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Department of Water Resources

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**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)
)
)
)
)
_____)

REPLY BRIEF OF
CITY OF EAGLE

COMES NOW, the City of Eagle and submits its reply brief pursuant to the IDWR Order dated March 25, 2008.

Introduction

The petitions for reconsideration before the Director address two matters. One matter is the City of Eagle's concern that its applications have not received a fair and comprehensive review. The second matter concerns Protestant Moyle's assertions regarding injury due to decreased artesian pressure. The City has addressed its concerns with the review of the applications and redesignation of its water rights in its opening brief. Protestant Moyle did not address the subject in his opening brief. Instead, Moyle's brief focuses solely on alleged injury to his water rights. Therefore, this reply brief is limited to the points made by Protestant Moyle.

Argument

I. **Protestant Moyle's Argument That Artesian Pressure is an Element of a Water Right is Contrary to the Express and Unambiguous Declarations of the Legislature.**

Protestant Moyle's allegations of injury are solely related to potential changes in artesian pressure. Thus, this is not a case about reasonable or historic pumping levels. Rather, it is about artesian pressure in a cold water aquifer. The City believes that Protestant Moyle's acknowledgment of the importance of the legislature's intent is determinative.

In Protestant Moyle's brief at pages 4-5, Protestant Moyle acknowledges that "Unless the result is palpably absurd, a court must assume that the legislature meant what is clearly stated in the statute. In re Permit No. 36-7000, 121 Idaho 819, 822, 828 (1992)." As set forth in the City of Eagle's opening brief, the legislature has addressed exactly the point that Protestant Moyle now argues to the contrary. In 1987 the legislature considered and made a decision on the issue of whether artesian pressure in cold water systems is a protected element of a water right. The legislature rejected the idea as reflected in the 1987 amendments to the Idaho Groundwater Act. I.C. § 42-226 et seq. See City of Eagle Brief at pages 11-16. It cannot be legitimately argued that the legislature did not mean what it said in the legislative committee meetings and the resulting legislation addressing cold water artesian pressure – cold water artesian pressure is not an element of a water right and, thus changes in pressure are not an injury to a water right. It is hard to conceive of more direct and conclusive proof than the legislative history of the 1987 amendments. The express will of the legislature on this point should be honored, and the matter should be considered resolved.

Protestant Moyle has not even alleged that he would not get the full amount of his water right. Rather, Protestant Moyle's argument is that he is entitled to rely solely upon artesian

pressure as a component of his water right. Further, he asserts that his alleged entitlement to artesian pressure as a part of his water right cannot be diminished – regardless of whether he gets the full amount of water. Indeed, Protestant Moyle’s interpretation of the “shall not affect” provision of I.C. § 42-226 would presumably protect artesian pressure in existence at the time of development of his water right. Under the extreme interpretation advanced by Protestant Moyle, any groundwater right junior to his in the entire aquifer is subject to curtailment if it affects pressure - regardless of whether he gets the full amount of his water right.

Moyle also seeks to imply that injury to his mink constitutes injury to his water right. However, his assertions contradict the record and reflect his failure to offer any evidence to support his allegations. At page 7 of Protestant Moyle’s brief, he alleges that his mink died because of a “loss of artesian pressure.” This assertion is incorrect and misstates the Final Order. The Final Order says “mink died from lack of water.” It says nothing about the cause being a loss of water due to a decrease in artesian pressure. Final Order p. 24. In fact, whether the lack of water to mink was caused by loss of pressure, clogged water lines, negligent care of the mink or whatever else could have occurred within his overall system was not established. Likewise, death of mink cannot be connected to an injury to Moyle’s water right unless pressure is itself part of the right, which it clearly is not. Moyle has a water right for a certain amount of water for a certain use. If that amount of water is available through his diversion system, his water right has not been injured. Importantly, Moyle fails to acknowledge that his diversion system consists of a hole in the ground – a well with no pump. Hence he has no historical or reasonable pumping level to even address. That is why his argument is about pressure, not pumping levels.

II. The Final Order's Application of Parker v. Wallentine is Correct.

Although the Final Order's description of the application of Parker v. Wallentine to Protestant Moyle's domestic water right is a bit confusing, the Final Order does reflect the correct approach as to how to determine if Parker does apply. The City of Eagle agrees, as reflected in earlier submittals, that Parker is potentially applicable. Protestant Moyle has domestic rights that come within the types of water rights implicated in the Supreme Court ruling in Parker. What was never established at hearing was whether Parker remedies apply to Moyle's situation. In the hearing and in post hearing submittals the City of Eagle indicated that the correct approach to determining whether any Parker injury would result from exercise of the City's rights was to obtain information as to potential impacts. Protestant Moyle, on the other hand, would have a change in artesian pressure constitute the sole basis for presuming Parker injury and requiring a Parker remedy. Because Moyle's assertions of injury are directed solely at cold water artesian pressure, this case simply does not fall squarely within the holding of Parker.

This case and Parker pose different facts and allegations of injury. Just because Moyle may have a Parker water right does not mean that he is entitled to Parker remedies. The Final Order properly defers that determination to a time when Moyle can present evidence that brings his allegations within the scope of remedies described in Parker. Because Moyle's alleged injury is a potential decrease in pressure, as opposed to the inability to obtain his water right through his existing diversion system (a well with no pumping mechanism), any conclusion that he is entitled to Parker remedies would be premature. That is why the Final

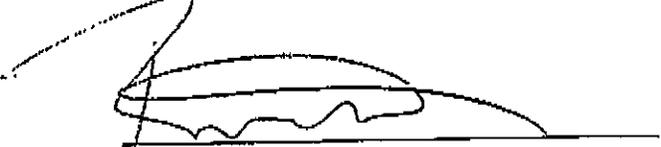
Order's procedure to have Moyle monitor his system and present the evidence to the IDWR is correct.¹

Conclusion

The City of Eagle's applications and the record supporting them were not properly and comprehensively considered. This led to an erroneous redesignation of the water rights from the applied for Municipal rights. This error should be corrected by returning to the original Preliminary Order holding approving the applications for 8.91 cfs of Municipal rights. Protestant Moyle's assertions of injury based on potential decreases in artesian pressure are not compensable because artesian pressure is not an element of a water right. Further, any application of Parker v. Wallentine is premature and must be made based on evidence showing that the domestic water right cannot be diverted from the existing system because of the exercise of the City's water rights.

Respectfully submitted this 2 day of May 2008.

MOORE SMITH BUXTON & TURCKE,
CHARTERED



BRUCE M. SMITH
Attorney for the City of Eagle

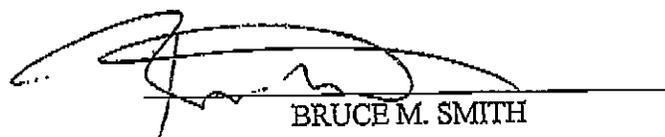
¹ Moyle asserts that it is inequitable to have to monitor his water levels because he was not notified of the City's pump test. This is incorrect in that Moyle was notified of the pump test. He just ignored the notice. See attached letter from IDWR dated December 26, 2005.

CERTIFICATE OF SERVICE

I hereby certify that on this 2 day of May 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
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via U.S. MAIL
 via HAND DELIVERY
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 via FACSIMILE


 BRUCE M. SMITH



State of Idaho

DEPARTMENT OF WATER RESOURCES

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DIRK KEMPTHORNE
GovernorKARL J. DREHER
Director

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MSB & T, CTD.

December 26, 2005

Distribution to parties involved with pending water right application No.'s 63-32089 & 63-32090 (protested), in the name of the City of Eagle

RE: Test well drilling and pump test plan.

Dear interested party:

In response to issues discussed at a pre-hearing conference held October 18, 2005, the Idaho Department of Water Resources (Department) has reviewed the comments submitted relative to the proposed pump testing and construction of test wells by the City of Eagle. At the Department's request, Holladay Engineering Company has submitted a revised pump test plan in consideration of these comments.

Department hydrologists have reviewed the revised plan and find this plan acceptable. The Department has issued drilling permits for construction of two wells. One well is to be used as the pumping well for the test and the second to be used as an additional monitoring well completed in the same aquifer as the pumping well. The Department intends to closely monitor construction of these wells to assure proper completion and has required submittal of a final well completion plan after drilling and logging of the pilot holes. Additionally, the City of Eagle has agreed that periodic and final reports of the data collected during drilling and pump testing will be submitted to the Department.

Any questions concerning this matter should be directed to Rob Whitney of this office.

Respectfully,

JOHN WESTRA
Manager, Western Region

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of December, 2005 a true and correct copy of the 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:

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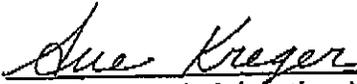
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FACSIMILE COVER SHEET

DATE: May 2, 2008 RECIPIENT'S FAX: 287-6700

TO: Idaho Dept of Water Resources CLIENT: City of Eagle

RE: City of Eagle Applications 63-32089 and 63-32090

FROM: Bruce M. Smith/Donda

NUMBER OF PAGES INCLUDING THIS COVER SHEET: 7

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ADDITIONAL COMMENTS:

Please find enclosed the Reply Brief of the City of Eagle. Thanks Bruce Smith

***** IMPORTANT MESSAGE *****

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