BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
TO APPROPRIATE WATER NO. 27-12155	)	**FINAL ORDER**
IN THE NAME OF THE CITY OF SHELLEY	)	
	)	

On July 19, 2007, the City of Shelley ("Shelley" or "city") filed an application to appropriate water with the Idaho Department of Water Resources ("IDWR" or "Department"). Application no. 27-12155 seeks the appropriation of 3.34 cubic feet per second ("cfs") for municipal purposes.

IDWR published notice of application no. 27-12155, and the application was protested by A & B Irrigation District, Milner Irrigation District, North Side Canal Company, Ltd., Twin Falls Canal Company, and Burley Irrigation District ("protestants"). The protestants assert that diversion of ground water by Shelley will deplete surface water flows in the Snake River.

Shelley recognized that simulations by ground water models employed in the joint administration of ground water and surface water for the Eastern Snake Plain Aquifer ("ESPA") would conclude that the ground water diversion proposed by application no. 27-12155 would deplete surface water flows in the Snake River. As a result, Shelley offered three mitigation plans: (1) maintaining active membership in a ground water district that provides mitigation in response to petitions for delivery call by the protestants; (2) limiting the total annual volume diverted to the total volume authorized by Shelley's perfected water rights; or (3) delivering surface water to Jensen's Grove, a pond near Blackfoot, Idaho through the Snake River Valley Irrigation District's delivery systems that would percolate into the ESPA. Facts related to these proposed mitigation plans are presented in the findings of fact.

On February 12, 2009, IDWR conducted a hearing for the contested case. On June 11, 2009, IDWR issued a preliminary order approving permit no. 27-12155 with conditions.

Shelley and the protestants timely petitioned the hearing officer to reconsider the preliminary order. On July 15, 2009, the hearing officer granted the petitions for reconsideration stating that "the merits of the petitions for reconsideration will be addressed by the hearing officer by separate order that will be issued within a short period of time." During the pendency of the petitions for reconsideration, the hearing officer was appointed as the interim director of IDWR. Any decision issued by the interim director will be a final order. Therefore, the petitions for reconsideration will be considered as exceptions filed with the interim director.

ANALYSIS OF ISSUES RAISED

Issues Raised by Shelley

Membership in a Ground Water District

1. *Does participation in a ground water district "provide mitigation for the depletionary effects of new ground water appropriation"?*

The interim director affirms his previous rulings in this final order. As stated previously, and restated in this order, "[i]f the Department determined that participation in a ground water district is sufficient mitigation, the Department would be ignoring its responsibility to specifically apply the Section 42-203A factors to the proposal and would be postponing the Department's obligation to insure the proposal would not reduce the quantity of water to a future time for determination." This postponement would also shift the burden of seeking redress for injury upon the protestants rather than placing the burden on the applicant of showing that the proposal will not reduce the quantity of water under existing rights.

Furthermore, the "burden of providing mitigation for the injury would shift, at least partially, to other ground water users if the Department recognized membership in a ground water district as adequate mitigation."

Finally, the standard of review is different for determining injury in a delivery call compared to reduction of the quantity of water under existing rights. In the analysis for reduction of the quantity of water under existing water rights, the Department must review the impact to each individual water right to determine whether the quantity of water will be reduced by the diversion and use proposed by the new application. The Department does not look at the total package of storage water and natural flow water rights held by a protestant and recognize that reductions in water under existing natural flow water rights can be made up by storage releases. As a corollary, when considering a water right application, the Department cannot review, on an annual basis, factors such as "reasonable carryover" and "in-season demand." The applicant must show the proposed use will not reduce the quantity of water under existing rights at the time the application is considered by the Department.

"Participation in a ground water district is not sufficient to provide mitigation for the depletionary effects of new ground water appropriations."

Alleged Requirement that the Quantity of Water be Reduced Under Existing Rights Every Year

2. *Does "diversion of ground water by Shelley deplete surface water flows in the Snake River and diminish the quantity of water available to satisfy the protestant's water right every year"?*

In Conclusion of Law no. 5 of the June 11, 2009, preliminary order, the interim director concluded that "Shelley's proposed diversion will deplete flows in the Snake River in reaches of

the Snake River that, at most times, are fully appropriated." This statement is more properly a finding of fact and will be included in the findings.

During spring runoff, there are some years when there is unappropriated water flowing in the Snake River. Nonetheless, every year, the watermaster of Water District 01 regulates and accounts for water diversions and use from the Snake River. The watermaster must regulate and account for water diversions and use from the Snake River because there is not sufficient water flowing in the Snake River to satisfy all of the existing water rights.

The interim director will add language to the findings of fact to include the above statements.

Diversion of Additional Total Flow Rate – No Increase in Total Decreed Volume

3. *When a new application proposes an appropriation of water that will increase the total flow rate authorized by existing water rights and will increase the historical volume of water diverted under the existing water rights, but will not result in the diversion of more volume of water than the express volume allowed by the existing water rights, will the proposed appropriation reduce the quantity of water available for other water rights?*

The interim director has addressed this issue twice and will reaffirm his decision in this order for the third time. The conclusions of law need no further elaboration on this subject.

The Applicant's Transient Plan for Providing Mitigation Water to Jensen's Grove

4. *If the hearing officer adopts Shelley's proposal to deliver surface water into Jensen's Grove for mitigation, must the mitigation plan follow the staged implementation proposed by Shelley?*

In its proposed mitigation alternative to deliver surface water to Jensen's Grove, Shelley proposes an annual monitoring and reporting of the number of connections to homes in the Copper Meadows property, the number of acres associated with the homes irrigated with ground water, and the number of acres within the Copper Meadows property still irrigated with surface water.

There are two reasons why this proposal is faulty. First, Shelley wants to divert and use the extra volume of ground water immediately for other developments, not as the Copper Meadows property is developed. The applicant's argument for staged implementation is disconnected from the reality of future water use. Shelley will use the additional volume immediately and the additional water use will deplete flows in the Snake River. Despite the depletions, Shelley's staged plan for mitigation would only be implemented as the Copper Meadows property is developed. Without further information, this decision must require mitigation when the depletion occurs.

The second reason for caution in adopting the applicants plan is the extensive reporting and oversight required by the Department and the watermaster. Significant complexity in the administration of water caused by this proposal and a myriad of other proposals without additional resources causes the proposal to be unmanageable. Because the proposal does not address the real depletions that will occur long before the Copper Meadows property is developed, as described above, the interim director need not rely on the unreasonable administration argument as cause for refusing to adopt the proposed staged mitigation.

Limitation to Diversion of 140 Acre Feet of Water Annually

5. *The total volume authorized for diversion under the permit should not be restrictively limited to 140 acre-feet.*

This argument is linked to previous arguments about whether a new water right can allow diversion of more volume than historically diverted but within the total volume of water that can be diverted when the individual volumes authorized by Shelley's existing water rights are summed together. The hearing officer ruled that any additional volume associated with the increased flow rate must be mitigated. Shelley offered 90 acre-feet of surface water for mitigation. Applying a consumptive use of 2.5 acre-feet per acre as the consumptive standard, 36 acres could be irrigated when 90 acre-feet of water is recharged to the ground water at Jensen's Grove. Only 35 acres will be irrigated with ground water within the Copper Meadows property. Because a portion of the ground water delivered for irrigation will not be consumed but will percolate back into the ground, a gross quantity of 4.0 acre-feet per acre can be diverted. Multiplying 35 acres by 4.0 acre-feet per acre results in a total volume of 140 acre-feet. Shelley should be limited to 140 acre-feet diverted from any new points of diversion under this water right.

Total Flow Rate and Proof Due Date

6. *The hearing officer should correct the total flow rate to 13.37 cfs not 13.34 cfs.*

7. *The proof of beneficial use due date should be amended to allow a full five years for development.*

This final order corrects the total flow rate authorized by the Shelley water rights to 13.37 cfs.

The application sought a development period of three years. The hearing officer doesn't recall anything in the record supporting a change. Nonetheless, a change in the period of development is not a change requiring amendment or notice. The proof of beneficial use will be due on or before December 1, 2014.

Issues Raised by the Protestants

Direct Irrigation vs. Mitigation with Surface Water – Idaho Code § 67-6537

1. *Does Idaho Code § 67-6537 require direct irrigation with the surface water appurtenant to the property when there is a land use change?*

This issue was raised as a pretrial issue and has been twice addressed by the interim director. This final order affirms the previous decisions.

Idaho Code § 67-6537 states that "[a]ll applicants proposing to make land use changes shall be required to use surface water, where reasonably available, as the primary water source for irrigation." The consideration of Idaho Code § 67-6537 raises two questions. First, is the Department vested with authority to directly enforce the statute through its water right processes, and second, does recharge with the surface water satisfy the mandate that the surface water be used "as the primary source for irrigation"?

Idaho Code § 67-6537 is a land use planning statute directed to the local government charged with approving land use changes. The Mayor of Shelley testified that Shelley will consider the installation of secondary surface water irrigation systems for future development but had determined to allow the Copper Meadows property to be developed without the secondary irrigation system, provided the Copper Meadows property developers mitigate for the extra ground water withdrawal with surface water appurtenant to the Copper Meadows property. The Department should defer to the decision of the local land use planning entity provided the intent of the statute is satisfied. The surface water is indirectly being used as the primary source for irrigation because it will percolate into the ground to mitigate for the ground water withdrawal. The net result will satisfy the intent of the statute that the appurtenant surface water will not be moved elsewhere resulting in further demands on the ground water and depletions to the Snake River that will reduce the available water for existing water rights.

This final order recognizes that withdrawals of ground water limited to quantities fully mitigated by surface water recharge satisfies the intent of Idaho Code § 67-6537 to the extent that the Department must review compliance with the provisions of the statute.

Authorization for Diversion of 140 Acre-Feet Annually

2. *The hearing officer should not allow diversion of 140 acre feet of ground water mitigated by 90 acre-feet of surface water placed in Jensen's Grove.*

The computations supporting authorization of diversion of 140 acre-feet annually are set forth and explained in the discussion of the applicant's reconsideration issues above under the heading "Limitation to Diversion of 140 Acre Feet of Water Annually." The computations recognize that the applicant is only required to mitigate for the consumptive portion of the ground water withdrawal and use, assuming that the nonconsumptive portion will percolate back into the ground water. This final order will not amend the authorization for annual withdrawal of not more than 140 acre-feet under this permit.

Given the above analysis, and having considered the evidence presented at the hearing, the interim director finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application no. 27-12155, filed by Shelley, proposes the following:

Flow rate:	3.34 cfs
Annual volume:	2,420 acre feet ("af")
Purpose of Use:	Municipal
Source of Water:	Ground water
Period of Use:	January 1 through December 31
Proposed Priority Date:	July 19, 2007
Point of Diversion:	NESWSE[1], Sec. 31, Township 1 North, Range 37 East
Place of Use:	The City of Shelley service area.

2. The actual public land survey locations of the present Shelley service area are identified in the application. This identification is useful for Department records, but is not the place of use proposed by the application.

3. The application seeks a water right that can be developed within the normal permit development periods and does not seek a water right for reasonably anticipated future needs.

4. Shelley's water rights for its integrated municipal system were decreed in the Snake River Basin Adjudication and identified four wells as the points of diversion. After the rights were decreed, Shelley filed application for transfer no. 75066 with IDWR, seeking authorization to divert any of its water rights, including the respective volumes, from any of the points of diversion and to add a fifth well onto the city's integrated system. The application for transfer was approved on November 12, 2008.

5. The points of diversion described by water right nos. 27-4107, 27-12078, 27-12077, 27-2155, and 27-7053 are the five wells supplying water to the integrated municipal water system. A sixth well provides water to the city's sewage treatment plant.

[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 Bingham County.

6. Shelley's wells are described as points of diversion in the following water rights. All of the wells are located in Township 1 North, Range 37 East.

Water Right No.	Flow Rate	Annual Volume	Priority Date	Well Location
27-4107	0.33 cfs	238.9 af	July 30, 1910	Two points of diversion in the NWNWNW, Sec. 33, one point of diversion in the NESWSE, Sec. 29, one point of diversion in Lot 2 (SESENW) Sec. 12, and one point of diversion in Lot 6 (NWNESE) Sec. 31
27-12078	1.11 cfs	803.6 af	June 27, 1948	same points of diversion as above
27-12077	0.78 cfs	564.7 af	Jan. 3, 1949	same points of diversion as above
27-2155	4.90 cfs.	3546.6 af	April 14, 1967	same points of diversion as above
27-7053	2.89 cfs	2092.2 af	April 17, 1975	same points of diversion as above
27-7420	0.02 cfs	0.10 af	June 17, 2003	Lot 2 (NENWNW) Sec. 31 (sewer treatment plant well)

7. The well identified as a point of diversion for water right no. 27-7420 is a small well that does not deliver water to the city's integrated municipal water system.

8. The volumetric amounts decreed in each of the water rights for the integrated municipal water system were computed by multiplying the flow rate in cubic feet per second authorized by the water right by the total number of seconds in an entire year and converting the units to acre-feet.

9. If all of the individual flow rates and volumes of the above water rights are summed, the total flow rate is 10.03 cfs and the total volume is 7,246.1 af annually.

10. Protestants hold water rights authorizing diversion of water from the Snake River at points of diversion located downstream from American Falls Dam and upstream from Milner Dam. The protestants' water rights are summarized in Protestants' Exhibit no. 3. The water rights held by the protestants bear priority dates of 1939 and earlier. The priority dates of the protestants' water rights are all earlier in time than all but the smallest of Shelley's integrated municipal water system water rights (water right no. 27-4107 - 0.33 cfs, July 30, 1910).

11. During spring runoff, there are some years when there is unappropriated water flowing in the Snake River. For much of the irrigation season every year, however, the watermaster of Water District 01 regulates and accounts for water diversions and use from the Snake River. The watermaster must regulate and account for water diversions and use from the Snake River because there is not sufficient water flowing in the Snake River to satisfy all of the existing water rights.

12. Diversions of ground water by Shelley deplete surface water flows in the Snake River. These depletions of Snake River flows diminish the quantity of water available to satisfy the protestants' water rights.

13. Shelley is a member of the Bingham Ground Water District. Shelley pays assessments to the Bingham Ground Water District based on the flow rates authorized by its water rights. These assessments are paid primarily to provide mitigation for depletions to downstream users caused by the diversions of ground water within the Bingham Ground Water District. This mitigation is required as a result of Department orders resulting from petitions for delivery call filed by the protestants in other administrative actions.

14. System demands on Shelley's integrated municipal delivery system reach their peak during the summer months. The peak hourly demand for present obligations is 12 cfs. The peak hourly demand for existing and obligated demands is 15.7 cfs. Application no. 27-12155 will add an additional 3.34 cfs of instantaneous flow capacity to the existing 10.03 cfs capacity of the Shelley system, totaling 13.37 cfs. Shelley is not applying for the entire 5.7 cfs difference between obligated peak hourly demand and present system capacity because the system capacity at the location of the proposed well limits the additional diversion rate to 3.34 cfs.

15. The total annual volume of water diverted by Shelley averages approximately 2,000 af per year. The largest volume of water annually pumped from 2001 through 2008 in water demand calculation sheets found in Appendix B of Exhibit I is approximately 2,230 af in 2002 (see the next to the last column titled "Total Quantity Pumped" in the total acre-feet per year line). This volume of water is approximately 5,000 af less than the total volume of water computed by summing the volume authorized by each of the integrated system water rights.

16. A mitigation plan offered by Shelley proposes delivery of 90 af of water through the Snake River Valley Irrigation District's system to Jensen's Grove pond or reservoir (hereafter referred to as "Jensen's Grove"). Jensen's Grove is a gravel pit located within the City of Blackfoot that fills with Snake River water. The reservoir is a recreational amenity within the City of Blackfoot. Water diverted into Jensen's Grove will percolate into the ESPA. The rate of percolation into the ground water from the reservoir increases with increasing deliveries to the reservoir until the reservoir is filled to capacity.

17. Jensen's Grove is included within the boundaries of the Snake River Valley Irrigation District.

18. Snake River Valley Irrigation District holds natural flow water rights authorizing diversion of Snake River water. Snake River Valley Irrigation District also holds contracts for storage water in reservoirs constructed on the Snake River and its tributaries.

19. The City of Blackfoot holds water right no. 1-181C. Water right no. 1-181C authorizes the following:

Source:	Snake River	
Purposes of Use:	Irrigation	1.0 cfs
	Diversion to Storage	46 cfs
	Irrigation Storage	200 AFA
	Irrigation from Storage	200 AFA

	Recreational Storage	2266.8 AFA
Total Flow Rate:		46 cfs
Priority Date:		June 16, 1900

20. The diversion of 46 cfs to storage is primarily for the purpose of filling Jensen's Grove and maintaining water levels in Jensen's Grove during the summer.

21. During the spring and early summer, the City of Blackfoot diverts natural flow from the Snake River into Jensen's Grove because the priority date of water right no. 1-181C (June 16, 1900) is early enough that it can be delivered. During the late summer and fall, flows in the Snake River may diminish to flow rates at which all or part of water right no. 1-181C is no longer in priority and thus not deliverable.

22. After the City of Blackfoot's right no. 1-181C is no longer deliverable, Snake River Valley Irrigation District delivers storage water to Jensen's Grove. The quantity of storage water delivered to Jensen's Grove may depend on the amount of storage water in Snake River Valley Irrigation District's storage allotment for the water year.

23. If Jensen's Grove is filled to capacity, additional water diverted will discharge back to the Snake River. The City of Blackfoot attempts to prevent flow back to the Snake River by regulating the diversion headgates that deliver Snake River water to Jensen's Grove.

24. Application no. 27-12155 refers to a development proposed by "Ball Ventures" named "Copper Meadows Property." The Copper Meadows property is 80 acres located in the SWNW and the NWSW of Section 21, Township 1 North, Range 37 East. The 80 acres is presently irrigated with Snake River water delivered by the Snake River Valley Irrigation District.

25. The Copper Meadows property is not yet annexed into Shelley, but future development of the property could be served by additional water provided by the proposed application for permit. Of the 80 acres, 35 acres would be irrigated by Shelley's integrated municipal water system. An additional 10 acres of the 80 acres would be irrigated with surface water because the land would be part of an elementary school. The remainder of the 80 acres would be developed into asphalt, home pads, and other cover-over.

26. At the hearing, Shelley and the protestants each offered a different value of evapotranspiration for turf grass and other landscape growth on the 35 acres of irrigated land associated with homes to be constructed on the Copper Meadows property. Shelley argued that evapotranspiration at an Agrimet station at Idaho Falls is the appropriate value. The protestants argued that evapotranspiration at an Agrimet station at Blackfoot is the appropriate value. Evapotranspiration of 2.5 acre feet per acre is the approximate evapotranspiration at the Copper Meadows property when the evapotranspiration values at the Idaho Falls and Blackfoot Agrimet stations are approximately averaged.

27. At a rate of 2.5 af per acre, 87.5 acre feet of mitigation would be required to compensate for the depletions to river flows. The offering of 90 acre feet is sufficient water to mitigate for depletions caused by irrigation of the 35 acres.

28. Model simulations by Shelley show that placement of water in Jensen's Grove will result in replacement water to the reaches from Shelley to near Blackfoot and from near Blackfoot to Neely in excess of the depletion caused by diversion of ground water for the proposed irrigation of the 35 acres in Copper Meadows.

29. Deliveries of this storage water are proposed for spring and summer of every year. Snake River Valley Irrigation District has sufficient storage water to provide the mitigation deliveries. To adequately mitigate for depletions, approximately one-third of the mitigation water must be delivered to Jensen's Grove in the spring and two-thirds of the mitigation water must be delivered during the summer.

30. Ordinances of Shelley require that developers convey existing surface water rights to the city and execute an agreement with the city for use of the surface water to irrigate the land proposed for development. The city ordinances do not require the installation of a secondary and separate irrigation system with surface water through the subdivision. Exhibit E is a surface water use agreement executed by Snake River Valley Irrigation District, the City of Shelley, and BV Copper Meadows LLC. The agreement provides that BV Copper Meadows LLC and Snake River Valley Irrigation District will provide mitigation water as approximately computed above. Snake River Valley Irrigation District agrees to deliver the water to Jensen's Grove.

31. The appropriation sought by application no. 27-12155 is a small part of the total service that could be provided through the appropriation of 3.34 cfs and the associated volume that could be diverted continuously at the proposed rate of diversion. Applicant's Exhibit I is a Facility Planning Study by the City of Shelley. On page 13 of the study, Table III-II shows both existing connections of 1,289 total units, and an additional 520 connections (obligated and anticipated) for a total of 1,809 connections. The 520 additional connections do not include any of the connections in the Copper Meadows proposed development. They do not include any of the 35 acres proposed for irrigation.

32. Evidence at the hearing established the proposed diversion of water and associated volume use for application no. 27-12155 would provide the additional volume and peak flow rates for all of the 520 additional connections, the Copper Meadows development, and perhaps other developments that the city is not yet obligated to provide water for, but are being reviewed by Shelley planners.

33. The water offered for mitigation would only compensate for a small portion of the total use proposed for appropriation by application no. 27-12155.

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. Based on Department computer models, diversion of water at the City of Shelley location will deplete surface water flows in the Snake River between Shelley and near Blackfoot, and also between near Blackfoot and Neely. Protestants rely on surface water flows from these reaches to satisfy their water rights. Shelley's proposed diversion will reduce the quantity of water available to the protestants' water rights and other water rights.

4. Shelley offered three plans to mitigate for its depletions: (1) Maintain membership in the Bingham Ground Water District; (2) Limit volume division to the volume authorized by existing decreed water rights held by Shelley, or (3) divert Snake River water into Jensen's Grove, which water will percolate into the ESPA and increase flows in the Snake River. Plans one and two were the subject of previous orders issued by the hearing officer, but this decision will again address those proposals.

Ground Water District Membership

5. An applicant seeking a new water right bears the burden of proof to establish all the factors the Department must consider under Idaho Code § 42-203A, including whether the proposed use will "reduce the quantity of water under existing water rights" and whether the water supply is sufficient for the purpose sought. Shelley's proposed diversion will deplete flows in the Snake River in reaches of the Snake River that, at most times, are fully appropriated. Idaho Code § 42-203A requires that each criterion in the statute must be applied specifically to

the pending proposal and must be satisfied at the time appropriation is sought, not after a water right is approved.

6. If the Department determined that participation in a ground water district is sufficient mitigation, the Department would be ignoring its responsibility to specifically apply the Section 42-203A factors to the proposal and would be postponing the Department's obligation to insure the proposal would not reduce the quantity of water to a future time for determination.

7. The postponement of the determination would also shift the burden of seeking redress for injury upon the protestants rather than placing the burden on the applicant of showing that the proposal will not reduce the quantity of water under existing rights.

8. The burden of providing mitigation for the injury would shift, at least partially, to other ground water users if the Department recognized membership in a ground water district as adequate mitigation.

9. Finally, the standard of review is different for determining injury in a delivery call compared to reduction of the quantity of water under existing rights. In the analysis for reduction of the quantity of water under existing water rights, the Department must review the impact to each individual water right to determine whether the quantity of water will be reduced by the diversion and use proposed by the new application. The Department does not look at the total package of storage water and natural flow water rights held by a protestant and recognize that reductions in water under existing natural flow water rights can be made up by storage releases. As a corollary, the Department cannot review, on an annual basis, factors such as "reasonable carryover" and "in-season demand." The applicant must show the proposed use will not reduce the quantity of water under existing rights at the time the application is considered by the Department.

10. Participation in a ground water district is not sufficient to provide mitigation for the depletionary effects of new ground water appropriations.

Limit Annual Volume to Already-Decreed Volumes for Other Water Rights

11. Shelley argues that a municipal water right grants entitlement to the full volume of water that would accrue by continuously diverting the existing water rights at the authorized flow rates for an entire year.

12. Shelley further argues, based on the assumption it is entitled to the annual volume described by its existing water rights, that the protestants cannot be injured if the volume is not exceeded due to an increase in flow rate.

13. The Department can grant a water right to a municipality that does not specify an annual volume limitation. Some municipal water rights are approved without an express annual volume. In contrast, other municipal water rights limit the annual volume. Issuance of a municipal water right does not create an absolute expectation that the annual volume authorized

is established and is only limited by the volume calculated by continuous accrual of the flow rate over the period of a year. The extent of a water right is bounded by the beneficial use of the water under the water right. A municipality has the ability to grow into its water right within reasonable limits. These limits include the express components that define the municipal water rights. One of these components is the flow rate. A reasonable exercise of a municipal water right is the construction of additional storage or additional delivery line capacity to address relatively short term demands on the system. These reasonable expansions of a municipal system are recognized within the expansion flexibility of a municipal system.

14. Approval of this water right application will increase the annual volume diverted beyond what was reasonably expected under the existing municipal water rights. The increase in the total volume of water diverted under this right will result in a reduction in the quantity of water available under existing rights. Large annual volumes for municipal water rights, whether implied when no volume is specified or expressly stated in the water right, are constrained and limited by the flow rate authorized by the water rights.

Mitigation Water Delivered to Jensen's Grove

15. Idaho Code Section 67-6537 states as follows:

> Use of surface and ground water: (1) The intent of this section is to encourage the use of surface water for irrigation. All applicants proposing to make land use changes shall be required to use surface water, where reasonably available, as the primary water source for irrigation. Surface water shall be deemed reasonably available if:
>
> (a) A surface water right is, or reasonably can be made, appurtenant to the land;
>
> (b) The land is entitled to distribution of surface water from an irrigation district, canal company, ditch users association, or other irrigation delivery entity, and the entity's distribution system is capable of delivering the water to the land; or
>
> (c) An irrigation district, canal company, or other irrigation delivery entity has sufficient available surface water rights to apportion or allocate to the land and has a distribution system capable of delivering the water to the land.
>
> (2) Consistent with sections 42-108 and 42-222, Idaho Code, any change in the nature of use of surface water provided by an irrigation delivery entity must be authorized by the entity holding the water right(s) for the available surface water. Nothing in this section shall alter the authority and discretion of irrigation delivery entities to apportion, allocate and distribute surface water, or for municipalities, counties, or water and sewer districts to pass ordinances or regulations to promote the use of surface water for irrigation.
>
> (3) Nothing in this section shall be construed to override or amend any provision of title 42 or 43, Idaho Code, or impair any rights acquired hereunder.
>
> (4) When considering amending, repealing or adopting a comprehensive plan, the local governing board shall consider the effect the

proposed amendment, repeal or adoption of the comprehensive plan would have on the source, quantity and quality of ground water in the area.

16. Shelley showed that it is requiring the use of surface water in considering a development within the confines of the city. Delivering water for mitigation is one way of satisfying the dictates of the statute. The Department does not have the authority to dictate that a secondary irrigation system be provided within the city limits.

17. Application no. 27-12155 proposes supplying significant additional quantities of water for developments within the city to which it is already committed or that have been proposed or discussed. These water demands far exceed the mitigation offered for the 35 acres of proposed irrigation at Copper Meadows.

18. The flow rate of 3.34 cfs can be approved to satisfy instantaneous demand within the City. The volume of water authorized for diversion from the proposed well, however, will be limited to 4 acre feet per acre for the 35 acres of irrigated land that will be irrigated in the Copper Meadows Subdivision. The total annual volume authorized for diversion under this water right will be limited to 140 acre feet.

19. Given the offered mitigation by Shelley, there is sufficient water for the purpose sought.

20. Shelley has sufficient financial resources to complete the project.

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

22. The application is in the local public interest.

23. Delivery of water as proposed is consistent with principles of conservation of the waters of the State of Idaho.

ORDER

IT IS HEREBY ORDERED that application to appropriate water no. 27-12155 is **Approved.**

IT IS FURTHER ORDERED that a map depicting the place of use boundary for this water right at the time of this approval will be attached to the permit approval document for illustration purposes.

IT IS FURTHER ORDERED that permit no. 27-12155 is subject to the following conditions:

Proof of application of water to beneficial use shall be submitted on or before December 1, 2014.

Subject to all prior water rights.

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

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

Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 120.

Noncompliance with any condition of this right, including the requirement for mitigation, is cause for the director to issue a notice of violation, cancel or revoke the right, or, if the right is included in a water district, request that the watermaster curtail diversion and use of water.

Prior to the diversion and use of water under this approval, the right holder shall install and maintain acceptable measuring device(s), including data logger(s), at the authorized point(s) of diversion, in accordance with Department specifications.

Prior to diversion of water under this right, the right holder shall install a lockable device, subject to the approval of the Department, in a manner that will provide the watermaster suitable control of the diversion.

The total annual volume that can be diverted under this right from the authorized point of diversion is 140 acre-feet.

Each year, the right holder shall deliver 90 acre feet of storage water, rented through the Water District 01 Rental Pool, to Jensen's Grove to mitigate for its ground water withdrawals. Approximately 30 acre-feet shall be delivered to Jensen's Grove in the spring and approximately 60 acre-feet shall be delivered to Jensen's Grove in the summer.

Each year, on or before December 31, the right holder shall submit a report to the Department including Water District 01 records showing that Snake River Valley Irrigation District delivered to Jensen's Grove, on behalf of the right holder, 90 acre feet of water rented by the right holder from the Water District 01 Rental Pool in the current calendar year during times when the City of Blackfoot's water right 1-181C could not be delivered because of priority cuts on the Snake River.

The place of use is within the service area of the City of Shelley municipal water supply system as provided for under Idaho law.

In any year that mitigation water is not fully provided, the consumptive uses developed under this right shall be proportionately reduced during the following year unless an alternate plan, approved by the Department, is implemented to provide the necessary mitigation.

DATED this 25th day of November, 2009.

GARY SPACKMAN
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of November, 2009, a true and correct copy of the above and foregoing document described below was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Final Order and Statement of Available Procedures and Applicable Time Limits for responding to Final Orders

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Deborah J. Gibson

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