BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32603 IN THE NAME OF PARAMOUNT DEVELOPMENT, INC.	))))	**ORDER DISPOSING OF PETITIONS FOR RECONSIDERATION AND AMENDING A PRELIMINARY ORDER**

PARTIES

On February 27, 2008, Paramount Development, Inc., ("Paramount" or "applicant") applied to the Department of Water Resources ("IDWR" or "Department") for a permit to appropriate 0.05 cubic feet per second ("cfs") of ground water in the NW¼SE¼NE¼ of Section 25, T4N, R1W, B.M., in Ada County to maintain a 22 acre-foot reservoir for aesthetic purposes.

The application was protested by the following parties:

- Buck and Martha Hamilton
- E. Aileen Scott
- Doug Rogers
- Bradford "Brad" Moulton
- North Slough Water Users Association ("North Slough")
- Daniel and Cathy Sherman

CASE SUMMARY

Paramount constructed two ponds in the Paramount Subdivision to temporarily store surface irrigation water delivered by Settlers Irrigation District. Ground water is also delivered into the ponds as a supplemental source of water for irrigation. Two booster pumps lift water from the ponds and pressurize the irrigation system for Paramount Subdivision. The application proposes the diversion of additional ground water to the ponds to enhance their aesthetic value by keeping them full throughout the year, especially during the non-irrigation season. The proposed diversion is within an area where new ground water diversions are likely to cause injury to senior Boise River water right holders. To mitigate for the likely injury, the applicant proposes to retire three-acre ground water irrigation right 63-32677.

The protestants allege that a new diversion of ground water at the location proposed in the application will injure them by drawing down water levels in their nearby wells. Protestants Bradford Moulton and the North Slough also assert that the diversion of relatively clean ground water for aesthetic purposes from the proposed aquifer is not in the public interest because sufficient low quality shallow ground water is available for appropriation. North Slough also asserts that overflows from Paramount's ponds will impede maintenance to part of North Slough's delivery system by causing water to run during the winter when maintenance is normally accomplished.

On September 11, 2008, the Department conducted a hearing about application no. 63-32603. At the hearing, attorney John Marshall represented Paramount, Bradford Moulton represented himself and North Slough, and Buck Hamilton represented himself and the North Slough Water Users Association. Protestants E. Aileen Scott, Doug Rogers, and Daniel and Cathy Sherman did not attend the hearing, nor were they represented at the hearing. The following witnesses testified at the hearing:

- Jaylen Walker of Brighton Development for the applicant
- Steve Hannula of ERO Resources Corp. for the applicant
- Doug Stewart for the protestants
- Brad Moulton for the protestants

At the hearing, the hearing officer admitted the following items into evidence:

- Exhibit 1 – A report titled *General Ground Water Conditions in the Vicinity of Paramount Subdivision Ada County Idaho* prepared by ERO Resources Corporation
- All public Department records pertaining to water rights, claims to water rights, and applications for water rights that may affect or be affected by Paramount's proposed water use.

On January 21, 2009, the Department issued a preliminary order dismissing protestants E. Aileen Scott, Doug Rogers, and Daniel and Cathy Sherman from the contested case for failure to appear at the hearing and granting permit no. 63-32603 to Paramount for the diversion of ground water for aesthetic storage purposes.

On January 23, 2009, the Department served notice to the applicant and protestants that the preliminary order had been issued. Petitions for reconsideration of the preliminary order were due on February 6, 2009.

On February 3, 2009, the Department received a timely petition for reconsideration of the order from protestant Moulton. Moulton also requested a hearing regarding the issues raised in his petition for reconsideration.

On February 6, 2009, the Department received a timely petition for reconsideration of the order from Jon C. Gould, attorney for protestant North Slough.

On February 13, 2009, the Department received a response to the petitions for reconsideration from John M. Marshall, attorney for Paramount.

ISSUES PRESENTED IN THE PETITIONS FOR RECONSIDERATION AND THE APPLICANT'S RESPONSE TO THE PETITIONS

Moulton

In his petition, Moulton requests reconsideration of the following items:

- The amount of ground water available for appropriation
- The effect of the proposed withdrawal of ground water on the his well and his neighbor's wells
- The approval condition requiring lining of the storage ponds and the material used to line them
- The approval condition requiring measuring and reporting of the amount of water diverted
- The approval condition requiring the applicant to implement a plan to mitigate for depletions to the Boise River caused by the proposed diversion of ground water
- The approval condition requiring the applicant to prevent overflow of water from the ponds to North Slough's distribution system during the winter
- The conclusion that the applicant can divert ground water from an existing deep well for the water used proposed in the application
- The authorized development period for the permit

Moulton also requests a hearing regarding the issues raised in his petition for reconsideration.

North Slough

In its petition, North Slough requests that the Department require the applicant to appropriate ground water from a shallower depth. North Slough suggests that Paramount's existing well could be modified to prevent diversion of deeper ground water and allow for diversion of ground water from a shallower depth. As an alternative to requiring Paramount to appropriate ground water from a shallow depth, North Slough requests the modification of approval condition nos 6, 7, 8, and 10 as follows:

- To approval condition no. 6, add, "The right holder shall provide the Department and North Slough Water Users Association with annual data demonstrating the effectiveness of the linear [sic]."

- To approval condition no. 7, add, "The right holder shall provide the North Slough Water Users Association with diversion volume records on a monthly basis."

- In approval condition no. 8, change the date through which the overflow conduit must be closed from March 1 to April 15.

- To approval condition no. 10, add, "The right holder is liable for damages to any person or party injured because of the right holder's failure to comply with the conditions of this approval."

Paramount

Paramount responds that both petitions for reconsideration should be denied.

Paramount also states that approval condition no. 8 should be amended to clarify that the Wolf Lateral Association, not North Slough, should be afforded the "opportunities for communication and inspection" described in the condition.

ANALYSIS OF THE PETITIONS FOR RECONSIDERATION AND THE APPLICANT'S RESPONSE TO THE PETITIONS

Moulton

In his petition, Moulton did not submit enough information to explain the nature and basis of his concerns, nor did he specify the exact findings, conclusion, or approval conditions that he would like changed. Moulton stated that he would submit additional information in support of his petition "within the 14 day review period." The purpose of the hearing is to develop a record by allowing the parties to present exhibits and testimony and to test the veracity of the exhibits and testimony through cross-examination. Allowing Moulton to submit additional evidence after the hearing would circumvent the established process to the detriment of the other parties. The Department should deny Moulton's petition for reconsideration pursuant to Idaho Code § 67-5243(3).

Moulton's request for another hearing is governed by Idaho Code § 42-1701A(3), which says, in pertinent part:

> Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved

by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.

Moulton has previously been afforded a hearing in this matter and is not automatically entitled to another hearing. The Department should deny Moulton's request for another hearing.

North Slough

North Slough does not provide additional public interest rationale for its request for the Department to require Paramount to divert "shallow" ground water instead of diverting water from its existing well. North Slough simply offers that it is possible to modify Paramount's existing well so that only shallow ground water can be diverted from the well. Paramount's proposed point of diversion is an existing well that also serves as the point of diversion for water right no. 63-32097. Modification of Paramount's existing well, which is proposed as the point of diversion for this right, would interfere with Paramount's ability to divert water in connection with prior water right no. 63-32097. The Department should not grant North Slough's request to require Paramount to modify its existing well or otherwise divert shallower ground water for the proposed water use.

The users of surface water delivered through the Wolf Lateral and Paramount have a common interest in limiting the seepage of water from Paramount's ponds. Paramount's storage facility is an integral part of the delivery system for surface water delivered to the area through the Wolf Lateral for irrigation purposes. The surface water users want an effective liner in the ponds to ensure that their irrigation water is not lost as it passes through the ponds. Paramount needs an effective liner so that it is able to maintain its ponds with no more than 13.5 AF of water diverted annually. The standard proposed by the Department for the pond liner was "nearly impermeable." North Slough proposes a standard of 1.0E-6 centimeters per second. There is no evidence in the record to support or refute the precise standard proposed by North Slough. There is evidence in the record, however, that of the 13.5 AF proposed to be diverted by Paramount to offset evaporation and seepage losses in the ponds, approximately 8.2 AF will evaporate. Unless seepage from the ponds is limited to the difference between 13.5 AF and 8.2 AF, or 5.3 AF, Paramount's annual volume request will not be sufficient to keep the ponds full. Therefore, it is reasonable to require the ponds to be lined with material that will limit annual seepage losses to 5.3 AF or less. Requiring Paramount to test the effectiveness of the liner and report the results annually to both North Slough and the Department would be overly burdensome. Hiring a licensed professional engineer or geologist to test the liner once every five years and report the results to the Department, whose records are available for inspection by the public, should be sufficient. Approval condition no. 6 should be modified to require Paramount to install a liner that limits annual seepage losses to 5.3 AF, to require testing of the pond liner once every five years by a licensed professional engineer or geologist, and to provide the results of the test to the Department.

Requiring Paramount to provide diversion volume records to North Slough each month, as North Slough proposes for approval condition no. 7, would be overly burdensome. The right holder can submit diversion data annually to the Department, whose records are available for inspection by any member of the public.

Both North Slough and Paramount agree that the Department should change the dates stated in approval condition no. 8 for opening and closing the overflow conduits. North Slough prefers to move the opening date forward six weeks to April 15. Paramount recommends requiring the overflow conduits to be closed when surface water is not being delivered to the Wolf Lateral by Settlers Irrigation District. Paramount's approach provides the necessary protection while allowing some flexibility for annual variations in surface water deliveries. Approval condition no. 8 should be modified as recommended by Paramount.

Determining liability for damages, as proposed by North Slough for approval condition no. 10, is not within the statutory authority of the Department.

North Slough's petition for reconsideration should be granted for the purposes of modifying approval condition nos. 6, 7, and 8.

Paramount

Testimony presented at the hearing confirms that the water delivered to Paramount's ponds comes from the Wolf Lateral. However, there is not sufficient information in the record to confirm who manages the Wolf Lateral. Approval condition no. 8 can nevertheless be modified to provide the "opportunities for communication and inspection" to whoever manages the Wolf Lateral. The fourth paragraph of the analysis section of this order, conclusion of law no. 7, and approval condition no. 8 should be modified to generally describe who has jurisdiction over the Wolf Lateral.

JURISDICTION AND AUTHORITIES

Idaho Code § 42-202 states in pertinent part:

> For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall, before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources for a permit to make such appropriation.

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.

The Department's Water Appropriation Rules "are applicable to appropriations from all sources of unappropriated public water in the State of Idaho under the authority of Chapter 2, Title 42, Idaho Code." (IDAPA 37.03.08.001.b)

Rule 40.01.b of the Water Appropriation Rules states:

Protested applications, whether for unappropriated water or trust water, will be processed using the following steps:

i. Advertisement and protest period;
ii. Hearing and/or conference;
iii. Department review of applications, hearing record and additional information including department field review if determined to be necessary by the director.
iv. Proposed decision (unless waived by the parties);
v. Briefing or oral argument in accordance with the department's adopted Rules of Procedure.
vi. Director's decision accepting or modifying the proposed decision.

Rule 40.04.c of the Water Appropriation Rules states: "The applicant has the ultimate burden of persuasion for the criteria of Section 42-203A . . . ."

Rule 702 of the Department's Rules of Procedure (IDAPA 37.01.01.702) states:

The agency shall promptly issue a default order or withdraw the notice of proposed default order after expiration of the seven (7) days for the party to file a petition contesting the default order or receipt of a petition. If a default order is issued, all further proceedings necessary to complete the contested case shall be conducted without participation of the party in default (if the defaulting party is not a movant) or upon the results of the denial of the motion (if the defaulting party is a movant). All issues in the contested case shall be determined, including those affecting the defaulting party. Costs may be assessed against a defaulting party.

ISSUES PRESENTED AT HEARING

1. Protestants Buck Hamilton and Bradford Moulton allege that a new diversion of ground water at the location proposed in the application will injure them by drawing down water levels in their nearby wells beyond reasonable pumping levels. They claim that a previous nearby appropriation of ground water caused them to have to replace or deepen their domestic wells. North Slough asserts that the proposed diversion of ground water will injure its members in the same way.

2. Bradford Moulton and North Slough assert that it is not in the local public interest to allow relatively clean ground water to be used for aesthetic purposes at the proposed location. They assert that using plentiful shallow ground water would reserve the cleaner, deeper ground water for potable uses.

3. North Slough asserts that overflows from Paramount's ponds will impede maintenance to part of its delivery system by causing water to run during the winter when North Slough maintains its canals and ditches.

FINDINGS OF FACT

1. In application no. 63-32603, Paramount Development, Inc., the developer of Paramount Subdivision, proposes to appropriate ground water to fill and maintain two ponds. The elements of the proposed water right are:

Applicant: Paramount Development, Inc.
Priority Date: February 27, 2008
Source: Ground Water
Point of Diversion: NW¼SW¼NE¼, Section 25, Township 4 North, Range 1 West, B.M.
Water Uses, Quantities, and Seasons of Use:

• Diversion to Storage	0.05 cfs up to 13.5 af	1/1 to 12/31
• Aesthetic Storage	22.0 af	1/1 to 12/31

Total Quantity: 0.05 cfs and 22.0 af
Place of Use: S½NW¼, Section 25, Township 4 North, Range 1 West, B.M.

2. The ponds proposed to be filled with the ground water diverted in connection with the application already exist. They cover a surface area of 2.9 acres and hold 22.0 acre-feet of water.

3. Approximately 8.2 acre-feet of water will evaporate from the ponds annually.

4. Application no. 63-32603 proposes diversion from ground water residing in the Treasure Valley hydrogeologic system, which is comprised of interbedded sands, gravels, and clays that have been subjected to tilting, faulting, and erosion.

5. Paramount proposes to divert ground water for the proposed water use from a well drilled in 2006 for Paramount. The well is 213 feet deep, and it is cased to a depth of 149 feet. The

water producing interval of the well is from approximately 142 feet to 212 feet below ground surface. The well currently serves as the point of diversion for water right no. 63-32097, which authorizes Paramount to divert up to 0.86 cfs and 193.5 acre-feet as a supplemental irrigation supply for 43 acres within Paramount Subdivision.

6. Protestant Bradford Moulton owns water right no. 63-20248, which authorizes the diversion of 0.04 cfs of ground water from a well located in the NW¼SW¼NW¼, Sec. 25,Township 4 North, Range 1 West, B.M. Bradford Moulton's well is approximately one half mile west of Paramount's proposed point of diversion. Since the 1980s, the static water level in Bradford Moulton's well declined from approximately eight feet below ground surface to approximately 30 feet below ground surface.

7. Protestant Buck Hamilton owns water right no. 63-18088, which authorizes the diversion of 0.04 cfs of ground water from a well located in the NE¼NE¼, Sec. 25, Township 4 North, Range 1 West, B.M., for use in the same quarter-quarter section. Buck Hamilton's parcel of land is actually in the SE¼NE¼, Sec. 25, Township 4 North, Range 1 West, B.M., approximately three-eighths of a mile east of the Paramount's proposed point of diversion. Buck Hamilton's well is 80 feet deep. Since the 1980s the static water level in Buck Hamilton's well declined from approximately 15 feet below ground surface to approximately 30 feet below ground surface. The pump in Buck Hamilton's well is set at 46 feet below ground surface.

8. North Slough is a lateral ditch water users association organized to deliver surface water from Settlers Irrigation District to over 100 water users along the North Slough Lateral, which traverses Section 25, Township 4 North, Range 1 West, B.M.

9. Paramount Subdivision is located in Ada County in Section 25, Township 4 North, Range 1 West, B.M., and is bounded on the north by Chinden Boulevard, on the south by McMillan Road, on the east by Meridian Road, and on the west by Linder Road.

10. One hundred twenty-nine miners inches (2.58 cfs) of Settlers Irrigation District surface water is delivered to Paramount Subdivision for irrigation purposes. The surface water is conveyed through the North Slough Lateral and the Lemp Lateral to the Wolf Lateral and into a vault between two existing ponds in Paramount Subdivision. Application no. 63-32603 proposes to fill the two existing ponds with ground water. From the vault, water is either conveyed southward into the ponds or westward into a ditch where it is subsequently conveyed to other water users on a rotation schedule. The two ponds in Paramount Subdivision are lined with bentonite clay to impede seepage, and they are interconnected to maintain a constant level in both ponds. From the ponds, water flows into a wet well where it is pumped into the pressurized irrigation system for the subdivision. If the delivery of water to the ponds exceeds the irrigation demand and other losses, an overflow system allows water to spill from the vault between the ponds and/or from the wet well to the ditch used to convey water westward to other surface water users.

11. Paramount also diverts up to 0.86 cfs of ground water under water right no. 63-32097 to supplement its surface water irrigation supply. The authorized season of use for water right no. 63-32097 is March 15 to November 15. Water right no. 63-32097 does not authorize the

diversion of water during the winter. Water right no. 63-32097 authorizes the diversion and use of ground water only when surface water is not available for irrigation. Paramount uses an automated system to regulate its diversions of ground water. When a water level transducer in the wet well connected to the ponds senses that the ponds are not full, the pump in Paramount's well switches on and injects water into the Wolf Lateral. If the system works properly, when surface water is available to keep the ponds full, ground water is not diverted. Use of the automated system is intended to prevent the continuous diversion of ground water when it is not needed. Paramount intends to employ the same automated system to regulate the diversion of ground water proposed in the application.

12. Paramount has already constructed the diversion, distribution, and storage works for the proposed project.

13. Water Appropriation Rule 35.03.b.vi (IDAPA 37.03.08.035.03.b.vi) states: "Every offstream storage impoundment application shall show a rate of diversion to storage as well as the total storage volume." For irrigation, the Department uses a 24-hour standard to determine if water is being stored. If the authorized diversion rate for the water rights being delivered into a basin or reservoir is not sufficient to fill the basin or reservoir within 24 hours, the Department considers the water used to fill the basin or reservoir to be stored water.

14. Because water right no. 63-32097 does not authorize the storage of water and 0.86 cfs is not sufficient to fill the ponds with 22 acre-feet of water in 24 hours, the storage of water in the ponds must be authorized under a different water right.

15. ERO Resources Corp. (ERO), a consulting firm of licensed engineers and geologists hired by the applicant, created an analytical model of the ground water aquifer system that supplies water to the wells owned and used by the applicant, Bradford Moulton, Buck Hamilton, and others. Using assumptions from its analytical model, ERO used the Theis equation to estimate the likely drawdown in wells ¼-mile and ½-mile from the proposed point of diversion if the application were approved. The likely drawdown is 0.19 feet at ¼-mile and 0.15 feet at ½-mile.

16. The Amended Moratorium Order issued on May 3, 1995, by the Department for the Boise River drainage area states: "Applications which propose use of surface water upstream from the Star Bridge will be denied unless the applicant files an acceptable plan to mitigate or avoid any material injury to existing water rights." To prevent injury to senior Boise River water users, the Department also refrains from approving new consumptive uses of shallow ground water hydraulically connected to the Boise River upstream from Star Bridge.

17. The existing Paramount well, proposed as a point of diversion by this application, is approximately 1.1 miles south of the Boise River in a location where ground water shallower than 200 feet below ground surface is presumed by the Department to be tributary to the Boise River above Star Bridge.

18. Paramount proposes to mitigate for the proposed consumptive use of ground water tributary to the Boise River upstream from Star Bridge by discontinuing the diversion and use of

water pursuant to water right no. 63-32677, which authorizes the diversion of up to 13.5 acre-feet of ground water in the SW¼NE¼, Section 21, Township 1 North, Range 1 West, B. M., to irrigate up to 3.0 acres of land.

19. In the Treasure Valley, the Boise River flows from east to west. The point of diversion for water right no. 63-32677 is located approximately 18 miles due south of Star Bridge. The general direction of ground water flow in the Treasure Valley is westward with some convergence toward the Boise River. Because the point of diversion for water right no. 63-32677 is 18 miles south of Star Bridge, ground water underlying the location of the point of diversion for water right no. 63-32677 is tributary to the Boise River **downstream** from Star Bridge.

20. Prior to the hearing, protestants E. Aileen Scott, Doug Rogers, and Daniel Sherman and Cathy Sherman did not notify the Department that they could not attend the hearing.

21. On November 25, 2008, the Department mailed a "Notice of Propose Default Order" by certified mail to protestants E. Aileen Scott, Doug Rogers, and Daniel Sherman and Cathy Sherman proposing to dismiss them as parties to this contested case pursuant to Rule 700 of the Department's Rules of Procedure (IDAPA 37.01.01.700). The notice granted the protestants seven days to file a written petition requesting that a default order not be issued.

22. Protestant Doug Rogers did not contest the proposed default order, nor did protestants Daniel Sherman and Cathy Sherman.

23. On December 4, 2008, two days after the due date for submittal of good cause for non- appearance, the Department received a petition from E. Aileen Scott to allow her to continue as a party to the contested case. In connection with the petition, E. Aileen Scott submitted a note from her doctor explaining that during the week of September 8, 2008, she was "restrained by a medical condition."

ANALYSIS

The total annual volume of water proposed to be used in connection with this application is not clear on the face of the application. Paramount listed 22 acre-feet for aesthetic storage and 13.5 acre-feet for diversion to storage. Summing the two would total 35.5 acre-feet. The total annual volume listed in item no. 5 on the application is 22 acre-feet, however. Paramount's expert witness, Steve Hannula, testified that Paramount would fill the ponds with 22 acre-feet of water authorized by a Water Supply Bank rental and to provide up to 13.5 acre-feet of water from this right to replace evaporation and seepage losses from the ponds. Because the 22 acre-feet will come from the Water Supply Bank, Mr. Hannula's testimony could lead to the conclusion that the total proposed volume is 13.5 acre-feet. However, the Department requires a water user to have a water right to retain the water in the ponds indefinitely, even if the water was initially provided by a Water Supply Bank rental or from some other temporary authorization. Therefore, the application seeks to appropriate an annual volume of 35.5 acre-feet, comprised of 22 acre-feet initially provided from another authorization and held in the ponds indefinitely and 13.5 acre-feet that can be diverted from ground water to replace evaporation and seepage losses from the ponds.

The protestants testified that ground water levels in their wells declined in the past. They attributed the ground water level declines to increased pumping, and they are concerned that further ground water withdrawals will result in significant additional declines in ground water levels. Pumping an additional 13.5 acre-feet of ground water will not cause a significant additional drawdown of the water level in the protestants' wells. The protestants did not provide expert testimony or a scientific report to show that the proposed appropriation of water would injure them, nor did they show that pumping of ground water from the proposed point of diversion for supplemental irrigation purposes has already injured them. ERO's report and expert testimony presented at the hearing conclude the drawdown in nearby wells, including the protestants' wells, caused by the pumping of ground water in connection with this application would be very small, perhaps even undetectable.

The protestants also oppose the Paramount's proposal to divert and use relatively clean ground water when shallower ground water of lesser quality is available. From Paramount's perspective, the diversion and use of deeper ground water from the existing well has two advantages. First, it eliminates the cost of drilling another well into the shallower ground water. Second, it provides a more reliable supply of water than a shallower well might, given that the protestants testified that the shallow ground water level has declined in the past 20 years. The local public interest requirement for approval of an application for permit dictates that the Department evaluate the application not from the applicant's perspective, but from the perspective of "the people in the area directly affected" by the proposed water use.[1] In general, it is good public policy to reserve deeper, high quality ground water for local uses that require clean water and to use surface water or shallower ground water for uses that can be accomplished with less pure water. It is also good public policy, however, to protect the local drinking water supply by minimizing the number of potential conduits for contaminants to enter the ground water. In this case, the two public objectives conflict. The Department must balance these conflicting interests. If Paramount proposed to use a larger volume of high quality ground water in a more limited aquifer, the public interest might tip in favor of preserving the cleaner, deeper ground water. In this case, however, the relatively small amount of ground water proposed for diversion in a large aquifer tips the public interest toward allowing the diversion from the existing well instead of requiring another well to be drilled.

The potential overflow from the ponds into the Wolf Lateral during the winter is problematic. The users clean and maintain the lateral in the winter. The lateral cannot be cleaned and maintained if water is flowing in it. Also, if water were to spill from the vault between the ponds or from the wet well, it would likely mean Paramount would be taking more water than is needed for the purpose proposed in the application, which is only to keep the ponds full. One solution would be for Paramount to disconnect the overflow outlets in the vault and the wet well from the lateral. Doing so would, however, eliminate the ability to manage the rotation of surface water during the irrigation season. Another solution would be for Paramount to set and maintain its pressure transducer switch system so that the ground water pump shuts off long before the ponds overflow in the winter. If Paramount's system fails to shut off its pump, the lateral users'

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[1] Idaho Code § 42-202B(3): "Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

maintenance opportunity will be disrupted. The consequences of a failure by Paramount should be borne by Paramount, not by the other lateral users. Therefore, to prevent injury to the other users of the Wolf Lateral, Paramount should be required to re-construct the overflow system from the vault and the wet well so that the overflow system can be shut and locked at the end of the irrigation season or until such time that the entity managing the Wolf Lateral informs Paramount that the annual maintenance cycle is complete. Paramount should be responsible for closing off the overflow outlets, and the managing entity for the Wolf Lateral should have access to check the closures prior to conducting maintenance.

Although it was not a concern of the protestants, the Department must evaluate the application to prevent injury to senior surface water users in the Treasure Valley. Ground water at the proposed point of diversion is tributary to the Boise River in the reach where all the water has been appropriated by senior right holders during the irrigation season. The source of water that Paramount would leave unused as mitigation is tributary to the Boise River too far downstream to prevent injury to the senior surface water users. The Department should prohibit diversion of water as proposed in the application until Paramount has provided a different mitigation plan that will augment the flow of the Boise River upstream from Star Bridge during the irrigation season each year.

E. Aileen Scott's petition to contest the issuance of a default order was not timely filed. Moreover, the note from her physician does not indicate that her condition was so grave during the week of the hearing that she could not have telephoned the Department to ask for a continuance of the hearing or designated a representative in writing. The issues raised in E. Aileen Scott's notice of protest are the same or similar to those raised by the protestants who appeared at the hearing.

CONCLUSIONS OF LAW

Parties

1. Protestants E. Aileen Scott, Doug Rogers, and Daniel and Cathy Sherman should be dismissed from the contested case pursuant to Rule 702 of the Department's Rules of Procedure (IDAPA 37.01.01.702).

Reduction of the quantity of water under existing rights

2. The proposed diversion and use of water will not reduce the quantity of water available under existing ground water rights.

3. The protestants did not question the mitigation plan proposed by Paramount. Nevertheless, the diversion and use of water as proposed will injure senior surface water right holders by reducing the amount of water flowing in the Boise River upstream from Star Bridge during the irrigation season. The mitigation proposed by the applicant is not sufficient to prevent injury to senior Boise River water right holders. This flaw in the application is not fatal, however, because the applicant could implement an alternative mitigation plan in a variety of ways.

Sufficiency of the water supply for the proposed use

4. The proposed source of water is sufficient to provide the volume of water necessary for the proposed project.

Good faith, delay, and speculation

5. The application was filed in good faith.

Financial resources

6. The applicant owns the point of diversion and place of use, and the diversion works, distribution system, and impoundment structures are already constructed. Paramount has the financial means to complete the project.

Local public interest

7. It is not in the local public interest for the ditch used by Paramount as an overflow outlet to be full of water in the winter months. The ditch users clean and maintain the ditch in the winter. To avoid conflict with the public interest, Paramount should be required to prevent overflow from the ponds into the ditch during the non-irrigation season.

8. It may not be in the public interest to use relatively clean ground water suitable for drinking and commercial purposes to fill a pond. Minimizing the number of wells drilled into the aquifers of the state will reduce the potential for contamination. In this case, because of the small amount of water proposed to be diverted, the need to limit the number of wells is a greater public interest than the need to preserve the clean ground water.

Conservation of water resources

9. If Paramount maintains reasonably impermeable liners in the ponds to minimize seepage losses, the proposed appropriation of water is consistent with the conservation of water resources in Idaho. Paramount should be required to maintain liners in the ponds.

Potential adverse affects on the local economy

10. The proposed appropriation of water will not harm the economy of the watershed or local area where the water will be diverted and used.

Overall

11. The Department should approve the application with conditions as provided in Idaho Code § 42-203A.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that E. Aileen Scott, Doug Rogers, and Daniel and Cathy Sherman are dismissed as parties to this contested case.

IT IS FURTHER ORDERED that Application for Permit No. 63-32603 in the name of Paramount Development, Inc. is **APPROVED** subject to the following conditions:

1. Proof of construction of works and application of water to beneficial use shall be submitted on or before January 1, 2011.

2. Subject to all prior water rights.

3. 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.

4. This right authorizes the continued storage of up to 22.0 acre-feet of water initially supplied through a separate authorization and the diversion of up to 13.5 acre-feet of water each year to replace evaporation and seepage losses from the storage facilities (ponds). If the ponds are depleted for maintenance or other reasons to the extent that 13.5 acre-feet of water is not sufficient to replenish them, the right holder shall seek a separate authorization, such as a Water Supply Bank rental, to fill the ponds.

5. The surface area of the ponds maintained in connection with this right shall not exceed 2.9 acres.

6. To impede seepage of water from the ponds created in connection with this right, the right holder shall line the ponds with bentonite clay or some other liner such that no more than 5.3 AF of water annually is lost to seepage. The right holder shall maintain the lining in good condition at all times. At least once before submitting proof of beneficial use in connection with this right and not less frequently than once every five years thereafter, the right holder shall conduct a fill and loss measurement test, overseen by a licensed professional engineer or geologist, and submit a report of the test to the Department demonstrating the effectiveness of the liner.

7. The right holder shall maintain a totalizing measuring device of a type approved by the Department as a part of the diverting works and shall record the volume of water diverted each month until proof of beneficial use is submitted in connection with this permit. The monthly diversion volume records for each calendar year shall be submitted to the Department by January 31 of the next year for each year until the right holder submits a proof of beneficial use statement for this right. When the right holder submits a proof of beneficial use statement for the right, the right holder shall submit to the Department all monthly diversion volume records that have not already been submitted. After submittal of proof of beneficial use, the right holder shall monthly measure and record the volume of water diverted, and shall maintain the records in his possession. Upon request by the Department, the right holder shall submit the diversion records to the Department.

8. Each year, within seven days of the final surface water delivery through the Wolf Lateral to the ponds authorized to be filled by this right, the right holder shall close and lock the overflow conduits from the vault used to regulate flows into the ponds filled by this right and from the wet well used to regulate diversions from the ponds filled by this right. The overflow conduits shall not be opened until an official responsible for operation of the Wolf Lateral notifies the right holder in writing that the annual maintenance cycle for the ditch receiving the overflow water is complete or surface water deliveries from the Wolf Lateral will commence within seven days. The right holder shall allow representatives of Wolf Lateral managing entity to inspect the mechanisms for closing the overflow conduits at any time when surface water is not being delivered from the Wolf Lateral to the ponds.

9. Prior to diverting water in connection with this right, the right holder shall prepare, submit, and obtain approval from the Department for a plan to augment the flow of the Boise River upstream from Star Bridge during the irrigation season of each year that water is diverted in connection with this right. The amount of augmentation water shall be sufficient to offset the depletion to the Boise River caused by the diversion of ground water in connection with this right.

10. Failure of the right holder to comply with the conditions of this approval is cause for the Director to cancel this permit.

IT IS FURTHER ORDERED that the petition for reconsideration submitted by Bradford Moulton is **DENIED**.

IT IS FURTHER ORDERED that Bradford Moulton's request for another hearing about this matter is **DENIED**.

IT IS FURTHER ORDERED that North Slough's petition for reconsideration is **GRANTED** for the purposes of modifying approval condition nos. 6, 7, and 8.

Dated this 27th day of February, 2009.

Gary Spackman

GARY SPACKMAN
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of March, 2009, a true and correct copy of the document(s) described below were served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Order Disposing of Petitions for Reconsideration and Amending a Preliminary Order and Explanatory Information sheet for a Preliminary Order when a hearing was held.

E AILEEN SCOTT
5725 N MERIDIAN RD
MERIDIAN ID 83646

BUCK HAMILTON
MARTHA HAMILTON
5945 N MERIDIAN RD
MERIDIAN ID 83646

JAY WALKER
PARAMOUNT
DEVELOPMENT INC
12601 W EXPLORER DR #200
BOISE ID 83713

DOUG STEWART
5960 N LINDER RD
MERIDIAN ID 83646

DOUG ROGERS
5665 N MERIDIAN RD
MERIDIAN ID 83646

BRADFORD MOULTON
5940 N LINDER RD
MERIDIAN ID 83646

JOHN MARSHALL
GIVENS PURSLEY
601 W BANNOCK
PO BOX 2720
BOISE ID 83702-2720

DANIEL SHERMAN
CATHY SHERMAN
5995 N MERIDIAN RD
MERIDIAN ID 83646

NORTH SLOUGH WATER
USERS ASSO
ATTN MIKE MYERS PRES
2685 N MERIDIAN RD
MERIDIAN ID 83646

JON C GOULD
RINGERT LAW CHARTERED
PO BOX 2773
BOISE ID 83701-2773

STEVE HANNULA
ERO RESOURCES
3314 GRACE ST
BOISE ID 83703

Deborah J. Gibson
Deborah J. Gibson
Administrative Assistant
Water Management Division