BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-31207 IN THE NAME OF I W LAND COMPANY	))))	RECOMMENDED DECISION AND ORDER

STANDARD FOR DECISION

This matter came before the Idaho Department of Water Resources on I W Land Company's ("I W Land's") application to appropriate ground water in the Boise River drainage. Water right applications are processed under Idaho Code § 42-203A which provides, in part, that:

> (5) The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; 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 provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

A water right applicant bears the burden of proof for the factors IDWR must consider under Section 42-203A, Idaho Code. Cantlin v. Carter, 88 Idaho 179, 187 (1964);

Shokal v. Dunn, 109 Idaho 330, 339 (1985). Both the applicant and any protestants have the burden of coming forward with information concerning factors affecting the local public interest of which they can be expected to be more cognizant than the other parties. Rule 40.03 Water Appropriation Rules, IDAPA 37.03.08.

The Idaho Department of Water Resources (IDWR), having examined the application and the written record, and having heard the testimony of the parties, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. Course of Proceedings

1. On March 28, 2001, I W Land submitted an application for a water right permit for a natural gas fired electrical generation facility. That application was assigned number 63-31207 (the "Application"). The Application described the proposed water use as follows:

Source of Water:	Ground water.
Point(s) of Diversion:	Three wells in SE ¼ NW ¼, Sec. 17, T. 4 N, R. 2 W, B.M., Canyon County.
Use(s):	1.06 cubic feet per second (cfs) for Industrial use; 0.04 cfs for Domestic use.
Total Quantity:	1.10 cfs and 345 acre feet per annum (afa).
Period of Use:	January 1 – December 31 (year-round).
Place of Use:	SE ¼ NW ¼, Sec. 17, T. 4 N, R. 2 W, B.M., Canyon County.

The Application was accompanied by a proposed mitigation plan.

2. Notice of the application was published on or about April 19 and 26, 2001 in the Idaho Press Tribune, a newspaper circulated daily in Canyon County. Timely protests were received by IDWR on May 4 and May 7, 2001, from the following (collectively referred to as "protestants"):

Citizens for Responsible Land Use ("CRLU") and its members:
Anthony and Christine Trani
Jonna Weber
Penny Steadham
Mitch Sanchotena
Marilyn Giacalone
Tim and Jamie Hunihan
Pamela and David Monson
Georgia Smith
Barbra Smith
Delores and David Cram

3. The issues identified in the protests are summarized as follows:

a. The proposed use will result in significant consumptive use of ground water from the lower Boise River Basin and is not in the public interest;

b. The mitigation plan outlined in the Application will not mitigate for the consumptive use of water and will not offset injury to the public interest;

c. The mitigation plan appears contingent on a transfer or changed use of water with the associated issues, including whether such transfer would be in the public interest, historic use, beneficial use and forfeiture;

d. Adverse impact on domestic wells in a one mile radius of the point of diversion, including the drying up of artesian wells;

e. Adverse impact on surface water sources and surface water rights;

f. Processing the Application conflicts with the moratorium on new ground water rights in this area;

g. The Application conflicts with the local public interest for the following reasons:

1. Contamination of the environment and human food sources, including air and water;

2. This is a poor site for a power plant due to moderate to high population density;

4. A prehearing conference was held on the Application and protests on June 18, 2001, at which time the CRLU and its members were represented by counsel, David Bricklin of Seattle, Washington. After this conference a *Prehearing Order and Notice of Prehearing Conference* was issued on July 23, 2001.

5. By Order dated June 27, 2001, Peter Anderson was formally appointed by the Director as Hearing Officer in this matter effective June 18, 2001.

6. On July 23, 2001, the Hearing Officer requested IDWR staff to file by August 31, 2001 a report providing: (1) an analysis of whether the application should be approved, and any conditions of approval; (2) a listing of applicable IDWR allocation memoranda; (3) IDWR's legal and factual basis for suspending processing of new water right applications in the area of the Application; (4) IDWR's evaluation of the Application if the water use is to be supplemental to municipal supply; and (5) a GIS map showing place of use and point of diversion.

7. On August 31, 2001, Applicant moved to dismiss the protest brought by Delores and David Cram. The Hearing Officer denied the motion to dismiss in an Order dated August 24, 2001.

8. By letter dated September 18, 2001, David Bricklin formally withdrew as counsel for CRLU and its members.

9. A prehearing conference was held on September 28, 2001 to establish a schedule for hearings. A *Prehearing Order and Notice of Hearing* was issued on October 12, 2001, establishing procedures to be followed in the hearing and setting dates

for the hearing, and establishing a time frame for substitution of new counsel. No new counsel appeared for CRLU within the time specified, and CRLU did not later seek permission to be represented by counsel.

10. On November 14, 15 and 19, 2001, pursuant to the *Prehearing Order and Notice of Hearing* issued on October 12, 2001, IDWR conducted a hearing on the Application. The Applicant was present and was represented by Albert P. Barker. The Protestants were present and represented themselves or by CRLU. Protestants Mitch Sanchotena and Marilyn Giacalone did not appear individually at any of the hearings, but were represented by CRLU.

11. At the conclusion of the hearing the parties were given until December 10, 2001, to file written closing statements. Statement were filed by the Applicant, CFRLU, David and Pamela Monson, Timothy and Jamie Hunihan, David and Deloris Cram, Georgia Smith and Barbra Smith.

II. Evidence Considered.

12. Exhibits offered and accepted by part of the record by Applicant are as follows:

a. Exhibit No. 1: Idaho Power Company Integrated Resource Plan, June 2000.

b. Exhibit No. 2: Idaho Power Request for Proposals – August 4, 2000.

c. Exhibit No. 3: News Report *Idaho Power Selects Garnet Energy to Supply Energy in 2004.*

d. Exhibit No. 4: Affidavit of Legal Interest dated March 20, 2001.

e. Exhibit No. 5: Grant Deed.

f. Exhibit No. 6: Notice of Interest dated March 23, 2001.

g. Exhibit No. 7: IdaCorp 2000 Annual Report.

h. Exhibit No. 8: Financial Assurance Letter to Idaho Department of Water Resources from J. Lamont Keene, Senior Vice President, Administration and Chief Financial Officer, Ida-Corp, July 30, 2001.

i. Exhibit No. 9: Letter from Caldwell Economic Development Council to Ida-West, September 22, 2000; Intermountain Gas Testimony, July 24, 2001; Intermountain Gas letter, July 20, 2001; Simplot Company letter, June 29, 2001.

j. Exhibit No. 10: Letter from Ida-West Energy to Mayor Frank McKeever, City of Middleton, re commitments of Garnet Energy, September 4, 2001.

k. Exhibit No. 11: Letter from Vernon Brewer, Holladay Engineering to Idaho Department of Water Resources, September 20, 2001.

l. Exhibit No. 12: Annexation and Extension of Municipal Water and Sewer Services Agreement, November 1, 2001.

m. Exhibit No. 13: Agreement for Community Funds, November 1, 2001.

n. Exhibit No. 15: I W Land Water Right Application, March 28, 2001.

o. Exhibit No. 16: Garnet Energy Conditional Use Application to Canyon County, April 3, 2001.

p. Exhibit No. 17: Garnet Energy Air Permit Application, June 19, 2001.

q. Exhibit No. 18: Garnet Energy Air Quality Permit to Construct issued by Idaho Department of Environmental Quality, October 19, 2001.

r. Exhibit No. 19: Land application permit application submitted by Garnet Energy LLC to the Idaho Department of Environmental Quality, March 30, 2001.

s. Exhibit No. 20: Garnet Energy Facility Technical Description.

t. Exhibit No. 21: Form letter sent to local agencies and responses from Canyon Highway District No. 4, Caldwell Fire Department and Idaho State Historical Society.

u. Exhibit No. 29: Hydrogeologic Engineering Report prepared by HDR Engineering, ERO Resources and HyQual, July 31, 2001, including mitigation plan.

v. Exhibit 30: Treasure Valley Groundwater Level Change Map prepared by Idaho Department of Water Resources, January 2000.

w. Exhibit 38: Revised Table B(4) from Table B(4) in Exhibit 29.

13. The Exhibits offered by Protestants and part of the record are as follows:

a. Exhibit 101: National Geographic Article on worldwide water usages.
Admitted.

b. Exhibit 102: "Request for Submission of Protestant Responses to this Application" submitted by Georgia and Barbra Smith.
Admitted.

c. Exhibit 103: Letter from Darryl Smith to City Water Superintendent, City of Middleton, dated July 12, 2001 and letter from Bob Schmillen, Public Works Superintendent, City of Middleton, to Darryl E. Smith, dated July 13, 2001.
Admitted.

d. Exhibit 104: Press release concerning Caldwell Locust 230 kV Transmission Project, dated August 11, 2001.
Admitted.

e. Exhibit 105: Notice of Public Hearing and draft application for rural community block grant, June 18, 2000.
Admitted.

f. Exhibit 106: Document dated 5 September 2001 to Development Services re Garnet Energy Facility public comment from Monica Martin containing several pages of typed material, copies of newspaper articles and letters.
Admitted.

g. Exhibit 107: Package of letters and note cards concerning opposition to construction of power plant.
Admitted.

h. Exhibit 108: Two page document entitled "Comments and Questions Water Quality and Changed Use of Water" submitted by Anthony Trani.
Admitted.

i. Exhibit 109: Perry Swisher letter to Jonna Weber, Federal Register Notice and report concerning natural gas and electricity in Washington from the Washington State Office of Trade and Economic Development dated May 2001
Admitted.

j. Exhibit 110: Notes, Internet articles, typewritten documents concerning air quality issues.
Objection sustained.

k. Exhibit 111: Just the Facts powerpoint and attached letters.
Objection sustained.

l. Exhibit 112: Document concerning noise levels prepared by Earnest Harper.
Objection sustained.

m. Exhibit 113: Power Point Presentation, Citizens for Responsible Land Use slide show presented to Canyon County Commission.
Admitted.

n. Exhibit 114: Well driller's report submitted by Nellie Wolfe.
Admitted.

o. Exhibit 115: Questions about project application submitted by David and Delores Cram.
Admitted.

p. Exhibit 116: Real Property Inquiry.
Objection sustained.

q. Exhibit 117: Draft application for a rural community block grant, June 18, 2000.
Objection sustained.

14. The following exhibits were admitted by IDWR on its own initiative:

a. Exhibit 201: Response to Request for Submittal of IDWR Staff Memorandum (Staff Memo).

b. Exhibit 202: Deb Abbott letter to IDWR – Received by IDWR 7/23/2001, and; N.C. Hedemark, Intermountain Gas, letter to IDWR – Received by IDWR 7/23/2001.

c. Exhibit 203: Letter from Steven Leinberger, Tom Bridges et al, – Received by IDWR 8/9/2001.

d. Exhibit 204: Letter from David Hawk, J.R. Simplot Company, to IDWR – Received by IDWR 8/16/2001.

e. Exhibit 205: Letter from Katrina Basye to IDWR, IDEQ and Canyon County – Received by IDWR 7/26/2001.

f. Exhibit 206: Letter from Lori Walters - – Received by IDWR 9/19/2001.

g. Exhibit 207: Letter from Mike Gretz, provided to Department at the hearing on November 15, 2001.

h. Exhibit 208: List of pending applications for water right permits in District 63.

15. At the hearing the following individuals testified on behalf of Applicant:

a. Randy Hill, President and CEO of IW Land

b. Mike Elliott, P.E., Project Manager for the Garnet Energy Facility

c. Jack Harrison, HyQual

d. Mike Murray, PhD., HDR, Inc.

e. Mayor Frank McKeever, Mayor of City of Middleton

f. Vern Brewer, Holladay Engineering

g. Sherl Chapman, ERO Resources Corporation

Each of these witnesses with the exception of Randy Hill and Mayor McKeever also provided rebuttal testimony.

16. At the request of the Hearing Officer, Gary Spackman of the Idaho Department of Water Resources, responded to questions from the Applicant and Protestants concerning the Staff Memorandum.

17. In opposition to the Application, the Citizens for Responsible Land Use called the following witnesses: Anthony Trani, Jonna Weber, Penny Steadham, Monica Martin, and Nellie Wolfe. David Cram testified for David and Delores Cram. Darryl Smith testified for Georgia Smith and Barbra Smith. David Monson testified for David and Pamela Monson. Tim Hunihan testified for Tim and Jamie Hunihan. Bill Chisholm of the Idaho Rural Council testified as a public witness.

18. All parties were afforded the opportunity to cross-examine the opposing side's witnesses.

III. Applicant.

19. IW Land and Garnet Power Company, the sole member and manager of Garnet Energy LLC, are subsidiaries of Ida-West Energy Company. Randy Hill is president of Ida-West Energy Company, IW Land and Garnet Power Company. For purposes of this water right application I W Land, Garnet Power Company, Garnet Energy LLC and Ida-West Energy Company are working in concert. IW Land was created to obtain lands and permits for electrical projects built by Ida-West Energy. Garnet Energy LLC is the entity created by Ida-West Energy to build the power plant. Ida-West Energy Company and Idaho Power Company are subsidiaries of IdaCorp. IdaCorp's net income in 2000 was $139,883,000, with total assets of $4,639,258,000.

20. Garnet Energy has been selected to supply energy under contract to Idaho Power Company during peak-demand months beginning in mid-2004 by the construction of a new 250-megawatt (MW) electrical generation project. The project will be financed through project financing, where a group of lenders will invest in the project, with the project being the sole collateral. Applicant submitted a financial assurance letter from J.

Lamont Keen, Sr. Vice President of Administration and Chief Financial Officer of IdaCorp, dated July 30, 2001, indicating that IdaCorp would provide whatever financial assurances necessary to satisfy the applicable financing entities so that Garnet Energy would be able to complete construction of the proposed natural gas electric generation facility.

21. Applicant and its sister and parent companies have sufficient financial resources to complete the Garnet energy project and it is reasonably probable that funding will be available for project construction.

IV. Intended Water Use under Application No. 63-31207.

22. Garnet Energy is proposing to build a 250 MW advanced combined-cycle natural gas powered electricity generating facility south of Middleton, Idaho (the Garnet energy facility). IW Land owns an option to purchase 30 acres of land from C & G Incorporated located in the South ½ of the Northwest ¼, Section 17, Township 4 North, Range 2 West, B.M., Canyon County, Idaho. C & G Incorporated is the record owner of this property.

23. IW Land submitted a technical description of the Garnet energy facility, but final design has not been completed. The project is in conceptual design phase. The complete combined cycle energy facility will have two combined cycle units, each unit consisting of a natural gas combustion turbine generator, exhausting into a heat recovery steam generator, a single steam turbine generator and an air cooled condenser. The heat recovery steam generator will be fitted with natural gas fired supplementary duct burners to increase steam production. Each unit will produce 273 MW.

24. Garnet Energy proposes to construct only one unit of this two-unit system by 2004. The second unit of the project will be construct only if the need for energy should arise. No evidence was presented regarding when the second unit would be constructed or if it would be constructed within five years. The first unit will occupy 10 acres of the 30-acre parcel upon which the project is to be built. If the second unit of the project is built, an additional 7 acres will be utilized for the electrical generation facilities.

25. The generation plant will include a Control Center/Administration Building, a combination gas/steam turbine building, a service/firewater pump building, and an electrical/control building. Approximately 21-25 full-time employees would work in the facility, with associated domestic water needs.

26. Each generating unit will utilize a maximum of 228 gallons per minute (gpm) or 0.51cfs, with an annual average of approximately 105 gallons per minute (gpm) or 0.24 cfs. The annual consumptive use of the first phase (273 kw) is 142 acre feet annually, with an additional 30 acre feet of consumptive use from the land application of waste water for a total consumptive use of 172 acre feet for each phase of the project. The total consumption from both phases of the project would be 345 acre feet annually. The use of air cooled condensers in the generating units reduces the amount of water used by each generating unit substantially from the amount that would be used with a water cooled system.

27. IW Land's intent is that the industrial water use to be authorized by water right permit no. 63-31207 will be developed under that permit only if municipal water cannot be obtained from the City of Middleton in a timely manner. Garnet Energy

entered into an agreement with the City of Middleton on November 1, 2001, (the "Water Agreement") to assist in the extension of municipal water and sewer services south of the Boise River to the facility site. Exhibit 11. The area south of the river is within the City of Middleton's area of impact. Garnet Energy has agreed to pay approximately One Million Dollars of the cost of that extension so long as the conditions of the Water Agreement have been met. Ex. 12. The conditions of the Water Agreement are essentially that all necessary permits for the construction of the plant are obtained. Testimony of Vern Brewer. When asked directly what the impact of a denial of water right application no. 63-31207 would be, Garnet Energy President Randall Hill could not testify that it would have a fatal impact on the construction of the plant.

28. The City of Middleton has current capacity to serve the Garnet energy facility's water needs. Garnet Energy President Randall Hill testified that it would take approximately 12 months for the City of Middleton to extend water and sewer service to the Garnet facility once all conditions of the Water Agreement have been met. The Water Agreement contemplates that the water right permit no. 63-31207 will then be transferred to the City, for the City's use for future growth on the south side of the River. The City of Middleton requested that water right permit no 63-31207 be conditioned so that upon the consideration of the transfer of water right permit or license no. 63-31207 to the City of Middleton, any conditions, including volumetric limitations, placed upon permit no. 63-31207 as an industrial use be extinguished and the application be considered afresh as a municipal water right application. Testimony of Vernon Brewer. IW Land had no objection to such conditions.

29. The Application was submitted for an industrial water use, not municipal purposes. A water right for municipal uses is completely different, with separate considerations. *See* Idaho Code § 42-202. It goes without saying that the City of Middleton could at any time apply to IDWR for municipal water rights to be filled from ground water wells built south of the Boise River and Garnet Energy or IW Land could assist the City in that effort. It is probable that the Garnet Energy facility will utilize the City of Middleton's municipal water rights for the Garnet energy facility rather than proceeding under the appropriation applied for in the Application.

V. Water Supply.

30. The ground water wells contemplated by the Application will withdraw water from the Boise River drainage, which is designated hydrologic basin 63 in IDWR records. During the five to six year drought period during the late 1980's and early 1990's IDWR was concerned regarding the availability of ground water in basin 63. The concern was that ground water withdrawals could be approaching the average rate of average recharge and that additional development might exceed the sustainability of the aquifer. As a result, in 1992, IDWR ordered cessation of processing of all new consumptive water rights in the Snake River Basin, including the Boise River drainage. In 1995, IDWR lifted the moratorium in the Boise River drainage in an Amended Moratorium Order dated May 3, 1995, subject to conditions designed to provide protection to existing water users within the basin. The 1995 Amended Moratorium Order provides, in part, that:

> Processing of applications for permit within the Boise River Drainage Area that had been withheld by the moratorium shall proceed at a rate not

> to exceed thirty (30) applications for permit per month, <u>in priority date order</u>.

Amended Moratorium Order at 3 (1995)(underscoring added). Many of these applications have yet to be processed. Ex. 208.

31. IDWR is still concerned that there might not be sufficient water for additional appropriations in the Boise River drainage and desires additional data. During the 1995-1996 legislative session, the legislature appropriate $300,000 for a study of ground water availability in the Lower Boise River Basin called the Treasure Valley Hydrologic Project. The study was expected to take approximately five years to complete. With certain exceptions, until data from that study is available, IDWR has not processed applications for new consumptive uses of ground water in order to be reasonably sure that there is sufficient water for appropriation. The exceptions are:

> (1) Waters rights for domestic purposes or for ground water permits seeking water for multiple ownership subdivisions or mobile home parks that are exempt from the requirement to file an application for a water right permit.
>
> (2) Applications for non-consumptive uses of water.
>
> (3) Applications which the Director of IDWR determines should be processed because their immediate consideration is necessary for the protection and furtherance of the public interest.
>
> (4) Applications which will have no effect on prior surface and ground water rights because of their location, insignificant consumption of

water or mitigation provided by the applicant to offset injury to other rights.

Most water uses that IDWR processes cause a very small impact on the total ground water resources available in the Boise River drainage. However, when considering an out-of-priority application IDWR assesses the cumulative impact on the drainage of approving all pending applications filed earlier than the out-of-priority application at issue. To avoid consideration of these cumulative impacts, an applicant may file a mitigation plan. An acceptable mitigation plan must replace all water consumed by the out-of-priority water use, essentially making the out-of-priority use "invisible" in its impact on the overall Boise River drainage water supply.

32. There is a quantity of ground water leaving the Boise River drainage. Preliminary date indicates that the amount of water leaving the drainage is approximately 300,00 - 500,000 afa, consisting primarily of shallow ground water from the drainage's irrigation system. There are 370 water right applications pending in the Boise River drainage with priorities earlier than the Application, some of which apparently propose to consume large quantities of water. Exhibit 208. Each of these water right applications, if granted, would be entitled to take their full quantity of water before the proposed Garnet energy facility wells. IW Land submitted no analysis of the cumulative impacts of these applications on the ground water supply in the Boise River drainage, in general. IW Land submitted no information regarding the cumulative impact that development of pending applications may have on the shallow aquifer in the immediate area of the Garnet energy facility. Instead, IW Land submitted a mitigation plan, discussed below.

33. IW Land did submit an analysis of the aquifer underlying the Garnet energy facility as it is impacted by currently existing water rights. HDR Engineering, ERO Resources and HyQual employed experienced engineers and hydrologists to prepare Hydrogeologic Engineering Report. Protestants offered no expert or hydrology testimony to contradict the Report The Report is the only credible hydrology information in the record.

34. IW Land proposes to drill three wells in the lower zone of the Treasure Valley Shallow Aquifer at a depth of between 180' and 230'. Exhibit 29, Figure 5-1. Currently, there is adequate water in this water-bearing zone to fulfill the projected diversion rate of the complete Garnet energy facility of 1.10 cfs, and the consumption of 345 acre feet annually.

VI. Impact On Water Quantity Under Existing Water Rights.

35. The wells within a one-half mile radius of the Garnet Energy Facility for which there are well drillers' reports, are found on Table 4-1 of the Hydrogeologic Engineering Report. Exhibit 29. One of the wells is located in the Treasure Valley Deep Aquifer below a layer of blue clay at a depth of 380'. The remainder of the wells are in zones of the Treasure Valley Shallow Aquifer above the proposed location of the Applicant's wells. There are intermittent layers or lenses of clay throughout the Treasure Valley Shallow Aquifer intermediate and lower zones, which would tend to inhibit impacts from the proposed well on the surrounding wells. Harrison Testimony, Exhibit 29. Under a theoretical, worst-case analysis, a two-foot drawdown would be experienced in wells at one-half mile radius, but the more likely drawdown would be between one-half and one foot at that distance. No pump tests were conducted to determine actual

impacts of pumping from the proposed water-bearing zone. The quantity of water under existing water rights would not be reduced by the ground water withdrawals proposed for the Garnet energy facility.

36. The impact of the Garnet energy plant wells on the Boise River will likely be approximately .1 cfs, or 45 gpm. The flow of the Boise River at Middleton, even in low water periods, is generally 150 cfs. The depletion caused by the Garnet energy plant to the Boise River would not be measureable.

37. Each of the 370 pending water right applications discussed in Finding of Fact 32, if granted, would be entitled to take their full quantity of water before the proposed Garnet energy facility wells. IW Land submitted no analysis of whether the quantity of water under any of these water rights would be reduced by the Garnet energy facility.

38. Randall Hill specifically testified that IW Land and Garnet Energy LLC were not offering a mitigation plan for existing wells that may lose their water as a result of the pumping for the Garnet energy facility. Mr. Hill directed such water right holders to pursue those remedies available to them at law if they felt that their water was being reduced by the Garnet energy facility. IW Land and Garnet Energy LLC are also not offering mitigation to any of the 370 water right for which applications are pending that precede them in priority.

VII. Mitigation Proposal.

39. IW Land submitted a mitigation plan with the Application. The plan proposes to use a portion of a water right held by Mason Creek Ditch Co. numbered 63-00179C and claimed in the Snake River Basin Adjudication as follows:

Priority Date:	June 1, 1869.
Source of Water:	Boise River.
Point(s) of Diversion:	NE ¼ NE ¼ NE ¼, Sec. 24, Township 4 North, Range 2 West, B.M., Canyon County.
Use(s):	Irrigation of 1937 acres and incidental stockwater.
Total Quantity:	37.2 cfs and 6779.5 acre feet per annum (afa).
Period of Use:	March 15 – November 15 (irrigation season).
Place of Use:	Various sections in Township 4 North, Ranges 2 and 3 West, B.M., Canyon County.

IW Land owns or controls 53 shares of Mason Creek Ditch Co. One share of the Mason Creek Ditch Co. is equal to 0.02 cfs or one miner's inch. The total of these 53 shares equals a total diversion rate of 1.06 cfs. The mitigation plan proposes to divert the Mason Creek Ditch Co. right at its current point of diversion, deliver the water to the Garnet energy facility, and convey it into an existing drainway leading back into the Boise River. The water diverted under the mitigation plan would not be used for irrigation. IW Land has submitted no applications to change either the purpose, period or place of use of the Mason Creek Ditch Co. rights and does not intend to do so. Testimony of Sherl Chapman.

40. IDWR staff estimated consumptive use for the irrigation of 53 acres by multiplying the acreage by a standard maximum consumptive use in the Treasure Valley of 3.5 acre-feet per irrigation season. The computation is 53 acres x 3.5 acre-feet per year = 185.5 acre-feet consumed during each irrigation season. The complete Garnet

energy facility operating year-round will consume 345 acre-feet annually; the first unit consuming only half of this total.

41. This mitigation plan was submitted by IW Land only to cure injury to surface water rights on the lower Boise River during the irrigation season caused by the year-round 0.1 cfs projected depletion to the Boise River caused by the Garnet energy facility withdrawals. It was not designed to ensure that that there is sufficient ground water for the facility without reducing the amount of water available to ground water rights, either existing or pending. The mitigation plan was not designed to ensure that the Garnet energy facility use would not reduce the amount of water available to downstream surface water rights, either existing or pending, using water during the non-irrigation season.

VIII. Local Public Interest.

42. Idaho Power in its 2000 Integrated Resource Plan determined that beginning in 2004, additional electrical resources must be available to it to serve its expected loads. For this reason Idaho Power issued a Request for Proposals on August 4, 2000. On January 23, 2001, Idaho Power selected Garnet Energy, LLC to provide Idaho Power with electricity during peak-demand months beginning in mid-2004. Electricity from the Garnet energy facility has been committed to Idaho Power during the peak months of June – September. Idaho Power also has the right of first refusal to receive the electricity during periods of need during the rest of the year. This agreement is binding upon any successors or assigns acquiring the Garnet energy facility.

43. IW Land submitted sufficient details of the proposed design, construction and operation of the project and directly associated operations, to allow the water resource impact of the project to be evaluated.

44. The construction of the Garnet energy facility will employ 200-250 people. During operation of the facility there will be 21 to 25 full time jobs. The construction of the project will add approximately $150 million in assessed values to the local tax base.

45. Applicant sought comment from local governing bodies. The Applicant submitted a letter to 21 different local governmental agencies. Response was received from three, none of which opposed the project. Applicant has agreed with the City of Middleton to finance a fund for community benefits in the amount of $100,000 per year, and to provide matching funds of up to $200,000 for certain types of community needs, including libraries or senior centers. The City of Middleton signed this Agreement for Community Funds because the city government supports construction of the Garnet energy facility.

46. In the Agreement for Community Funds the City of Middleton also agreed that it:

> shall not take any action of any kind (including but not limited to any action before or filing with any public body, regulatory authority or government agency) or issue any statement of any kind that is opposed, or could reasonably be construed to be opposed, to such construction and continued operation of the Facility on the Subject Property.

Although the City would not have signed this Agreement if it did not support construction of the Garnet energy facility, the unfortunate effect of this provision could be to inhibit a full and candid presentation of the City's views regarding the Garnet

energy facility to IDWR and other agencies. IDWR is left with little information regarding the City's concerns, if any, that could be addressed in the water right permitting process. Agreeing to such a provision is not in the public interest.

47. IW Land did submit a letter from the City of Middleton and its engineering firm, Holladay Engineering Co., dated September 20, 2001, that expresses the need for the City of Middleton to develop a municipal ground water source on the south side of the Boise River. The letter states:

> Sound engineering practice for the municipal water system dictates that a source of water will be located on the south side of the Boise River if the City is to provide reliable service to the area. Justification for such planning involves several key issues:
>
> 1. Service disruption on account of natural disasters including flood damage at the river crossing;
> 2. Disseminated source water withdrawal points to provide reliable water supply if a single source was somehow compromised;
> 3. Economics of reduced main line sizing for fire flow friction losses;
> 4. Lessened potential for vandalism or other system wide disruption;
> 5. Reduced localized impacts on groundwater withdrawal;
> 6. Disseminated ties to the electrical power grid that lessens the likelihood of power loss on account of accidents or natural disasters; and
> 7. Greater flexibility and efficiency of the distribution system.
>
> For these reasons, the City has sought from the outset of discussions with Garnet Energy (IW Lands) *sic* to incorporate their water requirement and source development with the City's long term plan to serve the area providing an additional source of supply to our system. An agreement is being prepared that provides for the extension of water and sewer service to the facility and allows the City to apply to the Department for transfer of water rights and well to the City upon annexation of the plant. The City request *sic* that the Department consider recommending the transfer of the rights to the City upon annexation and would limit conditions upon the application in accordance with a municipal right as though the City were the applicant.

Exhibit 11. Applicant entered into the Water Agreement with the City of Middleton on September 20, 2001. Exhibit 12.

48. Garnet Energy LLC will build the energy facility in compliance with federal state and local law. IW Land submitted copies of applications for other permits including the Conditional Use Application submitted to Canyon County, Exhibit 16, an Air Permit Application, Exhibit 17, and the Land Application Permit, Exhibit 19. Applicant further submitted evidence that the Air Quality Permit to Construct was issued by the Idaho Department of Environmental Quality on October 19, 2001, Exhibit 18. Testimony of Mike Elliott. These permitting processes will consider issues such as air quality, water quality, noise, aesthetics, wildlife, demographic and health impacts of the Garnet energy facility.

49. Applicant has not filed a Land Application Permit for the wastewater associated with the second unit of the Garnet energy facility. IW Land does not own, or have an option for, enough land to use a land application system for the wastewater to be generated for the second unit. Applicant's wastewater expert, Mike Murray, testified that he would be speculating at this time to describe the means by which the wastewater from the second unit would be handled.

50. IW Land commissioned an Environmental Review of the Garnet energy facility by SAIC to consider impacts on cultural resources, wetlands, rare and endangered species, wildlife and habitat concerns. SAIC determined that the project will have minimal or no impact on fish and wildlife, vegetation and cultural resources in the vicinity of the plant. Testimony of Mike Elliott and Exhibit 16, Attachment at page 21.

51. Any hazardous waste or substances would be handled in accordance with DEQ and EPA standards. Testimony of Mike Elliott. IW Land does not anticipate the need for any DEQ hazardous substances permits.

52. The Garnet energy facility has been endorsed, in general terms, by the Treasure Valley Chambers of Commerce and the local business community. Individuals have also written IDWR in support of the Garnet energy facility. Likewise, many individuals, including protestants, generally oppose the Garnet energy facility being located at the proposed place of use. Very few of the exhibits of public support either for, or in opposition to, the Garnet energy facility discussed the water resource impact of the facility. Ex. 9, 107, 202, 203, 204, 205. *But see* Letter of Lori Walters, Ex. 206, and Letter of Mike Gretz, Ex. 207.

53. Protestants testified regarding air and water quality impacts and expressed concerns about the noise of the Garnet energy facility. The agency primarily responsible for determining air and water quality impacts is the Idaho Department of Environmental Quality. The DEQ has issued a permit to construct this facility and Garnet Energy LLC has applied to DEQ for a Wastewater Land Application Permit for the first unit. Noise issues and other siting issues are in the primary jurisdiction of the Canyon County Commission. Garnet Energy LLC has submitted an Application for a Conditional Use Permit with Canyon County. If these permits are issued for the Garnet energy facility, and if the facility complies with any conditions imposed by such permits, then the local public interest in air and water quality, and facility siting, are satisfied.

CONCLUSIONS OF LAW

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

I. Quantity of Water Under Existing Rights.

1. The prior appropriation doctrine is the foundation of Idaho's water laws. Idaho Constitution, Art. XV, Sec. 3. The basic formulation of this doctrine is that during times of shortage a water right with an earlier priority date is entitled to its water supply before a water right with a later priority date. As a consequence, the water permitting statute does not allow a new water right applicant to receive a permit if "it will reduce the quantity of water under existing rights." Idaho Code § 421-203A. In other words, a new water user cannot claim there is a sufficient water supply for its use, if the claim is based upon water that is used by existing water rights.

2. One consequence of this requirement is that water right applications on the same source generally must be issued in order of priority.[1] Otherwise, IDWR cannot fully determine whether there is unused water available for a new proposed water use. In fact, if IDWR processes water right applications out-of-priority, the statute does not allow it to consider the impact on prior pending applications because they are not "existing water rights." Further, processing water rights out-of-priority could even have the anomalous effect of protecting "existing" junior water rights against earlier priority applications. The statute's plain language requires a determination that the quantity of water under "existing" water rights will not be reduced, not "existing prior" rights. As a result of these considerations it is a common rule under the prior appropriation doctrine that water right applications be considered in the order of priority. *See* Amended

[1] Priority date being determined by the date a water right application is filed. Idaho Code § 42-219(4).

Moratorium Order at 3 (1995) Ex. 201; Hillis v. Department of Ecology, 932 P.2d 139, 149 (Wash. 1997); Postema v. Pollution Control Hearing Board, 11 P.3rd 726, 748 (Wash. 2000); *see also*, Central Platte Natural Resources Dist. V. State, 513 N.W.2d 847, 855 (Neb. 1994)(When determining adequacy of supply for a new water right the amount of water under pending applications and undeveloped water right permits must be considered).

3. The only exception to this requirement of the prior appropriation doctrine is that a out-of-priority application may be processed if it includes a mitigation plan that ensures that the quantity[2] of water that may be used by prior water right applications is not reduced.

4. IW Land submitted a mitigation plan to IDWR. That plan relies upon the diversion of water for an irrigation water right, and then the conveyance of that water back to the Boise River without use. The proposed mitigation plan of IW Land would constitute an improper diversion of water. Idaho Code § 42-351. A water right is not a "source of supply" that can be used by its owner in any fashion the owner sees fit. A water right is authorization to use water for the purposes for which it was appropriated. The Mason Creek Ditch Co. water right is an irrigation water right. The water under that right may only be diverted if it is used for irrigation, absent a change in purpose of use

[2] Idaho Code § 42-203A(5)(a) does not require that existing water rights not be "injured," only that the quantity of water under such rights is not reduced. This is because the considerations of Idaho Code § 42-203A(5)(a) and (b) are designed to ensure that there is sufficient water supply for a proposed water use to be completed. The provisions of Idaho Code § 42-203A(5)(a) ensure that a proposed water use will not be relying upon water that is already used by other appropriators. The provisions of Idaho Code § 42-203A(5)(b) ensure that a water supply, either after the subtractions of other existing users, or even if there are no other users of that supply, is sufficient to support the proposed use. Prevention of injury to other water rights is not an explicit concern of Idaho Code § 42-203A(5).

approved by IDWR. Idaho Code § 42-222. IW Land indicated that it did not intend to file for any such change with IDWR.

5. Even if the use of the Mason Creek Ditch Co. for mitigation was proper, that mitigation plan only mitigates for the impacts on pending surface water right applications pending downstream of the Garnet energy facility. Further, the mitigation would occur during the irrigation season. Finally, the mitigation plan would only be sufficient to mitigate for the impacts of the first unit, of the two-unit Garnet energy facility.

6. IW Land has not satisfied its burden to show that there would be no reduction in the quantity of water under existing water rights.

II. Adequacy of the Water Supply.

7. As discussed in Conclusions of Law 1 through 3, the prior appropriation doctrine requires that pending applications be processed in order of priority. Otherwise IDWR risks over-appropriation of a particular source of supply. If IDWR were to grant the IW Land Application, IDWR could not then deny an water right application with an older priority date because the water supply is inadequate. By granting the Application out-of-priority IDWR would be concluding that there is a sufficient water supply in Basin 63 to grant all applications prior to IW Land's Application. Insufficient information was submitted by IW Land to make this conclusion.

8. Absent that information, IW Land could have submitted a mitigation plan that would provide for no net loss to the water supply by the Garnet energy facility use. As discussed in Conclusion of Law 4, the mitigation plan submitted by IW Land was insufficient to accomplish this purpose.

9. IW Land has not satisfied its burden to show that the water supply itself is sufficient for the purposes for which it is sought to be appropriated.

III. Good Faith, Delay or Speculation.

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

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

IDAPA 37.03.08.045.01.c.

11. Garnet Energy LLC has two alternatives for providing water for the Garnet energy facility. The Application was filed to provide a water system owned and

operated by IW Land. The alternate source of water is the City of Middleton's municipal supply, under the Water Agreement. Although it is likely that the Garnet energy facility will use municipal water, having a contingency source is prudent and not speculative. To ensure that the water right applied for under the Application is developed, even in the event that the Garnet energy facility is served in the first instance by the municipal supply, the Water Agreement provides that IW Land's permit will be transferred to the City of Middleton.[3]

12. However, IW Land has only shown that it intends to apply the water requested for the first unit of the two-unit energy facility to beneficial use with reasonable diligence. IW Land identified no schedule or economic conditions that will result in the construction of the second unit. Further, IW Land does not currently own enough land to land apply the wastewater to be generated by the second unit, and its own expert testified that he could only speculate regarding the means by which the wastewater from the second unit would be handled.

13. IW Land has sustained its burden to show that it intends to apply the water needed for the first unit and domestic uses to beneficial use with reasonable diligence. IW Land has not sustained its burden to show that it intends to apply the water needed for the second unit to beneficial use with reasonable diligence.

IV. Sufficiency of Financial Resources.

14. IW Land has satisfied its burden to show that it has sufficient financial resources with which to complete the work involved.

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[3] The permit, if transferred to the City of Middleton, could not "result in the diversion and use of more water than originally permitted", thus making the transaction a zero net gain to the City of Middleton. Idaho Code §42-211. *See* Conclusion of Law 16.

V. Local Public Interest.

15. The local public interest would best be served if, with limited exceptions, processing of water right applications in the Boise River drainage be suspended until completion of the Boise River drainage Hydrologic Study. Wise water resource management requires a thorough understanding of the water system being managed. Further, processing of water right applications should proceed on the basis of priority date. To allow water right applications to proceed out of priority is unfair to early priority applications that have not been processed awaiting the outcome of the Study. Processing water rights out-of-priority without an adequate mitigation plan also risks over-appropriation of the Boise River drainage water supply and threatens the water supply that may be available to early priority applications. There is even a risk that IW Land could be awarded a water right permit that could never be used, because of subsequent approval of earlier priority water right applications.

16. If the City of Middleton extends its municipal system south of the Boise River the local public interest would best be served if municipal water rights are authorized south of the River in the first instance, rather than as the transferred industrial rights sought in the Application. Municipal wells should be constructed after consideration of a municipal water right application so issues such as appropriate location, well construction and reasonably anticipated future needs can be evaluated in a timely fashion. Issues such as adequacy of supply for municipalities are lessened by the existence of the power of eminent domain. A permit for a municipal water use would not have the same quantitative and use limitations on the City of Middleton as the industrial use proposed in the Application. Idaho Code §§ 42-202(2), -202B.

17. If the City of Middleton should apply for municipal water rights south of the Boise River, nothing in the record suggests that Garnet Energy LLC could not construct those wells for the City and use them at the outset to service the Garnet energy facility to ensure completion by the 2004 deadline.

18. IW Land has not satisfied its burden of showing that approving the Application is in the local public interest.

VI Conservation of Water Resources.

19. IW Land has satisfied its burden to show that the Garnet energy facility water use is consistent with the conservation of water resources within the state of Idaho.

RECOMMENDED ORDER

Based upon these Findings of Fact and Conclusions of Law the Application is DENIED.

PROCEDURAL RIGHTS

This is the Recommended Decision and Order of the Hearing Officer. It will not become final without action of the Director of the Idaho Department of Water Resources. Any party may file a petition for reconsideration of this recommended order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Section 67-5243(3) Idaho Code.

Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for

reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the Director or Director's designee on any issue in the proceeding. If no party files exceptions to the recommended order with the Director or Director's designee, the Director or Director's designee will issue a final order within fifty-six (56) days after:

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

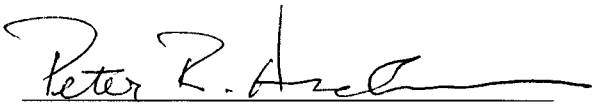
ii. The service date of a denial of a petition for reconsideration by the hearing officer; or

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

Written briefs in support of or taking exceptions to this recommended order shall be filed with the Director or Director's designee. Opposing parties shall have fourteen (14) days to respond. The Director or Director's designee may schedule oral argument in the matter before issuing a final order. The Director or Director's designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency

may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

DATED this 19th day of February, 2002.



PETER R. ANDERSON
Hearing Officer