

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

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 63-32061 IN THE)
NAME OF AVIMOR, LLC, FORMERLY)
KNOWN AS SUNCOR IDAHO, LLC)
_____) **FINAL ORDER**

This matter is before the Director of the Idaho Department of Water Resources (“Director,” “Department” or “IDWR”) on exceptions to a recommended order for approval of the protested application for permit of applicant Avimor, LLC, formerly known as SunCor Idaho, LLC (“SunCor” or “Avimor”). The Director makes the following Findings of Fact, Conclusions of Law, and Final Order approving the application upon conditions as follows:

FINDINGS OF FACT

1. On January 25, 2005, SunCor submitted amended Application for Permit No. 63-32061 (“Application”) seeking 5.0 cubic feet per second (“cfs”) of ground water to be used year-round for municipal purposes at a planned development spanning Ada, Boise and Gem Counties. The Application remarks section states, “municipal use may also include seasonal aquifer recharge” and “[r]echarged water would be rediverted from the aquifer for municipal purposes under pending water right permit 63-31966.” The Application did not include a request to obtain and hold water for reasonably anticipated future needs for a planning horizon associated with diversion and use of water under the Application.

2. The planned development community is primarily to be located northwest of Boise, Idaho in northern Ada County in Spring Valley (“Project”). The proposed points of diversion in the Application are located approximately four (4) to eight (8) miles west of the place of use. A pipeline will be constructed to convey water to the Project. Water diverted and conveyed to the Project under this right will be used in the proposed public water system either directly or following recharge and re-diversion under right 63-31966.

3. The Application proposes that water diverted for recharge be injected through injection wells located several miles east and north of the points of diversion proposed in the Application. The Department has approved three injection wells identified as Injection Well Permit Nos. 63W208001, 63W208002 and 63W208003.

4. On March 11, 2005, the Department issued Permit No. 63-31966 to SunCor authorizing the diversion of 5.0 cfs of ground water for municipal purposes to be diverted year-round from wells as part of the Project. Wells from Injection Well Permit Nos.

63W208001 and 63W208002 may be points of diversion described by Permit No. 63-31966. SunCor has obtained or has applied for other permit approvals associated with the Project and has started development work at the Project site.

5. In April and May of 2005, the Department published notice of the Application. Subsequently, beginning in May 2005, North Ada County Foothills Association, Rod Davidson, Lyle K. Mullins, Hillsdale Estates Homeowners Association, Willowbrook Development, Inc., Little Enterprises Limited Partnership, Garth Baldwin, and Phillip Fry filed protests. All protests except those of Davidson, Mullins, Baldwin, and Fry were dismissed or have been withdrawn.

6. On March 7, 2006, based on its filings with the Idaho Secretary of State, SunCor changed its name to Avimor, LLC. Based on this name change, SunCor has requested that the permit be issued in the name of Avimor, LLC. SunCor hereafter is referred to as Avimor in this order.

7. On April 27, 2006, the Department appointed L. Glen Saxton as the Hearing Officer (“Hearing Officer”) pursuant to IDAPA Rules 37.01.01.410-413 and the relevant provisions of chapter 52, title 67, Idaho Code.

8. On October 31 and November 1, 2006, the Department held a hearing in Boise, Idaho. At the hearing, Albert P. Barker represented Avimor, and Judith M. Brawer represented Davidson, Baldwin and Mullins. Fry represented himself.

9. At the hearing, Avimor deleted two proposed points of diversion located in Section 23, T5N, R1W, B.M. from the Application, leaving a total of four points of diversion.

10. The four points of diversion, generally, are located within the Willow Creek drainage for which surface flow is tributary to the Boise River. However, ground water contours developed from limited data indicate that the direction of ground water flow at the location of the proposed wells is toward the Payette River drainage rather than the Boise River drainage. The Payette River drainage is not closed to new appropriations of either ground or surface water.

11. Avimor has access to the proposed place of use for the Project and to the proposed points of diversion.

12. Through their protests, Davidson, Baldwin, Fry, and Mullins expressed concern that sufficient studies of water availability have not been made, over-appropriation of ground water may occur, ground water contamination may occur, and that the amount of water to be appropriated is excessive. They also suggest a written mitigation plan and a long-term ground water monitoring plan are needed.

13. Davidson, Baldwin, Fry, and Mullins presented no technical data or other specific information for evaluating Avimor’s Project that supported their concerns.

14. Fry suggested a change from the “first in time, first in right” principle to a concept of “equitable sharing” of water.

15. Mullins suggested a moratorium on development and a comprehensive water availability study and IDWR monitoring programs.

16. Davidson and Mullins do not own water rights or wells but instead receive their water from the City of Eagle and United Water Idaho, respectively.¹ Neither the City of Eagle nor United Water Idaho filed protests to the Application. Baldwin lives on Eagle Island, which is approximately 20 miles southwest of the Project, and receives his water from a municipal provider. Fry lives approximately 15 miles southwest of the Project and uses a domestic well for his water. Fry has filed a pending water right application to use ground water for irrigation in the Boise River drainage. None of the four own water rights that could be affected by the Application.

17. SunCor Development Company (“SunCor Development”) is the parent company for SunCor/Avimor. According to its 2005 Annual Report, SunCor Development has nearly \$500 million in assets. SunCor Development’s primary activities include acquisition, development, construction, operation, and sale of residential and commercial properties in the western United States. It is a wholly owned real estate development subsidiary of Pinnacle West Capital Corporation (“Pinnacle West”). According to Pinnacle West’s 2005 Annual Report, it has assets of \$11.3 billion and revenues of \$3 billion. Pinnacle West and SunCor Development are involved in numerous residential, commercial and industrial real estate and electrical energy projects in the western United States.

18. Avimor plans to own and operate water and sewer companies to serve the Project development.

19. In Idaho, municipal and irrigation uses are recognized as beneficial uses of water.

20. Annual ground water recharge tributary to the area of the proposed wells resulting from precipitation is estimated to be approximately 3,500 acre-feet per year (“AFY”), *see* Exh. 23 at ¶ 4, but the true amount is unknown because the area where water is proposed to be appropriated is “hydrologically unexplored.” *See* Exh. 27, p.22.

21. There is speculation about additional recharge to ground water in the Willow Creek Drainage from Farmer’s Union Canal, located on the edge of the northwest Ada County foothills, and from Black Canyon Canal, located on the southern edge of the rim bounding the east and south edge of the Emmett Valley. Although Avimor assumes those canal systems in the Boise and Payette River drainages may recharge ground water in the area of the proposed points of diversion, *see* Exh. 23 at ¶ 4, the canals do not overlie the area and are both located several miles from the Willow Creek Drainage where the wells are proposed.

22. According to the aquifer evaluation commissioned by Avimor for this Application, the western portion of the Spring Valley Ranch overlies a geologically complex, hydrologically unexplored area. *See* Exh. 27 at p.22. Although the ground water resources are characterized as “a significant water resource,” *see id.*, the aquifers underlying Spring Valley Ranch are not quantified.

23. The volumetric diversion sought from this Application could result in diversion of ground water of 3,620 AFY. When combined with the amounts previously

¹ IDWR understands that Davidson at the time of hearing had moved to Oregon but remained owner of the Eagle property.

approved in Permit No. 63-31966, the total volume that could be diverted under the Application and Permit No. 63-31966 would be 7,240 AFY.

24. Full build-out of the Project may require additional appropriations of water. Significant additional residential development is planned in the Northwest Ada County Foothills in the vicinity of the proposed points of diversion.

25. Unappropriated water exists for the use of ground water in the Willow Creek drainage. Avimor's estimates of water availability versus existing water use show there is water available for its use in excess of the amount of water presently used under the existing water rights in the Willow Creek drainage. Plus, water levels in existing wells in the drainage are stable.

26. The quantity of water available for appropriation in the Willow Creek drainage is not known.

27. Avimor proposes a number of water conservation measures including special landscaping, reuse of treated effluent from its sewage treatment plant and limiting the amount of irrigated turf in common areas.

28. On March 13, 2007, the Hearing Officer issued a Recommended Order approving the Application for permit subject to certain conditions.

29. On March 27, 2007, Davidson, Mullins and Baldwin ("Protestants") filed a Petition for Reconsideration of Recommended Order

30. On April 4, 2007, the Hearing Officer denied the petition for reconsideration finding the issues raised were previously considered and his Recommended Order did not need to be changed.

31. On April 17, 2007, Protestants filed their Exceptions to Order Denying Petition for Reconsideration of Recommended Order ("Protestants' Exceptions"), in essence taking exception to the approval of the Application.

32. On April 18, 2007, Avimor filed its Exceptions to Recommended Order, which included both exceptions and suggested clarifications, and on May 1, 2007, Avimor filed its Response to Protestants' Exceptions.

CONCLUSIONS OF LAW

1. This Final Order is issued pursuant to Idaho Code §§ 67-5244 and 67-5246.
2. Section 42-203A(5), Idaho Code, provides, in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved

therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

3. Avimor bears the ultimate burden of persuasion for satisfying the criteria of Idaho Code § 42-203A. IDAPA 37.03.08.40.04.c.

4. Use of water as proposed in the Application will not reduce the quantity of water under existing rights in the Willow Creek Drainage.

5. While the aquifer underlying Spring Valley Ranch is not quantified, Avimor offered evidence including transmissivity and well tests suggesting sufficient capacity. Avimor's estimates indicate excess water is available for appropriation in the Willow Creek Drainage. Thus, if used carefully according to the conditions presented in the Order, and mindful of the local public interest and conservation of water resources, the water supply itself is deemed sufficient for the purposes intended.

6. Given Avimor's development business, its ownership of the land at issue, its record of seeking various permits for the Project, and its progress physically developing the land, the Application is made in good faith and not for delay or speculative purposes.

7. Avimor must show that "it is reasonably probable that [it] can obtain the necessary financing to complete [its] project within the time constraints of the permit and the Idaho Code." *Shokal v. Dunn*, 109 Idaho 330, 335, 707 P.2d 441, 446 (1985). Based on Avimor's financial backing through its parent company, SunCor Development, and SunCor Development's considerable equity, Avimor has established that it has sufficient financial ability to complete the Project.

8. "Local public interest" is defined by Idaho Code § 42-202B(3) 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."

9. The burden of proof as to where the public interest lies rests with Avimor, and as such, Avimor must "show that the project is either in the local public interest or that there are factors that outweigh the local public interest in favor of the project." *See Shokal*, 109 Idaho at 339, 707 P.2d at 450. *See also* IDAPA 37.03.08.40.04.b.

10. The determination of how the public interest is impacted and what the public interest requires is "committed to [IDWR's] sound discretion." *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 606, 759 P.2d 891, 897 (1988) (quoting *Shokal*, 109 Idaho at 339, 707 P.2d at 450).

11. It would not be in the local public interest to allow a single large development entity to hold water rights to a significant portion of a limited public resource for irrigation of common areas when the water may be needed to supply the domestic,

culinary and potable water needs for future development. Accordingly, to the extent feasible, irrigation of common areas, including parks, golf courses, school grounds, and other similar irrigation uses should not be allowed under the proposed appropriation unless that land is irrigated with water already used for culinary/potable use that is recaptured and treated.

12. The Application is not contrary to the conservation of water resources within the state of Idaho if the water is used primarily for domestic, culinary and potable purposes under the municipal water right. The conditions provided in this order seek to ensure Avimor's compliance with this limitation.

13. Although the points of diversion and place of use are at different locations, Avimor intends to use the ground water in the same general locale where it is withdrawn, thus keeping the benefits of the use within the same area or watershed.

14. Under Idaho law, a municipal provider includes "[a]ny corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area" and "[a] corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a 'public water supply' as described in section 39-103(12), Idaho Code." I. C. § 42-202B(5).

15. Municipal purposes "refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, ... which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider." I. C. § 42-202B(6).

16. Planning horizon is defined by Idaho Code § 42-202B(7) as "the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs."

17. Reasonably anticipated future needs is defined by Idaho Code § 42-202B(8) as:

future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans.

18. Protestants suggest that if Avimor qualifies as a municipal provider then it necessarily needs to seek to hold water for its reasonably anticipated future needs and establish a planning horizon consistent with Idaho law. However, none of the statutory references cited by Protestants require that municipal providers hold water for reasonably anticipated future needs. Indeed, Avimor repeatedly made clear in this application process that it was foregoing the opportunity to seek to "reserve" water for such future use.

19. To the extent Protestants' Exceptions may be construed to request further reconsideration of the Hearing Officer's denial of their motion to disqualify him, the request is denied.

20. The Department has the authority to grant a permit upon conditions. Idaho Code § 42- 203A; *Collins Bros. Corp.*, 114 Idaho at 606; IDAPA 37.03.08.050.01.

ORDER

IT IS THEREFORE HEREBY ORDERED that, based upon the foregoing Findings of Fact and Conclusions of Law, Application for Permit No. 63-32061 filed by SunCor, LLC is approved and shall be issued in the name of Avimor, LLC subject to the following conditions:

1. Proof of application of water to beneficial use shall be submitted on or before August 1, 2013.
2. Use of water under the permit shall be subject to all prior water rights.
3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of IDWR that delays were due to circumstances over which the permit holder had no control.
4. The permit holder shall comply with the drilling permit requirements of Idaho Code § 42-235 and the Department's applicable Well Construction Rules.
5. Ground water discharged to a subsurface system must be authorized by a separate injection well permit. At the time of permit approval, reinjection of water diverted under this permit into the ground water is authorized at the following well locations and by the associated injection well permits: NWSESE, Section 1, T5N, R1E (injection well permit no. 63W208001); NWSESE, Section 1, T5N, R1E (injection well permit no. 63W208002); and NWSWSE, Section 6, T5N, R2E (injection well permit no. 63W208003).
6. The water bearing zone to be appropriated is from 200 feet to 1,000 feet.
7. The place of use is within the area served by the public water supply system of Avimor, LLC for use within the Spring Valley Ranch. The place of use is generally located within Sections 1, 12, 13, and 24, T5N, R1E; Sections 5-7, 17, 18, and 20, T5N, R2E; Section 36, T6N, R1E, B.M., and Sections 31 and 32, T6N, R2E.
8. A map depicting the place of use boundary for this water right at the time of this approval shall be attached to the permit for illustration purposes.
9. Use of water under this water right may be affected by a private agreement between Avimor (or its predecessor SunCor) and the North Ada County Foothills Association in connection with an agreed upon water level monitoring program.

10. Water diverted under this right shall not be provided for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.
11. The right holder shall fully utilize treated waste water for irrigation purposes on all common areas, including parks, playgrounds, golf courses and other similar areas, prior to applying any water under this right to such common area parcels. This condition shall not apply to small isolated common area parcels for which connection to the waste water reuse system is not feasible. The right holder shall provide the Department with a schematic of the waste water reuse system identifying any small isolated common area parcels for which the right holder requests this condition not apply.
12. Water diverted under this right may be used for direct irrigation of up to one-half (½) acre per residential lot upon which a home has been constructed.
13. Water used for recharge under this right and rediverted under right 63-31966 for irrigation use on common areas is subject to the condition that where feasible treated waste water shall be used first on these common areas as required by Condition 11.
14. Prior to diversion of water under this right, the permit holder shall prepare and submit an ongoing monitoring and data submittal plan, acceptable to IDWR, to demonstrate that the ground water diverted from authorized points of diversion is tributary to the Payette River drainage.
15. Prior to diversion of water under this right, the permit holder shall provide a means of measurement, acceptable to IDWR, from all authorized points of diversion which will allow determination of the total rate of diversion and volume of water diverted.
16. Prior to or at the time of submitting a proof of beneficial use statement for municipal water use under this right, the permit holder shall provide IDWR with documentation showing the water supply system is being regulated by the Idaho Department of Environmental Quality as a public water supply system and that the permit holder has been issued a public water supply system number.
17. The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

IT IS FURTHER ORDERED that any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt,

or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order may appeal to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

DATED this 7th day of August 2008.


DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August 2008, a true and correct copy of the following document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

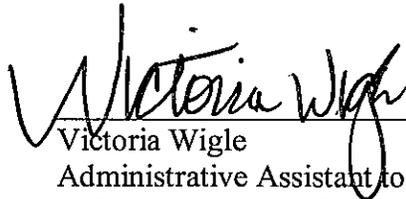
Document(s) served: Final Order

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