monitors static water levels in his well and can show that water levels decline in the well after Eagle begins pumping water, Eagle must compensate Meissner for the additional cost of pumping from up to four feet of water level declines, including costs of lowering a pump, if necessary. If the well dries up within the four feet of water level declines, Eagle must either: (a) provide water service to Meissner through its municipal water system; or (b) redrill a well for Meissner and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire

Meissner's water right, perhaps through condemnation. The depth of the third Meissner well is unknown.

21. Meissner had the burden to show that he holds a water right for a third well bearing a priority date that would qualify for *Parker* protection. Meissner did not satisfy his burden of proof for the third well.

Purdy

22. Dana and Viki Purdy own an irrigation well that is approximately 90 feet deep and is pumped to supply supplemental ground water for irrigation when surface water is not available. The water right for the irrigation well bears a priority date of 1953. Pumping from the deep aquifer will not injure water right no. 63-2920 because Purdys divert ground water from the shallow aquifer. The water level in the Purdy irrigation well is not entitled to *Parker* protection.

23. The well for water right no. 63-15680 is a domestic well entitled to *Parker* protection of ground water levels.

24. The point of diversion for water right no. 63-15680 is a well drilled to a depth of 250 feet. The well is probably completed in the deep aquifer, although the well does not free flow at land surface. Under *Parker*, Eagle must compensate Purdys for the additional costs of pumping resulting from declines in water levels caused by Eagle's pumping. In order to avail themselves of the benefits of *Parker*, on or before August 1, 2008, Purdys must begin semiannual measurements of the static water levels in the well for water right no. 63-15680. Purdys must allow Eagle the opportunity to observe or independently measure water levels in the well. If Purdys monitor static water levels in the well and can show that water levels decline in the well after Eagle begins pumping water, Eagle must compensate Purdys for the additional cost of pumping from up to five feet of ground water declines, including costs of lowering a pump, if necessary. If the well dries up within the predicted five feet of ground water declines, Eagle must either: (a) provide free municipal water service to Purdys; or (b) redrill a well for Purdys and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire water right no. 63-15680, perhaps through condemnation.

25. Water right no. 63-22652 authorizes domestic and stockwater use, and bears a priority date of June 1, 1967. The well for water right no. 63-22652 is a domestic well entitled to *Parker* protection of ground water levels.

26. The point of diversion for water right no. 63-22652 is a well drilled to a depth of 120 feet. The well is constructed in the intermediate aquifer. Water in the well is under artesian pressure, but water does not free flow at ground surface. The well was constructed in 1966. Under *Parker*, Eagle must compensate Purdys for the additional costs of pumping resulting from declines in water levels caused by Eagle's pumping. To avail themselves of the benefits of *Parker*, on or before August 1, 2008, Purdys must begin semiannual measurements of the static water levels in the well for water right no. 63-22652. Purdys must allow Eagle the opportunity to observe or independently measure the water levels in their well. If Purdys monitor static water levels in their well and can show that water levels decline in the well after Eagle begins pumping

water, Eagle must compensate Purdys for the additional cost of pumping from up to five feet of ground water declines, including costs of lowering a pump, if necessary. If the well dries up within the predicted five feet of ground water declines, Eagle must either: (a) provide free municipal water service to Purdys; or (b) redrill a well for Purdys and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire water right no. 63-22652, perhaps through condemnation.

27. Purdys also presented evidence about a well supplying water to Dana Purdy's mother's home. This well was drilled after domestic wells were subjected to the reasonable pumping level standard.

Taylor

28. All but one of the Taylor wells are completed in the shallow aquifer. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. The water levels in the shallow Taylor wells are not entitled to *Parker* protection.

29. The well described as a point of diversion by water right no. 63-5040 is entitled to *Parker* protection. The well is located in excess of two miles away from the nearest proposed Eagle well. Ground water levels in the well described by water right no. 63-5040 will not decline sufficiently as a result of pumping as proposed by Eagle to require compensation.

Combe

30. The Combe well is 65 feet deep, and within the shallow aquifer. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. The water level in the Combe well is not entitled to *Parker* protection.

Rosti

31. Rostis own a domestic well drilled in 1980. The Rosti domestic well was drilled after the 1978 amendment to the Ground Water Act that subjected domestic wells to the reasonable pumping level. The Rosti domestic well is not entitled to *Parker* protection of ground water levels.

32. The Rosti irrigation well completed in the deep aquifer was drilled in 1992. The Rosti irrigation well was constructed after the 1953 amendment to the Ground Water Act. The Rosti irrigation well is not entitled to *Parker* protection of ground water levels.

33. Water levels and pressures are not declining significantly in the area where water is sought for appropriation. Nonetheless, IDWR staff raised concerns about limitations of the pump test. Furthermore, in its addendum to the pump test report, Eagle recognized some of the uncertainties about sufficiency of the water supply and injury and recommended further ground water monitoring. IDWR staff recommended the construction/identification by Eagle of two observation wells, one up-gradient and one down-gradient of the proposed wells. In addition, Eagle must develop a monitoring, recording, and reporting plan for the observation wells.

34. By compensating the protestants entitled to protection of water levels/pressures under *Parker*, and by monitoring ground water levels during pumping, the proposed appropriation by Eagle will not injure other water users.

35. There is sufficient water for the purposes sought by Eagle’s applications. The additional monitoring of the two dedicated observation wells will insure that the deep aquifer in the area is not overappropriated.

36. The application is not filed in bad faith or for purposes of speculation or delay.

37. Eagle has sufficient monetary resources to complete the project.

38. The proposed project is in the local public interest.

39. The proposal conserves the water resources of the state of Idaho because irrigation and other outside uses of water will be provided primarily by other water rights.

ORDER

IT IS HEREBY ORDERED that applications to appropriate water nos. 63-32089 and 63-32090 are **Approved** subject to the limitations and conditions set forth below.

IT IS FURTHER ORDERED that the beneficial uses and flows rates authorized are as follows:

Municipal	2.23 cfs
Fire Protection	6.68 cfs
Total	8.91 cfs

IT IS FURTHER ORDERED that the approved applications to appropriate water nos. 63-32089 and 63-32090 are subject to the following conditions:

Proof of application of water to beneficial use shall be submitted on or before **October 1, 2012**.

In connection with the proof of beneficial use submitted for this permit, the permit holder shall also submit a report showing the total annual volume, the maximum daily volume, and the maximum instantaneous rate of flow diverted from the point of diversion authorized for this permit during the development period. The report shall also show the maximum instantaneous rate of diversion, either measured or reasonably estimated by a qualified professional engineer, geologist, or certified water rights examiner, for the entire City of Eagle municipal water system. The report shall also describe and explain how water diverted under this permit provides an additional increment of beneficial use of water for the City of Eagle municipal water system as opposed to an alternative point of diversion for prior water rights already held and used by the City of Eagle for its municipal water system.

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.

Subject to all prior water rights.

Place of use is within the service area of the City of Eagle municipal water supply system as provided for under Idaho Law.

Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department as part of the diverting works.

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

The water right holder shall compensate Moyles for reductions in artesian flow rates delivered for Moyles' beneficial uses caused by reductions in pressure (water levels) in the four flowing artesian wells identified as points of diversion for water right nos. 63-2546 and 63-2609, and for the flowing artesian well for domestic use of water in the home presently owned by Joseph and Lynn Moyle. In order to avail themselves of *Parker* protection, however, on or before August 1, 2008, Moyles must test each of their wells to determine the actual reduction in delivered flow for their beneficial uses resulting from a pressure head reduction of four feet, or a direct pressure reduction of approximately 1.7 pounds per square inch. Moyles must prepare a written proposal of how the test will be conducted and submit the proposal to the Department and the water right holder. The Department must approve the test proposal. Moyle must notify the Department and the water right holder of the date and time of the tests, and Moyles must allow the water right holder and the Department to participate in the tests.

Following the determination of the reduction in flow caused by a reduction in pressure head, the water right holder shall (a) be ready and able to supply the tested loss of water flow for uses of ground water from the five Moyle wells entitled to *Parker* protection at no cost to Moyles except the cost for incidental electricity that adds pressure to the water supply for domestic and commercial uses; or (b) acquire all or a portion of the water rights from Moyles corresponding to the tested loss of flow, possibly through condemnation. Following a determination of the loss of water flow resulting from a reduction in pressure, if the right holder decides not to acquire all or a portion of Moyles' water rights, the right holder shall complete one of the following: (a) physically connect Moyles' water delivery system to the right holder's municipal water system; or (b) with Moyles' consent, place the necessary pumps in the Moyle wells and/or delivery system, supply the power for the pumps, construct or install any other physical features, including running power to the wells, and at the same time, insure the water supply to Moyles' beneficial uses is not interrupted; or (c) drill new wells that will supply the water to Moyles' beneficial uses and construct and install all necessary features. The right holder shall pay all construction and

equipment costs, maintenance, and power costs, except for the electricity costs described above to add additional pressure for domestic and commercial uses.

The right holder shall compensate Meissner for additional costs of pumping from the Double R Cattle Well because of declines in water levels caused by pumping from the authorized points of diversion. To avail himself of the benefits of *Parker*, on or before August 1, 2008, Meissner must semiannually measure static water levels in the Double R Cattle Well. Meissner must allow the right holder the opportunity to observe or independently measure water levels in the Meissner well. If Meissner monitors static water levels in his well and can show that water levels continue to decline in the well after the right holder begins pumping water, the right holder must compensate Meissner for the additional cost of pumping from up to four feet of water level declines, including costs of lowering a pump, if necessary. If the well dries up within the four feet of water level declines, the right holder must either: (a) provide water service to Meissner through its municipal water system; or (b) redrill a well for Meissner and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire Meissner's water right, perhaps through condemnation.

The right holder must compensate Purdys for the additional costs of pumping from the well described as a point of diversion by water right no. 63-15680. To avail themselves of the benefits of *Parker*, on or before August 1, 2008, Purdys must semiannually measure the static water levels in the well for water right no. 63-15680. Purdys must allow the right holder the opportunity to observe or independently measure water levels in the well. If Purdys monitor static water levels in the well and can show that water levels decline in the well after the right holder begins pumping water, the right holder must compensate Purdys for the additional cost of pumping from up to five feet of ground water declines, including costs of lowering a pump, if necessary. If the well dries up within the five feet of ground water declines, the right holder must either: (a) provide free municipal water service to Purdys; or (b) redrill a well for Purdys and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire water right no. 63-15680, perhaps through condemnation.

The right holder must compensate Purdys for the additional costs of pumping from the well described as a point of diversion by water right no. 63-22652. To avail themselves of the benefits of *Parker*, on or before August 1, 2008, Purdys must semiannually measure the static water levels in the well for water right no. 63-22652. Purdys must allow the right holder the opportunity to observe or independently measure water levels in the well. If Purdys monitor static water levels in the well and can show that water levels decline in the well after the right holder begins pumping water, the right holder must compensate Purdys for the additional cost of pumping from up to five feet of ground water declines, including costs of lowering a pump, if necessary. If the well dries up within the five feet of ground water declines, the right holder must either: (a) provide free municipal water service to Purdys; or (b) redrill a well for Purdys and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire water right no. 63-22652, perhaps through condemnation.

Prior to diversion of water under this right, the right holder shall construct/identify two observation wells, one up-gradient and one down-gradient of the production wells under this right. The location and construction must be approved by the Department. Each observation

well must be constructed so that water levels in each of the three aquifers can be independently measured.

Prior to diversion of water under this right, the right holder shall develop and the Department must approve, a monitoring, recording, and reporting plan for the observation wells.

The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.

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.

The wells constructed at the points of diversion shall be constructed in accordance with the rules of the Idaho Department of Water Resources regarding well construction standards and measurement of diversions and the rules of the Department of Environmental Quality for Public Drinking Water Systems, IDAPA 58.01.08.

IT IS FURTHER ORDERED that the request for oral argument filed by Muller and Howarth is **Denied**.

Dated this 3rd day of October, 2007.



Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2007, a true and correct copy of the foregoing document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Amended Preliminary Order and Explanatory Sheet for "Responding to Preliminary Orders..." when a hearing was held.

JERRY & MARY TAYLOR
3410 HARTLEY
EAGLE ID 83616

CORRIN & TERRY HUTTON
10820 NEW HOPE RD
STAR ID 83669

SAM & KARI ROSTI
1460 N POLLARD LN
STAR ID 83669

LEEROY & BILLIE MELLIES
6860 W STATE ST
EAGLE ID 83616

DEAN & JAN COMBE
6440 W BEACON LIGHT
EAGLE ID 83616

BRUCE M SMITH
MOORE SMITH BUXTON TURKE
225 N 9TH STE 420
BOISE ID 83702

JOHN M MARSHALL
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720

CHARLES L HONSINGER
DANIEL V STEENSON
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773

WESTERN REGION
ATTN JOHN WESTRA
2735 AIRPORT WAY
BOISE ID 83705-5082


Deborah J. Gibson
Administrative Assistant

SECOND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2007, a true and correct copy of the foregoing document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Amended Preliminary Order and Explanatory Sheet for
"Responding to Preliminary Orders..." when a hearing was held.

DANA & VICKI PURDY
5926 FLOATING FEATHER
EAGLE ID 83616


Deborah J. Gibson
Administrative Assistant

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS TO)
APPROPRIATE WATER NOS. 63-32089 AND)
63-32090 IN THE NAME OF THE CITY)
OF EAGLE)
_____)

PRELIMINARY ORDER

On January 19, 2005, the City of Eagle (“Eagle”) filed two applications for permit to appropriate water, numbered in the files of the Idaho Department of Water Resources (“IDWR” or “Department”) as 63-32089 and 63-32090. IDWR published notice of the applications in the Idaho Statesman on April 21 and 28, 2005. The applications were protested by the following individuals: Roy Barnett, Tim Cheney, City of Star, Dean and Jan Combe, Michael Dixon/Hoot Nanney Farms, Bill Flack, Bob and Elsie Hanson, Michael Heath, Charles Howarth, Corrin Hutton, Norma Mares, Michael McCollum, Charles Meissner, Jr., LeRoy and Billie Mellies, Robyn and Del Morton, Frank and Elaine Mosman, Joseph, Lynn, and Mike Moyle, Eugene Muller, Tony and Brenda O’Neil, Bryan and Marie Pecht, Dana and Viki Purdy, Sam and Kari Rosti, Ronald Schreiner, Star Sewer and Water District, Jerry and Mary Taylor, United Water Idaho, and Ralph and Barbara Wilder.

IDWR conducted a prehearing conference on July 28, 2005. At the prehearing conference, Scott Reeser hand-delivered a letter to IDWR. In the letter, Scott Reeser asked to intervene in the contested case.

On September 13, 2005, IDWR issued an order granting Scott Reeser’s petition to intervene.

Several protestants failed to appear at the prehearing conference. IDWR mailed a notice of default to the non-appearing protestants. The following non-appearing protestants who failed to show good cause for non-appearance were dismissed as parties: Roy Barnett, Bryan and Marie Pecht, Del and Robin Morton, Tony and Brenda O’Neil, and Frank and Elaine Mosman.

The hearing officer conducted a second prehearing conference on October 18, 2005. At the prehearing conference, Eagle proposed to drill two wells for conducting a pump test. Eagle proposed to pump water from one of the wells and measure water levels in other wells in the vicinity of the pumped well to determine the impacts of pumping.

On December 22, 2005, IDWR approved two drilling permits to construct wells for the pump test.

On January 17, 2006, IDWR received a “notice of protest” from Bud R. Roundtree. IDWR interpreted the document as a petition to intervene.

On January 19, 2006, the hearing officer issued a *Notice of Hearing, Order Authorizing Discovery, and Prehearing Order*. The hearing officer scheduled the hearing for April 10 through April 14, 2006. On February 28, 2006, Eagle notified the hearing officer that the two test wells had not been constructed. The letter stated “the City of Eagle will not be able to get the pump test completed pursuant to the existing schedule.” As a result of the notice, the hearing officer canceled and continued the hearing. In the *Order Continuing Hearing and Canceling Prehearing Deadlines*, the hearing officer ordered the following:

...[U]pon completion of construction of the test wells, the City of Eagle shall arrange a time for the anticipated pump tests with the other parties. When the date(s) for the pump tests have been arranged, the City of Eagle shall notify the Department of the test date(s). After receiving notice of the test date(s), the Department will inquire about available dates for a hearing. The hearing will be scheduled no earlier than ninety days following the date of the test to allow the exchange of information and discovery previously authorized.

On July 11, 2006, the City of Eagle notified the hearing officer that “the pump test conducted by the City of Eagle has been completed.”

Sometime during late summer or the fall of 2006, Eagle submitted a report titled *City of Eagle – 7 Day Aquifer Test* to IDWR staff for review. The document is dated “June 2006,” but the test was not completed until June 19, 2006.

On September 6, 2006, the hearing officer issued a second *Notice of Hearing, Order Authorizing Discovery, and Prehearing Order*. The Notice of Hearing scheduled the hearing for December 6 through 8, 2006 and December 11 and 12, 2006. At the time of service of the notice of hearing, IDWR had not acted on the petition to intervene filed by Bud Roundtree. The record does not show that IDWR ever determined whether Roundtree should be allowed to intervene. Roundtree received notice of all the proceedings, however, and IDWR treated Roundtree as a full party to the contested case.

On November 7, 2006, Star Sewer & Water District withdrew its protest.

On November 13, 2006, protestants Joseph, Lynn and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., and Charles Howarth filed a *Motion to Continue the Hearing*. On November 15, 2006, the above protestants filed an *Amended Motion to Continue Hearing*. The protestants filing the motion for continuance asserted: (1) various scheduling conflicts of the protestants; and (2) Eagle failed to “arrange a time for the anticipated pump test with the other parties” as required by the hearing officer’s March 10, 2006 *Order Continuing Hearing and Canceling Prehearing Deadlines*.

On November 20, 2006, the hearing officer denied the *Amended Motion for Continuance*. This order will not discuss the grounds for refusing the continuance based on scheduling conflicts. A discussion of the prearrangement of the pump test is germane, however.

In denying the request for a continuance on the grounds of failure to jointly conduct a pump test, the hearing officer wrote:

...The hearing officer intended that all the parties interested in the pump test have an opportunity to participate in the test. If Eagle failed to arrange the timing of the test with the parties, the hearing officer is dismayed that Eagle did not follow the dictates of the order.

Nonetheless, even assuming Eagle did not arrange a time for the pump test with the protestants as required by the hearing officer's March 10, 2006 order, the protestants have known that the City of Eagle completed its pump test since receiving the July 11, 2006 letter. The hearing officer also notified the protestants of the completion of the pump test in his August 16, 2006 letter and alluded to the completion of the test in his September 6, 2006 order. Failure of the city to fully coordinate the pump test with the protestants should have been raised as an issue at the time the protestants were notified that the pump test had been completed. Instead, the protestants waited until less than a month before the scheduled hearing to complain. Despite Eagle's failure, the protestants' inaction after learning of the completion of the pump test for approximately four months leads the hearing officer to surmise that the protestants were disinterested in participating actively in the pump test. Consequently, failure to coordinate the pump test is not grounds for postponing the hearing at this late date.

On November 22, 2006, protestants Joseph, Lynn and Michael Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., and Charles Howarth filed a *Motion in Limine*. The protestants participating in the *Motion in Limine* argued that the "...data and results collected from the seven-day pump test conducted by the City of Eagle in May and June, 2006" should be excluded from the evidence "...because the Protestants were not provided an opportunity to collect data from their wells while the pump test was conducted."

On November 30, 2006, the hearing officer issued an *Order Denying Motion in Limine, Notice of Staff Memorandum, and Amended Notice of Hearing*. In the order, the hearing officer stated:

...The protestants had an opportunity to complain about their inability to participate in the test long in advance of the hearing. The protestants did not avail themselves of the opportunity and should not be allowed to raise the issue just prior to the hearing as a means of preventing consideration of technical information.

The *Motion in Limine* should be denied.

On November 29, 2006, Sean Vincent and Shane Bendixsen submitted a Department staff memorandum to the hearing officer that evaluated the pump test conducted for the City of Eagle test wells. A copy of the staff memorandum is enclosed with this document. The staff memorandum raises several issues about the procedures of the pump test and the analysis of the pump test data. The

questions raised by Department staff could seriously affect the credibility of the pump test evidence presented at the hearing.

The hearing officer will consider the Department staff memorandum as part of the evidence in this contested case. Because the analysis of the pump test submitted to Department staff was incomplete, the hearing officer will forward any additional evidence about the pump test received into evidence at the hearing to Department staff for further review to determine possible deficiencies. After the staff review, the hearing officer will distribute the results of the Department's post hearing review to the parties who will have an opportunity to submit additional comments and possibly to request supplemental hearings about the document. This process **will delay** the ultimate consideration of the applications.

The November 30, 2006 order also delayed commencement of the hearing by one day.

A hearing for the contested case was conducted on December 7 and 8, 2006, and resumed on December 11 and 12, 2006. At the end of the day on December 12, 2006, the presentation of evidence was not complete. As a result, additional evidence was presented the morning of December 18, 2006.

Bruce Smith and Tammy Zokan, attorneys at law, appeared on behalf of Eagle. Charles Honsinger and Jon Gould, attorneys at law, appeared on behalf of Joseph, Lynn and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanney Farms. Sam Rosti, Corrin & Terry Hutton, Mary Taylor, and Jan Combe appeared individually representing themselves.

On December 20, 2006, the hearing officer issued a request for staff memorandum to Hal Anderson, Rick Raymond, Sean Vincent, and Shane Bendixsen. The request for staff memorandum stated the following:

Sean Vincent (Vincent) and Shane Bendixsen (Bendixsen) reviewed a technical document titled *City of Eagle, Idaho 7-Day Aquifer Test* prepared by Chris H. Duncan of Holladay Engineering Company. After the review, Vincent and Bendixsen issued a staff memorandum dated November 29, 2006. In the memorandum Vincent and Bendixsen stated that "the scope of the data collection was adequate, but the aquifer test analysis is incomplete."

The request for staff memorandum recited some of the procedural background, and further stated:

At a hearing conducted on December 7-8, 11-12, and 18, 2006, the City of Eagle presented additional analysis of the aquifer test data. In addition, the City of Eagle called Vincent to testify regarding the November 29, 2006 staff memorandum.

THEREFORE, the hearing officer invites department staff to augment the November 29, 2006 staff memorandum regarding the above captioned matter, which could include, without limitation:

1. A full scrutiny of the methods of gathering data, the data presented, and results of the aquifer test contained in the *City of Eagle, Idaho 7-Day Aquifer Test* report dated June 2006.
2. Presentation and analysis of additional data available to department staff to enhance the hearing officer's understanding of the hydrogeology and aquifers in the vicinity of the proposed appropriations of water, including, but not limited to data related to aquifer tests performed for the Lexington Hills well and the Floating Feather well.
3. An independent analysis of Eagle's 7-Day Aquifer Test data using commonly accepted scientific methods in the field of geology, hydrogeology, and engineering.
4. A technical review and critic (sic) of any information and analysis of data presented as evidence during the contested case hearing conducted on December 7-8, 11-12, and 18, 2006.

On February 27, 2007 (date on the document was February 27, 2006), Sean Vincent of IDWR submitted to the hearing officer a staff memorandum titled *Review of Addendum to City of Eagle, Idaho 7-Day Aquifer Test Report*. Attached to the staff memorandum was a document titled *Addendum to City of Eagle 7-day Aquifer Test Report*.

In the staff memorandum, Vincent states that "the Addendum adequately addresses comments made in a previous memo to you dated November 29, 2006."

On March 13, 2007, Eagle mailed copies of the written addendum reviewed by IDWR staff to the parties who attended the December hearing.

On March 27, 2007, the hearing officer mailed a copy of the staff memorandum written by Vincent to the parties who attended the December hearing. The hearing officer also served a *Notice of Consideration of Additional Evidence and Post Hearing Order* on the parties. The document informed the parties that the hearing officer would consider the information in the addendum and the staff memorandum, and granted the parties until April 25, 2007 to review documents and to submit technical comments about the addendum to the hearing officer and/or request a supplemental hearing.

On March 27, 2007, the hearing officer issued an order dismissing the following parties from the contested case: Michael McCollum, Michael and Nancy Heath, Tim Cheney, Bob & Elsie Hanson, Bill Flack, Ronald Schreiner, City of Star, Scott and Nancy Reeser, Bud Roundtree, Ralph and Barbara Wilder, and Norma Mares.

On April 24, 2007, Mary Taylor submitted written comments to Eagle's addendum.

On April 25, 2007, protestants Joseph, Lynn and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanny Farms, Inc., submitted comments to Eagle’s addendum and the IDWR staff memorandum.

Having considered the evidence presented at the hearing, and the information subsequently submitted to the hearing officer, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On January 19, 2005, the City of Eagle submitted two applications to appropriate water to IDWR. IDWR assigned application numbers 63-32089 and 63-32090 to the applications.

2. Application to appropriate water no. 63-32089 seeks the following:

Source:		Groundwater
Flow Rate:		4.0 cfs
Purpose of Use:		Municipal
Proposed Priority:		January 19, 2005
Period of Use:		Jan. 1 through Dec. 31
Points of Diversion:		
Township 04 North, Range 01 West,	Section 10	NWNE ¹
	Section 11	SENE
	Section 10	NWNW
	Section 11	NWSE (two wells)
Place of Use:		The municipal service area for the City of Eagle.

3. Application no. 63-32090 proposes the following:

Source:		Groundwater
Flow Rate:		4.9 cfs
Purpose of Use:		Municipal
Proposed Priority:		January 19, 2005
Season of Use:		Jan. 1 through Dec. 31
Points of Diversion:		
Township 04 North, Range 01 West,	Section 10	NWNE
	Section 11	SENE
	Section 10	NWNW
Place of Use:		The municipal service area for the City of Eagle.

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 Ada County.

4. The two applications identify eight possible separate well locations. The three points of diversion listed in application no. 63-32090 duplicate locations described in application no. 63-32089. Eagle only intends to construct a maximum of five wells.

5. Eagle owns and operates a municipal water system that serves a geographical area within the municipal boundaries of the City of Eagle. The certificated area of service for the Eagle municipal water system also includes lands outside of the city boundaries. The certificated area for service by the Eagle municipal water system is depicted in Eagle Exhibit 6 and is color-coded in pink. Eagle Exhibit 6 also shows locations of the five wells proposed by the applications.

6. A portion of Eagle's service area is located west of Linder Road, east of Highway 16, and north of Highway 44 to the edge of the foothills bounded on the north by Homer Road. This area will be referred to in this decision hereinafter as the "western expansion area."

7. Two housing developments named Eaglefield and Legacy are currently proposed for construction in the western expansion area. The combined number of homes proposed for the development is approximately 2,000 homes. The homes will be constructed on approximately 800 to 900 acres in Sections 2, 3, 9, 10, and 11, T4N, R1W.

8. Eagle anticipates that the development for the 2,000 homes will be complete within five-years, although all of the homes may not be built by that time.

9. Developers proposing construction of residential housing within Eagle are required to dedicate sufficient ground water or surface water rights to the proposed developed lands to accommodate irrigation demands within the subdivision. When surface water is the traditional method of irrigating the lands prior to development, the developer is required to install a separate system from Eagle's municipal water system for delivery of surface water for irrigation.

10. The applications propose delivery of water primarily for in-house use in the 2,000 homes projected for construction. The peak one-hour demand for in-house use in 2,000 residential units is 2.23 cfs. In addition, Eagle is required to supply the development with 6.68 cfs for fire protection. The total projected instantaneous demand is 8.9 cfs, the combined flow rate sought by the two applications.

11. The developers of the proposed subdivisions must pay for the five proposed wells and internal delivery system within the development. In addition, Eagle has set aside monies in its budget for construction of main lines and trunk lines to connect with the existing Eagle municipal water system. Eagle also has the power to levy assessments against its water users for payment of additional improvements. Finally, Eagle has the authority to form a Local Improvement District (LID) and issue bonds to be repaid by future assessments.

12. Eagle does not presently intend to employ any water storage to meet peak demands. Storage to supply short-term peak demands and fire flow demands could be a component of future use, however. Eagle Exhibit 6 identifies the location of a future storage tank at the northern boundary of the western expansion area.

13. In May 2006, Eagle constructed two wells within the proposed development property. Both of the wells were constructed according to the Department of Environmental Quality standards.

14. The first well was constructed in the SENW, Section 11, Township 04 North, Range 01 West. This well will be referred to hereafter as Well no. 1 or the "Legacy Well." The second well was constructed in the NWSE, Section 11, Township 04 North, Range 01 West. This well will be referred to hereafter as Well no. 2, or the "Eaglefield Well."

15. An aquifer pump test was conducted from approximately May 25 through June 19, 2006, by pumping the Eaglefield Well and monitoring water levels in other wells. The test was conducted in three separate phases. Background testing was conducted for seven days prior to the pump test. A seven-day constant rate pump test commenced on June 2 and ended on June 9 at a pumping rate of 1,580 gallons per minute ("gpm"). Following pumping, water levels were measured for seven days following the end of the pumping period to determine recoveries of ground water levels without pumping.

16. Eagle monitored the water levels in eight wells. One of the monitoring wells was the pumping well (Eaglefield Well). Water levels in the Legacy Well were monitored. Water levels in six other privately owned wells were also monitored. Other parties to this contested case were not given an opportunity to participate in the test and monitor their own wells during the test.

17. Eagle submitted to IDWR a report titled *City of Eagle, Idaho 7-Day Aquifer Test*. The report was received into evidence as Eagle Exhibit 14. Copies of the aquifer test were made available to the parties.

18. IDWR staff reviewed the report. In a staff memorandum dated November 29, 2006, staff found several deficiencies in the report. The staff memorandum stated, among other things, the following:

a. A higher pumping rate than was originally proposed for the lower yielding Monitoring Well # 1 (Legacy Well) could and should have been used to stress the system. If Eagle had done so, the effect on other nearby wells and possible boundary conditions would have been more clearly identified.

b. Site hydrogeology should have been consulted to determine whether the test data and conceptual models were reasonable.

c. Other factors such as water level trends, barometric pressure fluctuations, and fluctuations caused by nearby pumping wells should have been examined and used to correct and/or interpret the test data.

d. Tables should have been prepared to identify the various wells and their construction characteristics. Methods of analysis other than the Theis Equation should have been employed. This would have verified the results of the Theis estimates. Use of other methods would have better analyzed the water level recovery data.

e. Significant differences in the values estimated for storativity were not well explained.

f. Some water levels recovered to an elevation higher than the initial static water level.

19. The above deficiencies were discussed at the hearing. As a result of these concerns, the hearing officer allowed additional analysis of data and information following the conclusion of the presentation of evidence.

20. Ground water levels measured in a well owned by Ricks (Monitoring Well no. 6) showed some signs of a boundary condition. The Ricks well began a steeper decline in water levels approximately four to five days into the pump test. Because the rate of pumping of the Eaglefield Well was not as high as it could have been, and because the pumping test was of somewhat short duration, this possibility of boundary conditions was never explored.

21. In an addendum to its original report submitted to the hearing officer after the hearing, Eagle addressed some of the concerns raised by IDWR staff. As a result, IDWR staff issued a supplemental staff memorandum dated February 27, 2007. The author of the supplemental memorandum, Sean Vincent, wrote the following:

1. The water level and aquifer test data presented in the Addendum generally support the authors' primary conclusion (i.e., the deep sand layers that are targeted for production have sufficient capacity for additional withdrawals). The fact that static water levels in the deep system near the area of proposed development are above land surface and appear to be relatively stable suggest that the deep aquifer system is not currently in a state of overdraft.
2. An exception to the relatively stable water level trend described above is the hydrograph for Well 04N01W-31AAA1, which is located approximately 5 miles southwest of the area of proposed development. The water level in this well has declined by approximately 10 to 15 feet since 1970. Because the aquifer strata are dipping, however, this 462-foot deep well may not be producing from the same aquifer system that is targeted for the development by the City of Eagle.
3. The inclusion of a conceptual hydrogeologic model, hydrographs for area wells, and additional analyses using the Cooper-Jacob (1946) and Theis (1935) residual drawdown methods, significantly improves the value of the aquifer test as a basis for evaluating the water supply.
4. As discussed in the Addendum, semilogarithmic plots of drawdown and residual drawdown suggest that both positive (recharge) and negative (finite aquifer) boundaries affected the test data. The observed behaviors are consistent with the conceptual model of a finite, confined aquifer that receives recharge from the surrounding uplands. Given the available data,

application of the Theis (1935) solution to estimate the aquifer properties is appropriate for this hydrologic setting.

5. The Addendum also includes calculations for estimating potential impacts to existing wells. The calculations, which also are based on the Theis (1935) solution, are conservative in that they neglect to account for aquifer recharge but non-conservative in that they are premised on the assumption of an infinite aquifer.
6. The 1-year timeframe for evaluating impacts to existing wells is appropriate, in my opinion, and is consistent with guidance for determining yield for public drinking water supply wells (IDEQ, 2007). The ranges of transmissivity and storativity values used to estimate drawdown also are appropriate based on available information.
7. I verified that the drawdown estimates presented in Table 4 of the Addendum were calculated correctly using the series approximation of the Theis (1935) solution and the assumed input values.
8. Although the data analysis provides the basis for estimating hydraulic properties for the target aquifer system, the aquifer test was not of sufficient duration to definitively evaluate aquifer boundary conditions and long-term impacts associated with pumping. As recommended in the Addendum (Recommendations 15 and 16), a long-term water level and discharge rate monitoring program should be implemented if the water right applications are approved in order to evaluate water level trends as affected by pumping. Dedicated upgradient and downgradient monitoring wells that are completed in the deep aquifer system within the zone of influence of the aquifer test are recommended.
22. The hearing officer adopts the Vincent analysis text quoted above as findings of fact.
23. Ground water underlying the location of the proposed wells resides in three aquifers separated by discontinuous clay aquatards. The discontinuity of the impervious clay strata allows some communication between the aquifers. This communicative relationship between the aquifers will be discussed in subsequent findings.
24. The shallow aquifer is a water table aquifer extending from land surface to approximately 100 feet below land surface. The intermediate aquifer is generally found from 100-200 feet below ground surface and is at least semi-confined. The deep aquifer is located at depths below approximately 200 feet and is under artesian pressure. There may also be deeper aquifers, including geothermal aquifers.
25. The production zones for two of the test wells are completed in the shallow aquifer. The production zones for three of the test wells are completed in the intermediate aquifer. The

Eaglefield Well, the Legacy Well, and one of the United Water wells are completed in the deep aquifer. Evidence at the hearing established that a United Water intermediate aquifer well and a United Water deep aquifer well were completed within the same borehole. Upon construction, United Water nested strings of casing inside a single well. The casing for the monitoring well identified as having been constructed into the deep aquifer monitoring well commingled the intermediate and deep aquifers together, resulting in a mixing of water from the intermediate and deep aquifers, and also mixing the pressures of the two zones. This commingling probably skewed the data gathered from the United Water deep aquifer well. As a result, the only direct measurements of drawdowns in the deep aquifer caused by pumping are the measurements of drawdowns for the Legacy well.

26. Eagle Exhibit 8 is a summary of the potential effects on the protestants' wells of pumping the proposed Eagle Wells at various flow rates.

27. Eagle Exhibit 24 contains information about the protestants' well and tables estimating drawdowns using the Theis equation at various radial distances from a producing well in the three different aquifers, the shallow aquifer, the intermediate aquifer, and the deep aquifer.

28. Table 1 of Eagle Exhibit 24 is an estimate of potential drawdown in the shallow aquifer based on various pumping rates and distance from the pumping well. The estimates were calculated by multiplying Theis equation drawdowns by a multiplier of 0.116. The 0.116 multiplier is an arbitrary number that has no basis in scientific or technical literature nor is it derived from actual data. Nonetheless, there is limited communication between the shallow, intermediate, and deep aquifers, and the separation between the shallow aquifer and the deep aquifer production zone significantly reduces the communication. The hearing officer determines there is little effect on the shallow aquifer by pumping from the deep aquifer.

29. Table 2 of Eagle Exhibit 24 is an estimate of potential drawdowns in the intermediate aquifer resulting from continuous pumping at various flow rates from the deep aquifer. The drawdowns were calculated by multiplying the Theis equation drawdown values by 0.5. The 0.5 multiplier has no basis in technical literature or data analysis. The hearing officer determines there is a direct hydraulic relationship between the intermediate aquifer and the deep aquifer from which Eagle proposes to produce water. Although the direct relationship may be limited by the separation from the deep aquifer, the degree of the limitation was not established. As a result, the hearing officer assumes the full Theis equation drawdowns will occur in the intermediate aquifer without applying a fractional multiplier, and will use Table 3 of Eagle Exhibit 24 to determine the impacts of pumping the proposed wells on wells constructed in the intermediate aquifer.

30. Table 3 of Eagle Exhibit 24 contains results of a direct Theis equation calculation of drawdowns at various flow rates and distances from the pumping well for continuous pumping over a period of 365 days. Pumping from the deep aquifer will directly and adversely affect other nearby water users diverting from the deep aquifer.

31. Water residing in the intermediate and deep aquifers in the area of proposed well construction is under artesian pressure. Artesian pressure in the deep aquifer causes water to rise

above land surface in wells constructed with a production zone in the deep aquifer. These artesian pressures have been used by some of the protestants to supply water to their beneficial uses.

32. The following is a table of the active protestants' names, water right priorities/date of construction, and the depth of their wells. Some of this information is taken from Eagle Exhibit 24.

Protestant	Water Right	Priority - Construction	Distance from Nearest Proposed Eagle Well	Comments
Dean & Jan Combe	63-2858A	8/5/1956	5,900 ft	Well is 65 feet deep
Mike Dixon	63-2957 63-2958 63-31988	8/28/1953 8/28/1953 3/1/1976		No information about the depth or number of wells was presented at the hearing
Charles Howarth	Domestic (not recorded)	2002	1,399 ft	Well is 333 feet deep
Corrin & Terry Hutton	Domestic		11,992 ft	Well is 115 feet deep
Charles W. Meissner	Three wells. Well logs for two of the wells. No recorded water rights.	July 1981 July 1970	4,800 ft	Well is 90 feet deep Well is 103 feet deep
Mike Moyle	63-2546 63-2609	12/12/1959 2/15/1944	5,643 ft to 7,200 ft	Six wells, all completed in the deep aquifer
Eugene Muller	63-22650	7/25/1887	3,286 ft	Well was initially completed in the shallow aquifer. The well was redrilled in 1979, and now the production zone is in the deep aquifer
Dana & Viki Purdy	63-2920 63-15680 63-22652	1/2/1953 6/1/1900 6/1/1967	3,390 ft 2,700 ft approx.2,640 ft	Well is 90 feet deep Well is 250 feet deep Well is 120 feet deep
Sam & Kari Rosti	Domestic (not recorded) 63-11715	1980 1992	3,444 ft	Well is 255 feet deep Well is 445 feet deep
Jerry & Mary Taylor	63-5040 63-2858B 63-17523 63-3296 63-32189	3/1/1941 6/10/1951 6/1/1960 6/5/1962 3/31/1976	5,997 ft.	Wells completed in the shallow aquifer

33. Pumping at a continuous rate of 8.9 cfs is not an unreasonable assumption about future use of water by Eagle, given Eagle's projected growth and probable storage of municipal water in the future.

34. Pumping of Eagle's proposed wells at a rate of 8.9 cfs will cause significant reduction in the artesian pressures of wells constructed in the deep aquifer. Pumping will also cause reductions in artesian pressures in the intermediate zone.

Moyle

35. Joseph, Lynn, and Mike Moyle own six wells constructed in the deep aquifer that flow under artesian pressure. Four of the wells are described as points of diversion by water rights nos. 63-2546 and 63-2609, bearing priority dates of 1939 and 1943, respectively. A fifth well is the point of diversion for an unrecorded domestic use for a home built by Joseph and Lynn Moyle in approximately 1970. The sixth well was constructed in 1997 to supply water to Mike Moyle's home.

36. Moyles have measured the closed-in pressure in the wells at 10 pounds per square inch ("psi"). Ten psi correlates to a water level head of approximately 21 feet. The flowing artesian wells have supplied stock water for as many as 43,000 mink on the Moyle property. In addition, the Moyle wells have provided irrigation water and water for commercial refrigeration and cooling. Finally, the flowing artesian wells provide domestic water for several homes. In some locations, small, relift pumps increase the pressure for commercial and domestic uses.

37. The four Moyle wells described by decreed or claimed water rights are remote from an electrical supply. As a result, pumping the wells would be difficult if the artesian pressure is lost.

38. As artesian pressure declines, the flow from the artesian wells will decrease. During the end of June 2006 or the first of July 2006, the pressure dropped in some of the artesian wells. Moyles discovered that artesian water was not flowing to the end of the water lines providing drinking water for the mink. As a result, some of the mink died from lack of water.

39. If Moyle's nearest well is approximately 5,643 feet away from a new well pumping continuously at a flow rate of 8.9 cfs, Table 3 of Eagle Exhibit no. 24 predicts a decline in artesian pressure of approximately 15 feet. A reduction from an artesian pressure head of 21 feet down to six feet would significantly reduce the flow needed to supply the domestic, commercial, stockwater, and irrigation needs for Moyles. Lesser reductions of artesian pressure will also significantly reduce the flow needed by Moyles to supply the beneficial uses.

Muller

40. Eugene Muller holds water right no. 63-22650. The original well was constructed to a depth of 70 feet, and the production zone was in the shallow aquifer. In 1979, the well could no longer provide water for Muller's beneficial use, and Muller dug a new well in the deep aquifer. The new well is a flowing artesian well.

41. Muller testified that water flowed from the original well. His testimony is inconsistent with the described characteristics of the shallow aquifer. Nonetheless, any loss of pressure or water level in the original well occurred prior to 1979 when the original well failed, requiring construction of a new well in the deep aquifer.

Howarth

42. In approximately 2001 or 2002, Charles Howarth constructed a domestic well in the deep aquifer. The domestic well is under artesian pressure, maintaining 3 to 7 psi of pressure.

Meissner

43. Charles Meissner, Jr. owns three wells. One of the wells is completed in the shallow aquifer at a depth of 90 feet.

44. A second well was constructed to a depth in excess of 103 feet (See Protestants Exhibit 404, second page) in 1970, and is used for domestic and stockwater purposes. This well will be referred to as the "Double R Cattle Well." The well casing is not perforated, and the water in the well is derived from the bottom of the casing. The casing passes through a significant layer of clay from 70 to 85 feet in depth that probably acts as an aquatard. The water underlying the aquatard is under artesian pressure, but the water does not flow above land surface. The production zone for the well is completed in the intermediate aquifer.

45. Table 3 of Eagle Exhibit 24 establishes that, at a distance of 4,800 feet from the nearest proposed Eagle well and at a continuous pumping rate of 8.9 cfs, water levels in the Double R Cattle Well will decline approximately 15 feet.

46. The depth and other information about the third well was not presented, except Meissner speculated that the well has collapsed.

Purdy

47. Dana and Viki Purdy hold water right no. 63-2920 authorizing irrigation from ground water. The point of diversion is a well approximately 90 feet deep. Purdys pump supplemental ground water for irrigation when surface water is not available for irrigation. The water right for the irrigation well bears a priority date of 1953, but is constructed in the shallow aquifer.

48. Water right no. 63-15680 authorizes use of water for domestic and stockwater purposes and bears a priority date of June 1, 1900. The well is constructed to a depth of 250 feet. Viki Purdy testified that the well has been in place during several decades she has lived on the Purdy farm and that the well had not been worked on or replaced. Water in the well is under artesian pressure but does not free flow. The production zone for this well is most likely completed in the deep aquifer.

49. Table 3 of Eagle Exhibit 24 establishes that, at a distance of 2,700 feet from the nearest proposed Eagle well and at a continuous pumping rate of 8.9 cfs, water levels in the well for water right no. 63-15680 will decline approximately 19.5 feet.

50. Water right no. 63-22652 authorizes a stockwater use, and bears a priority date of June 1, 1967. The point of diversion for water right no. 63-22652 is a well drilled to a depth of 120 feet. The well is constructed in the intermediate aquifer. Water in the well is under artesian pressure, but water does not free flow at ground surface. The well was constructed in 1966.

51. Table 3 of Eagle Exhibit 24 establishes that, at an approximate distance of 2,640 feet from the nearest proposed Eagle well and at a continuous pumping rate of 8.9 cfs, water levels in the well for water right no. 63-22652 will decline approximately 19.0 feet.

52. A well log for another well associated with a home owned by Dana Purdy's mother was received into the evidence. The well was drilled in 1991.

Taylor

53. Jerry and Mary Taylor own several water rights. Three of the water rights authorizes a total irrigation of 17 to 18 acres. Another water right authorizes domestic use. Claim no. 63-5040 is for a domestic/commercial use in the City of Star. The point of diversion is sufficiently distant from the proposed wells that it would not be affected. The wells nearest to the proposed points of diversion are completed in the shallow aquifer.

Combe

54. Dean and Jan Combe hold a water right for a domestic use from a well with a priority date of August 5, 1956. The well is 65 feet deep, and is completed in the shallow aquifer.

Rosti

55. Sam and Kari Rosti own a domestic well drilled in 1980. In addition, they own a 445 foot deep irrigation well completed in the deep aquifer drilled in 1992.

56. Diversion of water from the deep aquifer would have little or no effect on the Boise River in the reach from Lucky Peak to just below Star Bridge. The flows of the Boise River in this zone are affected primarily by water residing in the shallow aquifer and are directly related to surface water flows in the Boise River. Water in the deeper zones is separated by an aquatard or several aquatards. Water in the deeper aquifer migrate westerly toward the Snake River.

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. Idaho Code § 42-111 defines the phrase “domestic purposes.” Stockwater use of up to 13,000 gallons a day is recognized as use of water for domestic purposes.

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 1978, the Idaho Legislature amended the Ground Water Act again. The 1978 amendment expressly stated that domestic water rights are subject to the reasonable economic pumping level standard.

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 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. 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.

103 Idaho 506, 512 (1982) (emphasis supplied). 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.

7. 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 1953, or 1978 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.

8. The extent to which *Parker* provides protection to the protestants' water rights depends on proof of injury and factual similarities to the facts of the *Parker* case.

9. In *Parker*, the owner of the domestic well was unable to divert water from the domestic well within minutes of when the junior priority 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 the Department.

10. In an administrative hearing for an application to appropriate water, the applicant bears the burden of proving that the proposed use of water will not injure other water rights. If a protestant seeks the protection of *Parker* that would insulate the protestant from the reasonable pumping level standard of the Ground Water Act, however, the protestant must come forward with evidence that: (1) the protestant is the holder of a water right that is not subject to the reasonable pumping standard of the Ground Water Act, and (2) the protestant's diversion equipment and facilities are capable of diverting the protestant's 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 proposed use of water will not injure the protestant under the *Parker* standard.

11. Pumping of 8.9 cfs will not cause water level declines in area wells below a level that is reasonable.

12. The following describes how *Parker* applies to each of the active protestants.

Moyle

13. The priority dates of the water rights held by Moyle predate the 1953 amendment of the Ground Water Act subjecting subsequent appropriations of water to the reasonable pumping level standard. Moyles are entitled to protection of their historical water levels in the four wells recorded by their water rights and in one other domestic well associated with a home owned by Joseph and Lynn Moyle. Evidence presented established that Moyles were receiving water under artesian pressure at the time Eagle filed its applications and during the summer preceding the hearing. Diversion from the proposed Eagle wells will injure Moyles' water rights.

14. Prior to diverting water from its existing or proposed wells, Eagle must (a) supply water for uses of ground water from the five Moyle wells entitled to *Parker* protection at no cost to Moyles except the cost for incidental electricity that adds additional pressure to the water supply for domestic and commercial uses, and be immediately ready and able to physically deliver the water to Moyles; or (b) acquire the water rights from Moyles, possibly through condemnation. To be immediately ready and able to physically deliver water to Moyles, Eagle must complete one of the following prior to initiating pumping from and beneficial use of ground water under permits for these applications: (a) physically connect Moyle's water delivery system to Eagle's municipal water system; or (b) with Moyles' consent, place the necessary pumps in the Moyle wells, supply the power for the pumps, construct or install any other physical features, including running power to the wells, and at the same time, insure the water supply to Moyles' beneficial uses is not interrupted; or (c) drill new wells that will supply the water to Moyles' beneficial uses and construct and install all necessary features. Eagle must pay all construction and equipment costs, maintenance, and power costs, except for the electricity costs described above to add additional pressure for domestic and commercial uses.

Muller

15. The priority date for water right no. 63-22650 (1887), owned by Eugene Muller, predates the 1953 amendment to the Ground Water Act that subjects water rights to the reasonable pumping level standard. The original well for water right no. 63-22650 was constructed in the shallow aquifer. In 1979 Muller dug a new well in the deep aquifer. *Parker* would only protect Muller's water right from injury to water levels in the shallow aquifer. The hearing officer determines that pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. Any new water levels (or pressures) in a new well constructed in 1979 are subject to the reasonable pumping level standard established by the 1978 amendment to the Ground Water Act as it relates to domestic water rights.

Howarth

16. Charles Howarth constructed a domestic well in the deep aquifer in approximately 2001 or 2002. The domestic well is under artesian pressure, maintaining 3 to 7 psi of pressure. Howarth's well is subject to the reasonable pumping level standard established by the 1978 amendment to the Ground Water Act as it relates to domestic water rights.

Meissner

17. One of Meissner's three wells derives water from the shallow aquifer. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer.

18. The Double R Cattle Well is a domestic well and is entitled to *Parker* protection because its use predates the requirement of ground water pumping levels under the 1978 amendment to the Ground Water Act.

19. The Double R Cattle Well is completed in the intermediate aquifer. Because Eagle did not satisfy its burden of proving the relationship between the intermediate and the deep aquifer, the hearing officer will assume that the Theis equation drawdowns apply directly to the intermediate aquifer. Under *Parker*, Eagle must compensate Meissner for the additional costs of pumping. Eagle must notify Meissner in the year it begins diverting water from the proposed wells. To avail himself of the benefits of *Parker*, Meissner must measure the water levels in the Double R Cattle Well, beginning during the year Eagle begins pumping water from the proposed wells. Meissner must allow Eagle the opportunity to observe or independently measure water levels in the Meissner well. If Meissner monitors static water levels in his well and can show that water levels continue to decline in the well after Eagle begins pumping water, Eagle must compensate Meissner for the additional cost of pumping from up to 15 feet of water level declines, including costs of lowering a pump, if necessary. If the well dries up within the 15 feet of water level declines, Eagle must either: (a) provide free water service to Meissner through its municipal water system; or (b) redrill a well for Meissner and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire Meissner's water right, perhaps through condemnation.

20. The depth of the third Meissner well is unknown. Meissner had the burden to show that he had a water right for the well bearing a priority date that would qualify for *Parker* protection. Meissner did not satisfy his burden of proof for the third well.

Purdy

21. Dana and Viki Purdy own an irrigation well that is approximately 90 feet deep and is pumped to supply supplemental ground water for irrigation when surface water is not available. The water right for the irrigation well bears a priority date of 1953. Pumping from the deep aquifer will not injure water right no. 63-2920 because Purdys divert ground water from the shallow aquifer. The water level in the Purdy irrigation well is not entitled to *Parker* protection.

22. The well for water right no. 63-15680 is a domestic well entitled to *Parker* protection of ground water levels.

23. The point of diversion for water right no. 63-15680 is a well drilled to a depth of 250 feet. The well is probably completed in the deep aquifer, although the well does not free flow at land surface. Under *Parker*, Eagle must compensate Purdys for the additional costs of pumping from a deeper depth. Eagle must notify Purdys in the year it begins diverting water from the proposed wells. In order to avail themselves of the benefits of *Parker*, however, Purdys must measure the water levels in the well for water right no. 63-15680, beginning in the first year Eagle

begins pumping water from the proposed wells. Purdys must allow Eagle the opportunity to observe or independently measure water levels in the well. If Purdys monitor static water levels in the well and can show that water levels decline in the well after Eagle begins pumping water, Eagle must compensate Purdys for the additional cost of pumping from up to 19.5 feet of ground water declines, including costs of lowering a pump, if necessary. If the well dries up, Eagle must either: (a) provide free municipal water service to Purdys; or (b) redrill a well for Purdys and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire water right no. 63-15680, perhaps through condemnation.

24. Water right no. 63-22652 authorizes domestic and stockwater use, and bears a priority date of June 1, 1967. The well for water right no. 63-22652 is a domestic well entitled to *Parker* protection of ground water levels.

25. The point of diversion for water right no. 63-22652 is a well drilled to a depth of 120 feet. The well is constructed in the intermediate aquifer. Water in the well is under artesian pressure, but water does not free flow at ground surface. The well was constructed in 1966. Under *Parker*, Eagle must compensate Purdys for the additional costs of pumping from a deeper depth. Eagle must notify Purdys in the year it begins diverting water from the proposed wells. In order to avail themselves of the benefits of *Parker*, Purdys must measure the water levels in the well for water right no. 63-22652, beginning in the first year Eagle begins pumping water from the proposed wells. Purdys must allow Eagle the opportunity to observe or independently measure the water levels in their well. If Purdys monitor static water levels in their well and can show that water levels decline in the well after Eagle begins pumping water, Eagle must compensate Purdys for the additional cost of pumping from up to 19 feet of ground water declines, including costs of lowering a pump, if necessary. If the well dries up Eagle must either: (a) provide free municipal water service to Purdys; or (b) redrill a well for Purdys and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire water right no. 63-22652, perhaps through condemnation.

26. Purdys also presented evidence about a well supplying water to Dana Purdy's mother's home. This well was drilled after domestic wells were subjected to the reasonable pumping level standard.

Taylor

27. The Taylor wells are completed in the shallow aquifer. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. The water levels in the Taylor wells are not entitled to *Parker* protection.

Combe

28. The Combe well is 65 feet deep. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. The water level in the Combe well is not entitled to *Parker* protection.

Rosti

29. Rostis own a domestic well drilled in 1980. The Rosti domestic well was drilled after the 1978 amendment to the Ground Water Act that subjected domestic wells to the reasonable pumping level. The Rosti domestic well is not entitled to *Parker* protection of ground water levels.

30. The Rosti irrigation well completed in the deep aquifer was drilled in 1992. The Rosti irrigation well was constructed after the 1953 amendment to the Ground Water Act. The Rosti irrigation well is not entitled to *Parker* protection of ground water levels.

31. Water levels and pressures are not declining significantly in the area where water is sought for appropriation. Nonetheless, IDWR staff raised concerns about limitations of the pump test. Furthermore, in its addendum to the pump test report, Eagle recognized some of the uncertainties about sufficiency of the water supply and injury and recommended further ground water monitoring. IDWR staff recommended the construction/identification by Eagle of two observation wells, one up-gradient and one down-gradient of the proposed wells. In addition, Eagle must develop a monitoring, recording, and reporting plan for the observation wells.

32. By compensating the protestants entitled to protection of water levels/pressures under *Parker*, and by monitoring ground water levels during pumping, the proposed appropriation by Eagle will not injure other water users.

33. There is sufficient water for the purposes sought by Eagle's applications. The additional monitoring of the two dedicated observation wells will insure that the deep aquifer in the area is not overappropriated.

34. The application is not filed in bad faith or for purposes of speculation or delay.

35. Eagle has sufficient monetary resources to complete the project.

36. The proposed project is in the local public interest.

37. The proposal conserves the water resources of the state of Idaho because irrigation and other outside uses of water will be provided primarily by other water rights.

ORDER

IT IS HEREBY ORDERED that applications to appropriate water nos. 63-32089 and 63-32090 are **Approved** subject to the following conditions:

Proof of application of water to beneficial use shall be submitted on or before **August 1, 2012**.

In connection with the proof of beneficial use submitted for this permit, the permit holder shall also submit a report showing the total annual volume, the maximum daily volume, and the maximum instantaneous rate of flow diverted from the point of diversion authorized for this

permit during the development period. The report shall also show the maximum instantaneous rate of diversion, either measured or reasonably estimated by a qualified professional engineer, geologist, or certified water rights examiner, for the entire City of Eagle municipal water system. The report shall also describe and explain how water diverted under this permit provides an additional increment of beneficial use of water for the City of Eagle municipal water system as opposed to an alternative point of diversion for prior water rights already held and used by the City of Eagle for its municipal water system.

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.

Subject to all prior water rights.

Place of use is within the service area of the City of Eagle municipal water supply system as provided for under Idaho Law.

Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department as part of the diverting works.

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

Prior to diverting water from its existing or proposed wells, for the four wells identified as points of diversion for water right nos. 63-2546 and 63-2609, and for the domestic use of water in the home presently owned by Joseph and Lynn Moyle, the right holder shall: (a) supply water for uses of the five Moyle wells at no cost to Moyles except the cost for incidental electricity that adds additional pressure to the water supply for domestic and commercial uses and be ready and able to immediately, physically deliver the water to Moyles; or (b) purchase the Moyle water rights, perhaps through condemnation. To be immediately ready and able to physically deliver water to Moyles, the right holder must complete one of the following prior to initiating pumping from and beneficial use of ground water under this right: (a) physically connect Moyles' water delivery system to the right holder's municipal water system; or (b) with Moyles' consent, place the necessary pumps in the Moyle wells, supply the power for the pumps, construct or install any other physical features, including running power to the wells, and, at the same time, insure the water supply to Moyles' ongoing beneficial uses is not interrupted; or (c) drill new wells that will supply water to Moyles, and construct and install all necessary features. The right holder shall pay for all construction and equipment costs, maintenance, and power costs, except for the electricity costs described above to add additional pressure for domestic and commercial uses.

The right holder must compensate Meissner for additional costs of pumping from the Double R Cattle Well because of declines in water levels caused by pumping from the authorized points of diversion. The right holder must notify Meissner of the year it begins diverting water from the proposed wells. In order to avail himself of the benefits of *Parker*, however, Meissner must measure the water levels in the Double R Cattle Well, beginning during the year Eagle begins

pumping water from the proposed wells. Meissner must allow Eagle the opportunity to observe or independently measure water levels in the Meissner well. If Meissner monitors static water levels in his well and can show that water levels continue to decline in the well after the right holder begins pumping water, Eagle must compensate the right holder for the additional cost of pumping from up to 15 feet of water level declines, including costs of lowering a pump, if necessary. If the well dries up within the 15 feet of water level declines, Eagle must either: (a) provide free water service to Meissner through its municipal water system; or (b) redrill a well for Meissner and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire Meissner's water right, perhaps through condemnation.

The right holder must compensate Purdys for the additional costs of pumping from the well described as a point of diversion by water right no. 63-15680. The right holder must notify Purdys in the year it begins diverting water from the proposed wells. In order to avail themselves of the benefits of *Parker*, however, Purdys must measure the water levels in the well for water right no. 63-15680, beginning in the first year the right holder begins pumping water from the proposed wells. Purdys must allow the right holder the opportunity to observe or independently measure water levels in the well. If Purdys monitor static water levels in the well and can show that water levels decline in the well after the right holder begins pumping water, the right holder must compensate Purdys for the additional cost of pumping from up to 19.5 feet of ground water declines, including costs of lowering a pump, if necessary. If the well dries up within the 19.5 feet of ground water declines, the right holder must either: (a) provide free municipal water service to Purdys; or (b) redrill a well for Purdys and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire water right no. 63-15680, perhaps through condemnation.

The right holder must compensate Purdys for the additional costs of pumping from the well described as a point of diversion by water right no. 63-22652. The right holder must notify Purdys in the year it begins diverting water from the proposed wells. In order to avail themselves of the benefits of *Parker*, however, Purdys must measure the water levels in the well for water right no. 63-22652, beginning in the first year the right holder begins pumping water from the proposed wells. Purdys must allow the right holder the opportunity to observe or independently measure water levels in the well. If Purdys monitor static water levels in the well and can show that water levels decline in the well after the right holder begins pumping water, the right holder must compensate Purdys for the additional cost of pumping from up to 19 feet of ground water declines, including costs of lowering a pump, if necessary. If the well dries up within the 18 feet of ground water declines, the right holder must either: (a) provide free municipal water service to Purdys; or (b) redrill a well for Purdys and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire water right no. 63-22652, perhaps through condemnation.

Prior to diversion of water under this right, the right holder shall construct/identify two observation wells, one up-gradient and one down-gradient of the production wells under this right. The location and construction must be approved by the Department. Each observation well must be constructed so that water levels in each of the three aquifers can be independently measured.

Prior to diversion of water under this right, the right holder shall develop and the Department must approve, a monitoring, recording, and reporting plan for the observation wells.

The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.

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.

The wells constructed at the points of diversion shall be constructed in accordance with the rules of the Idaho Department of Water Resources regarding well construction standards and measurement of diversions and the rules of the Department of Environmental Quality for Public Drinking Water Systems, IDAPA 58.01.08.

Dated this 17th day of July, 2007.



Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of July, 2007, a true and correct copy of the foregoing document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Preliminary Order and Explanatory Sheet for "Responding to Preliminary Orders..." when a hearing was held.

JERRY & MARY TAYLOR
3410 HARTLEY
EAGLE ID 83616

CORRIN & TERRY HUTTON
10820 NEW HOPE RD
STAR ID 83669

SAM & KARI ROSTI
1460 N POLLARD LN
STAR ID 83669

LEEROY & BILLIE MELLIES
6860 W STATE ST
EAGLE ID 83616

DEAN & JAN COMBE
6440 W BEACON LIGHT
EAGLE ID 83616

BRUCE M SMITH
MOORE SMITH BUXTON TURKE
225 N 9TH STE 420
BOISE ID 83702

JOHN M MARSHALL
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720

CHARLES L HONSINGER
DANIEL V STEENSON
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773

WESTERN REGION
ATTN JOHN WESTRA
2735 AIRPORT WAY
BOISE ID 83705-5082



Deborah J. Gibson
Administrative Assistant

**STARTING
RIGHT
SIDE OF
FILE**

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

East Front Street, P.O. Box 83720
Boise, Idaho 83720-0098

Return Service Requested

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FIRST CLASS



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63-32089

DANA & VICKI PURDY
5926 FLOATING FEATHER
EAGLE ID 83616

RECEIVED

MAR 28 2008

DEPARTMENT OF
WATER RESOURCES

Resent Order

3/31/08 - w/

change in address; etc.

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RETURN TO SENDER
PURDY
PO BOX 11
NEW MEADOWS ID 83654-0011

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83720@0098



**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS TO)
APPROPRIATE WATER NOS. 63-32089 AND)
63-32090 IN THE NAME OF THE CITY)
OF EAGLE)
_____)

**ORDER GRANTING
PETITIONS FOR
RECONSIDERATION
OF THE FINAL ORDER
AND SCHEDULING ORDER**

On February 26, 2008, the Director issued a final order in the above titled matter approving applications nos. 63-32089 and 63-32090. On February 26, 2008, the final order was served on the parties by mailing a copy of the final order to each of the parties via the United States Postal Service.

The following parties filed timely petitions for reconsideration: The City of Eagle and Protestants Joseph, Lynn and Michael Moyle, Eugene Muller, Charles W. Meissner, Jr., Charles Howarth and Mike Dixon/Hoot Nanney Farms, Inc. by and through their attorneys of record Ringert Clark Chartered.

ORDER

IT IS HEREBY ORDERED that the Petitions for Reconsideration filed with the Idaho Department of Water Resources ("Department") are **Granted**.

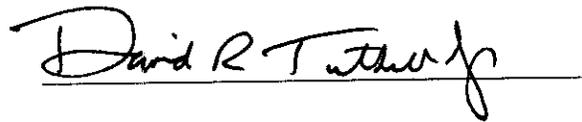
IT IS FURTHER ORDERED that the party/petitioners request for Oral Argument is **Granted**.

IT IS FURTHER ORDERED that written briefs in support of or taking exceptions to the final order shall be simultaneously filed on or before **April 18, 2008**. Reply briefs shall be simultaneously filed on or before **May 2, 2008**.

IT IS FURTHER ORDERED that the party/petitioners may present oral arguments to the Director on **May 7, 2008 at 9:00 a.m.** in the offices of the Department located at 322 E. Front St., Boise, ID, Conference Room 648A.

The Director will issue a final order within fifty-six (56) days of holding the oral argument. 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 25th day of March, 2008.

A handwritten signature in cursive script, reading "David R. Tuthill, Jr.", written over a horizontal line.

David R. Tuthill, Jr.
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of March, 2008, a true and correct copy of the foregoing document described below was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document Served: Order Granting Petitions for Reconsideration of the Final Order and Scheduling Order

BRUCE M SMITH
MOORE SMITH BUXTON TURKE
225 N 9TH STE 420
BOISE ID 83702

JOHN M MARSHALL
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720

CHARLES L HONSINGER
DANIEL V STEENSON
RINGERT CLARK CHARTERED
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BOISE ID 83701-2773

JERRY & MARY TAYLOR
3410 HARTLEY
EAGLE ID 83616

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10820 NEW HOPE RD
STAR ID 83669

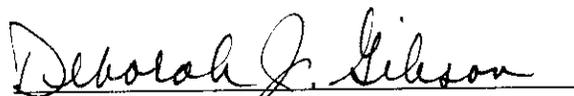
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6440 W BEACON LIGHT
EAGLE ID 83616

DANA & VICKI PURDY
5926 FLOATING FEATHER
EAGLE ID 83616

WESTERN REGION
ATTN JOHN WESTRA
2735 AIRPORT WAY
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Deborah J. Gibson
Administrative Assistant

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Attorneys at Law
950 W. Bannock Street, Suite 520
Boise, ID 83702-5716
Telephone: (208) 331-1800
Facsimile: (208) 331-1202

RECEIVED

MAR 11 2008

DEPARTMENT OF
WATER RESOURCES

Attorneys for the City of Eagle

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS FOR)
PERMIT NOS. 63-32089 AND 63-32090 IN THE)
NAME OF THE CITY OF EAGLE)
)
)
)
)
)
)
_____)

PETITION FOR
RECONSIDERATION OF
~~PRELIMINARY~~ ORDER
FINAL

INTRODUCTION

The City of Eagle hereby petitions the Director for reconsideration of the February 26, 2008, Final Order in this matter. The City requests that the Director revise the Final Order to state that Applications Nos. 63-32089 and 63-32090 provide for 8.91 cfs of Municipal water right consistent with the applications filed by the City. The City requests: (1) that it be permitted 14 days to submit a brief on this matter, and (2) that the Director permit oral argument on the matter.

ARGUMENT

The City submitted Applications for Permit Nos. 63-32089 and 63-32090 consistent with the requirements of Idaho Code and the IDWR rules. The two applications sought to appropriate a total of 8.91 cfs for Municipal purposes. In the Final Order, the Director reduced Application 63-32089 to 2.23 cfs for Municipal and 1.77 cfs for Fire Protection. Application No. 63-32098 was redesignated to 4.91 cfs for Fire Protection. In the section of the Final Order discussing Issue No.

1 (Future Anticipated Needs of a Municipality) and Issue No. 2 (Authority to Change the Nature of Use Sought By Eagle's Applications to Another Nature of Use), the Director set out his explanation for changing the applications as shown in the Final Order. The City of Eagle respectfully disagrees with this aspect of the Final Order and believes that both the applications and supporting information, as well as the evidence submitted at the hearing, fully support the City's applications as filed.

Because the Final Order refers to certain specific testimony, the City in responding to the Final Order, will need to have a transcript of certain parts of the hearing. The City has requested and received a copy of the hearing tapes and is diligently proceeding to transcribe relevant parts of the hearing. However, some additional time is required to complete this effort in order to properly brief the matter. Therefore, the City requests that it be allowed 14 days from approval of this Petition to Reconsider to submit a brief setting forth the relevant information. Further, because of the nature of the issues involved, the City requests the opportunity for oral argument on its petition at a time convenient for the Director.

CONCLUSION

The City of Eagle requests reconsideration of Issues 1 and 2 in the Final Order and for the Director to redesignate the relevant permits for Municipal purposes.¹ The City requests 14 days from the approval of this Petition to submit a brief setting forth the parts of the record that support the applications as filed and the opportunity for oral argument to the Director.

¹ The City, while asking for reconsideration of Issues 1 and 2, reserves all of its rights with regard to other exceptions.

Respectfully submitted this 11 day of March 2008.

MOORE SMITH BUXTON & TURCKE,
CHARTERED

A handwritten signature in black ink, appearing to read 'Bruce M. Smith', is written over a horizontal line. The signature is stylized with a large initial 'B' and a long horizontal stroke.

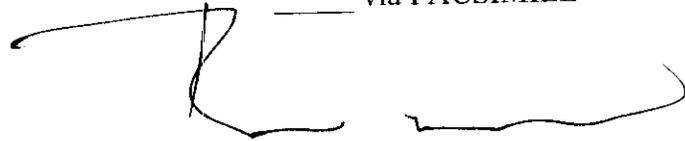
BRUCE M. SMITH
Attorney for the City of Eagle

CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of March 2008, a true and correct copy of the foregoing document was served upon the following by the method indicated below:

DEAN & JAN COMBE 6440 W BEACON LIGHT EAGLE ID 83616	CHARLES HONSINGER DANIEL V. STEENSON RINGERT CLARK CHTD 455 S. THIRD STREET PO BOX 455 BOISE, ID 83701-2773
CORRIN & TERRY HUTTON 10820 NEW HOPE ROAD STAR ID 83669	DANA & VIKI PURDY 5926 FLOATING FEATHER EAGLE ID 83616
LEEROY & BILLIE MELLIES 6860 W STATE STREET EAGLE ID 83616	SAM & KARI ROSTI 1460 N. POLLARD LANE STAR ID 83669
JERRY & MARY TAYLOR 3410 HARTLEY EAGLE ID 83616	IDWR - WESTERN REGION ATTN JOHN WESTRA 2735 AIRPORT WAY BOISE ID 83705-5082

- via U.S. MAIL
- via HAND DELIVERY
- via OVERNIGHT MAIL
- via FACSIMILE



BRUCE M. SMITH

RECEIVED

MAR 11 2008

DEPARTMENT OF
WATER RESOURCES

CHARLES L. HONSINGER (ISB #5240)
DANIEL V. STEENSON (ISB #4332)
JON C. GOULD (ISB #6709)
RINGERT CLARK CHARTERED
455 S. Third Street, P.O. Box 455
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

Attorneys for Protestants Joseph, Lynn and Michael Moyle,
Eugene Muller, Charles W. Meissner, Jr., Charles Howarth
and Mike Dixon/Hoot Nanney Farms, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS TO)
APPROPRIATE WATER NOS. 63-32089) PROTESTANT MOYLE'S PETITION
AND 63-32090 IN THE NAME OF THE) FOR RECONSIDERATION OF
CITY OF EAGLE) FINAL ORDER
_____)

COMES NOW Protestants Joseph, Lynn and Michael Moyle (hereinafter "Moyle"), by and through their counsel of record, Ringert Clark Chartered, 455 S. Third Street, P.O. Box 2773, Boise, Idaho 83701-2773, and hereby file this petition for reconsideration of the Director's February 26, 2008 *Final Order* issued in the above-captioned matter. This Petition is supported by the record herein, and is filed pursuant to IDAPA 37.01.01.730.02(a) and I.C. §67-5243. This Petition is timely based upon the *Final Order's* service date of February 26, 2008 listed on the Certificate of Service attached thereto.

The *Final Order* grants permits to water right no. 63-32089 and 63-32090 for which the City of Eagle filed its applications in January of 2005. Various parties, including Moyle, protested the applications, and IDWR initiated proceedings in the matter. The protests were filed primarily

to protect the protestants' water rights from injury.

Moyle seeks reconsideration of the *Final Order* for two reasons: First, Moyle's position is that the Director's conclusion that Moyle's water rights authorizing diversion for ground water for non-domestic uses, bearing priority dates earlier than the 1953 amendment to the Idaho Ground Water Act do not create a right to protection of historic ground water levels is erroneous and must be reversed. As a result of the Final Order, the groundwater levels that provide above-ground pressure for diversions of Moyle's water rights will be unprotected as is required by Idaho law. The Director must conclude, as is provided in Idaho law, that the "reasonable pumping level" provision of the Idaho Ground Water Act does not apply to groundwater rights established prior to the 1953 amendment to that act.

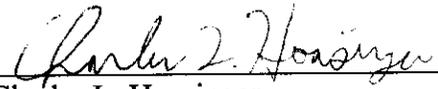
Second, the *Final Order* does not require that the City protect Moyle's domestic water right levels. Instead, the Final Order requires Moyle to test the impact of the reduction of pressure head expected to be caused by the City's pumping to determine whether there would be a reduction in flow to Moyle's domestic uses - at Moyle's own expense. If there has been a reduction in flow to domestic uses, Moyle must then petition the Department to determine that there has been a material injury to his water rights - again, presumably the costs of such a petition and proceeding to be borne by Moyle. In light of the evidence at hearing that injury will result to Moyle with lesser diversions than those presumed under the *Final Order*, there is simply no basis for the Director to find that Moyle must now be required to again "prove" injury to his water rights before they are protected from further injury. The *Final Order* must be amended to provide, as did the *Preliminary Order* issued in this case, that the City of Eagle must mitigate Moyle's injury *before* diverting any water pursuant to the water rights that are the subject of this

action.

This petition states Moyle's initial grounds for reconsideration of the *Final Order*. Moyle hereby reserves his rights to amend these grounds, and present additional grounds, through the customary pre-hearing opportunities to submit statements of issues, and to present argument and submit briefing on all issues that have been raised, or will be raised during hearing. A briefing schedule and oral argument are hereby requested.

DATED this 11th day of March, 2008.

RINGERT CLARK CHARTERED

By 
Charles L. Honsinger
Attorneys for Protestants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of March, 2008, 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:

Jerry & Mary Taylor
3410 Hartley
Eagle, Idaho 83616

Leeroy & Billie Mellies
6860 W. State Street
Eagle, Idaho 83616

Corrin & Terry Hutton
10820 New Hope Road
Star, Idaho 83669

Dean & Jan Combe
6440 W. Beacon Light
Eagle, Idaho 83616

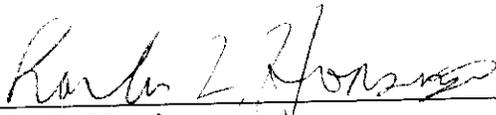
Sam & Kari Rosti
1460 N. Pollard Lane
Star, Idaho 83669

Bruce Smith
Moore Smith Buxton & Turke
950 W. Bannoc, Ste. 520
Boise, Idaho 83702

Western Region
Attn: John Westra
2735 Airport Way
Boise, Idaho 83705-5082

John M. Marshall
Givens Pursley
P.O. Box 2720
Boise, Idaho 83701

Dana and Vicky Purdy
5926 Floating Feather
Eagle, ID 83616



Charles L. Honsinger

03-32084

MOORE SMITH BUXTON & TURCKE, CHARTERED

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950 W. BANNOCK STREET, SUITE 520; BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202 www.msbtlaw.com

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SUSAN E. BUXTON*
PAUL J. FUZER
BRUCE M. SMITH
PAUL A. TURCKE◊
CARL J. WITHROE»*
TAMMY A. ZOKAN†

JOHN J. MCFADDEN**
of Counsel
MICHAEL C. MOORE‡
of Counsel

» Also admitted in California
* Also admitted in New Mexico
* Also admitted in Oregon
◊ Also admitted in South Dakota
≈ Also admitted in Utah
† Also admitted in Washington

March 6, 2008

RECEIVED

MAR 06 2008

DEPARTMENT OF
WATER RESOURCES

Debbie Gibson
Administrative Assistant
Water Allocation Bureau
State of Idaho
Department of Water Resources
322 East Front Street
Boise, ID 83720

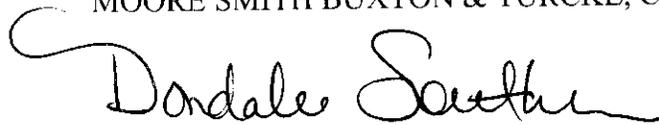
Re: City of Eagle 2006 Hearing

Dear Ms. Gibson:

Please consider this is a formal request for copies of the CD's pertaining to the 2006 Hearing involving the City of Eagle. Thank you for your assistance in this matter. If you have any questions, please contact me at (208) 331-1800.

Sincerely yours,

MOORE SMITH BUXTON & TURCKE, CHTD.



Dondalee Southern
Legal Assistant

/ds



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

February 26, 2008

RE: In the matter of the protested applications for permit to appropriate water nos. 63-32089 and 63-32090 in the name of the City of Eagle

Dear Interested Parties:

The Department of Water Resources (department) has issued the accompanying **Final Order** pursuant to section 67-5246 or 67-5247, Idaho Code. **Enclosed is an informational sheet that explains how to respond to final orders.**

Sincerely,

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Enclosures

c: IDWR –Region

**EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER**

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) the petition for reconsideration is disposed of; or
 - (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

The appeal must be filed within twenty-eight (28) days a) of the service date of the final order, b) of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW
950 W. BANNOCK STREET, SUITE 520; BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202 www.msbtlaw.com

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SUSAN E. BUXTON*
DANIELLE M. DANCHOV"
PAUL J. FITZER
MICHAEL C. MOORE†
BRUCE M. SMITH
PAUL A. TURCKE‡
CARL J. WITHROE»*
TAMMY A. ZOKAN†

JOHN J. MCFADDEN*
of Counsel
√ Also admitted in Arizona
» Also admitted in California
" Also admitted in Colorado
* Also admitted in New Mexico
* Also admitted in Oregon
‡ Also admitted in South Dakota
† Also admitted in Washington

December 10, 2007


Dave Tuthill, Director
Idaho Department of Water Resources
2735 Airport Way
Boise, ID 83705

RECEIVED
DEC 13 2007
DEPARTMENT OF
WATER RESOURCES

Re: In the matter of Applications for Permit
Nos. 63-32089 and 63-32090 in the Name
of the City of Eagle

Dear Director Tuthill:

This letter addresses the City of Eagle's pending application Nos. 63-32089 and 63-32090. The City of Eagle filed the above noted applications on January 19, 2005. A Preliminary Order was issued July 17, 2007. That Preliminary Order was the subject of several Petitions for Reconsideration, and an Amended Preliminary Order was issued October 4, 2007.

The City of Eagle filed Exceptions to the Amended Preliminary Order and requested oral argument before the Director. Protestants Joseph, Lynn and Mike Moyle filed a Petition for Reconsideration of the Amended Preliminary Order. The Department has not acted on the Petition for Reconsideration nor has the City of Eagle received any notice of oral argument or information on the Director's consideration of the Exceptions filed by the City of Eagle.

While the City of Eagle recognizes the number of pending matters before the Department and that you are extremely busy, the City would appreciate knowing your intent with regard to the Exceptions filed by the City of Eagle. If you are going to schedule oral argument, it would be appreciated if we could anticipate a date.

I would also like to raise another issue. The Exceptions filed by the City covered the matters the City has to anticipate for purposes of appeal should that be necessary. However, continued litigation is certainly not the City's preferred outcome, and the City remains hopeful

Dave Tuthill, Director
Idaho Department of Water Resources
December 10, 2007
Page 2

some alternative resolution might be reached. The City would like to propose and/or request the Department's help in finding resolution of this matter as an alternative to continue litigation.

The normal procedure for handling protested applications is to schedule a conference to try to resolve issues raised in the protests. It would seem that such a proceeding might provide at least an opportunity to address these applications now that the parties have held a hearing and two preliminary orders have been issued. If you would consider ordering such a proceeding, the City would agree to meet with the Department and the limited number of protestants who remain a part of the proceedings to see if resolution can be reached. Based on efforts by the City subsequent to the issuance of the Amended Order, I believe the Department's participation, just as at a conference, would be helpful.

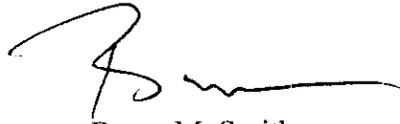
I recognize this request falls outside the norm for the Department's handling of contested cases. To offer some initial thoughts for you in considering this request, I am attaching correspondence which was sent to the Hearing Officer in this matter in an effort by the City to address the concerns raised by the protestants on sufficiency of the supply and possible impacts on protestants' water rights. The hearing produced clear evidence that there is sufficient water to grant the application. On the issue of impact, the City proposed staged development of the water rights accompanied by ongoing monitoring as a means to identify whether there were any impacts associated with the exercise of the water rights. As a good faith effort to advance resolution of this matter, if you would order a conference to be held, the City would consider discussing these conditions again as a way of scientifically dealing with the concerns expressed.

The City must protect its legal rights as set forth in the Exceptions and will do so if necessary. That legal position, however, does not dictate that the parties avoid working in good faith to address the issues. Therefore, please consider this request by the City for the Department's help.

I look forward to hearing from you.

Very truly yours

MOORE SMITH BUXTON & TURCKE CHARTERED



Bruce M. Smith

BMS/clb
Enclosures

Dave Tuthill, Director
Idaho Department of Water Resources
December 10, 2007
Page 2

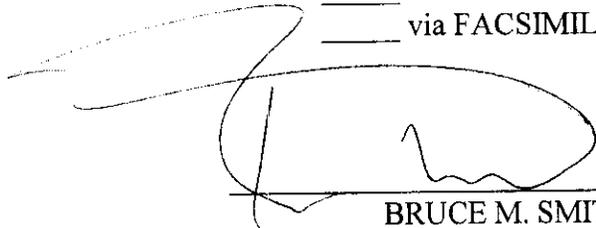
Cc: Gary Spackman, Hearing Officer
Protestants on attached Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that on this / 8 day of October 2007, a true and correct copy of the foregoing document was served upon the following by the method indicated below:

DEAN & JAN COMBE 6440 W BEACON LIGHT EAGLE ID 83616	CHARLES HONSINGER DANIEL V. STEENSON RINGERT CLARK CHTD 455 S. THIRD STREET PO BOX 455 BOISE, ID 83701-2773
CORRIN & TERRY HUTTON 10820 NEW HOPE ROAD STAR ID 83669	SAM & KARI ROSTI 1460 N. POLLARD LANE STAR ID 83669
LEEROY & BILLIE MELLIES 6860 W STATE STREET EAGLE ID 83616	IDWR - WESTERN REGION ATTN JOHN WESTRA 2735 AIRPORT WAY BOISE ID 83705-5082
JERRY & MARY TAYLOR 3410 HARTLEY EAGLE ID 83616	DANA AND VIKI PURDY 5926 FLOATING FEATHER RD EAGLE, ID 83616

- via U.S. MAIL
- via HAND DELIVERY
- via OVERNIGHT MAIL
- via FACSIMILE



BRUCE M. SMITH

1019.03

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

950 W. BANNOCK STREET, SUITE 520
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STEPHANIE J. BONNEY
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PAUL J. FITZER
MICHAEL C. MOORE†
BRUCE M. SMITH
PAUL A. TURCKE‡
CARL J. WITHROB‡*
TAMMY A. ZOKAN‡

JOHN J. MCFADDEN‡*
Of Counsel
‡ Also admitted in California
* Also admitted in New Mexico
* Also admitted in Oregon
‡ Also admitted in South Dakota
‡ Also admitted in Washington

April 26, 2007

RECEIVED

MAY 1 - 2007

MSB & T, CTD.

Mr. Gary Spackman
Idaho Department of Water Resources
322 E. Front Street
Boise, ID 83720-0098

RE: City of Eagle Applications Nos. 63-32089 and 63-32090

Dear Gary:

According to the Notice of Consideration of Additional Evidence and Post Hearing Order, any party who wanted a further evidentiary hearing on the above applications based on the Addendum report and the February 27, 2007 staff memorandum by Sean Vincent was to request an additional hearing day by April 25, 2007. I do not believe any party has asked for any additional hearing. The staff memorandum addressed all the issues raised by the staff's earlier memorandum. Notably, no other party presented any contrary technical testimony or other evidence to contradict the Applicant's information, data, and testimony.

The City of Eagle would appreciate the Department's expeditious consideration of these applications. There are several developments underway, which are dependent upon the City's water system incorporating these water rights.

While the City believes that the evidence and analysis supports a finding that there is sufficient water for appropriation and that these applications should be granted as filed, the City has tried to address issues that have been raised at various points in the process. In the hope that it will help expedite the Department's processing, the City would offer the attached proposed

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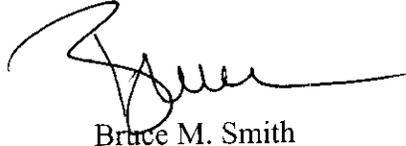
WATER RESOURCES
WESTERN REGION

conditions that the City would voluntarily agree to have included as conditions on the permits. The City believes that these conditions, which reflect a carefully staged development process coupled with extensive monitoring, should allow the immediate issuance of these permits while providing assurances that the Department has the ability to determine if and when any impact or injury occurs. This approach also allows the Department to continue gathering information for future decisions on water rights in this basin.

Thank you.

Sincerely,

MOORE SMITH BUXTON & TURCKE, CHTD.

A handwritten signature in black ink, appearing to read "Bruce M. Smith", with a long horizontal flourish extending to the right.

Bruce M. Smith

BMS/dls

Enclosure

cc: Client w/Enclosures

Protestants w/Enclosures

**PROPOSED CONDITIONS FOR
PERMIT NOS. 63-32089 and 63-32090**

- Prior to diversion of water under this right, the Permit Holder shall install at each well developed under Permit Nos. 63-32089 and 63-32090 a flow meter capable of instantaneous and totalized flow measurements.
- The Permit Holder shall record instantaneous flow, totalized flow, and water level in each well developed under Permit Nos. 63-32089 and 63-32090 on a monthly basis.
- The Permit Holder shall monitor water levels in up to four (4) appropriate observation wells in the vicinity of the proposed points of diversion on a quarterly basis. The observation wells shall be selected in consultation with the Department. These wells are in addition to the wells noted above.
- A summary report of monthly and annual diversions, and water level readings for each well developed under Permit Nos. 63-32089 and 63-32090 shall be submitted to the Department on an annual basis.
- Monitoring and reporting required as conditions of this permit shall be provided for a five-year period following permit approval.
- To provide for phased development, the maximum annual volume authorized under this Permit shall be limited to 1,200 acre-feet per year in each of the first three years following permit approval. The maximum annual diversion volume shall increase by 500 acre-feet in each year thereafter. The rate of volume diverted may be increased beyond that specified in any given year if the volume increase is offset by mitigation.
- This Permit is eligible for licensing when the system capacity to divert 8.9 cfs has been established.

RECEIVED

DEC 13 2007

WATER RESOURCES
WESTERN REGION

63-03289

63-03290

John -

The Director's decision on the City of Eagle's applications is expected in the next couple of weeks. Here is a letter I delivered to the Director requesting consideration of another conference to perhaps resolve the problems in the interim.

63-12448 - I also spoke w/ Aaron Marshall today about trying to lease some water sufficient to do the IDEQ pump test. If there is sufficient water to lease for the pump test, the City would appreciate your reconsideration of allowing the pump test to proceed pending a final decision from the Director. Thanks

Bruce Smith

Call me on my cell if you have questions 631-3702



State of Idaho

DEPARTMENT OF WATER RESOURCES

Western Region, 2735 Airport Way • Boise, Idaho 83705-5082

Phone: (208) 334-2190 • Fax: (208) 334-2348 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

November 26, 2007

Chris H. Duncan, P.G.
Holladay Engineering Co
32 N Main PO Box 235
Payette ID 83661

Ref. Only

RE: 11/09/07 Request for Groundwater Testing--City of Eagle #4 Well

Dear Mr. Duncan:

This letter is in response to your request to conduct a ground water pumping certification test on City of Eagle well #4. The test is scheduled for 12/10/07 through 12/13/07.

The Department Administration has reviewed your request taking into consideration the status of the City's contested applications for permit #63-32089 & #63-32090. As you are aware, the recent preliminary order decision has drawn several petitions for reconsideration. Currently, the hearing officer is in the process of considering the petitions. Until the decision process is complete and legal actions settled, the Department will not authorize additional testing/certification of the City's applicable ground water wells.

Should you have questions or concerns, please contact me at the Western Regional Office, phone 334-2190.

Sincerely,

A handwritten signature in cursive script that reads "John Westra".

John Westra, Manager
Western Region

Cc: G. Spackman, IDWR
R. Whitney, IDWR
B. Smith, Attorney

RECEIVED

OCT 18 2007

DEPARTMENT OF WATER RESOURCES

BRUCE M. SMITH, ISB #3425
MOORE SMITH BUXTON & TURCKE, CHARTERED
Attorneys at Law
950 W. Bannock Street, Suite 520
Boise, ID 83702-5716
Telephone: (208) 331-1800
Facsimile: (208) 331-1202

Attorneys for the City of Eagle

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS FOR)
PERMIT NOS. 63-32089 AND 63-32090 IN THE)
NAME OF THE CITY OF EAGLE)
)
)
)
)
)
_____)

EXCEPTIONS TO AMENDED
PRELIMINARY ORDER ISSUED
OCTOBER 4, 2006, AND
SUPPORTING MEMORANDUM

COMES NOW the City of Eagle (“Eagle”) and submits the following Exceptions to the Amended Preliminary Order issued by Hearing Officer Gary Spackman on October 4, 2007.

The City directs the Exceptions to the Director and requests oral argument before the Director. Eagle submits exceptions to and assigns as error the following:¹

- (a) “Change To Nature of Use on Applications (Issue 3);
- (b) “Mitigation Prior to Demonstration of Injury” (Issue 23);
- (c) Findings of Fact Nos. 17, 10, 11, 12, 28, 29, 30, 32, 33, 34, 35, 36, 38, 39, 40, 41, 49, 53, 55, 58;;
- (d) Conclusions of Law Nos. 13, 15, 19, 20, 24, 25, 26, 34;
- (e) Order

¹ The identified Exceptions are also set forth for purpose of the Record on Appeal.

BACKGROUND

As noted in the Amended Preliminary Order (“Amended Order”), Eagle filed its Applications in January, 2005. A hearing on these Applications was conducted December 7, 8, 11, 12, and 18, 2006, and additional information was submitted pursuant to an Addendum to City of Eagle 7 Day Aquifer Test Report. The only expert testimony and evidence submitted was by the City of Eagle. None of the protestants offered any independent expert testimony nor any rebuttal expert testimony. The initial Preliminary Order was issued July 17, 2007. The Amended Preliminary Order was issued October 4, 2007. The identified Exceptions apply to the Amended Preliminary Order issued in response to several Petitions for Reconsideration timely filed with the Department.

ARGUMENT

Department’s Change In Nature of Use of Applications (Issue No. 3)

The original Preliminary Order properly granted the City of Eagle’s Applications for Municipal water rights for a total of 8.91 cubic feet per second (cfs) and required certain mitigation by Eagle. The Amended Preliminary Order has now changed the nature of use of the Applications from a total of 8.91 cfs Municipal to 2.23 cfs Municipal and 6.68 Fire Protection in response to Issue No. 3. This arbitrary change in the nature of use on the Eagle Applications is neither allowed by statute nor is it consistent with the Applications filed by the City. Furthermore, the change impermissibly undermines the efforts by the City to serve its citizens and is contrary to the criteria set forth in I.C. § 42-203A.

The City of Eagle submitted Applications for permits for appropriation of water consistent with Idaho statutes (I.C. § 42-202 et. seq.) and the Idaho Constitution (Article XV, § 3). The Applications contained all the information required by Idaho statutes and once received and

accepted, the Department is under a nondiscretionary duty to process the Application consistent with Idaho Code § 42-203A.

Nowhere in Idaho Code is the Director provided the discretion to arbitrarily change the nature of use of a water right or an application for a permit. If a person holding a licensed water right desires to change the nature of use, the right holder may file an application to change the nature of use pursuant to I.C. § 42-222. That is the process established by the Legislature to change the nature of use of a water right. It is not a procedure available to the Director nor to a hearing officer who is assigned to conduct a hearing and issue a preliminary order on the Applications.

In the section of the Amended Order addressing the issue of the nature of use on the City's Applications, there is limited commentary on the issue of reasonably anticipated future need water rights which are unique to municipal providers such as the City of Eagle. The Amended Order states

“If a municipal provider seeks a water right for reasonable anticipated future needs, the planning horizon and supporting data cannot be inconsistent with the comprehensive land use plans. Furthermore, water rights for reasonably anticipated future needs cannot be granted to a municipal provider in “areas overlapped by conflicting comprehensive land use plans.” ... Furthermore, testimony established that the area sought to be served by water under Eagle's proposed appropriation is within both the impact areas of the City of Eagle and the City of Star.”

Amended Order at 10.

There was no evidence submitted by the Protestants that any part of the Applications were “inconsistent with comprehensive land use plans” or that the Applications were sought for areas “overlapped by conflicting comprehensive land use plans.” In fact, there was no evidence about the comprehensive land use plans of the City

of Star at all. The evidence submitted was the City of Eagle's Master Water Plan which was specifically noted to be consistent with the City of Eagle's Comprehensive Land Use Plan. The reference in the Amended Order to the "impact areas" of Eagle and Star is simply irrelevant and inconsistent with the very explanation contained in the Amended Order. This issue was not raised by any Protestant in the hearing nor was it raised in any Petition for Reconsideration.²

The remainder of the Amended Order dealing with Issue No. 3 attempts to explain why the Department "cannot" issue a Municipal water right because it would create a "de facto" water right for reasonably anticipated future needs. The Amended Order couches the assertion by suggesting that Eagle did not submit information to support a reasonably anticipated future need water right. This is incorrect. Eagle submitted a copy of its Master Water Plan which contains all reasonably related information relevant to statutory requirements. It contains population projection data, development information, water system design information, and planning horizons. The submittal was supported by the testimony of Vern Brewer representing the City Engineer. The testimony and evidence by the City was un rebutted and unchallenged.

The City of Eagle would also point out that the Department's assertion regarding this issue has apparently changed given that one month before the City of Eagle filed its Applications, the Department approved a Municipal water right under exactly these circumstances. See Department File for Water Right Permit 63-31969. To arbitrarily change the Department's approach to its legal authority, policy, or processing of

² The City notes that the reference to comprehensive plans was contained in the Petition for Reconsideration filed but withdrawn by United Water Idaho (UWI). The language in the Amended Order reflects the language in UWI's petition. The Department's consideration of the UWI petition is improper as the petition was withdrawn.

applications within the span of two months without any notice or explanation represents an abuse of discretion.

In sum, the Department does not have authority to arbitrarily change the nature of use of the Applications and cannot simply reverse its position on its legal authority to grant Municipal water rights for convenience or other reasons.

Mitigation Prior to Demonstration of Injury (Issue No. 23)

In its Petition to Reconsider, the City of Eagle pointed out the difference in the approach to mitigation the initial Preliminary Order took between mitigation for water rights in the Moyle wells versus other protestant's wells. The City asked that before mitigation was required for alleged impacts to the Moyle wells that there be some demonstration of injury.

The City's approach was to determine through monitoring if there was an injury before having to undertake mitigation. The Amended Order, by reducing the City's Municipal water right Applications from a total of 8.9 cfs to 2.23 cfs, indicates that a smaller "reduction in pressure head" would result thereby justifying the type of testing procedure suggested by the City of Eagle in its petition. The City does not agree to the arbitrary reduction in the Municipal nature of use in its Applications but does agree that a test to determine impacts on the Moyle wells prior to requiring mitigation is a sound approach. Until there is injury, there is no obligation to mitigate. Whether an alleged impact to artesian head is small or large is less relevant than the identification of whether there is any impact or, more importantly, any injury. If a party is required to mitigate for injury to a water right, the duty to mitigate is reflective of the injury. If mitigation is required for a reduction of 4.0 feet, mitigation is required for that impact. If the reduction

is 8.0 feet, the mitigation is proportionate. In other words, mitigation is reflective of the impact.

Injury to Artesian Head

Most, if not all, of the alleged injury to the water rights of the protestants concerned impacts to artesian head pressure. This issue is addressed in various Findings and Conclusions throughout the Amended Order. The arbitrary reduction in the City's Municipal diversion rate was apparently proposed in order to address pressure reductions. Most protestants indicated that they had diversion systems which were not particularly efficient nor, in some instances, apparently even pumped. They simply used artesian pressure to divert.

The Amended Order applies the Idaho Supreme Court's holding in Parker v. Wallentine, 103 Idaho 506, 650 P.2d. 648 (1982) to various protestants' water rights and requires mitigation for potential losses in artesian pressure. The City does not believe Parker is applicable to the protestants' water rights at issue. First, Parker dealt with a senior water right holder who was pumping his water right when the junior appropriator's well completely and immediately dried up the senior's well. There was no showing by any protestant in the present proceeding that any well would dry up or that the protestant could not exercise their water right. Indeed, each protestant's argument was that they were entitled to the historic artesian head that had always existed and were injured by any reduction in pressure.

Reduction in artesian pressure, however, does not constitute injury to a water right and as such, mitigation for reduction in pressure alone is not required. In 1988, six years after the Parker decision, the Idaho Supreme Court upheld the Department's ruling as a

matter of law that “reduction in artesian pressure is not an injury.” In the Matter of Applications for Permit No. 47-7680 In the Name of Royal Crest Inc., Collins Bros. Corp. Assignee, 114 Idaho 600, 759 P.2d 891 (1998). Thus, reliance upon artesian pressure as a means of diversion does not support allegations of injury, and the Amended Order requirement to mitigate for reductions in pressure is in violation of Idaho Supreme Court case law and Department rulings.

Exceptions As to Specific Findings

The City of Eagle submits Exceptions and assigns error to a number of Findings of Fact which are not supported by the record. Following is the Finding of Fact and explanation of the error associated with it.

Finding No.

7. The City’s Applications were filed in January 2005. Because of the time involved in processing, the number of developments and houses in the western expansion area exceed 2000. As noted in submissions to the Department, the anticipated development and immediate need for a total of 8.9 cfs Municipal water right was for Block I of the western area.

10. The City’s Applications proposed Municipal use for the 2000 homes in the Eaglefield and Legacy developments and other developments in the western expansion area. The City’s Applications were for a total of 8.91 cfs of Municipal water right, which was designed for the western expansion area, not just the Eaglefield and Legacy developments. Information on the 2.23 cfs peak one hour demand and 6.68 cfs for fire protection represented an explanation of how the City’s Applications were consistent with the Idaho Department of Environmental Quality requirements for the Legacy and

Eaglefield developments and the western expansion area. The City's Application reflected current needs.

11. The City of Eagle has budgeted some funds for the construction of main lines and trunk lines. The finding as stated is ambiguous in that it does not identify what the "existing Eagle municipal water system" refers to.

12. Eagle's Master Water Plan identifies potential water storage opportunities. Storage is not yet available which is partially why the Applications for a total of 8.91 cfs of Municipal water right were submitted.

28. The 0.116 multiplier reflected in Eagle Exhibit 24 is not an "arbitrary number with no basis in scientific or technical literature or derived from actual data." The multiplier was based on expert opinion provided by Holladay Engineering which performed the pump test and determined aquifer characteristics. As noted, there was no rebuttal or other expert testimony offered, and the record reflects the multiplier as the best information available.

29. The .5 multiplier reflected in Eagle Exhibit 24 does have a basis in data analysis. The multiplier was determined and provided by expert testimony by Holladay Engineering which performed the pump test and determined aquifer characteristics. As noted, there was no rebuttal or other expert testimony offered, and the record reflects the multiplier as the best information available.

Further, the hearing officer has no basis for determining the hydraulic relationship between the intermediate and deep aquifers. Since the expert testimony by the City of Eagle is the only expert testimony and evidence in the record, the hearing officer may not

“assume” a fractional multiplier does not apply, has no basis for modifying Eagle Exhibit 24, and cannot arbitrarily determine impacts of pumping.

30. This finding identifies impacts on “nearby” water users without specifying what is meant by “nearby.”

32. This finding indicates that “some” of the information in the table is taken from Eagle Exhibit 24. The information in the table that is not from Exhibit 24 is not identified nor is its source identified. To the extent the Amended Order reflects consideration of evidence from outside the record, it is a denial of due process and abuse of discretion.

33. The record, including the Applications, reflects that Eagle’s projected growth required the total of 8.91 cfs Municipal water right applied for in the Applications. The arbitrary change to the nature of use in the Applications by the Amended Order is improper.

34. Pumping of the Eagle wells may reduce artesian pressure in either the deep or intermediate aquifers to some degree. As noted, reductions in artesian pressure are not an injury.

35. There is no basis stated for the relationship stated in this Finding.

36. There is no basis for the information stated in the table in this Finding. The idea that scientific data can be simply “extrapolated” is unsupported in the Amended Order. Any conclusions drawn from the information in the table in this Finding is arbitrary and capricious.

38. There is no basis in the record for this Finding.

39. There is no basis in the record for this Finding.

40. Any inference that mink died based on pumping by the City of Eagle is improper. There was no evidence that any mink died as a result of any specific activity. If any mink died from lack of water, or any other reason, there must be some showing of causation.

41. This Finding is unsupported in the record and is arbitrary and capricious. The table in Finding No. 36 cannot be used to support this Finding.

49. This Finding is unsupported in the record and is arbitrary and capricious. The table in Finding No. 36 cannot be used to support this Finding.

53. This Finding is unsupported in the record and is arbitrary and capricious. The table in Finding No. 36 cannot be used to support this Finding.

55. This Finding is unsupported in the record and is arbitrary and capricious. The table in Finding No. 36 cannot be used to support this Finding.

58. There is no basis in the record for this Finding.

Exceptions As To Conclusions of Law

The City of Eagle submits Exceptions and assigns error to a number of Conclusions of Law which are not supported by the record or are improper as a matter of law. Following is the Conclusion of Law and an explanation of the error associated with it.

Conclusions of Law No.

13. The Moyle water rights are not injured by a reduction in artesian head.

15. Eagle does not have to mitigate when there is no injury to a water right.

19. To the extent the Double R Cattle Well is artesian, a reduction in artesian head is not an injury.

20. The Double R Cattle Well is not injured by a reduction in artesian head, and the City is not required to mitigate. The record reflects that the City of Eagle provided the only expert testimony, which was unrebutted, related to the relationship between the intermediate and deep aquifer.

23. A reduction in artesian head for water right 63-15680 is not an injury, and the City is not required to mitigate.

24. To the extent any impact is a reduction in artesian head, the City is not required to mitigate. Depending on the test anticipated by the Amended Order, this water right may be entitled to Parker protection of ground water levels.

25. To the extent any impact is a reduction in artesian head, the City is not required to mitigate.

26. To the extent any impact is a reduction in artesian head, the City is not required to mitigate. Depending on the results of the test anticipated by the Order, this right may be entitled to Parker protection of ground water levels.

34. Compensation for reductions in artesian pressure is not required. Further, monitoring in and of itself will not cause injury to other water users.

Exceptions to Order

The Order cannot change the nature of use of the Applications. With regard to the reporting required for proof of beneficial use, the City believes the information requested can be provided. However, the information does not appear to be related to proof of beneficial use. If it is the Department's intent to use the requested information for establishing beneficial use, the City requests the Department to explain how the information is to be used. The City has previously explained that reductions in artesian

head is not an injury and consequently, the Department cannot order mitigation when there is no injury. The Order requires the construction/identification of observation wells. These wells are not required in order to appropriate water, and the City objects to the conditioning of its Applications by requiring construction of observation wells which are to be used for independent Departmental obligations.

Other Exceptions

For purposes of the Record of Appeal, the City also assigns as error the following:

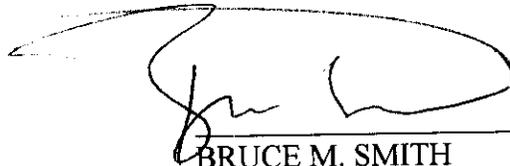
1. To the extent the Amended Order reflects evidence or consideration of evidence outside the record, the Department may not properly consider such evidence.
2. The hearing officer failed to designate and fix the record at the time of the hearing thereby denying the City due process.
3. The Department may not consider issues not raised by Protestants in the proceeding below.
4. The Amended Order reflects that the hearing officer considered comments filed by Mike Moyle, Eugene Miller, and Charles Howarth. These comments were not proper petitions for reconsideration and raised issues and provided improper comments beyond the authority of the Department to consider.
5. The Amended Order fails to identify parts of the record upon which findings were based.
6. The Amended Order seeks to impose obligations in excess of the authority of the Department.

CONCLUSION

The City submitted Applications for Municipal water rights consistent with Idaho statutes and the City's Constitutional rights. The Department cannot arbitrarily change the nature of use of the Applications and cannot require mitigation when there is no legal injury based on a reduction in artesian head. The City is entitled to have its Applications processed consistent with Department policies and Idaho Code and to not have the Department arbitrarily change its legal position and policies for the processing of the City's Applications. The City requests that the Director amend the Amended Preliminary Order consistent with the Exceptions raised by the City and approve the City's Applications for a total of 8.91 cfs Municipal use water rights.

Submitted this 17 day of October 2007.

MOORE SMITH BUXTON & TURCKE,
CHARTERED

A handwritten signature in black ink, appearing to read "Bruce M. Smith", is written over a horizontal line. The signature is stylized and cursive.

BRUCE M. SMITH
Attorney for the City of Eagle

CERTIFICATE OF SERVICE

I hereby certify that on this / 8 day of October 2007, a true and correct copy of the foregoing document was served upon the following by the method indicated below:

DEAN & JAN COMBE 6440 W BEACON LIGHT EAGLE ID 83616	CHARLES HONSINGER DANIEL V. STEENSON RINGERT CLARK CHTD 455 S. THIRD STREET PO BOX 455 BOISE, ID 83701-2773
CORRIN & TERRY HUTTON 10820 NEW HOPE ROAD STAR ID 83669	SAM & KARI ROSTI 1460 N. POLLARD LANE STAR ID 83669
LEEROY & BILLIE MELLIES 6860 W STATE STREET EAGLE ID 83616	IDWR - WESTERN REGION ATTN JOHN WESTRA 2735 AIRPORT WAY BOISE ID 83705-5082
JERRY & MARY TAYLOR 3410 HARTLEY EAGLE ID 83616	DANA AND VIKI PURDY 5926 FLOATING FEATHER RD EAGLE, ID 83616

- via U.S. MAIL
- via HAND DELIVERY
- via OVERNIGHT MAIL
- via FACSIMILE



BRUCE M. SMITH

RECEIVED

OCT 17 2007

DEPARTMENT OF
WATER RESOURCES

CHARLES L. HONSINGER (ISB #5240)
DANIEL V. STEENSON (ISB #4332)
JON C. GOULD (ISB #6709)
RINGERT CLARK CHARTERED
455 S. Third Street, P.O. Box 455
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

Attorneys for Protestants Joseph, Lynn and Michael Moyle,
Eugene Muller, Charles W. Meissner, Jr., Charles Howarth
and Mike Dixon/Hoot Nanney Farms, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS TO)
APPROPRIATE WATER NOS. 63-32089) PROTESTANT MOYLE'S PETITION FOR
AND 63-32090 IN THE NAME OF THE) RECONSIDERATION OF AMENDED
CITY OF EAGLE) PRELIMINARY ORDER
_____)

COMES NOW Protestants Joseph, Lynn and Michael Moyle (hereinafter "Moyle"), by and through their counsel of record, Ringert Clark Chartered, 455 S. Third Street, P.O. Box 2773, Boise, Idaho 83701-2773, and hereby file this petition for reconsideration of the hearing officer's October 3, 2007 *Amended Preliminary Order*. This Petition is supported by the record herein, and is filed pursuant to IDAPA 37.01.01.730.02(a) and I.C. §67-5243. This Petition is timely based upon the *Amended Preliminary Order's* service date of October 4, 2007 listed on the Certificate of Service attached thereto.

ARGUMENT

The City of Eagle filed its applications to appropriate water right nos. 63-32089 and 63-32090 in January of 2005. Various parties, including Moyle, protested the applications, and

IDWR initiated proceedings in the matter.

From June 2, 2006 through June 9, 2006, the City of Eagle conducted a pump test to determine the impact the diversions proposed under its applications would have upon other wells, including those owned by Moyle. According to the City's own test, diversions of 2.23 cfs from a new well proposed under the City's applications will result in a decline in Moyle's artesian pressure of 3.9 feet. *Amended Preliminary Order*, p. 22, ¶41. The Hearing Officer's July 17, 2007 *Preliminary Order* presumed the City would be pumping 8.90 cfs from a new well, and that such diversion would result in a decline in artesian pressure in the Moyle wells of approximately 15 feet. *Preliminary Order*, p. 13, ¶ 39. The Hearing Officer's *Preliminary Order* found that such a decline in artesian pressure would significantly reduce the flow needed to supply Moyle's needs. *Id.* Additionally, the Hearing Officer found that "[l]esser reduction of artesian pressure will also significantly reduce the flow needed by Moyles to supply the beneficial uses." *Id.* (italics added). The Hearing Officer held that Moyle was entitled to protection of their water levels under *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), and required the City of Eagle to take measures to protect Moyle's water levels "prior to diverting water from its existing or proposed wells." *Preliminary Order*, p. 18, ¶14.

Petitions for reconsideration of the *Preliminary Order* were filed by several parties, including the City of Eagle and Moyle. The City requested that the mitigation required in the *Preliminary Order* not be required prior to demonstration of injury to water rights. *Amended Preliminary Order*, p.9, ¶ 23. Among other issues, Moyle and other protestants requested that any water right granted to the City be limited to 2.23 cfs for municipal purposes. The Hearing

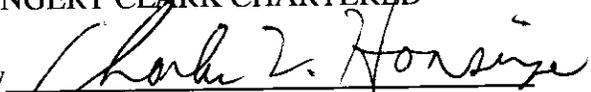
Order, p. 18, ¶13. Accordingly, the Hearing Officer required the City to mitigate the injury that he found Moyle would suffer *before* it was suffered. Nothing has changed with respect to Moyle's situation in this proceeding - they are still "entitled to protection of their historical water levels" - there has been no change or addition of facts that would permit the Hearing Officer to make any contrary conclusion. Moyle is still unquestionably entitled to protection of their historic water levels pursuant to *Parker v. Wallentine, supra* according to the Hearing Officer's own language in the Preliminary Order. *Id.* Especially in light of the *Preliminary Order's* finding of fact that injury will result to Moyle with lesser diversions than those presumed under the *Preliminary Order*, there is simply no basis for the Hearing Officer to find that Moyle must now be required to again "prove" injury to his water rights before they are so protected. Injury has already been proven, as the Hearing Officer has found, and his holding that Moyle are protected by *Parker v. Wallentine* is still a correct and valid conclusion.

Given that there is no basis for the Hearing Officer to require Moyle to again prove injury so that they are protected in their historical water levels, the *Amended Preliminary Order* must again be amended to provide, as did the *Preliminary Order*, that the City of Eagle must mitigate Moyle's injury *before* diverting any water pursuant to the water rights that are the subject of this action.

DATED this 17th day of October, 2007.

RINGERT CLARK CHARTERED

By



Charles L. Honsinger
Attorneys for Protestants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October, 2007, 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:

Jerry & Mary Taylor
3410 Hartley
Eagle, Idaho 83616

Leeroy & Billie Mellies
6860 W. State Street
Eagle, Idaho 83616

Corrin & Terry Hutton
10820 New Hope Road
Star, Idaho 83669

Dean & Jan Combe
6440 W. Beacon Light
Eagle, Idaho 83616

Sam & Kari Rosti
1460 N. Pollard Lane
Star, Idaho 83669

Bruce Smith
Moore Smith Buxton & Turke
225 N. 9th Street, Ste.420
Boise, Idaho 83702

Western Region
Attn: John Westra
2735 Airport Way
Boise, Idaho 83705-5082

John M. Marshall
Givens Pursley
P.O. Box 2720
Boise, Idaho 83701

Dana and Vicky Purdy
5926 Floating Feather
Eagle, ID 83616



Charles L. Honsinger



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

October 3, 2007

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

Re: In the matter of the Applications to Appropriate Water Nos. 63-32089 and 63-32090 in the name of the City of Eagle

Dear Interested Parties:

The Amended Preliminary Order issued on October 4, 2007 was found to have an error on the Certificate of Service page. Dana and Vicki Purdy were to be included on that list. This error was found immediately and no change in the service date will result from this error. I am providing a copy of the second Certificate of Service page for attachment to your copy of the order.

If you have any questions, please call me at (208) 287-4942.

Sincerely,

A handwritten signature in cursive script that reads "Deborah J. Gibson".

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Enclosure



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

October 3, 2007

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

Re: In the matter of the Applications to Appropriate Water Nos. 63-32089 and 63-32090 in the name of the City of Eagle

Dear Interested Parties:

The Department of Water Resources ("Department") has issued the enclosed Amended Preliminary Order in the above-referenced matter. Pursuant to section 67-5243, Idaho Code, **the enclosed order can and will become a final order without further action of the Department unless a party petitions for reconsideration, requests a hearing, or files an exception and/or brief as described in the enclosed information sheet.**

Please note that water right owners are required to report any change of water right ownership and/or change of mailing address to the Department within 120 days of the change. Contact any office of the Department or visit our homepage on the Internet at www.idwr.idaho.gov to obtain the proper reporting form.

If you have any questions, please call me at (208) 287-4942.

Sincerely,

A handwritten signature in cursive script that reads "Deborah J. Gibson".

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Enclosures

cc: Regional office

RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration within fourteen (14) days after issuance as further described below:**

PETITION FOR RECONSIDERATION

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

EXCEPTIONS AND BRIEFS

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

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

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

CERTIFICATE OF SERVICE

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

FINAL ORDER

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

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

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

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

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

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

Spackman, Gary

From: Keith Allred [Keith@AllredSolutions.com]
Sent: Tuesday, October 02, 2007 5:54 PM
To: Spackman, Gary
Cc: Owsley, Dennis
Subject: Suggestions

Hello Gary,

I'm attaching a version of my summary of the foothills development issues that has a revised water section that aimed at reflecting the feedback I got from various folks on the first draft.

In this version, I go into some more detail about what might happen if new wells in the foothills turn out to have an impact on existing wells. Several folks who have read this revised section suggest that this aspect of the issue too complex to capture adequately and would best be eliminated from the summary or summarized in just a few sentences.

I'm reluctant to do that b/c it seems a pretty important aspect of the policy questions that will be interesting and relevant to the common citizens for whom we're writing this summary. Since the paragraph from IDWR on what we know about available water in the foothills indicates that there are remaining uncertainties and since the hydrogeologists seem to agree that there's a limit to how much we will know until long-term pumping begins, it seems pretty relevant to consider what happens if there are impacts. This is certainly where a lot of the questions were focused from the audience at IDWR's public event in Eagle.

I'd appreciate any suggestions you have on this. In particular, I'd be interested in knowing if you think:

- a) That this is sufficiently relevant to be worth getting into
- b) If so, do you have suggestions about how to better characterize what the parameters are for what happens if there are impacts

If you had a chance to get back to me this week, it would be a great help. I'm hoping to get this wrapped up by Mon.

Many thanks,

Keith

Keith Allred, Ph.D
Allred Solutions
2480 N Edgewood
Eagle, ID 83616
Office: (208) 939-3046
Mobile: (208) 860-8289
www.AllredSolutions.com

Doc. 10/3/07 order to Mr. Allred

10/3/2007

Gibson, Deborah

From: Gibson, Deborah
Sent: Friday, September 28, 2007 8:53 AM
To: Bruce Smith (E-mail)
Subject: City of Eagle Applications 63-32089 and 63-032090

Bruce,

I received your request for copies of the hearing tapes regarding the above referenced matter on Monday, 9/24/07. I immediately requested that IT staff make these copies. Today I received their estimate of when the copies would be ready. I understand you can expect the copies the week of October 15th. Responding to your request was delayed because of other requests for copies of other hearing tapes and because the City of Eagle's hearings are contained on 8 tapes. These copies are being recorded at "real" time because we do not have the equipment to copy them quicker. I hope this timeframe will work with your schedule since the Amended Preliminary Order has not been issued yet.

Deborah Gibson
Administrative Assistant I
Water Allocation Bureau
Idaho Department of Water Resources
Phone (208) 287-4942
Fax (208) 287-6700
email: deborah.gibson@idwr.idaho.gov

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AT LAW

BANNER BANK BUILDING, SUITE 520
950 WEST BANNOCK STREET, BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

FACSIMILE COVER SHEET

DATE: September 23, 2007 RECIPIENT'S FAX: 287-6700

TO: Debbie Gibson CLIENT: _____

RE: City of Eagle Applications 63—32089 and 63-32090

FROM: Bruce M. Smith/Debbie

NUMBER OF PAGES INCLUDING THIS COVER SHEET: _____

- ORIGINAL WILL NOT BE SENT
- ORIGINAL WILL BE SENT BY FIRST CLASS MAIL
- ORIGINAL WILL BE SENT BY FEDERAL EXPRESS

ADDITIONAL COMMENTS:

Debbie—This is a request for the hearing tapes (CDs) for the hearing on the above water right applications. Please let me know when we may pick them up. Thanks Bruce

***** IMPORTANT MESSAGE *****

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS TO)
APPROPRIATE WATER NOS. 63-32089 AND)
63-32090 IN THE NAME OF THE CITY)
OF EAGLE)
_____)

**ORDER GRANTING
PETITIONS FOR
RECONSIDERATION**

On July 17, 2007, the hearing officer issued a preliminary order in the above titled matter approving applications nos. 63-32089 and 63-32090. On July 18, 2007, the preliminary order was served on the parties by mailing a copy of the preliminary order to the each of the parties via the United States Postal Service.

The following parties filed timely petitions for reconsideration: United Water Idaho; Joseph, Lynn and Mike Moyle (Moyles), Eugene Muller, Dana and Viki Purdy, Charles W. Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanney Farms, Inc., all represented by Ringert Clark Chartered; Mary Taylor; and the City of Eagle. In addition, the hearing officer received individual comments from Mike Moyle, Eugene Muller, Charles Howarth.

On August 2, 2007, United Water Idaho filed a *Withdrawal of Petition for Reconsideration*.

On August 14, 2007, Ringert Clark Chartered withdrew as counsel for Dana and Viki Purdy. Dana & Viki Purdy are parties now representing themselves.

ORDER

IT IS HEREBY ORDERED that the Petitions for Reconsideration timely filed with the Idaho Department of Water Resources are **Granted**. An amended preliminary order will be expeditiously issued.

Dated this 21st day of August, 2007.



Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of August, 2007, a true and correct copy of the foregoing document described below was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document Served: Order Granting Petitions for Reconsideration

BRUCE M SMITH
MOORE SMITH BUXTON TURKE
225 N 9TH STE 420
BOISE ID 83702

JOHN M MARSHALL
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720

CHARLES L HONSINGER
DANIEL V STEENSON
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773

JERRY & MARY TAYLOR
3410 HARTLEY
EAGLE ID 83616

CORRIN & TERRY HUTTON
10820 NEW HOPE RD
STAR ID 83669

SAM & KARI ROSTI
1460 N POLLARD LN
STAR ID 83669

LEEROY & BILLIE MELLIES
6860 W STATE ST
EAGLE ID 83616

DEAN & JAN COMBE
6440 W BEACON LIGHT
EAGLE ID 83616

DANA & VICKI PURDY
5926 FLOATING FEATHER
EAGLE ID 83616

WESTERN REGION
ATTN JOHN WESTRA
2735 AIRPORT WAY
BOISE ID 83705-5082


Deborah J. Gibson
Administrative Assistant

RECEIVED

AUG 14 2007

DEPARTMENT OF WATER RESOURCES

CHARLES L. HONSINGER (ISB #5240)
DANIEL V. STEENSON (ISB #4332)
JON C. GOULD (ISB #6709)
RINGERT CLARK CHARTERED
455 S. Third Street, P.O. Box 455
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

Attorneys for Protestants Joseph, Lynn and Michael Moyle,
Eugene Muller, Charles W. Meissner, Jr.,
Charles Howarth and Mike Dixon/Hoot Nanney Farms, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS TO)
APPROPRIATE WATER NOS. 63-32089) NOTICE OF WITHDRAWAL OF
AND 63-32090 IN THE NAME OF THE) REPRESENTATION
CITY OF EAGLE)
_____)

COMES NOW Ringert Clark Chartered, counsel for the above-referenced parties, and, pursuant to IDAPA 37.01.01.205, hereby notifies the Department and parties that it is withdrawing as counsel of record for Protestants Dana and Vicky Purdy. All further pleadings and correspondence in this matter should be directed to the Protestants at the following address: Dana and Vicky Purdy 5926 Floating Feather, Eagle, ID 83616.

DATED this 14th day of August, 2007.

RINGERT CLARK CHARTERED

By Charles L. Honsinger
Charles L. Honsinger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of August, 2007, 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:

Jerry & Mary Taylor
3410 Hartley
Eagle, Idaho 83616

Leeroy & Billie Mellies
6860 W. State Street
Eagle, Idaho 83616

Corrin & Terry Hutton
10820 New Hope Road
Star, Idaho 83669

Dean & Jan Combe
6440 W. Beacon Light
Eagle, Idaho 83616

Sam & Kari Rosti
1460 N. Pollard Lane
Star, Idaho 83669

Bruce Smith
Moore Smith Buxton & Turke
225 N. 9th Street, Ste.420
Boise, Idaho 83702

Western Region
Attn: John Westra
2735 Airport Way
Boise, Idaho 83705-5082

John M. Marshall
Givens Pursley
P.O. Box 2720
Boise, Idaho 83701

Dana and Vicky Purdy
5926 Floating Feather
Eagle, ID 83616



Charles L. Honsinger



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

August 14, 2007

Re: In the matter of the protested applications for permit to appropriate water nos.
63-32089 and 63-32090 in the name of the City of Eagle

Dear Parties:

Enclosed is another response to the Preliminary Order that the Idaho Department of Water Resources ("Department") received from Protestant Mike Moyle in the above-referenced matter. I am providing this copy to all parties because it appears this response was not provided to the parties as required and stated in the Department's Rules of Procedures.

Sincerely,

A handwritten signature in cursive script that reads "Gary Spackman".

Gary Spackman
Hearing Officer

Enclosure

Cc: All the parties on service list (attached)

RECEIVED

JUL 31 2007

DEPARTMENT OF
WATER RESOURCES

July 27th, 2007

Dear Mr. Spackman,

This letter is in response to your Preliminary Order issued July 17th, 2007.

As a resident of this State and as a representative of my constituents, I have several concerns about this Order.

The Department's letter dated 3-10-06 ordered the City of Eagle to arrange a time for the anticipated pump tests with the other parties. Eagle defied this order. No arrangements were made, no notifications were sent. In addition, from Eagle's own 7-Day Aquifer Test page 2 they state the pumping well was moved to test well #2. None of this was known to the protesters either. It is illegal for us to trespass on private property. Living near the site, we kept watching for equipment, signs of their pump tests and waited for arrangements to be made. In your Preliminary Order, page 8 item 16, you state that other parties were not given the opportunity to participate in the test and to monitor their wells.

So Eagle defiles your Order, fails to arrange with protesters, moves their pump test to a different location unknown to protesters and we missed the opportunity to complain? Just exactly when was our opportunity? We are at fault? We didn't even know the tests were done until it was all over and too late to complain! How then is it the protesters fault (page3)?

Why were the protesters shut out of the pump tests? What was Eagle afraid might be found out if our wells were monitored at the time of their tests? So Eagle defies your Order and gets rewarded with everything they asked for!

The test should have been done at a higher rate and for a longer period to determine the true impacts. The Department knows this and should at a very minimum require a new pump test at a higher rate before approving a water right.

Idaho code 42-237a-g states, "Water in a well shall not be deemed available to fill a water right therein if withdrawal there from of the amount called for by such right would affectthe present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge."

Show me the study that proves that the "anticipated average rate of future natural recharge" will cover the amount of water that this applicant will withdraw from this aquifer.

Remember Eagle has the burden to prove extra water was available. They did not.

I also believe that IDWR needs to establish what the reasonable pumping level for this aquifer is before they approve any new water rights. For IDWR to fail to define reasonable pumping levels would be a disservice to all parties involved.

Information concerning the drop in our aquifer (wells having to go deeper to tap into their water right) was not allowed in the hearing because of technicalities. I understand there have been additional wells in this area that have had to go deeper since the hearing. I thought the hearing was to gather all the facts available. What difference does it make to the facts who presents them? If there is information about drops in the aquifer from whatever source, they should have been included in this hearing. To make decisions without all the facts is a dangerous precedent to set.

In a letter from the Department dated December 26th, 2005, It stated that the Department will closely monitor construction of a pump test well and an additional monitoring well. Who at the Department closely monitored the construction of these wells and on what dates? Who at the Department monitored the actual pumping tests? If the Department was notified in advance, why were not my constituents? Are there screens at different levels that are allowing co-mingling? If you tell me no, how do you know?

In the beginning, all of us were led to believe Eagle's permits represented a transfer of water rights. They do not. They are for new water rights. What policy does the Department have regarding mitigation? These rights represent a much greater use, much longer period of time and most importantly they are going to the foothills and everybody knows it. M3, Suncor, Avimore, etc. do not have the water to provide for such large developments. The City of Eagle now has annexation signs clear to the top of Horseshoe Bend Hill. Their service area is a moving target. It grows larger every day. And it is going north! Dry foothills, no water, guess what? Eagle is gunning for our aquifer. How can the Department possibly expect this aquifer, which is dropping, to provide all the water for the dry foothills to the north? But that is what this order will set the precedent for. Water spreading is illegal. But Eagle is headed in that direction with this preliminary order.

United water and Star Water both have said they could provide water for the area. In fact, I believe United Water and Star Water have both run lines into the area in the last couple of months. Star has a new well and a water right which would allow them to service part of the area today. I believe this application is not about providing water as much as it is about money.

If I am not mistaken, I believe your Department, has not approved a new consumptive use for water unless it was for a municipality or a big developer, since 1992. I believe if

a farmer or some other individual were to sue the department over this fact they would probably win.

The law does not allow mining. By approving this application you will be allowing mining of the aquifer. There is approximately a million acre foot of surface water leaving the valley every year. Before using ground water you should look at the possibilities of using the extra surface water and not mining the ground water. If you are approving this application because of this million acre foot, you should be aware that new studies show that the water that you are over-appropriating actually goes to the Payette River. At the very least before approving this water right application you should do a study to make sure where this quote "extra water" is going or coming from.

Last but not least, my biggest concern is a repeat of the Eastern Snake River plain aquifer problem. Director Tuthill reported in June that it is a very serious problem with no solution in site. As a state legislature we have expended millions of dollars to try to fix the problem. No fix is in sight. Now we are looking at an even bigger problem in this region due to over appropriation and mining of the aquifer here. In the Hagerman valley area we are talking about fish farms. In the Treasure Valley we are talking about thousands of homes and people.

Please take these concerns into consideration before making your final decision.

Respectfully,

A handwritten signature in black ink, appearing to read "Mike Moyle". The signature is fluid and cursive, with the first name "Mike" and last name "Moyle" clearly distinguishable.

Mike Moyle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of August, 2007, a true and correct copy of the foregoing document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Transmittal letter dated August 14, 2007 from Gary Spackman, Hearing Officer.

JERRY & MARY TAYLOR
3410 HARTLEY
EAGLE ID 83616

CORRIN & TERRY HUTTON
10820 NEW HOPE RD
STAR ID 83669

SAM & KARI ROSTI
1460 N POLLARD LN
STAR ID 83669

LEEROY & BILLIE MELLIES
6860 W STATE ST
EAGLE ID 83616

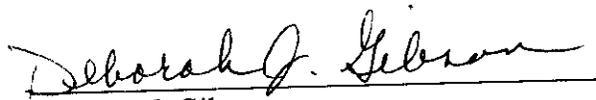
DEAN & JAN COMBE
6440 W BEACON LIGHT
EAGLE ID 83616

BRUCE M SMITH
MOORE SMITH BUXTON TURKE
950 W BANNOCK STE 520
BOISE ID 83702

JOHN M MARSHALL
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720

CHARLES L HONSINGER
DANIEL V STEENSON
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773

WESTERN REGION
ATTN JOHN WESTRA
2735 AIRPORT WAY
BOISE ID 83705-5082


Deborah J. Gibson
Administrative Assistant



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

August 7, 2007

Re: In the matter of the protested applications for permit to appropriate water nos.
63-32089 and 63-32090 in the name of the City of Eagle

Dear Parties:

Enclosed are responses to the Preliminary Order that the Idaho Department of Water Resources ("Department") received from two Protestants in the City of Eagle matter. I am providing these copies to all parties because it appears these responses were not provided to the parties as required and stated in the Department's Rules of Procedures. The Department has received two Petition for Reconsideration therefore an evaluation of these responses will be made by the hearing officer and a response will be issued.

Sincerely,

A handwritten signature in cursive script that reads "Gary Spackman".

Gary Spackman
Hearing Officer

Enclosure

Cc: All the parties on service list (attached)

Gary

RECEIVED
JUL 26 2007
DEPARTMENT OF
WATER RESOURCES

July 24, 2007

To: Mr. Gary Spackman - IDWR hearing officer
From: Mary Taylor - protestant
Re: Preliminary Order" for City of Eagle applications # 63-32089 & 63-32090

Dear Mr. Spackman,

This letter is my "Petition for Reconsideration".

Facts Presented at Hearing

I provided scientific documentation of the water levels in my well dating from 1999 to October 2006. This data was gathered by professional firms:

- SPF Water Engineering of Boise
- Hydro Logic, Inc. of Boise
- Adamson Pump and Drilling Company of Nampa

That evidence established the following facts:

<u>Date</u>	<u>Water level</u>	<u>Circumstances</u>
September 8, 1999	48 to 61 feet (average 54.5')	during 1 hour flow test of my well
June 25, 2006	75.82	measurement taken a few days after Eagle's pump test
August 18, 2006	69.1	
October 11, 2006	52.12	
Additional tests have been taken since the hearing in December of 2006 - see attached copies.		
December 18, 2006	50.05	
February 19, 2007	50.58	
April 26, 2007	52.71	
June 28, 2007	52.62	Almost exactly 1 year from when Eagle did pump tests

The 52.62' of June 2007 versus the 75.82' of June 2006, following Eagle's pump test, represents a drop in the water level of my well of 23-25 feet!

Certainly these additional tests, not available at the time of the hearing in December of 2006, qualify as "further factual development" (as per your "Certificate of Service"). In addition, they provide further evidence confirming the injury to my well during Eagle's pump tests.

We were told the "burden of proof rests upon the applicant". Eagle has failed to prove their pump test was ***NOT*** responsible for the unprecedented and inexplicable 23-25 foot drop in the water level of my well. As per Item # 8, page 17 of the "Preliminary Order" - "Proof of

Injury” - Injury did occur to the water level in my well at the same time Eagle did their pump tests. The City pumping this aquifer year-round at a far greater amount than the 1580 gpm is a guarantee of further injury.

Preliminary Order - Findings of Facts

Item #53, page 15 - Taylor - claim no. 63-5040

This water right predates the Legislative action of 1951 or the modifications of 1953. The “Priority date for this right is 03/01/1941”. This well is a free flowing artesian well as defined during the hearing, as is Mr. Moyle’s. However, there is a shut off valve so the flow is only used when needed. This water right point of diversion is within ½ mile of Mr. Moyle’s wells. This well is necessary for commerce as is Mr. Moyle’s. I ask for at least a portion of the same consideration for my well as given to the Moyle wells in this “Preliminary Order.”

Conclusions of Law

Item #27, page 20 - Taylor - water levels in wells “not entitled to *Parker* protection”.

During the hearing in December of 2006, the following definition was established:

0-80 feet	shallow aquifer
80-200	intermediate aquifer
200-500	deep aquifer

Item #8, page 17 - “proof of injury” and “factual similarities”

“Factual similarities” - taken from 103 Idaho 506, 650 P.2d 648. *Parker v. Wallentine* are as follows:

“The Parker well had been drilled to a depth of 71 feet”. My wells are at 80 feet. By definition, Mr. Parker’s well would have been in the shallow aquifer. My well is in the shallow aquifer. “L. Junior Wallentine drilled a well..... to a depth of 200 feet”. Mr. Wallentine’s well was located in a deeper aquifer. City of Eagle’s wells are in a deeper aquifer.

<u>Parker v. Wallentine</u>
71 feet/deeper aquifer
no water/pumped 1350 gpm
injury occurred within few minutes

<u>My well v. City of Eagle</u>
80 feet/deeper aquifer
water level drop 23-25 feet/ 1580 gpm
injury occurred within few days

To paraphrase Item #27, page 20: Mr. Parker’s (Taylor’s) well was completed in the shallow aquifer. Mr. Wallentine (City of Eagle) pumping from the deep aquifer would not injure water rights diverting from the shallow aquifer. This proved to be in error!

“Factual similarities” are here presented. “Proof of injury” was presented at the hearing with further confirmation on page 1 of this letter. To quote the “Preliminary Order” under “Conclusion of Law” Item #15 - Muller: “*Parker* would only protect Muller’s water right from injury to water levels in the *shallow* aquifer” (emphasis added). If *Parker* would have protected the Muller’s water right in the shallow aquifer, then it should protect mine in that

same shallow aquifer.

In addition, my water right #63-2858B predates any of the legislation of 1951, 1953 or 1978. The priority date is 06/10/1951. Even with those facts in mind, the "Ground Water Act" of 1951 reads as follows:

"Section 1. It is hereby declared that All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed."

From the 1953 modification:

"Section 1. It is hereby declared early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer".

The Eagle permits have never been about providing water. United Water and Star Sewer and Water have already been assigned the rights to do just that. In view of this fact, these permits by the City represent nothing more than the following as quoted from the report of the *Parker v. Wallentine* page 513, (*Noh v. Stoner*):

"If subsequent appropriators desire to engage in such a contest [a race to the bottom of the aquifer] the financial burden must rest on them and with ***no*** injury to the ***prior*** appropriators for loss of their water" (emphasis added).

These two permit applications represents nothing more than "a race to the bottom of the aquifer" on the part of Eagle. ***Water mining!*** And it will prove to be at the expense of other senior, prior water right holders. A drop of 23-25 feet in the shallow aquifer represents injury to my water right and the potential loss of it completely. I am asking for reconsideration for protection of my water rights under the *Parker v. Wallentine* case.

Quoting from page 510, footnote 4 of the report of *Parker v. Wallentine*:

"In this very case the record demonstrates that the Department issued the water permit to Wallentine because its ***experts*** did not expect that the Wallentine well would have a significant impact on the Parker domestic well. This later proved to be incorrect". ***This "Preliminary Order" will prove to be incorrect as well!***

"Experts" deal in expectations. Water right holders deal in reality. When the ***experts"*** are again proven to be wrong, what then? Our water rights are voided, our land becomes valueless and our livelihoods in jeopardy. The injury is not "if" but "when". The decisions in this "Preliminary Order" represent nothing more than the taking of private property for public use without the protection by law of "just compensation".

Furthermore, on June 12, 2007, Director Tuthill reported to a Legislative Natural Resources Interim Committee as to the water conditions around our State. His report only reinforced our position. To quote Mr. Tuthill's comments to that committee - aquifers are being pumped at greater rates than are sustainable, shallow aquifers are being depleted, junior water right holders are being given orders to shut off wells. Ground water throughout the State is in a troubling condition with southern Idaho at the top of the list.

All the money and political power in the world can not restore water depletion from the aquifer due to over appropriation, lack of recharge and no mitigation. These two Eagle permits pose a very clear injury to our water rights, in the future, if they are granted.

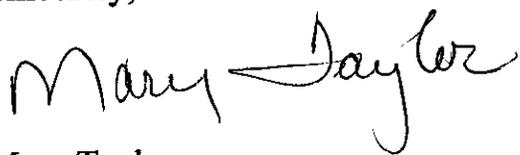
There is currently a moratorium on any new agricultural wells. Eagle's 2 permits represent a far greater drain on the aquifer than any new ag. well in both volume and time pumped. If ag. wells pose a threat of injury, Eagle's two permits guarantee it. Eagle's use of the water from this aquifer will go to sewage treatment facilities and down the Boise River - gone forever. And incidentally, we all know where Eagle's "Service Area" is going - NORTH. There is not enough water in Treasure Valley to green up those foothills, but Eagle is going to try by draining this aquifer.

Why is Eagle not required to provide a percentage of recharge for every gallon taken from this aquifer in your "Preliminary Order"? Why is Eagle not required to mitigate these "new" and "change of use" permits? That seems most inconsistent given the current conditions of our ground water as outlined by Director Tuthill on June 12th of this year.

In conclusion, I am asking for reconsideration of your decision not allowing protection of my water rights. This reconsideration is being asked due to the evidence presented at hearing and "further factual developments" provided in this letter as well as similarities to past cases in the law.

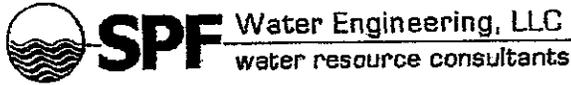
If water right permits # 63-32089 and 63-32090 are fully granted or any portion of them, the City of Eagle should be responsible for the injury to my well at their expense. Compensation for my loss should be the exclusive responsibility of the City of Eagle. Restoration of my senior water right should be done in a timely fashion and at the expense of Eagle.

Sincerely,

A handwritten signature in cursive script that reads "Mary Taylor". The signature is written in black ink and is positioned above the typed name and address.

Mary Taylor
3410 Hartley
Eagle, Idaho 83616
(208) 286-7575

enclosure: 2



June 12, 2007

Mary Taylor
 3410 North Hartley Lane
 Eagle, Idaho 83616

Subject: Water Level Monitoring Results

Dear Mrs. Taylor,

I have been measuring water levels in your irrigation well in accordance with the agreement signed by Mr. Jerry Taylor with SunCor Idaho, LLC. I am employed by SPF Water Engineering, who Suncor Idaho has hired to conduct this monitoring. These water level measurements are being taken as part of a larger water level monitoring program being conducted in northern Ada County.

During our conversation on June 11, you requested a summary of the water level measurements taken from your irrigation well since December 2006. On December 18, 2006, I measured a depth to water of 50.05 feet, measured from a hole in the well casing near the top. On February 19, 2007, I measured a depth to water of 50.58 feet. On April 26, 2007, the depth to water was measured at 52.71 feet. The April measurement was lower than the previous two measurements likely because the well was being used for irrigation.

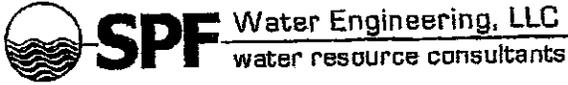
— # 1
 — # 2
 — # 3

Please contact me with any questions you may have regarding these measurements.

Sincerely,

Jason W. Thompson, E.I.T.
 Associate Engineer

Document Info:
 Filename: Letter to Mary Taylor June07.doc
 SPF file number: 285.0170



July 24, 2007

Mary Taylor
3410 North Hartley Lane
Eagle, Idaho 83616

Subject: Water Level Monitoring Results

Dear Mrs. Taylor,

I have been measuring water levels in your irrigation well in accordance with the agreement signed by Mr. Jerry Taylor with SunCor Idaho, LLC. I am employed by SPF Water Engineering, who Suncor Idaho has hired to conduct this monitoring. These water level measurements are being taken as part of a larger water level monitoring program being conducted in northern Ada County.

The latest water level measurement occurred on June 28. At that time, I measured a depth to water of 52.62 feet. — # 4

Please contact me with any questions you may have regarding this measurement.

Sincerely,

Jason W. Thompson, E.I.T.
Associate Engineer

Document Info:
Filename: Letter to Mary Taylor July07.doc
SPF file number: 285.0170

July 25, 2007

RECEIVED

JUL 26 2007

To: Director Tuthill proof
IDWR

DEPARTMENT OF
WATER RESOURCES

From: Mary Taylor

Re: "Preliminary Order" issued July 17th for City of Eagle water permit applications

Dear Mr. Tuthill,

I am a protestant to the City of Eagle's application for two water right permits in my neighborhood. A hearing was held in December of 2006. From the beginning of this process, we were told repeatedly the burden of proof rested upon the applicant (the City of Eagle). The hearing officer issued a "Preliminary Order" on July 17th.

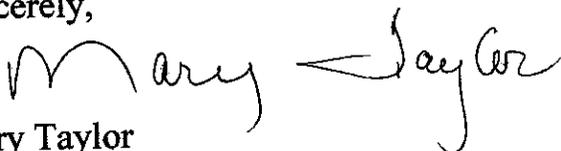
On June 12th, I attended the Legislative Interim Committee hearing on Natural Resources at which you gave a report as to the condition of water sources throughout our State. Your report was not encouraging. It only confirmed what all of us as protestants have known for some time.

I am extremely concerned with the "Preliminary Order" issued by your Department. It is my opinion that critical evidence regarding injury was ignored in the decision and the potential for greater injury dismissed. Furthermore, additional confirming data of that presented at the hearing has been made available since the hearing. I quote from the "Certificate of Service" which accompanied the Preliminary Order: "further factual development of the record". Such factual evidence is available and should be considered before a final order is given.

I am asking that I and all of the protesters be allowed to have the opportunity to present "Oral Arguments" to you as outlined in the Hearing Officer's "Certificate of Service". The City of Eagle failed to prove any thing in the hearing except the very real threat of injury to all of our water rights. The ground water issues are far to critical to be over appropriated and evidence of injury dismissed so casually. Please allow the protesters to at least bring their concerns to your attention.

Your consideration to this critical matter is greatly appreciated.

Sincerely,



Mary Taylor
3410 Hartley
Eagle, Idaho 83616
(208) 286-7575

July 26, 2007

To: Director Tuthill - IDWR
From: Mary Taylor
Re: Preliminary Order for City of Eagle Water Permits

RECEIVED

JUL 27 2007

DEPARTMENT OF
WATER RESOURCES

Dear Mr. Tuthill,

This letter is a follow-up to my letter dated July 25, 2007. I wish to make three points, before any decision is handed down, that I believe are critical to this issue.

1. I have provided Mr. Spackman with additional evidence of injury to the water level in my well at the time Eagle did their pump test. (See attached copy)

2. Eagle defied the Department's Order to:

"Arrange a time for the anticipated pump tests with the other parties."

Not only did Eagle not arrange a time with the protestants nor make any effort to notify us of the such, they also moved the pump test to a different well than originally designated. We had no way of knowing, even though we were watching for equipment and such, until the tests were already completed and the time for monitoring our wells was past. I just happened, almost by accident, to be monitoring my well at the time. Incidentally, I offered my well to Eagle for monitoring during the pump test and they refused (this was all brought out in the hearing).

3. In a letter dated December 26, 2005, the Department stated that they (the Department) intend "to closely monitor construction of these wells".

That was not done nor did the Department do any observation during the pump tests. So we only have the word of the City Eagle that all was completed properly.

In view of all this, I believe the minimum the Department can do to protect this valuable but diminishing resource is:

- a. require Eagle to re-schedule and re-do their pump tests
- b. require Eagle to notify all protestants two weeks in advance of pump tests
- c. require Eagle to pay for independent firms to monitor protestants' wells
- d. the Department have on-sight observers
- e. allow protestants or representative of their choosing to observe pump test.

As to the actual pump tests, these facts. The well they used for testing is a free flowing artesian well with a pressure of 8.1# and a flow of 1125 gpm. Those facts compromise the accuracy of the pump tests done with only 1580 gpm in June of 2006. Therefore, to provide more accurate information from which to draw conclusions of fact for any decision about these two permits the following should be required of Eagle:

- a. pump at 3500-4000 gpm
- b. continuous for two (2) weeks

Since they are asking for 8.9cfs in their permits, these seem like minimal requirements to achieve any degree of accuracy as to impact on other existing wells. Eagle will complain this is too expensive, but it is not nearly as costly as drilling new well for everyone affected or replenishing the aquifer once it has been depleted.

And by the way, what is going to limit Eagle to 8.9cfs? They have already demonstrated their willingness to defy Department orders. The Department has neither the manpower nor

resources to ride herd on them. So who is to say once they have these two permits they will not pump as much as they please? I believe their permits are for 5 wells which would clearly provide a far greater capacity than 8.9cfs. Once they are in the aquifer, it is theirs to plunder.

Given all the facts and history, these permits pose too great a risk to this aquifer to not require some additional testing and information gathering before any final decision is rendered.

Again, I appreciate your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Mary Taylor". The signature is written in black ink and is positioned above the typed name.

Mary Taylor
3410 Hartley
Eagle, Idaho 83616
(208) 286-7575

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of August, 2007, a true and correct copy of the foregoing document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Transmittal letter dated August 7, 2007 from Gary Spackman, Hearing Officer.

JERRY & MARY TAYLOR
3410 HARTLEY
EAGLE ID 83616

CORRIN & TERRY HUTTON
10820 NEW HOPE RD
STAR ID 83669

SAM & KARI ROSTI
1460 N POLLARD LN
STAR ID 83669

LEEROY & BILLIE MELLIES
6860 W STATE ST
EAGLE ID 83616

DEAN & JAN COMBE
6440 W BEACON LIGHT
EAGLE ID 83616

BRUCE M SMITH
MOORE SMITH BUXTON TURKE
950 W BANNOCK STE 520
BOISE ID 83702

JOHN M MARSHALL
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720

CHARLES L HONSINGER
DANIEL V STEENSON
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773

WESTERN REGION
ATTN JOHN WESTRA
2735 AIRPORT WAY
BOISE ID 83705-5082


Deborah J. Gibson
Administrative Assistant

Dave

Petition For Reconsideration 7/26/07

Re: Wells on Legacy development

RECEIVED

JUL 26 2007

DEPARTMENT OF
WATER RESOURCES

"The hearing officer intended that all the parties interested in the pump test have an opportunity to participate in the test -

The hearing officer is DISMAYED that Eagle did not follow the dictates of the order."

Page 3. 2nd paragraph

So the dismayed hearing officer gives them what they request!

We request an oral argument!!!

CHARLES H. HOWARTH, M.D.
833 N. PALMER
EAGLE, ID 83616
286-9764

CHowarth MD

Eugene O. Muller
320 N. PALMER LN.
EAGLE, ID. 83616
PHONE 286-7369

COPY

John M. Marshall
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
www.givenspursley.com
Attorneys for United Water Idaho Inc.

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WATER RESOURCES
WESTERN REGION

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AUG 08 2007

DEPARTMENT OF
WATER RESOURCES

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS FOR
PERMIT NOS. 63-32089 AND 63-32090 IN THE
NAME OF THE CITY OF EAGLE

**WITHDRAWAL OF PETITION
FOR RECONSIDERATION**

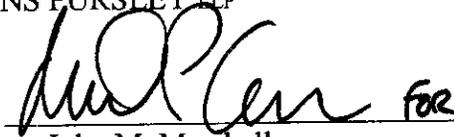
United Water Idaho Inc. ("United Water") hereby withdraws its Petition for
Reconsideration previously filed in this matter.

DATED this 1st day of August 2007.

Respectfully submitted,

GIVENS PURSLEY LLP

By


John M. Marshall

I HEREBY CERTIFY that on this 1st of August 2007, the above and foregoing was served as follows:

ORIGINAL FILED

Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

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 Overnight Mail
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Eagle, ID 83616

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Corrin & Terry Hutton
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Attn: John Westra
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John M. Marshall

CHARLES L. HONSINGER (ISB #5240)
DANIEL V. STEENSON (ISB #4332)
JON C. GOULD (ISB #6709)
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RECEIVED *Howarth*
AUG 02 2007 RECEIVED
WATER RESOURCES
WESTERN REGION
AUG 01 2007
DEPARTMENT OF
WATER RESOURCES

Attorneys for Protestants Joseph, Lynn and Michael Moyle,
Eugene Muller, Dana and Viki Purdy, Charles W. Meissner, Jr.,
Charles Howarth and Mike Dixon/Hoot Nanney Farms, Inc.

RECEIVED
AUG
WATER
RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

RECEIVED
AUG 08 2007
DEPARTMENT OF
WATER RESOURCES

IN THE MATTER OF APPLICATIONS TO)
APPROPRIATE WATER NOS. 63-32089) PETITION FOR CLARIFICATION/
AND 63-32090 IN THE NAME OF THE) RECONSIDERATION
CITY OF EAGLE)
_____)

COMES NOW Protestants Joseph, Lynn and Michael Moyle, Eugene Muller, Dana and Viki Purdy, Charles W. Meissner, Jr., Charles Howarth and Mike Dixon/Hoot Nanney Farms, Inc. (hereinafter "Protestants"), by and through their counsel of record, Ringert Clark Chartered, 455 S. Third Street, P.O. Box 2773, Boise, Idaho 83701-2773, and hereby file this petition for clarification/reconsideration of the hearing officer's July 17, 2007 *Preliminary Order*. This Petition is supported by the record herein, and is filed pursuant to IDAPA 37.01.01.730.02(a) and I.C. §67-5243. This Petition is timely based upon the *Preliminary Order's* service date of July 18, 2007 listed on the attached Certificate of Service.

SUMMARY

The City of Eagle filed its applications to appropriate water right nos. 63-32089 and 63-32090 in January of 2005. The two applications sought a total of 8.9 cfs from groundwater for municipal purposes within the City of Eagle service area. Of the 8.9 cfs sought by the City, 6.68 cfs is sought for fire protection. *Preliminary Order*, p. 7, ¶10. Various parties, including the Protestants, protested the applications, and IDWR initiated proceedings in the matter.

On March 10, 2006, IDWR hearing officer Gary Spackman issued an *Order Continuing Hearing and Canceling Prehearing Deadlines*. That *Order* required that the City of Eagle “arrange a time for the anticipated pump tests with the other parties.” As the hearing officer found, the City of Eagle failed to comply with the *Order* and no time was arranged.

On July 12, 2006, the attorney for the City of Eagle informed the Department that the pump test was complete. Protestants received notification from the City of Eagle of the pump test a month after it was completed. Therefore, the Protestants, through no fault of their own, were denied the opportunity to observe the water levels in their wells and gather data simultaneous with the pumping conducted by the City of Eagle. *Preliminary Order*, p. 8, ¶16.

The Protestants filed a *Motion for Continuance* of the hearing in November, 2006 based in part upon the fact that the Protestants had no opportunity to participate in the pump test. The hearing officer denied the *Motion* on the grounds that the Protestants had not raised the City’s failure to notify them of the pump test as an issue between notification of its completion in July and the date of the *Motion* in November. On November 22, 2006, the Protestants filed a *Motion in Limine*, seeking to exclude from evidence all of the data and results of the pump test because the Protestants had no opportunity to participate in the same by collecting data from their own

wells during that test. The hearing officer denied the *Motion in Limine*, holding that the Protestants “did not avail themselves of the opportunity” to “complain about their inability to participate in the test” earlier. *Preliminary Order*, p. 3.

The hearing officer found that the seven day aquifer test was inadequate in several ways. The seven day aquifer test was conducted under a pumping rate of 1,580 gallons per minute. *Preliminary Order*, p. 8, ¶15. In a staff memorandum reviewing the City of Eagle’s 7-Day Aquifer Test report, IDWR stated that a “higher pumping rate than was originally proposed for the lower yielding Monitoring Well #1 (Legacy Well) could and should have been used to stress the system. If Eagle had done so, the effect on other nearby wells and possible boundary conditions would have been more clearly identified.” *Preliminary Order*, p. 8, ¶18.a. In a supplemental staff memorandum dated February 27, 2007, IDWR stated that “the aquifer test was not of sufficient duration to definitively evaluate aquifer boundary conditions and long-term impacts associated with pumping.” *Preliminary Order*, p. 10, ¶18. The hearing officer found that “the only direct measurements of drawdowns in the deep aquifer caused by pumping are the measurements of drawdowns for the Legacy well.” *Preliminary Order*, pp. 10 - 11, ¶25.

In his decision, the hearing officer discussed the 1951 Ground Water Act, noting that “ground water appropriators would be required to pump from a “reasonable pumping level” established by the Department.” *Preliminary Order*, p. 16, ¶ Then, the hearing officer determined that “[p]umping of 8.9cfs will not cause water level declines in area wells below a level that is reasonable” without stating what that level actually is, or providing any citations to factual support for that conclusion. *Preliminary Order*, p. 17, ¶11.

ARGUMENT

A. **The Preliminary Order Must Include a Copy of the Approved Permit**

The *Preliminary Order* approved applications to appropriate water nos. 63-32089 and 63-32090 subject to a number of listed conditions. The *Preliminary Order* does not include the permit with the listed conditions as is typical IDWR practice. All parties must be given an opportunity to review the permit with the conditions listed thereon prior to issuance of the same pursuant to the *Preliminary Order*. Review of the approved permit may identify errors, omissions, mistakes and eliminate potential misunderstandings.

B. **The Permit Should Limit or Deny the Quantity Proposed for Fire Protection**

In its Findings of Fact the *Preliminary Order* finds that the “applications propose delivery of water” for 2,000 homes in a construction project, that the “peak one-hour demand for in-house use in 2,000 residential units is 2.23 cfs” and that 6.68 cfs of the projected 8.9cfs total instantaneous demand sought by the City is for fire protection purposes. *Preliminary Order*, p. 7, ¶10. Thus, the 8.9 cfs total sought under the permit applications was approved based on the fact that 6.68 cfs is required for fire protection. Despite these findings of fact, the *Preliminary Order* contains no condition limiting the use of 6.68 cfs of the total 8.9cfs sought for fire protection purposes. Such a condition must be imposed because without it, the “municipal” purposes for which the water right is sought may permit the entire quantity to be used on a year-round basis for “residential, commercial, industrial, irrigation of parks and open space, and related purposes.” *See* I.C. §42-202B(6). As “fire protection” use of a water only occurs either during a fire, or while filling a water storage facility to be used for “fire protection” purposes, the potential for abuse and overuse of the permitted water right for other purposes under the “municipal” label is

great without the limiting condition. As an alternative, IDWR may simply deny the 6.68 cfs sought for firefighting purposes as it is unnecessary. See I.C. §42-201(3)

C. **A New and Adequate Pump Test Must be Required Prior to Granting the Permit**

The City of Eagle's pump test and the results thereof are technically deficient. IDWR itself recognizes the deficiencies: (1) the pump test was not conducted at a pumping rate sufficient to identify boundary conditions and the impacts thereof upon nearby wells; (2) the length of the pumping test was insufficient to properly evaluate boundary conditions and the impacts of long-term pumping; (3) there are only measurements from one well (the Legacy well) that provide drawdown data for the deep aquifer from which the City is proposing to appropriate its water rights; (4) despite the hearing officer's order requiring the City to arrange a time with the other parties to the case for a pump test that would allow Protestants to measure the water levels in their wells during the test, the City failed to notify the Protestants of the pump test until after it was over. IDWR compounded the City's error by denying the Protestants' motions based upon the City's failure to follow the hearing officer's order. The fact is that the Protestants raised the issue well before the hearing - the failure to require the City to follow the hearing officer's orders has resulted in a serious infringement of Protestants' rights.

In addition to the deficiencies recognized by IDWR, the City of Eagle's monitoring data is so insufficient that IDWR is without adequate information to reach supportable conclusions as to potential impacts water nos. 63-32089 and 63-32090 will have on the local ground water levels. As noted above, the Protestants were not provided the opportunity to monitor water levels in their wells during the pump test. Water level monitoring conducted by the applicant was limited to the well being pumped and six observation wells. In its Findings of Fact, the

Preliminary Order finds that “[t]he shallow aquifer is a water table aquifer extending from land surface to approximately 100 feet below land surface. The intermediate aquifer is generally found from 100-200 feet below ground surface . . .” *Preliminary Order*, p. 10, ¶10. The *Preliminary Order*’s Findings of Fact further provide that “[t]he deep aquifer is located at depths below approximately 200 feet . . .” *Id.*

The observation wells included two shallow wells, 15 feet deep and 55 feet deep, located adjacent to one another. Thus, the monitoring data from the shallow aquifer is limited to only one point and lacks spatial representation of the shallow aquifer. Additionally, the monitoring data collected from the shallow aquifer wells shows a gradual decline during the monitoring period suggesting impact from pumping.

No monitoring wells were screened or had open intervals in the intermediate aquifer (100-200 feet below ground surface). Monitoring well nos. 1, 4, 6, and 11/12¹ were screened or had open intervals at depths greater than 200 feet below ground surface. Water levels in three of the four deep aquifer monitoring wells did not fully recover to pretest levels at the end of the monitoring period even though the pumping period was only seven days and the pumping rate was a fraction of the rate sought by the Applicant.

The monitoring data collected does not provide IDWR with adequate information to reach any conclusion as to the impact approving water nos. 63-32089 and 63-32090 will have on the local ground water levels. These deficiencies can all be remedied by simply requiring the City to conduct a pump test that is properly overseen by IDWR and in which the Protestants have

¹Monitoring well nos. 11 and 12 are the same well with two open intervals located at 345 to 425 and 400 to 500 feet below ground surface. The interval through which the water enters the well cannot be distinguished.

an opportunity to participate. IDWR must issue such an Order, and must withhold approval of these permit applications until such a test is properly conducted, and the results properly evaluated.

D. **The Department Must List the “Reasonable Pumping Level” it References in the Preliminary Order**

The hearing officer’s determination that “[p]umping of 8.9 cfs will not cause water level declines in area wells below a level that is reasonable” is without support. The hearing officer does not state what the “reasonable pumping level” is, and does not cite any support for his conclusion. At a bare minimum, IDWR must establish the reasonable pumping level (see I.C. §42-237a), and list the factual support for its conclusion. Without such factual information, the hearing officer’s determination is simply conclusory, and arbitrary and capricious.

CONCLUSION

For the foregoing reasons, IDWR should reconsider and clarify the Preliminary Order. IDWR must order that the City of Eagle conduct a proper pumping test with appropriate parameters and sufficient monitoring in which all of the Protestants actually have the opportunity to participate. If IDWR determines that there is a “reasonable pumping level” to which certain wells are subject, it must state what that pumping level actually is, and cite support for its conclusion. Finally, any Preliminary Order must also be issued with the proposed permit itself with all conditions to which it is subject including a condition limiting 6.68 cfs of the quantity sought by the City to fire protection purposes (alternatively, IDWR may simply deny the “fire protection” flows sought as unnecessary). Protestants request that the hearing officer set a briefing and argument schedule.

DATED this 1st day of August, 2007.

RINGERT CLARK CHARTERED

By Charles L. Honsinger

Charles L. Honsinger

Attorneys for Protestants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August, 2007, 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:

Jerry & Mary Taylor
3410 Hartley
Eagle, Idaho 83616

Leeroy & Billie Mellies
6860 W. State Street
Eagle, Idaho 83616

Corrin & Terry Hutton
10820 New Hope Road
Star, Idaho 83669

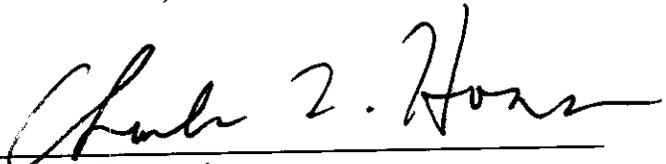
Dean & Jan Combe
6440 W. Beacon Light
Eagle, Idaho 83616

Sam & Kari Rosti
1460 N. Pollard Lane
Star, Idaho 83669

Bruce Smith
Moore Smith Buxton & Turke
225 N. 9th Street, Ste.420
Boise, Idaho 83702

Western Region
Attn: John Westra
2735 Airport Way
Boise, Idaho 83705-5082

John M. Marshall
Givens Pursley
P.O. Box 2720
Boise, Idaho 83701



Charles L. Honsinger

over?

MOORE SMITH BUXTON & TURCKE, CHARTERED

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PAUL J. FITZER
MICHAEL C. MOORE†
BRUCE M. SMITH
PAUL A. TURCKE°
CARL J. WITTHROE»*
TAMMY A. ZOKAN†

JOHN J. MCFADDEN*¹
of Counsel
√ Also admitted in Arizona
» Also admitted in California
" Also admitted in Colorado
* Also admitted in New Mexico
* Also admitted in Oregon
° Also admitted in South Dakota
† Also admitted in Washington

VIA FACSIMILE AND US MAIL

Director
Idaho Department of Water Resources
322 E Front Street
Boise, Idaho 83720-0098

July 31, 2007

Originally
RECEIVED
by fax on
JUL 31 2007

dy
Department of Water Resources

RECEIVED

AUG 02 2007

DEPARTMENT OF
WATER RESOURCES

Re: City of Eagle Applications for Permit Nos. 63-32089 and 63-32090

Dear Sirs/Madam:

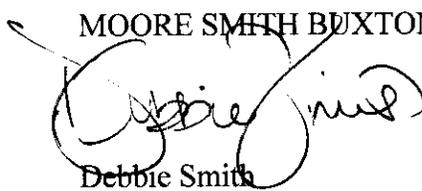
Enclosed please find the original and one copy of the Petition for Reconsideration of Preliminary Order to be filed in the above referenced matter.

Please file the original and provide our office with a conformed copy at your earliest opportunity. For that purpose, I have enclosed a stamped, self-addressed envelope.

Thank you, and if you should have any questions please feel free to contact me.

Sincerely yours,

MOORE SMITH BUXTON & TURCKE, CHTD.


Debbie Smith

Legal Assistant to Bruce M. Smith

/dls

Enclosures

BRUCE M. SMITH, ISB #3425
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Attorneys at Law
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Attorneys for the City of Eagle

RECEIVED
by fax on
JUL 31 2007

Department of Water Resources



**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS FOR)
PERMIT NOS. 63-32089 AND 63-32090 IN THE) PETITION FOR
NAME OF THE CITY OF EAGLE) RECONSIDERATION OF
) PRELIMINARY ORDER
)
)
)
_____)

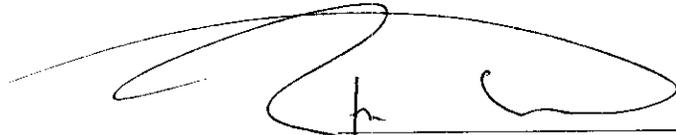
COMES NOW the City of Eagle and petitions the IDWR for reconsideration of the following issue:

Under the Preliminary Order issued July 18, 2007, the Hearing Officer ordered that certain mitigation be completed prior to use of water under the relevant permits and before a demonstration of any injury to some water rights. The proposed mitigation is potentially time consuming. Unrebutted testimony at the hearing on this issue was that no impact or injury to water rights would occur immediately given the anticipated schedule of development. Further monitoring would allow measurement of impacts and a determination of injury should it occur. On some water rights with the possibility of injury, the Preliminary Order adopted just such an approach – monitoring to determine impacts in order to determine if injury occurred. Requiring

mitigation when there is no injury is inconsistent with the Supreme Court's ruling in Parker v. Wallentine, 103 Idaho 506, 650 P.2d 648 (1982).

Submitted this 31 day of July 2007.

MOORE SMITH BUXTON & TURCKE,
CHARTERED

A handwritten signature in black ink, appearing to read 'Bruce M. Smith', is written over a horizontal line. The signature is stylized with a large loop at the end.

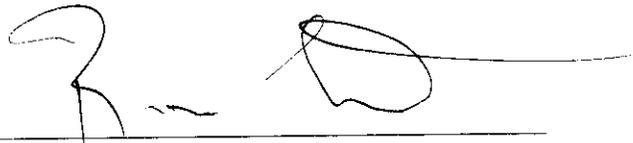
BRUCE M. SMITH
Attorney for the City of Eagle

CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of July 2007, a true and correct copy of the foregoing document was served upon the following by the method indicated below:

DEAN & JAN COMBE 6440 W BEACON LIGHT EAGLE ID 83616	CHARLES HONSINGER DANIEL V. STEENSON RINGERT CLARK CHTD 455 S. THIRD STREET PO BOX 455 BOISE, ID 83701-2773
CORRIN & TERRY HUTTON 10820 NEW HOPE ROAD STAR ID 83669	JOHN M. MARSHALL GIVENS PURSLEY PO. Box 2720 BOISE ID 83701-2720
LEEROY & BILLIE MELLIES 6860 W STATE STREET EAGLE ID 83616	SAM & KARI ROSTI 1460 N. POLLARD LANE STAR ID 83669
JERRY & MARY TAYLOR 3410 HARTLEY EAGLE ID 83616	IDWR - WESTERN REGION ATTN JOHN WESTRA 2735 AIRPORT WAY BOISE ID 83705-5082

- via U.S. MAIL
- via HAND DELIVERY
- via OVERNIGHT MAIL
- via FACSIMILE



BRUCE M. SMITH

MOORE SMITH BUXTON & TURCKE, CHARTERED

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JOHN J. MCFADDEN*
of Counsel
√ Also admitted in Arizona
» Also admitted in California
" Also admitted in Colorado
* Also admitted in New Mexico
* Also admitted in Oregon
° Also admitted in South Dakota
‡ Also admitted in Washington

July 31, 2007

VIA FACSIMILE AND US MAIL

Director
Idaho Department of Water Resources
322 E Front Street
Boise, Idaho 83720-0098

RECEIVED
JUL 31 2007
Department of Water Resources

Re: City of Eagle Applications for Permit Nos. 63-32089 and 63-32090

Dear Sirs/Madam:

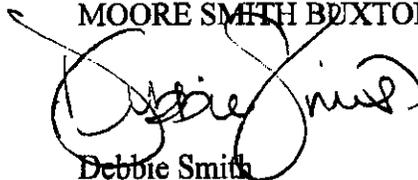
Enclosed please find the original and one copy of the Petition for Reconsideration of Preliminary Order to be filed in the above referenced matter.

Please file the original and provide our office with a conformed copy at your earliest opportunity. For that purpose, I have enclosed a stamped, self-addressed envelope.

Thank you, and if you should have any questions please feel free to contact me.

Sincerely yours,

MOORE SMITH BUXTON & TURCKE, CHTD.



Debbie Smith
Legal Assistant to Bruce M. Smith

/dls
Enclosures

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Facsimile: (208) 331-1202

RECEIVED
JUL 31 2007

Department of Water Resources

Attorneys for the City of Eagle

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS FOR)
PERMIT NOS. 63-32089 AND 63-32090 IN THE)
NAME OF THE CITY OF EAGLE)
)
)
)
)
)
_____)

PETITION FOR
RECONSIDERATION OF
PRELIMINARY ORDER

COMES NOW the City of Eagle and petitions the IDWR for reconsideration of the following issue:

Under the Preliminary Order issued July 18, 2007, the Hearing Officer ordered that certain mitigation be completed prior to use of water under the relevant permits and before a demonstration of any injury to some water rights. The proposed mitigation is potentially time consuming. Unrebutted testimony at the hearing on this issue was that no impact or injury to water rights would occur immediately given the anticipated schedule of development. Further monitoring would allow measurement of impacts and a determination of injury should it occur. On some water rights with the possibility of injury, the Preliminary Order adopted just such an approach – monitoring to determine impacts in order to determine if injury occurred. Requiring

mitigation when there is no injury is inconsistent with the Supreme Court's ruling in Parker v. Wallentine, 103 Idaho 506, 650 P.2d 648 (1982).

Submitted this 31 day of July 2007.

MOORE SMITH BUXTON & TURCKE,
CHARTERED



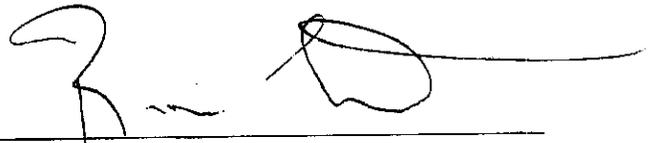
BRUCE M. SMITH
Attorney for the City of Eagle

CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of July 2007, a true and correct copy of the foregoing document was served upon the following by the method indicated below:

DEAN & JAN COMBE 6440 W BEACON LIGHT EAGLE ID 83616	CHARLES HONSINGER DANIEL V. STEENSON RINGERT CLARK CHTD 455 S. THIRD STREET PO BOX 455 BOISE, ID 83701-2773
CORRIN & TERRY HUTTON 10820 NEW HOPE ROAD STAR ID 83669	JOHN M. MARSHALL GIVENS PURSLEY PO. Box 2720 BOISE ID 83701-2720
LEEROY & BILLIE MELLIES 6860 W STATE STREET EAGLE ID 83616	SAM & KARI ROSTI 1460 N. POLLARD LANE STAR ID 83669
JERRY & MARY TAYLOR 3410 HARTLEY EAGLE ID 83616	IDWR - WESTERN REGION ATTN JOHN WESTRA 2735 AIRPORT WAY BOISE ID 83705-5082

via U.S. MAIL
 via HAND DELIVERY
 via OVERNIGHT MAIL
 via FACSIMILE



BRUCE M. SMITH

RECEIVED

July 27th, 2007

Dear Mr. Spackman,

JUL 31 2007
DEPARTMENT OF
WATER RESOURCES

This letter is in response to your Preliminary Order issued July 17th, 2007.

As a resident of this State and as a representative of my constituents, I have several concerns about this Order.

The Department's letter dated 3-10-06 ordered the City of Eagle to arrange a time for the anticipated pump tests with the other parties. Eagle defied this order. No arrangements were made, no notifications were sent. In addition, from Eagle's own 7-Day Aquifer Test page 2 they state the pumping well was moved to test well #2. None of this was known to the protesters either. It is illegal for us to trespass on private property. Living near the site, we kept watching for equipment, signs of their pump tests and waited for arrangements to be made. In your Preliminary Order, page 8 item 16, you state that other parties were not given the opportunity to participate in the test and to monitor their wells.

So Eagle defies your Order, fails to arrange with protesters, moves their pump test to a different location unknown to protesters and we missed the opportunity to complain? Just exactly when was our opportunity? We are at fault? We didn't even know the tests were done until it was all over and too late to complain! How then is it the protesters fault (page3)?

Why were the protesters shut out of the pump tests? What was Eagle afraid might be found out if our wells were monitored at the time of their tests? So Eagle defies your Order and gets rewarded with everything they asked for!

The test should have been done at a higher rate and for a longer period to determine the true impacts. The Department knows this and should at a very minimum require a new pump test at a higher rate before approving a water right.

Idaho code 42-237a-g states, "Water in a well shall not be deemed available to fill a water right therein if withdrawal there from of the amount called for by such right would affectthe present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge."

Show me the study that proves that the "anticipated average rate of future natural recharge" will cover the amount of water that this applicant will withdraw from this aquifer.

Remember Eagle has the burden to prove extra water was available. They did not.

I also believe that IDWR needs to establish what the reasonable pumping level for this aquifer is before they approve any new water rights. For IDWR to fail to define reasonable pumping levels would be a disservice to all parties involved.

Information concerning the drop in our aquifer (wells having to go deeper to tap into their water right) was not allowed in the hearing because of technicalities. I understand there have been additional wells in this area that have had to go deeper since the hearing. I thought the hearing was to gather all the facts available. What difference does it make to the facts who presents them? If there is information about drops in the aquifer from whatever source, they should have been included in this hearing. To make decisions without all the facts is a dangerous precedent to set.

In a letter from the Department dated December 26th, 2005, It stated that the Department will closely monitor construction of a pump test well and an additional monitoring well. Who at the Department closely monitored the construction of these wells and on what dates? Who at the Department monitored the actual pumping tests? If the Department was notified in advance, why were not my constituents? Are there screens at different levels that are allowing co-mingling? If you tell me no, how do you know?

In the beginning, all of us were led to believe Eagle's permits represented a transfer of water rights. They do not. They are for new water rights. What policy does the Department have regarding mitigation? These rights represent a much greater use, much longer period of time and most importantly they are going to the foothills and everybody knows it. M3, Suncor, Avimore, etc. do not have the water to provide for such large developments. The City of Eagle now has annexation signs clear to the top of Horseshoe Bend Hill. Their service area is a moving target. It grows larger every day. And it is going north! Dry foothills, no water, guess what? Eagle is gunning for our aquifer. How can the Department possibly expect this aquifer, which is dropping, to provide all the water for the dry foothills to the north? But that is what this order will set the precedent for. Water spreading is illegal. But Eagle is headed in that direction with this preliminary order.

United water and Star Water both have said they could provide water for the area. In fact, I believe United Water and Star Water have both run lines into the area in the last couple of months. Star has a new well and a water right which would allow them to service part of the area today. I believe this application is not about providing water as much as it is about money.

If I am not mistaken, I believe your Department, has not approved a new consumptive use for water unless it was for a municipality or a big developer, since 1992. I believe if

a farmer or some other individual were to sue the department over this fact they would probably win.

The law does not allow mining. By approving this application you will be allowing mining of the aquifer. There is approximately a million acre foot of surface water leaving the valley every year. Before using ground water you should look at the possibilities of using the extra surface water and not mining the ground water. If you are approving this application because of this million acre foot, you should be aware that new studies show that the water that you are over-appropriating actually goes to the Payette River. At the very least before approving this water right application you should do a study to make sure where this quote "extra water" is going or coming from.

Last but not least, my biggest concern is a repeat of the Eastern Snake River plain aquifer problem. Director Tuthill reported in June that it is a very serious problem with no solution in site. As a state legislature we have expended millions of dollars to try to fix the problem. No fix is in sight. Now we are looking at an even bigger problem in this region due to over appropriation and mining of the aquifer here. In the Hagerman valley area we are talking about fish farms. In the Treasure Valley we are talking about thousands of homes and people.

Please take these concerns into consideration before making your final decision.

Respectfully,

A handwritten signature in black ink, appearing to read "Mike Moyle". The signature is fluid and cursive, with the first name "Mike" and last name "Moyle" clearly distinguishable.

Mike Moyle

John M. Marshall
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
www.givenspursley.com
Attorneys for United Water Idaho Inc.

RECEIVED

JUL 31 2007

DEPARTMENT OF
WATER RESOURCES

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS FOR
PERMIT NOS. 63-32089 AND 63-32090 IN THE
NAME OF THE CITY OF EAGLE

**PETITION FOR
RECONSIDERATION**

INTRODUCTION

United Water Idaho Inc. ("United Water") hereby petitions the Hearing Officer for reconsideration of the June 17, 2007 Preliminary Order in this matter. United Water requests revision of the Preliminary Order to provide a municipal purpose of use for only 2.23 cfs under permit 63-32089. The remainder of the permit should either not exist or should include a fire protection purpose of use. The entirety of permit 63-32090 should either not exist or should have a fire protection purpose of use.

ARGUMENT

Idaho Code recognizes the unique obligations of municipal water providers and includes special provisions for municipal water rights. Most notably, the law recognizes that the five-year build-out provision applicable to other water users under I.C. § 42-204 does not work well for growing municipalities that need to plan and acquire assets to meet anticipated future growth. Accordingly, the law provides that municipal providers can acquire water rights for "reasonably

anticipated future needs” and hold them for a “planning horizon” without having to prove actual use of the water. I.C. § 42-202B(7). In this way a municipal provider can acquire new water rights in the present to meet future demands that may not materialize for more than five years. This unique treatment, however, requires the municipal provider to prove its “reasonably anticipated future needs” with evidence of anticipated water demand in the form of “population and other planning data.” I.C. § 42-202B(8). The municipal applicant also must demonstrate that water is not sought for “areas overlapped by conflicting comprehensive land use plans.” I.C. § 42-202B(8).

The Applicant did not provide any evidence required by I.C. § 42-202B(8). However, the Applicant admitted on several occasions that the requested quantities under its permit applications were designed to meet growth for twenty years. The Applicant avoided the proof requirements by stating that all the requested diversion quantity not needed to meet municipal needs over the next five years is necessary for fire fighting. By allowing Applicant to obtain large municipal water rights in the present for nothing more than fire protection capacity, the Hearing Officer has permitted an end-run around the statutory proof requirements for future needs water rights.

The Hearing Officer can avoid the circumvention of the required statutory proof by splitting the permitted diversion rate into a municipal and a fire protection component. Alternatively, the Hearing Officer can deny the applications for that portion of them needed for fire flow capacity. The Applicant does not need a water right in order to divert water for fire protection purposes. I.C. § 42-201(3) (“Notwithstanding the provisions of subsection (2) of this section [prohibiting the diversion of natural waters without having obtained a valid water right], water may be used at any time, with or without a water right, to extinguish an existing fire on

private or public lands, structures, or equipment, or to prevent an existing fire from spreading to private or public lands, structures, or equipment endangered by an existing fire.”).

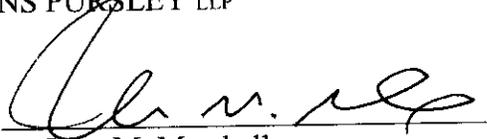
Applicant admits that its five-year municipal water demand is met with approximately 2.23 cfs. The Hearing Officer should cap the municipal component of the permits at this amount. Applicant requests that the Hearing Officer grant this Petition and then provide a schedule for briefing.

DATED this 30th day of July 2007.

Respectfully submitted,

GIVENS PURSLEY LLP

By


John M. Marshall

I HEREBY CERTIFY that on this 31 of July 2007, the above and foregoing was served as follows:

ORIGINAL FILED

Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

U. S. Mail
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 Overnight Mail
 Facsimile
 E-mail

SERVICE

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3410 Hartley
Eagle, ID 83616

U. S. Mail
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 Overnight Mail
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 E-mail

Corrin & Terry Hutton
10820 New Hope Road
Star, ID 83669

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Sam & Kari Rosti
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Dean & Jan Combe
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Bruce M. Smith
Moore Smith Buxton Turke
225 N. 9th, Suite 420
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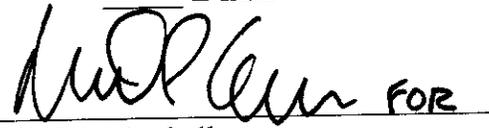
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Western Region
Attn: John Westra
2735 Airport Way
Boise, ID 83705-5082

U. S. Mail
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 FOR

John M. Marshall

Gary

RECEIVED
JUL 26 2007
DEPARTMENT OF
WATER RESOURCES

July 24, 2007

To: Mr. Gary Spackman - IDWR hearing officer
From: Mary Taylor - protestant
Re: Preliminary Order" for City of Eagle applications # 63-32089 & 63-32090

Dear Mr. Spackman,

This letter is my "Petition for Reconsideration".

Facts Presented at Hearing

I provided scientific documentation of the water levels in my well dating from 1999 to October 2006. This data was gathered by professional firms:

- SPF Water Engineering of Boise
- Hydro Logic, Inc. of Boise
- Adamson Pump and Drilling Company of Nampa

That evidence established the following facts:

<u>Date</u>	<u>Water level</u>	<u>Circumstances</u>
September 8, 1999	48 to 61 feet (average 54.5')	during 1 hour flow test of my well
June 25, 2006	75.82	measurement taken a few days after Eagle's pump test
August 18, 2006	69.1	
October 11, 2006	52.12	
Additional tests have been taken since the hearing in December of 2006 - see attached copies.		
December 18, 2006	50.05	
February 19, 2007	50.58	
April 26, 2007	52.71	
June 28, 2007	52.62	Almost exactly 1 year from when Eagle did pump tests

The 52.62' of June 2007 versus the 75.82' of June 2006, following Eagle's pump test, represents a drop in the water level of my well of 23-25 feet!

Certainly these additional tests, not available at the time of the hearing in December of 2006, qualify as "further factual development" (as per your "Certificate of Service"). In addition, they provide further evidence confirming the injury to my well during Eagle's pump tests.

We were told the "burden of proof rests upon the applicant". Eagle has failed to prove their pump test was **NOT** responsible for the unprecedented and inexplicable 23-25 foot drop in the water level of my well. As per Item # 8, page 17 of the "Preliminary Order" - "Proof of

Injury” - **Injury did occur to the water level in my well at the same time Eagle did their pump tests.** The City pumping this aquifer year-round at a far greater amount than the 1580 gpm is a guarantee of further injury.

Preliminary Order - Findings of Facts

Item #53, page 15 - Taylor - claim no. 63-5040

This water right predates the Legislative action of 1951 or the modifications of 1953. The “Priority date for this right is 03/01/1941”. This well is a free flowing artesian well as defined during the hearing, as is Mr. Moyle’s. However, there is a shut off valve so the flow is only used when needed. This water right point of diversion is within ½ mile of Mr. Moyle’s wells. This well is necessary for commerce as is Mr. Moyle’s. I ask for at least a portion of the same consideration for my well as given to the Moyle wells in this “Preliminary Order.”

Conclusions of Law

Item #27, page 20 - Taylor - water levels in wells “not entitled to *Parker* protection”.

During the hearing in December of 2006, the following definition was established:

0-80 feet shallow aquifer

80-200 intermediate aquifer

200-500 deep aquifer

Item #8, page 17 - “proof of injury” and “factual similarities”

“Factual similarities” - taken from 103 Idaho 506, 650 P.2d 648. *Parker v. Wallentine* are as follows:

“The Parker well had been drilled to a depth of 71 feet”. My wells are at 80 feet. By definition, Mr. Parker’s well would have been in the shallow aquifer. My well is in the shallow aquifer. “L. Junior Wallentine drilled a well..... to a depth of 200 feet”. Mr. Wallentine’s well was located in a deeper aquifer. City of Eagle’s wells are in a deeper aquifer.

Parker v. Wallentine

71 feet/deeper aquifer

no water/pumped 1350 gpm

injury occurred within few minutes

My well v. City of Eagle

80 feet/deeper aquifer

water level drop 23-25 feet/ 1580 gpm

injury occurred within few days

To paraphrase Item #27, page 20: Mr. Parker’s (Taylor’s) well was completed in the shallow aquifer. Mr. Wallentine (City of Eagle) pumping from the deep aquifer would not injure water rights diverting from the shallow aquifer. This proved to be in error!

“Factual similarities” are here presented. “Proof of injury” was presented at the hearing with further confirmation on page 1 of this letter. To quote the “Preliminary Order” under “Conclusion of Law” Item #15 - Muller: “*Parker* would only protect Muller’s water right from injury to water levels in the **shallow** aquifer” (emphasis added). If *Parker* would have protected the Muller’s water right in the shallow aquifer, then it should protect mine in that

same shallow aquifer.

In addition, my water right #63-2858B predates any of the legislation of 1951, 1953 or 1978. The priority date is 06/10/1951. Even with those facts in mind, the "Ground Water Act" of 1951 reads as follows:

"Section 1. It is hereby declared that All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed."

From the 1953 modification:

"Section 1. It is hereby declared early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer".

The Eagle permits have never been about providing water. United Water and Star Sewer and Water have already been assigned the rights to do just that. In view of this fact, these permits by the City represent nothing more than the following as quoted from the report of the *Parker v. Wallentine* page 513, (*Noh v. Stoner*):

"If subsequent appropriators desire to engage in such a contest [a race to the bottom of the aquifer] the financial burden must rest on them and with ***no*** injury to the ***prior*** appropriators for loss of their water" (emphasis added).

These two permit applications represents nothing more than "a race to the bottom of the aquifer" on the part of Eagle. ***Water mining!*** And it will prove to be at the expense of other senior, prior water right holders. A drop of 23-25 feet in the shallow aquifer represents injury to my water right and the potential loss of it completely. I am asking for reconsideration for protection of my water rights under the *Parker v. Wallentine* case.

Quoting from page 510, footnote 4 of the report of *Parker v. Wallentine*:

"In this very case the record demonstrates that the Department issued the water permit to Wallentine because its ***experts*** did not expect that the Wallentine well would have a significant impact on the Parker domestic well. This later proved to be incorrect". ***This "Preliminary Order" will prove to be incorrect as well!***

"Experts" deal in expectations. Water right holders deal in reality. When the ***experts*** are again proven to be wrong, what then? Our water rights are voided, our land becomes valueless and our livelihoods in jeopardy. The injury is not "if" but "when". The decisions in this "Preliminary Order" represent nothing more than the taking of private property for public use without the protection by law of "just compensation".

Furthermore, on June 12, 2007, Director Tuthill reported to a Legislative Natural Resources Interim Committee as to the water conditions around our State. His report only reinforced our position. To quote Mr. Tuthill's comments to that committee - aquifers are being pumped at greater rates than are sustainable, shallow aquifers are being depleted, junior water right holders are being giving orders to shut off wells. Ground water throughout the State is in a troubling condition with southern Idaho at the top of the list.

All the money and political power in the world can not restore water depletion from the aquifer due to over appropriation, lack of recharge and no mitigation. These two Eagle permits pose a very clear injury to our water rights, in the future, if they are granted.

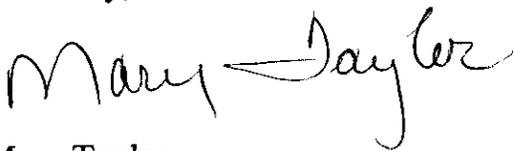
There is currently a moratorium on any new agricultural wells. Eagle's 2 permits represent a far greater drain on the aquifer than any new ag. well in both volume and time pumped. If ag. wells pose a threat of injury, Eagle's two permits guarantee it. Eagle's use of the water from this aquifer will go to sewage treatment facilities and down the Boise River - gone forever. And incidentally, we all know where Eagle's "Service Area" is going - NORTH. There is not enough water in Treasure Valley to green up those foothills, but Eagle is going to try by draining this aquifer.

Why is Eagle not required to provide a percentage of recharge for every gallon taken from this aquifer in your "Preliminary Order"? Why is Eagle not required to mitigate these "new" and "change of use" permits? That seems most inconsistent given the current conditions of our ground water as outlined by Director Tuthill on June 12th of this year.

In conclusion, I am asking for reconsideration of your decision not allowing protection of my water rights. This reconsideration is being asked due to the evidence presented at hearing and "further factual developments" provided in this letter as well as similarities to past cases in the law.

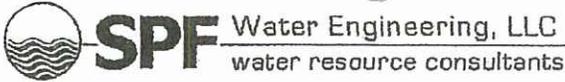
If water right permits # 63-32089 and 63-32090 are fully granted or any portion of them, the City of Eagle should be responsible for the injury to my well at their expense. Compensation for my loss should be the exclusive responsibility of the City of Eagle. Restoration of my senior water right should be done in a timely fashion and at the expense of Eagle.

Sincerely,

A handwritten signature in cursive script that reads "Mary Taylor". The signature is written in black ink and is positioned above the typed name and address.

Mary Taylor
3410 Hartley
Eagle, Idaho 83616
(208) 286-7575

enclosure: 2



June 12, 2007

Mary Taylor
3410 North Hartley Lane
Eagle, Idaho 83616

Subject: Water Level Monitoring Results

Dear Mrs. Taylor,

I have been measuring water levels in your irrigation well in accordance with the agreement signed by Mr. Jerry Taylor with SunCor Idaho, LLC. I am employed by SPF Water Engineering, who Suncor Idaho has hired to conduct this monitoring. These water level measurements are being taken as part of a larger water level monitoring program being conducted in northern Ada County.

During our conversation on June 11, you requested a summary of the water level measurements taken from your irrigation well since December 2006. On December 18, 2006, I measured a depth to water of 50.05 feet, measured from a hole in the well casing near the top. On February 19, 2007, I measured a depth to water of 50.58 feet. On April 26, 2007, the depth to water was measured at 52.71 feet. The April measurement was lower than the previous two measurements likely because the well was being used for irrigation.

— # 1
— # 2
— # 3

Please contact me with any questions you may have regarding these measurements.

Sincerely,

Jason W. Thompson, E.I.T.
Associate Engineer

Document Info:
Filename: Letter to Mary Taylor June07.doc
SPF file number: 285.0170



SPF Water Engineering, LLC
water resource consultants

July 24, 2007

Mary Taylor
3410 North Hartley Lane
Eagle, Idaho 83616

Subject: Water Level Monitoring Results

Dear Mrs. Taylor,

I have been measuring water levels in your irrigation well in accordance with the agreement signed by Mr. Jerry Taylor with SunCor Idaho, LLC. I am employed by SPF Water Engineering, who Suncor Idaho has hired to conduct this monitoring. These water level measurements are being taken as part of a larger water level monitoring program being conducted in northern Ada County.

The latest water level measurement occurred on June 28. At that time, I measured a depth to water of 52.62 feet. — # 4

Please contact me with any questions you may have regarding this measurement.

Sincerely,

Jason W. Thompson, E.I.T.
Associate Engineer

Document Info:
Filename: Letter to Mary Taylor July07.doc
SPF file number: 285.0170

July 25, 2007

RECEIVED

JUL 26 2007

DEPARTMENT OF
WATER RESOURCES

To: Director Tuthill proof
IDWR

From: Mary Taylor

Re: "Preliminary Order" issued July 17th for City of Eagle water permit applications

Dear Mr. Tuthill,

I am a protestant to the City of Eagle's application for two water right permits in my neighborhood. A hearing was held in December of 2006. From the beginning of this process, we were told repeatedly the burden of proof rested upon the applicant (the City of Eagle). The hearing officer issued a "Preliminary Order" on July 17th.

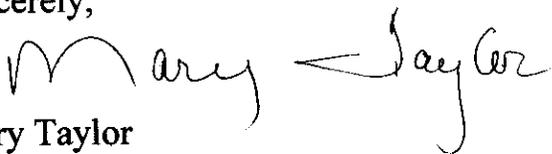
On June 12th, I attended the Legislative Interim Committee hearing on Natural Resources at which you gave a report as to the condition of water sources throughout our State. Your report was not encouraging. It only confirmed what all of us as protestants have known for some time.

I am extremely concerned with the "Preliminary Order" issued by your Department. It is my opinion that critical evidence regarding injury was ignored in the decision and the potential for greater injury dismissed. Furthermore, additional confirming data of that presented at the hearing has been made available since the hearing. I quote from the "Certificate of Service" which accompanied the Preliminary Order: "further factual development of the record". Such factual evidence is available and should be considered before a final order is given.

I am asking that I and all of the protesters be allowed to have the opportunity to present "Oral Arguments" to you as outlined in the Hearing Officer's "Certificate of Service". The City of Eagle failed to prove any thing in the hearing except the very real threat of injury to all of our water rights. The ground water issues are far to critical to be over appropriated and evidence of injury dismissed so casually. Please allow the protesters to at least bring their concerns to your attention.

Your consideration to this critical matter is greatly appreciated.

Sincerely,



Mary Taylor
3410 Hartley
Eagle, Idaho 83616
(208) 286-7575

Dave

Petition For Reconsideration 7/26/07

Re: Wells on Legacy development

RECEIVED
JUL 26 2007
DEPARTMENT OF
WATER RESOURCES

"The hearing officer intended that all the parties interested in the pump test have an opportunity to participate in the test -
The hearing officer is DISMAYED that Eagle did not follow the dictates of the order"
Page 3 2nd paragraph

So the dismayed hearing officer gives them what they request?

We request an oral argument!!!

CHARLES H. HOWARTH, M.D.
833 N. PALMER
EAGLE, ID 83616
286-9764

CHowarth MD

Eugene O. Muller
320 N. PALMER LN.
EAGLE, ID. 83616
PHONE 286-7369

July 26, 2007

To: Director Tuthill - IDWR
From: Mary Taylor
Re: Preliminary Order for City of Eagle Water Permits

RECEIVED

JUL 27 2007

DEPARTMENT OF
WATER RESOURCES

Dear Mr. Tuthill,

This letter is a follow-up to my letter dated July 25, 2007. I wish to make three points, before any decision is handed down, that I believe are critical to this issue.

1. I have provided Mr. Spackman with additional evidence of injury to the water level in my well at the time Eagle did their pump test. (See attached copy)

2. Eagle defied the Department's Order to:

"Arrange a time for the anticipated pump tests with the other parties."

Not only did Eagle not arrange a time with the protestants nor make any effort to notify us of the such, they also moved the pump test to a different well than originally designated. We had no way of knowing, even though we were watching for equipment and such, until the tests were already completed and the time for monitoring our wells was past. I just happened, almost by accident, to be monitoring my well at the time. Incidentally, I offered my well to Eagle for monitoring during the pump test and they refused (this was all brought out in the hearing).

3. In a letter dated December 26, 2005, the Department stated that they (the Department) intend "to closely monitor construction of these wells".

That was not done nor did the Department do any observation during the pump tests. So we only have the word of the City Eagle that all was completed properly.

In view of all this, I believe the minimum the Department can do to protect this valuable but diminishing resource is:

- a. require Eagle to re-schedule and re-do their pump tests
- b. require Eagle to notify all protestants two weeks in advance of pump tests
- c. require Eagle to pay for independent firms to monitor protestants' wells
- d. the Department have on-sight observers
- e. allow protestants or representative of their choosing to observe pump test.

As to the actual pump tests, these facts. The well they used for testing is a free flowing artesian well with a pressure of 8.1# and a flow of 1125 gpm. Those facts compromise the accuracy of the pump tests done with only 1580 gpm in June of 2006. Therefore, to provide more accurate information from which to draw conclusions of fact for any decision about these two permits the following should be required of Eagle:

- a. pump at 3500-4000 gpm
- b. continuous for two (2) weeks

Since they are asking for 8.9cfs in their permits, these seem like minimal requirements to achieve any degree of accuracy as to impact on other existing wells. Eagle will complain this is too expensive, but it is not nearly as costly as drilling new well for everyone affected or replenishing the aquifer once it has been depleted.

And by the way, what is going to limit Eagle to 8.9cfs? They have already demonstrated their willingness to defy Department orders. The Department has neither the manpower nor

resources to ride herd on them. So who is to say once they have these two permits they will not pump as much as they please? I believe their permits are for 5 wells which would clearly provide a far greater capacity than 8.9cfs. Once they are in the aquifer, it is theirs to plunder.

Given all the facts and history, these permits pose too great a risk to this aquifer to not require some additional testing and information gathering before any final decision is rendered.

Again, I appreciate your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Mary Taylor".

Mary Taylor
3410 Hartley
Eagle, Idaho 83616
(208) 286-7575



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

July 17, 2007

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Interim Director

Re: In the matter of applications to appropriate water nos. 63-32089 and 63-32090 in the name of the City of Eagle

Dear Interested Parties:

The Department of Water Resources ("Department") has issued the enclosed Preliminary Order in the above-referenced matter. Pursuant to section 67-5243, Idaho Code, **the enclosed order can and will become a final order without further action of the Department unless a party petitions for reconsideration, requests a hearing, or files an exception and/or brief as described in the enclosed information sheet.**

Please note that water right owners are required to report any change of water right ownership and/or change of mailing address to the Department within 120 days of the change. Contact any office of the Department or visit our homepage on the Internet at www.idwr.idaho.gov to obtain the proper reporting form.

If you have any questions, please call me at (208) 287-4942.

Sincerely,

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Enclosures

**RESPONDING TO PRELIMINARY ORDERS ISSUED
BY THE IDAHO DEPARTMENT OF WATER RESOURCES**

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration within fourteen (14) days after issuance as further described below:**

PETITION FOR RECONSIDERATION

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

EXCEPTIONS AND BRIEFS

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

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

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

CERTIFICATE OF SERVICE

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

FINAL ORDER

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

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

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

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

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

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