

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

IN THE MATTER OF APPLICATION)	
FOR AMENDMENT OF PERMIT NO.)	RECOMMENDED DECISION
63-12448 IN THE NAME OF THE CITY)	AND ORDER
OF EAGLE)	
_____)	

STANDARD FOR DECISION

This matter came before the Idaho Department of Water Resources (“IDWR”) on the application by the City of Eagle (“Eagle” or “Applicant”) to amend existing municipal water right permit no. 63-12448 to add two new points of diversion of ground water in the Boise River drainage. Applications to amend existing permits are processed under Idaho Code §§ 42-211 and 42-203A. Idaho Code § 42-211 provides in part:

Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of diversion or proposed use or uses of the water, he shall file an application for amendment upon forms furnished by the department of water resources together with the statutory fee for filing and recording the same, and upon receipt thereof it shall be the duty of the department of water resources to examine same and if approval thereof would not result in the diversion and use of more water than originally permitted and if the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application and return an approved copy to the permit holder. The director of the department of water resources shall give such notice to other affected water users as he deems appropriate and may grant the amendment, in whole or in part or upon conditions, or may deny the same. Notice of partial approval or conditions or denial of an amendment shall be forwarded to the applicant by certified mail and shall be subject to judicial review as hereafter provided. The priority of the right established pursuant to a permit which has been amended under these provisions shall date from the date of the original application for permit, provided the permit holder has complied with other provisions of this act.

* * *

Protests to the application for amendment may be filed with and heard by the director in the same manner as provided by section 42-203 [42-203A], Idaho Code, for protests to an application for a permit.

Idaho Code § 42-203A(5) provides, in part, that:

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.

A water right applicant bears the burden of proof for the factors IDWR must consider under Idaho Code §§ 42-203A and 42-211. Cantlin v. Carter, 88 Idaho 179, 187 (1964); Shokal v. Dunn, 109 Idaho 330, 339 (1985). IDWR has adopted rules setting forth the criteria for evaluating the factors. IDAPA 37.03.08.045.

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 June 8, 2001, the City of Eagle submitted an application to amend existing water right permit no. 63-12448 to add two additional points of diversion (the “Application”).

The proposed points of diversion are located in Eagle, Idaho in the SW¼ SW¼ Sec. 4 T4N R1E (Eagle Well #3 aka Brookwood well) and NE¼ SE¼ Sec. 4 T4N R1E (Eagle Well #4). .

2. Notice of the Application was published in The Idaho Statesman of Boise, Idaho on or about June 21 and 28, 2001.

3. Protests to the Application from the Eagle Water Company, Inc., Weldon T. Fisher, Eleanor I. Chase, a group of concerned citizens¹, were received by IDWR. Only the protest of Eleanor Chase revealed the basis for submitting the protest. Ms. Chase was concerned that granting the Application could affect the water rights of her adjacent wells and other wells. The group of concerned citizens, in a letter received by IDWR on August 13, 2001, clarified that their concern also was the impact of additional wells on their private wells.

4. A prehearing conference was held on the Application and protests on August 15, 2001. Following several attempts to set a second prehearing conference IDWR issued a *Notice Canceling Prehearing Conference and Interrupting Processing* on November 29, 2001, which interrupted the proceedings for six months to allow the parties to negotiate a settlement of this matter.

5. In January 2002, protestant Eleanor I. Chase died. On July 11, 2002, the Estate of Eleanor I. Chase (the “Chase Estate”) was allowed to intervene as a full party on the grounds stated in Ms. Chase’s protest.

6. A second prehearing conference was held on September 18, 2002. A *Prehearing Order* issued following that conference that (1) pursuant to Eagle’s request gave the parties until

¹ James. Burton identified himself as the spokesperson of a number of concerned citizens living on Eagle Road who signed the protest. Letter Received August 13, 2001, at IDWR’s Western Region. Many of the signatures on the protest forms were illegible. Only one protest fee of \$25 was received from Darrell E. Davis with this protest. Using the forms and other submissions in the record the concerned citizens included Darrell Davis, James Burton, Stan Stevens, Stanton Niccols, Melissa Sadlek, Jason Stinar, William Miller, Chris Brooke, Sheri Kinzer, Steve Capellar, Shelby Conrad, Michael Kilfoyle, Laren Walker, Gary Heikes.

November 1, 2002, to negotiate regarding settlement of the protests, (2) tentatively scheduled a hearing for February 26, 2003, and (3) authorized informal discovery. A *Notice of Hearing* issued on January 10, 2003, setting a hearing for February 26, 2003. That hearing was vacated and formal discovery was authorized on February 4, 2003, in the *Order Granting Petition for Reconsideration and Authorizing Discovery*.

7. Peter Anderson was formally appointed by the Director of IDWR as Hearing Officer in this matter on June 5, 2003, following the issuance of an *Order Granting Motion to Strike and Recusing Hearing Officer*, by then Hearing Officer L. Glen Saxton.

8. A third prehearing conference was held on August 1, 2003. After this conference, a *Scheduling Order* issued on August 20, 2003, that established time periods for completion of discovery, provided for the exchange of witness and exhibit lists and set tentative hearing dates for November 13-14, 2003.

9. Pursuant to a formal *Notice of Hearing* a two-day hearing was held at IDWR's state office in Boise, Idaho on November 13-14, 2003. The City was represented by Mr. Bruce M. Smith and Ms. Tammy A. Zokan, the Chase Estate was represented by Mr. Matt Howard, the Eagle Water Company was represented by Ms. Molly O'Leary, and Mr. James Burton attended on November 13, 2003 and Mr. Shelby Conrad attended on November 14, 2003 from the group filing a joint protest. Weldon Fisher did not appear at the hearing.

10. At the conclusion of the hearing the parties were given until December 15, 2003, to file written closing statements. Eagle, the Chase Estate, Eagle Water Company and Mr. James Burton filed written statements. This matter was fully submitted to IDWR on December 15, 2003.

II. Evidence Considered.

11. Exhibits offered by Eagle and admitted by stipulation of the protestant as part of the record are as follows:

Exhibit 1: Application for Amendment of Permit No. 63-12448 filed by the City of Eagle.

Exhibit 2: Brookwood Public Water Supply Well, Design/Proposal Plans and Specifications dated May 2000.

Exhibit 3: Illustration of Eagle Water System.

Exhibit 4: Illustration of well locations.

Exhibit 5: Chart of Eagle Water System changes.

Exhibit 6: Resume of Terry Scanlan, P.E., P.G.

Exhibit 7: Municipal Production Bar Graph.

Exhibit 8: United Water Idaho Floating Feather & Redwood Creek Monthly Well Production.

Exhibit 9: Eagle Water Company Annual Well Production.

Exhibit 10: Eagle Annual Well Production.

Exhibit 11: Water Level Monitoring of Vail and Miller Wells, October 22, 1999.

Exhibit 12: June 2, 2003 and June 3, 2003 letters regarding monitoring results for Vail and Miller Wells.

Exhibit 13: September 26, 2003 letter regarding water level monitoring results for Vail and Miller Wells.

Exhibit 14: June 3, 2003 letter regarding Burton Group Well Measurements.

Exhibit 15: Photo log and photographs of May 13, 2003 site inspection of Chase Dairy site.

Exhibit 16: Agreement to Provide Supplemental Fire Flows.

Exhibit 17: Water Line Agreement.

Exhibit 18: December 2, 1997 Agreement.

Exhibit 19: Water Service Contract and First Amendment to Water Service Contract.

Exhibit 20: Water Right Claim No. 63-5227.

Exhibit 21: Water Right Claim No. 63-5229.

Exhibit 22: Approved Application for Permit No. 63-8663.

Eagle also joined with the Chase Estate in offering Exhibits 102, 103, 104, 105 and 106, which are described in Finding 12. Exhibits offered by Eagle and admitted in rebuttal to the Protestants' case and part of the record are as follows:

Exhibit 23: Chase Dairy Well Pump Evaluation, 11/13/03.

Exhibit 24: Chase Small Irrigation Well Suction Lift Evaluation, 11/13/03.

Exhibit 25 was not admitted.

12. Exhibits offered by the Chase Estate and admitted as part of the record are as follows:²

Exhibit 101: Summary of Ground Water Conditions in the Vicinity of Proposed Brookwood Subdivision Well Site, August 15, 2001.

Exhibit 102: Revised Summary of Ground Water Conditions in the Vicinity of Proposed Brookwood Subdivision Well Site, August 17, 2001.

Exhibit 103: IDWR Open-File Report, Ground-Water Condition in the Dry Creek Area, June 1991.

Exhibit 104: Results of the 30-Day Pumping Test and Aquifer Analysis, June 1991.

Exhibit 105: Aquifer Test at Floating Feather Well, August 9, 1995.

Exhibit 106: Municipally-Owned Water System Master Plan and Budget Study, April 12, 2002 and rev. May 21, 2003.

Exhibit 107: Deposition of the City of Eagle, September 10, 2003.

Exhibit 108: Well specifications and reports from Layne of Idaho, Inc.

² Exhibits 101 –112 and 120 –123 were admitted by stipulation of the City of Eagle.

Exhibit 109: Eagle's Response to the Estate's Third Set of Interrogatories, etc.

Exhibit 110: Eagle's Fifth Supplemental Response to Estate's Interrogatories, etc.

Exhibit 111: Eagles's Sixth Supplemental Response to Estate's Interrogatories, etc.

Exhibit 112: Eagle's Verification of Signatures on Discovery Responses.

Exhibit 113: Amendment to Application of Eagle United Water before IPUC, September 1, 1994.

Exhibit 114: Testimony of Morgan Masner before IPUC, December 1, 1995.

Exhibit 115: IPUC Order No. 26337, March 5, 1996.

Exhibit 116: IPUC Order No. 26524, July 19, 1996.

Exhibit 117: Application of United Water Idaho, July 11, 1997.

Exhibit 118: Comments of IPUC Staff, August 20, 1997.

Exhibit 119: IPUC Order No. 27121, September 8, 1997.

Exhibit 120: Protest by Eleanor I. Chase to Application No. 63-11413, November 29, 1990.

Exhibit 121: Notes of D. Tuthill re Application No. 63-11413.

Exhibit 122: Proposed Memorandum Decision and Order Approving Application for Permit No. 63-11413.

Exhibit 123: Portions of Eagle's Response to Eagle Water Company, Inc.'s First Set of Interrogatories, etc.

Exhibit 124: Letter from Eagle to David Tuthill, May 24, 1995.

Exhibit 125: Letter from Chris Meyer to Jim Johnson, November 19, 1998.

Exhibit 126: Proof of Beneficial Use, 63-12017.

Exhibit 127: Proof of Beneficial Use, 63-11413.

Exhibit 128: Amendment of Permit No. 63-12448, April 7, 2000.

Exhibit 129: Application for Amendment of Permit 63-12448, December 2, 1998.

Exhibit 130: Application for Permit 63-12448, April 7, 1998.

Exhibit 131: Letter from Chris Meyer to Jeff Peppersack, March 31, 2000.

Exhibit 132: Letter from Eleanor I. Chase to Gary Spackman, August 14, 1999.

Exhibit 133: Letter from J. Evan Robertson to Gary Spackman, November 25, 1998.

Exhibit 134: Letter from Eleanor I. Chase to Gary Spackman, September 23, 1998.

Exhibit 135: Letter from Eleanor I. Chase to IDWR, July 9, 2001.

Exhibit 136: City of Eagle United Water Operations Reports.

Exhibit 137: Agreement to Provide Supplemental Water for Fire Flows.

Exhibit 138: Cooperative Agreement.

Exhibit 139: Water Line Agreement.

Exhibit 140: Agreement dated December 2, 1997.

Exhibit 141: Well Purchase Agreement.

Exhibit 142: Notice of Claim 63-5224.

Exhibit 143: Partial Decree 63-5225.

Exhibit 144: Amended Notice of Claim No. 63-5226.

Exhibit 145: Notice of Claim No. 63-5227.

Exhibit 146: Amended Notice of Claim No. 63-5229.

Exhibit 147: Notice of Claim 63-8663.

Exhibit 148: License 63-8663.

Exhibit 149: IDWR Field Report 63-8663.

Exhibit 150: Partial Decree 63-15820.

Exhibit 151: Partial Decree 63-18731.

Exhibit 152: ERO Resources, Inc., Report Regarding Wells for 63-5226 and 63-5229.

Exhibit 153: Resume for David B. Shaw, P.E..

Exhibit 154: Beneficial Use Field Report 63-12192.

Exhibit 155: Diagram of Selected Well Locations.

Exhibit 156: 1970's photograph of barn and Chase Dairy.

Exhibit 157: 1952 photograph of barn.

Exhibit 158: 1952 photograph of barn and Chase dairy.

13. IDWR, on its own initiative and without objection from the parties, admitted the following exhibit:

Exhibit 400: Summary of water rights located in the NE $\frac{1}{4}$ of SE $\frac{1}{4}$, Section 5, T4N, R1E in Ada County.

14. The following individuals testified on behalf of Eagle:

- a. Ms. Lynne Sedlacek, Eagle City Councilmember.
- b. Mr. Vernon Brewer, representative of Eagle City Engineer, Holladay Engineering Co.
- c. Mr. Terry M. Scanlan, P.E., P.G., Scanlan Engineering.
- d. Nancy Merrill, Eagle Mayor.³

15. The following individuals testified on behalf of the Chase Estate:

- a. Mr. Mike Chase, Chase Estate.
- b. Mr. Dave Shaw, ERO Resources, Inc.
- c. Mr. Bill Chase, Chase Estate.
- d. Mr. Vernon Brewer, representative of Eagle City Engineer, Holladay Engineering Co.

16. No other party offered exhibits or testimony for IDWR's consideration.

17. All parties present at the hearing were afforded the opportunity to cross-examine the opposing side's witnesses.

III. Applicant and Permit No. 63-12448.

18. Eagle is a municipal corporation under the laws of the State of Idaho. Eagle owns a municipal water system serving several developments in Eagle under Water Right Permit No. 63-12448 (the "Permit") with a priority date of April 8, 1998. The current water use under the Permit is described as follows:

Source of Water:	Ground water from the water bearing zone from 183 to 602 feet.
Point(s) of Diversion:	NW ¹ / ₄ , SW ¹ / ₄ Sec. 3, T4N, R1E, B.M., Ada County, Idaho. SW ¹ / ₄ , SW ¹ / ₄ Sec. 3, T4N, R1E, B.M., Ada County, Idaho. SE ¹ / ₄ , SW ¹ / ₄ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.
Use(s):	Municipal.
Total Quantity:	3.25 cfs/ 1455.0 acre feet annually (AFA).
Period of Use:	January 1 – December 31 (year-round).
Place of Use:	Within the city limits of Eagle and surrounding service area.

A. Source of Water.

19. The aquifer source under the Permit is characterized as a leaky water table aquifer, with attenuated communication from shallow water bearing zones to deep water zones. The aquifer was generally described in a report prepared by CH2M Hill in June 1991 following a thirty-day pump test at one of the currently authorized points of diversion for the Permit:

The aquifer is characterized as a complexly stratified water table aquifer consisting of highly permeable sand layers and lenses separated by discontinuous and leaky sandy clays. Aquifer response to pumping is expected to behave as a single thick water table aquifer with significant delayed yield due to gravity drainage early in the pumping period and close to the well. In distant observation wells the response during the relatively short 30-day pumping period was more indicative of a confined aquifer owing to the stratified nature.

³ Ms. Merrill's testimony was presented in writing and is in IDWR's files as the *Sworn Testimony of Nancy Merrill, Mayor, City of Eagle in Support of City's Application to Amend Permit No. 63-12448.*

Ex. 104 at 52. “Lateral inflow from the aquifer margin to the north and east and seepage from canal and irrigation laterals are probably the most significant sources of water.” Ex. 104 at 3. Although the points of diversion under Permit No. 63-12448 are spread laterally over approximately one mile, they draw from the same aquifer and are hydraulically connected. No evidence was presented to show that current pumping from this aquifer under the Permit detrimentally impacted other wells or surface water diversions, or that the aquifer itself was insufficient to satisfy the quantities authorized under the Permit.

B. Points of Diversion.

20. Eagle Well #1: This well, located in the SW $\frac{1}{4}$, SW $\frac{1}{4}$ Sec. 3, T4N, R1E, B.M., Ada County, Idaho and also known as Lexington Hills Well Number 1, is currently Eagle’s primary municipal well. It supplies all the water used during normal operation of the system. Two pumps, one with a capacity of 160 gallons per minute (“gpm”) and the other with a production capacity of 800 gpm, draw from the well and can be operated together. Water quality and stability of production at this well are both excellent. Ex. 106 at 11.

21. Eagle Well #2: This well, located in the NW $\frac{1}{4}$, SW $\frac{1}{4}$ Sec. 3, T4N, R1E, B.M., Ada County, Idaho and also known as Lexington Hills Well Number 2, is no longer used due to high iron content in the water and excessive sand production. No evidence was offered to explain why a new well could not be drilled at this point of diversion, although water production and water quality complaints from well owners generally diminish with distance in a southwesterly direction from the Boise foothills and this well. Ex. 102 at 3.

22. Floating Feather Well: This well, located in the SE $\frac{1}{4}$, SW $\frac{1}{4}$ Sec. 5, T4N, R1E, B.M., Ada County, Idaho, is owned and operated by United Water Idaho. The Floating Feather

well provides Eagle with a second well to satisfy minimum municipal water system requirements pursuant to a number of agreements between Eagle and United Water Idaho. Exs. 16, 17, 18.

C. Use.

23. Eagle's municipal water system serves the Lexington Hills, Echo Creek, Crown Point and Brookwood residential subdivisions, including Lexington Hills School, along with other potential residential subdivisions in the same general area. The system distributes potable water and fire flows through a piping network of 6-inch, 8-inch and 10-inch water pipes servicing the subdivisions. There is a 12-inch diameter trunk line along the north side of Floating Feather Road that interties the system with the United Water Idaho distribution network and Hidden Hollow Reservoir.

D. Total Quantity.

24. Permit No. 63-12448 authorizes Eagle to instantaneously pump up to 3.25 cfs and pump, on an annual basis, 1455.0 acre-feet. The 3.25 cfs instantaneous rate converts to a maximum of 1458.7 gpm. The 1455.0 acre-feet annual volume converts to a continuous average pumping rate of 902 gpm. This limitation applies to the quantities pumped under all of Eagle's water rights—63-11413, 63-12017 and 63-12448. Because Eagle does not have storage in its system it must meet peak demands with its maximum diversion rate

E. Period of Use.

25. Eagle's municipal water system is used all year, every day for potable water needs and irrigation and may at any time be needed for fire suppression.

F. Place of Use.

26. A general representation of Eagle's water service area boundary is shown on Exhibits 3 and 4. A general representation of the actual area served by Eagle's water system is

shown on the second map in Appendix I of Exhibit 106. The physical characteristics of the planning area are accurately described as follows:

The topography of the Planning Area generally comprises relatively high ground in Section 3 and the E ½ of Section 4, and ground 50 to 100 feet lower than the foregoing in the Dry Creek Valley in the W ½ of Section 4 and the E ½ of Section 5. There is a prominent bluff, 30 to 50 feet high, defining the boundary between the higher ground and the valley of Dry Creek, but the higher ground is rolling hills with elevation differences as great as 60 feet above the approximate top of the bluff. For practical management, the bluff divides the Planning Area into two service pressure zones

Exhibit 106 at 12.

IV. Proposed Project.

27. Eagle's Application requests that two additional points of diversion be approved by IDWR for Permit No. 63-12448, without any increase in the diversion rate under the permit. Eagle needs two wells for its municipal system. The Idaho Department of Environmental Quality requires that community water systems supplying groundwater to more than twenty-five (25) homes have a minimum of two (2) sources. IDAPA 58.01.08.550.03.p. Beyond this legal requirement having two wells provides Eagle many technical advantages. Two wells provide redundancy in case either well fails or needs maintenance. Two wells provide greater capacity to provide emergency supply. Water supplies are more reliable with two wells. Having two wells gives Eagle the ability to rest a well and extends the life of pumps. Having two wells also spreads the impact on the aquifer. Finally, if Eagle could develop Eagle Well #3 in the Dry Creek valley its elevation would improve the efficiency of the two-zone system, because it is more efficient to pump two wells to pump to different levels.

28. For policy reasons the current governing administration of Eagle desires to develop an independent City-owned municipal water system that does not rely on contracts with

third-parties. If the Application is not approved Eagle would have to continue its contractual relationship with United Water Idaho to use the Floating Feather Well.

A. Eagle Well #3 (Brookwood Well)

29. The first additional point of diversion requested by the Application is forty acres within Eagle's city limits described as the SW¹/₄ SW¹/₄, Sec. 4, T. 4 N., R. 1 E., B.M., Ada County. Specifically, Eagle intends to construct a well located at the northeast corner of the intersection of Eagle and Floating Feather Roads that would be known as Eagle Well #3 or the Brookwood well. This location would provide Eagle with a source point in the lower zone of its service area.

30. Eagle submitted design/proposal plans and specifications for Eagle Well #3 with other sufficient details to allow the water resource impact of the well to be evaluated. Ex. 2. The well would be 335 feet deep, with screening from 220-330 feet. The minimum sustained pumping rate for the well as designed is 1,000 gpm, but no current condition in Permit No. 63-12448 would prevent Eagle Well No. 3 from pumping at the maximum diversion rate of 1458.7 gpm. Eagle anticipates pumping an average of 200-280 gpm from Eagle Well #3, so long as Eagle Well #1 is pumping. The Idaho Department of Environmental Quality has reviewed and approved the well design and well site for Eagle Well #3, although the well construction approval has expired. The well design has been resubmitted for approval. The well location is located outside of the floodplain of Dry Creek.

31. Construction of Eagle Well No. 3 is a condition of development of the Brookwood subdivision by Aries Development, LLC. Aries Development, LLC agreed to construct Eagle Well No. 3 as a joint venture with Eagle. Ex. 141 Eagle would purchase the well upon completion pursuant to a *Well Purchase Agreement* with Aries Development, LLC.

Eagle has budgeted \$200,000.00 for Eagle Well #3 in the City's *Capital Improvement Plan* for the upcoming fiscal year. The City has already made significant investments in the proposed well site.

B. Eagle Well #4.

32. The second additional point of diversion requested by the Application is forty acres within Eagle's city limits described as the NE¼ SE¼, Sec. 4, T. 4 N., R. 1 E., B.M., Ada County. Ex. 3. Eagle would like to reserve this site in case Eagle Well #3 does not work out. Eagle does not own the site or have a development agreement for it. Unidentified issues between Eagle and Aries Development, LLC must be worked out before this site could be developed.

V. Impact On Water Quantity Under Existing Water Rights.

33. Four written studies relevant to the Application have been conducted: a June 1991 aquifer analysis by CH2M Hill; a June 1991 IDWR open-file report on ground water conditions in the Dry Creek area; a July 1995 aquifer pumping test at the Floating Feather Well by Terry Scanlan; and an August 2001 summary of ground water conditions in the vicinity of Eagle Well #3 by Bill Strowd. David Shaw also testified regarding his calculations of the potential impacts of pumping at Eagle Well #3.

34. The CH2M Hill report, Ex. 104, prepared in 1991, is based primarily on an extended pump test conducted on the Eagle Well #1, located one mile east of the proposed Eagle Well #3 site. From that pump test CH2M Hill developed conclusions regarding the aquifer characteristics in the study area. From these aquifer characteristics CH2M Hill created several simulations of the aquifer's response to various pumping scenarios.

35. The IDWR open file report, Ex. 103, prepared in 1991, analyzed the CH2M Hill aquifer test, water well measurements, and other data to assess concerns regarding the effects of

expanding development in the Dry Creek Area. The report also used the CH2M Hill data to further develop predictions on well interference caused by well pumping in the Dry Creek Area. The key development in this analysis was a diagram of the predicted “cone of depression” caused by pumping of the Eagle #1 well at 1000 gpm for 6 months. Ex. 103, p. 21, fig. 11. The prediction used a more conservative transmissivity value than the CH2M Hill report.

36. The Scanlan Report, Ex. 105, prepared in 1995, described the results of a pump test of United Water Idaho’s Floating Feather well, located approximately ½ mile west of the proposed Eagle Well #3 location. The test monitored wells in the vicinity of the Floating Feather well for drawdown effects during a 51-hour pump test at an average rate of 1,500 gpm. One monitored well was the Vail domestic well, approximately 250 feet from the Floating Feather well. Observed drawdown in the Vail well was 1.4 feet. However, Mr. Scanlan calculated that the drawdown would have been 8.7 feet if the aquifer zone tapped by the Vail well was directly connected to the zones tapped by the Floating Feather well. Ex. 105, p. 4. Another monitored well was called the Chase domestic well, approximately 1000 feet from the Floating Feather well. Observed drawdown in the Chase domestic well was approximately 1.5 feet. However, Mr. Scanlan calculated that the drawdown would have been 5.7 feet if the aquifer zone tapped by the Chase domestic well was directly connected to the zones tapped by the Floating Feather well. Ex. 105, p. 5. Mr. Scanlan suggested in his report that there are three aquifer zones in this area: a shallow unconfined aquifer zone to a depth of 50 feet, an upper confined aquifer zone extending from 100 to 170 feet, and a lower confined aquifer zone extending from 170 feet to depths of more than 335 feet. The Vail and Chase domestic wells described in the report penetrated the middle aquifer zone, while the Floating Feather well penetrated the lower aquifer zone.

37. The Strowd Report, Ex. 102, prepared in August 2001, analyzed the preceding reports and well logs in the vicinity of proposed Eagle Well #3 to reach conclusions regarding the predicted impacts of water withdrawals from Eagle Well #3. The cone of depression diagram for the Eagle Well #1 well in the IDWR open file report was superimposed on the proposed Eagle Well #3 point of diversion to show potential drawdowns caused by the withdrawal of 1000 gpm for six months. Ex. 102, Figure entitled “Estimated 6-Month Draw Down Based On 1000 GPM Pumping.” This figure predicts 8 feet of drawdown at 1000 feet from Eagle Well #3. This prediction is a worst case analysis of well impacts because the sustained average pumping from Eagle Well #3 is not expected to exceed 280 gpm, and the sustained average pumping cannot exceed 902 gpm. The impact of Eagle Well #3 withdrawing 280 gpm over six months can be extrapolated from Strowd Figure by multiplying the calculated impact by 0.28 (280 gpm/1000 gpm).⁴ However, no condition in Permit No. 63-12448 would prevent Eagle from pumping Eagle Well #3 at a maximum instantaneous rate of 1458.7 gpm, and sustaining an average pumping rate of 902 gpm. The Strowd Report concludes:

By employing this model, only the nearest wells to the Brookwood site should experience drawdowns in excess of five to six feet. Local wells exploiting another aquifer zone may be influenced even less. Wells within hundreds of feet of the Brookwood site, however, may experience drawdowns in excess of eight or ten feet.

Ex. 102, p. 6. Eagle testified that it was willing to mitigate for the impacts caused to senior water users by its water use.

A. Impact on Chase Estate Wells.

38. The Chase Estate owns and/or claims several water rights with points of diversion in the vicinity of proposed Eagle Well #3.

⁴ This same extrapolation can be used for the actual permit limit of 902 gpm over six months by multiplying the

39. Water Right No. 63-15820. This water right has been decreed in the Snake River Basin Adjudication, Twin Falls County Case No. 39576 (the “SRBA”), Ex. 150, and is described as follows:

Priority Date:	January 1, 1920.
Source of Water:	Ground water.
Point(s) of Diversion:	SE ¹ / ₄ , SE ¹ / ₄ , SE ¹ / ₄ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.
Use(s):	Domestic.
Total Quantity:	0.04 cfs.
Period of Use:	January 1 – December 31.
Place of Use:	SE ¹ / ₄ , SE ¹ / ₄ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.

This water right is withdrawn from a well known as the “dairy-domestic well,” reportedly 240 feet deep with a 3-inch casing at surface. The dairy-domestic well is equipped with two ¾ hp shallow well jet pumps that can lift water a maximum of about 26 feet and produce around 30 gpm (0.067 cfs). In May 2003 the depth to water in the dairy-domestic well was measured at 20 feet, 10 inches from the top of the well casing. The dairy-domestic well is located 509 feet from the proposed site of Eagle Well #3.

40. If Eagle Well #3 withdraws 902 gpm over 6 months it would likely cause 7 to 9 feet of drawdown in the dairy-domestic well. If Eagle Well #3 withdraws 280 gpm over 6 months it would likely cause 2.2 to 2.8 feet of drawdown in the dairy-domestic well. Based on the Scanlan Report, the short-term impact of the Eagle Well #3, if pumped at the full water right amount of 1458.7 gpm for 51 hours, could be a drawdown of approximately 8.7 feet in the dairy-domestic well.

41. Water Right No. 63-5226. This beneficial use water right has been claimed by the Chase Estate in the SRBA, and is described as follows:

Priority Date:	January 1, 1950.
Source of Water:	Ground water.

calculated impact in the Strowd Report by 0.90 (902 gpm/1000 gpm).

Point(s) of Diversion: SE¼, SE¼, SE¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.
Use(s): Stockwater, Commercial, Domestic.
Total Quantity: 0.31 cfs.
Period of Use: January 1 – December 31.
Place of Use: SE¼, SE¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.

This water right is also withdrawn from the dairy-domestic well. The water used under this water right is used for critical activities at the Chase dairy. Loss of water under this water right for as short a period as four to six hours in the summer could injure the cows, and after one to three days cows could die, irreparably damaging the Chase Dairy's closed herd.

42. The impact on this water right from Eagle Well #3 would be the same as that described in Finding No. 40.

43. Water Right No. 63-5226. This beneficial use water right has been claimed by the Chase Estate in the SRBA, and is described as follows:

Priority Date: October 27, 1925.
Source of Water: Ground water.
Point(s) of Diversion: NE¼, SE¼, SE¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.
Use(s): Supplemental Irrigation of 20 acres, Stockwater, Domestic.
Total Quantity: 0.46 cfs.
Period of Use: Irrigation: 3/1 to 11/15; Other: January 1 – December 31.
Place of Use: SE¼, SE¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.

This water right is withdrawn from a well known as the "small irrigation well," reportedly 280 feet deep with a 4-inch casing at surface. The small irrigation well is equipped with a 2 hp centrifugal end suction pump. The water withdrawn from this well is supplemental to wastewater the Chase Estate uses at the same place of use and has not been needed since 1983. The small irrigation well is located 820 feet from the proposed site of Eagle Well #3.

44. If Eagle Well #3 withdraws 902 gpm over 6 months it would likely cause 7 to 9 feet of drawdown in the small irrigation well. If Eagle Well #3 withdraws 280 gpm over 6 months it would likely cause 2.2 to 2.8 feet of drawdown in the small irrigation well. Based on the Scanlan

Report, the short-term impact of Eagle Well #3, if pumped at the full water right amount of 1458.7 gpm for 51 hours, could be a drawdown of approximately 5.7 feet in the small irrigation well.

45. Water Right No. 63-8663. This licensed water right has been claimed by the Chase Estate in the SRBA, and is described as follows:

Priority Date:	April 6, 1977.
Source of Water:	Ground water.
Point(s) of Diversion:	NW ¹ / ₄ , SE ¹ / ₄ , Sec. 5, T4N, R1E, B.M., Ada County, Idaho.
Use(s):	Irrigation of 100 acres, Stockwater.
Total Quantity:	2.0 cfs, 452.7 afa.
Period of Use:	Irrigation: 3/15 to 11/15; Other: January 1 – December 31.
Place of Use:	NW ¹ / ₄ , SE ¹ / ₄ and SW ¹ / ₄ , SE ¹ / ₄ and SE ¹ / ₄ , SE ¹ / ₄ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.

This water right is withdrawn from a well known as the “large irrigation well,” 338 feet deep with a 16-inch casing. The large irrigation well is equipped with a 25 hp line shaft turbine pump that produces 2 cfs with the current pump intake setting at 92 feet. The recommended net positive suction head for this well is 12 feet over the pump intake. In May 2003 the depth to water in the large irrigation well was measured at 58 feet, 3 inches from land surface. The large irrigation well is located 2,450 feet from the proposed site of Eagle Well #3.

46. If Eagle Well #3 withdraws 902 gpm over 6 months it would likely cause 3.6 to 4.5 feet of drawdown in the large irrigation well. If Eagle Well #3 withdraws 280 gpm over 6 months it would likely cause 1.1 to 1.4 feet of drawdown in the large irrigation well. Based on actual observations in the Scanlan Report, the short-term impact of Eagle Well #3, if pumped at the full water right amount of 1458.7 gpm for 51 hours, could be a drawdown of approximately 1 foot in the large irrigation well.

47. Other water rights held by the Chase Estate are more likely to be impacted by the Floating Feather well or have been unused since the 1980’s.

B. Impact on Burton Group Wells.

48. There are a number of domestic wells directly to the north of the Chase Estate's small irrigation well. They are shown on Exhibit 4 and are labeled the Burton Group Wells. Information in the record regarding these wells is limited. *See* Exs. 14 and 400. At least two wells in this area operate under water rights with priority dates of 1917 and 1962. These wells would be hydraulically connected to the proposed Eagle Well #3, although they likely do not penetrate to the deeper aquifer zone. The potential impact on these rights would be expected to range between the predicted impacts on the small and large irrigation wells.

C. Impact on Other Wells.

49. The undisputed testimony is that the proposed Eagle Well No. 3 would have a minimal impact on the wells of Weldon Fisher and Eagle Water Company.

VI. Local Public Interest.

50. Granting the Application would not increase demand upon the overall water supply in the aquifer. The impacts of the Application are in the immediate vicinity of the proposed Eagle Well #3 and #4. Those localized impacts, if substantial, would lead to conflict between domestic and municipal water users. Both types of water use have an immediate and critical need for water. Likewise, the localized impact of Eagle Well No. 3, if substantial, would lead to conflict between the Chase dairy water needs and the municipal water right users. Again, both type of water use have an immediate and critical need for water.

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 a senior priority date is entitled to its water supply before a water right with a junior priority date. As a consequence, the water permitting statute provides that the Director of IDWR may reject a new water right application if “it will reduce the quantity of water under existing rights.” Idaho Code § 421-203A.

2. In the present case it is probable that Eagle Well No. 3 will legally impact at least the quantity of water under water right no. 63-15820. The Idaho Supreme Court stated in Parker v. Wallentine that:

Under the doctrine of prior appropriation, because Parker’s domestic well was drilled prior to Wallentine’s irrigation well, Parker has a vested right to use the water for his domestic well. That right includes the right to have the water available at the historic pumping level or to be compensated for expenses incurred if a subsequent appropriator is allowed to lower the water table and Parker is required to change his method or means of diversion in order to maintain his right to use the water.

103 Idaho 506, 512 (1982) (emphasis supplied). The Idaho Supreme Court went on to note that:

Parker will not be deprived of any right to his use if water can be obtained for Parker by changing the method or means of diversion. The expense of changing the method or means of diversion, however, must be paid by the subsequent appropriator, Wallentine, so that Parker will not suffer any monetary loss. Thus, upon a proper showing by Wallentine that there is adequate water available for both he and Parker, it is within the inherent equitable powers of the court upon a proper showing and in accordance with the views herein expressed to enter a decree which fully protects Parker and yet allows for the maximum development of the water resources of the State.

103 Idaho at 514. IDWR, as an executive agency, does not have the equitable powers of a court to order the Chase Estate to accept payment from Eagle for the impact on the Estate’s right. However, for IDWR to deny the Applications would appear to foreclose for Eagle the option of approaching a district court for equitable relief. A middle approach is for IDWR to authorize Eagle to construct Eagle Well No. 3, more precisely study the well’s impacts, allow the parties to

negotiate regarding compensation for those impacts at Eagle's proposed levels of operation⁵, and then allow Eagle to approach a district court for equitable relief if necessary. The Director concludes that such a procedure would protect water right no. 63-15820 and allow for the development of Eagle Well #3.

3. Because water right no. 63-5226 withdraws water from the dairy-domestic well, the conditions stated in Conclusion No. 2 should also mitigate any impact on this water right.

4. Water right no. 63-5226 is a supplemental irrigation water right that has not been used since 1983. The Director concludes that the supplemental nature of this water right makes it unlikely that its enforcement would preclude the development of Eagle Well #3.

5. Water right no. 63-8663 is diverted through the large irrigation well. The Director concludes that this well is sufficiently distant and potential impacts are so small that it is unlikely that enforcement of this water right would preclude the development of Eagle Well No. 3.

6. The Director concludes that it is reasonably likely that the quantities under other existing water rights will not be reduced so long as the prior appropriation doctrine is enforced. However, based upon the information in the Strowd and Scanlan Reports there are a large number of senior, domestic water rights in the Burton Group Wells up to 2000 feet distant that may experience drawdowns because of Eagle's pumping from Eagle Well #3. A party applying for a permit is not required to show that the proposed use will never interfere with an existing water use. Occasional impacts on senior water rights are resolved by the application of the

⁵ The Hearing Officer struggled with providing an additional time period for the Chase Estate and Eagle to negotiate a resolution to the impacts on water right no. 63-15820. More than adequate time has already been unsuccessfully given for Eagle and the Chase Estate to reach a negotiated settlement in this matter. Two factors suggest additional time would be beneficial. First, allowing Eagle to construct Eagle Well No. 3 and performing a pump test will allow the impacts of the well to be more precisely known. Second, the parties may have been uncertain regarding

priority system. In ground water interference cases, between hydraulically connected ground water rights, the placement of the burden of proof on the junior water right to disprove interference, ensures that senior water users are not harmed by a junior water user. See Martiny v. Wells, 91Idaho 215 (1966). With such condition, which places the risk solely on Eagle, IDWR concludes that there is a reasonable probability that the Applicant will find sufficient water to complete the proposed water use without interfering with senior water rights.

7. The Director concludes that Eagle has not sustained its burden to show the water withdrawals from Eagle Well #4 would not impact quantities under existing rights. No testimony was offered regarding the impacts of Eagle Well #4 and nothing similar to the Strowd Report for Eagle Well #4 was admitted. Eagle Well #4 is not shown on Exhibit 4 and it is unclear what wells and water rights are in its vicinity.

II. Adequacy of the Water Supply.

8. Because Eagle will not increase the amount it will divert under water right no. 63-12448, Eagle has satisfied its burden to show that the water supply impacted by the Application is sufficient both from a water quantity and from a water quality standpoint.

III. Good Faith, Delay or Speculation.

9. IDWR's water appropriation rules provide the following regarding the determination of whether an 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

the legal protection afforded the Chase Estate's domestic water right and, conversely, the district court's equitable power to force the Chase Estate to accept compensation for changing the dairy-domestic well.

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.

10. Eagle has legal access to the property necessary to construct and operate the Eagle Well #3. Eagle has authority to operate a municipal water system and has applied to the Idaho Department of Environmental Quality for approval of Eagle Well #3. Eagle has sustained its burden to show that it intends to construct Eagle Well #3 with reasonable diligence.

11. Eagle has not sustained its burden to show that it intends to construct Eagle Well #4 with reasonable diligence. Eagle could not show that it has legal access to the property upon which the well would be built or that it is likely that legal access would ever be obtained. Eagle's evidence was that Eagle Well #4 was simply a contingent site that may never be built. Allowing this contingent point of diversion would be a trap that could harm future appropriators who develop water rights in the vicinity of Eagle Well #4 under the assumption that it will never be developed.

IV. Sufficiency of Financial Resources.

12. The Director concludes that Eagle has shown that it is reasonably probable that funding is or will be available for construction of Eagle Well #3.

13. The Director concludes that Eagle has not sustained its burden to show that it is reasonably probable that funding is or will be available for construction of Eagle Well #4.

V. Local Public Interest.

14. IDWR's water appropriation rules provide the following regarding the evaluation of whether the Application conflicts with the local public interest:

e. Criteria for determining whether the project conflicts with the local public interest. The director will consider the following, along with any other factors he finds to be appropriate, in determining whether the project will conflict with the local public interest:

i. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;

ii. The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed use; and

iii. Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions.

IDAPA 37.03.08.045. To some extent these regulations may conflict with the new statutory formula for the "local public interest:"

"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.

I.C. § 202B(3).

15. Eagle submitted sufficient details of the proposed design, construction and operation of Eagle Well #3 and directly associated operations, to allow the water resource impact of the project to be evaluated. Because the Application requests that Permit No. 63-12448 be

amended only to add new points of diversion the only area directly affected by the Application is the area within the immediate vicinity of the proposed wells.

16. The biggest local public interest concern is that if a water shortage should occur in the area of Eagle Well #3, an immediate conflict would arise between the dispassionate protection that the prior appropriation doctrine affords senior water rights and the critical needs of municipal water users. The critical needs of the Chase dairy and individual domestic water users would be hard pressed to defend their senior water rights in the face of the pressing needs of a larger group of municipal water users. The conditions stated in Conclusions No. 2 and 6 should prevent this pressure. Eagle's municipal water rights are not immune from the calls of senior water rights. Eagle bears the small risk, but risk nonetheless, that it may never be able to use Eagle Well #3 because of impacts on senior water rights.

17. Having made clear that Eagle bears the risk of any impact to senior water users, IDWR will not second guess Eagle's decision to pursue a City-owned second well, rather than relying upon United Water Idaho's Floating Feather well.

18. With the conditions stated in Conclusions 2, 6 and 16 Eagle has satisfied its burden of showing that approving the Application does not conflict with the local public interest.

VI. Conservation of Water Resources.

19. Approving the Application will not increase the amount of water withdrawn under Permit No. 63-12448. Eagle has satisfied its burden to show that the Application is consistent with the conservation of water resources within the state of Idaho.

VII. Affect on Local Economy.

20. Because the amount of water withdrawn under Permit No. 63-12448 will not be increased, with the conditions stated in Conclusions 2, 6 and 16 which mitigate local impacts,

Eagle has satisfied its burden of showing that approving the Application will not adversely affect the local economy.

VIII. Requirements of Idaho Code § 42-211.

21. The Director concludes that use of water under Permit No. 63-12448 will not be increased.

22. The conditions stated in Conclusions 2, 6 and 16 ensure that approving the Application will not adversely affect senior water rights . Junior water rights which have been developed between April 8, 1998 and June 8, 2001, in the vicinity of proposed Eagle Well No. 3, would not be protected by those conditions. Such junior water rights would have been developed with no knowledge that a large new municipal well could be operating in their vicinity until June 8, 2001. A condition that provides that the effective priority date at Eagle Well #3 for purposes of interference with other waters rights is June 8, 2001, ensures that approving the Application will not adversely affect any water rights developed between April 8, 1998 and June 8, 2001. *See e.g. In re SRBA: Fremont-Madison Irrig. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 461 (1996).

RECOMMENDED ORDER

Based upon these Findings of Fact and Conclusions of Law the Application is GRANTED, in part, and DENIED, in part, as follows:

Water Right Permit No. 63-12448 will be amended to allow for an additional point of diversion in the SW¹/₄ SW¹/₄, Sec. 4, T. 4 N., R. 1 E., B.M., Ada County, Idaho with the following conditions:

1. Wells constructed at this point of diversion shall be constructed in accordance with the rules of the Idaho Department of Water Resources regarding well construction

standards and measurement of diversions and the rules of the Department of Environmental Quality for Public Drinking Water Systems, IDAPA 58.01.08.

2. Before Eagle Well #3, or any other well at this point of diversion, may be connected to Eagle's municipal water system Eagle shall conduct a pump test and analysis of the well, pre-approved by IDWR, that describes the characteristics of the well, the aquifer from which it draws, and the expected impacts of its use, and Eagle will fulfill Conditions a.,b., and c., below. Upon the completion of the pump test and analysis Eagle shall:

- a. Determine the maximum level of sustained average pumping and maximum instantaneous diversion it wishes to operate at this point of diversion. In no event shall such maximum levels exceed those levels currently established in Water Permit No. 63-12448. Upon submitting Eagle's determination to IDWR, such level shall be a limiting condition of Water Right Permit No. 63-12448 on the operation of the well(s) at this point of diversion.
- b. Submit to IDWR a negotiated agreement with the Chase Estate, or its successor, that fully mitigates the impact of the levels of pumping designated pursuant to Condition 2.a. on Water Right No. 63-15820. In the event that no agreement is reached, Eagle must comply with Condition 2.c.
- c. If an agreement is not reached with the Chase Estate, or its successor, as described in Condition 2.b., Eagle must receive equitable relief from an appropriate district court to impose a mitigation agreement pursuant to Parker v. Wallentine 103 Idaho 506, 514 (1982).

3. Eagle shall immediately cease diversion of water at this point of diversion in the event that any senior water right diverting its water within a radial distance of 2,000 feet of the point of diversion is not being completely satisfied, until such time as Eagle establishes to IDWR's satisfaction that either:
 - a. The unsatisfied water right is not being materially affected by the diversion of water under this water right, or
 - b. Other defenses to such regulation, such as the use of an unreasonable means of diversion, are present.
4. The priority date for Water Right Permit No. 63-12448 at this point of diversion shall be June 8, 2001.

Water Right Permit No. 63-12448 will be not amended to allow for an additional point of diversion in the NE¹/₄ SE¹/₄, Sec. 4, T. 4 N., R. 1 E., B.M., Ada County, Idaho.

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 __5th_ day of March 2004.

_____/Signed/_____
PETER R. ANDERSON
Hearing Officer