

**STARTING
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FILE**

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

**IN THE MATTER OF APPLICATION FOR)
AMENDMENT OF PERMIT NO. 63-12448)
IN THE NAME OF THE CITY OF EAGLE)**

**FINAL ORDER DENYING
REQUESTS FOR COSTS
AND ATTORNEYS FEES**

The Estate of Eleanor I. Chase (“Chase”) filed *Memorandum of Costs and Attorney Fees* pursuant to Idaho Code § 12-117(1) and Idaho Rules of Civil Procedure 54(d) and (e) and *Brief in Support of Request for Attorney Fees and Costs Pursuant to I.C. § 12-117(1)*. In its brief, Chase also requested a hearing. The Director of the Idaho Department of Water Resources (“Director” or “Department”) denies Chase’s request for hearing and also denies Chase’s request for costs and attorneys fees. The Director determines that the City of Eagle (“Eagle”) acted with reasonable basis in fact and law in filing and pursuing its application for amendment. The Director further concludes that based on the recent Idaho Supreme Court opinion in *Rammell v. Idaho State Department of Agriculture*, No. 34927, ___ P.3d ___, 2009 WL 1507748 (Idaho, June 1, 2009) he is without authority to award attorney fees under I.C. § 12-117. The Director also denies Eagle’s requests for costs and attorneys fees in responding to Chase’s request.

BACKGROUND

An application to amend water right permit no. 63-12448 was filed by Eagle and became a contested case when protests were filed against the application for amendment. Chase was one of the protestants. The application for amendment sought to add two points of diversion to water right permit no. 63-12448.

The primary issue before the Department was whether pumping from one or both of the new points of diversion would injure other water rights. The Department reviewed information about several water rights held by Chase and determined, based on expert testimony and evidence, that the proposed diversion of ground water by Eagle would injure two water rights held by Chase for its “dairy-domestic well.” There was insufficient information available to determine whether a third water right held by Chase for its “small irrigation well” would be adversely affected by Eagle’s proposed diversion of ground water, and the Department determined that a fourth water right held by Chase for its “large irrigation well” would not be injured.

On October 6, 2005, Chase filed its request (“Request”) for costs and attorneys fees composed of *Memorandum of Costs and Attorney Fees; Brief in Support of Request for Attorney Fees and Costs Pursuant to I.C. § 12-117(1); Affidavit of Charles L. Honsinger in Support of Memorandum of Costs and Fees; and Affidavit of Matt J. Howard in Support of Memorandum of Costs and Fees*. In its Request, Chase asserts that it was the prevailing party in the contested case and argues that it is entitled to costs and attorneys fees in accordance with Idaho Code § 12-117(1).

On October 19, 2005, Eagle filed its *Objection to Memorandum of Attorneys Fees and Costs* (“Objection”). In its Objection, Eagle asserts that Chase should not be entitled to an award of costs and attorneys fees because Chase was not the prevailing party and that Chase’s Request is frivolous. In the final sentence of its Objection, Eagle states that it “should be awarded the attorneys fees and costs it incurred in responding to Protestant’s frivolous motion.” Objection at p. 9. On November 14, 2005, Chase filed a *Response to Objection to Memorandum of Attorneys Fees and Costs* (“Response”).

AUTHORITY TO AWARD ATTORNEY FEES

Generally an administrative agency does not have authority to award costs and attorneys fees unless specifically authorized by statute or agreement between the parties. *See Idaho Power Company v. Idaho Public Utilities Commission*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981). Until recently, Idaho Code § 12-117(1) was construed to provide a narrow statutory exception to the general rule. Under this statute a court is authorized to award attorneys fees and other expenses to private parties who prevail in litigation with certain governmental entities. Idaho Code § 12-117(1) states:

(1) Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorneys fees, witness fees, and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

In 1989, the Idaho Supreme Court held that the authority to award fees and expenses under Idaho Code § 12-117(1) rests not only with a court, but also with an administrative agency. *Stewart v. Department of Health and Welfare*, 115 Idaho 820, 822-823, 771 P.2d 41, 43-44 (1989). This reading was supported by subsequent case law. *See Ockerman v. Ada County Board of Commissions*, 130 Idaho 265, 267, 939 P.2d 584, 586 (Ct. App. 1997); *Reardon v. Magic Valley Sand and Gravel, Inc.*, 140 Idaho 115, 118, 90 P.3d 340, 343 (2004).

Chase argues it is the prevailing party because, in approving the application, the Director found that the proposed diversion of water would injure water rights held by Chase. In contrast, Eagle contends it is the prevailing party because the Department approved its application to amend water right permit no. 63-12448. In this case, Eagle appropriately filed an application to amend an existing water right permit to serve its expanding needs. Eagle hired an expert who gave testimony presented at the hearing that ground water withdrawals from the proposed Eagle wells would reduce ground water levels at the Chase wells. The expert witnesses hired by Eagle and Chase essentially agreed regarding the potential impact of the proposed diversion of water by Eagle, although whether the existing pumping facilities at two of the wells owned by Chase were currently fully functional was at issue. The Director concludes that Eagle had a reasonable basis in fact and in law for pursuing its claims.

The Idaho Supreme Court's 1989 opinion in *Stewart* holding that an administrative agency has authority under Idaho Code § 12-117(1) to award attorney fees and expenses was reversed by the Court in *Rammell v. Idaho State Department of Agriculture*, No. 34927, ___ P.3d ___, 2009 WL 1507748 (Idaho, June 1, 2009). In reversing *Stewart* the Court in *Rammell* held:

There are two reasons to revisit *Stewart's* holding. First, we must assume that the Legislature meant what it said when it authorized the "court" to award attorney fees under the statute. If the Legislature had intended for administrative officers or agencies to award attorney fees, it would have been easy enough to insert such wording into the statute. Further, the language indicates that the award may be made where the court finds that the party against whom the "judgment" is rendered acted without reasonable basis in fact or law. The decision of an administrative officer or agency is not properly characterized as a judgment-only courts render judgments. We therefore overrule *Stewart* and hold that only a court-and not an administrative officer or agency-can award attorney fees under I.C. § 12-117.

Rammell, ___ P.3d at ___, slip op. at 9-10. Based on the holding in *Rammell*, the Director has no authority to award attorney fees under I.C. § 12-117.

In the final sentence of its Objection, Eagle states that it "should be awarded the attorneys fees and costs it incurred in responding to [Chase]'s frivolous motion" for costs and attorneys fees. Objection at p. 9. Eagle does not cite a rule or statute as a basis for its claim. The Director has no basis or authority to award costs and attorneys fees to Eagle in responding to Chase's Request.


ORDER

IT IS HEREBY ORDERED that the request for costs and attorneys fees, filed by the Estate of Eleanor I. Chase, is DENIED.

IT IS FURTHER ORDERED that the request for costs and attorneys fees, filed by the City of Eagle in responding to the Estate of Eleanor I. Chase's request for costs and attorneys fees, is DENIED.

IT IS FURTHER ORDERED that this is a final order of the Director issued pursuant to Idaho Code § 67-5246 and IDAPA 37.01.01.740. The available procedures and applicable time limits for seeking reconsideration or other relief are set forth in the accompanying sheet entitled "Explanatory Information to Accompany a Final Order" incorporated herein by reference.

Dated this 30th day of June, 2009.


DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June, 2009, a true and correct copy of the above and foregoing document described below was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Final Order Denying Requests for Costs and Attorneys Fees

BRUCE SMITH
MOORE SMITH BUXTON
950 W. BANNOCK, STE 520
BOISE ID 83702

CHARLES L. HONSINGER
RINGERT LAW, CHTD
P. O. BOX 2773
BOISE ID 83701-2773

JIM BURTON
1896 N EAGLE RD.
EAGLE ID 83616

MOLLY O'LEARY
RICHARDSON & O'LEARY
P. O. BOX 7218
BOISE ID 83707

WELDON FISHER
546 E BEACON LIGHT RD.
EAGLE ID 83616

JOHN WESTRA
IDWR - WESTERN REGION
2735 AIRPORT WAY
BOISE ID 83705-5082



Deborah Gibson
Administrative Assistant
Department of Water Resources

**EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER**

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) the petition for reconsideration is disposed of; or
 - (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a 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(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. 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 date of issuance (not service) of the final order, b) the date of issuance 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 section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

**STARTING
RIGHT
SIDE OF
FILE**



State of Idaho
DEPARTMENT OF WATER RESOURCES

322 East Front Street, P.O. Box 83720, Boise, Idaho 83720-0098
Phone: (208) 287-4800 FAX: (208) 287-6700 www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor
GARY SPACKMAN
Interim Director

July 31, 2009

CITY OF EAGLE
PO BOX 1520
EAGLE, ID 83616

PROOF DUE NOTICE

RE: PERMIT NO. 63-12448

IMPORTANT: A response from you is required to maintain the active status of the referenced water right permit. If no response is received from you, the permit will lapse and your authorization to develop and/or use this water right will be cancelled.

Dear Permit Holder:

One condition of approval of the above referenced water permit was that proof of the extent of your beneficial use must be submitted to this office on or before October 01, 2009. (See last page of your approval permit or your last approved extension request.) Enclosed is a form which when accompanied by the license examination fee or a completed field examination report prepared by a certified water right examiner, may be used to submit the required proof, if the water right has been applied to its beneficial use.

If you have not fully completed your project, and you or a previous owner of this permit have not received a prior extension of time, you may request an extension of time if the delay is for reasonable cause as provided in Section 42-204, Idaho Code. If you have been delayed by a federal agency or by litigation that brings title to the water in question, an extension of time may be granted if appropriate documentation is provided at the time of filing. An extension request must be accompanied by a \$50.00 filing fee and signed by the appropriate authorized permit holder(s) or authorized representative with a power of attorney.

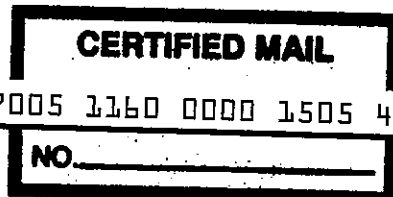
Either an acceptable proof or an acceptable extension request must be received by this department on or before the above proof due date. If neither is received, the department will send you a lapse notice and the permit will no longer be of any force nor effect.

Sincerely,

Darla Block, Technical Records Specialist
Water Allocation Bureau

Enclosures

cc: MOORE SMITH BUXTON & TURCKE





State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov.

JAMES E. RISCH
Governor

KARL J. DREHER
Director

November 16, 2006

VIA FACSIMILE

CHARLES L HONSINGER
RINGERT CLARK
455 SOUTH 3RD
BOISE, ID 83701-2773

TAMMY A ZOKAN
MOORE SMITH BUXTON &
TURCKE
950 W BANNOCK STREET STE 520
BOISE ID 83702

Re: Interpretation of Final Order for Amendment of Permit no. 63-12448 – City of Eagle

Dear Mr. Honsinger and Ms. Zokan:

On September 22, 2005, the Director of the Idaho Department of Water Resources (“the Department”) issued a *Final Order* for an application to amend permit no. 63-12448, authorizing two additional points of diversion for the ground water permit. The *Final Order* refers to points of diversion as “well no. 3” and “well no. 4.” The *Final Order* authorized construction of well no. 3 at a location just east of Eagle Road and approximately due east of the existing Chase Dairy. The *Final Order* determined that the construction and pumping of water by the City of Eagle from well no. 3 would injure water rights held by the Chase Estate.

On November 13, 2006, Charles Honsinger, attorney for the Chase Estate, sent me a letter asserting that the City of Eagle is preparing to construct Well no. 3. Honsinger asked the Department to “require the City of Eagle to cease and desist its drilling activities, until it compensates the Chase Estate as required in the Final Order.” Tammy Zokan, attorney for the City of Eagle, responded to the Honsinger letter, arguing that the *Final Order* does not require full compensation prior to drilling, and that the City has attempted to fully comply with the conditions of approval. Both Honsinger and Zokan have sent additional letters. I have read all of the correspondence and reviewed the *Final Order*.

The condition related to water right nos. 63-15820 (domestic) and 63-5226 (domestic, stock, and commercial), numbered in the *Final Order* as condition no. “(1)” states:

The City of Eagle must compensate the Chase Estate for the loss of production from the dairy domestic well to the full extent of the diversion rate authorized under water right no. 63-15820 (0.04 cfs) and claim no. 63-05226 (0.13 cfs) caused by diverting ground water from Eagle well no. 3 . . .

The condition further explains two alternatives for compensation and also allows the parties to agree to other methods of compensation not expressly stated in the condition. Based on other


correspondence in the file, I understand that the City of Eagle intends to provide water to the Chase Dairy directly from its municipal water system.

The text of the *Final Order* does not require that the means of compensation be physically in place prior to well construction of well no. 3. The City of Eagle can construct well no. 3 prior to having constructed the delivery lines to deliver compensation water to Chase Dairy. Furthermore, the decision does not require that the physical delivery piping from the City of Eagle to the Chase Dairy be constructed and operating prior to the commencement of pumping well no. 3 by the city. Based on the record, however, there is near certainty that pumping well no. 3 will interrupt the water supply to Chase Dairy from the existing Chase Dairy wells, causing significant injury. Any interruption to the supply of water to Chase Dairy after well no. 3 begins pumping will be attributable to the City of Eagle, and will result in swift issuance of a notice of violation to the city, assessment of maximum penalties, and possible cancellation of the permit under Idaho Code § 42-311. I suggest the city connect the Chase Dairy to its municipal system as soon as possible.

In a prior telephone conversation with Honsinger and Zokan, the parties asked whether the City of Eagle was required to compensate the Chase Estate for anticipated injury to water right no. 63-5229 (small irrigation well). In the *Final Order*, the amount of compensation required of the city was limited to the flow rate that could be pumped from the small irrigation well using the existing small irrigation well pump and associated system. The Chase Estate conducted a pump test to determine the pumping capacity of the pump in and the associated delivery system delivering water from the small irrigation well.

Again, as stated above, the decision does not require that the physical delivery piping from the City of Eagle to the Chase Dairy or other method of compensation be constructed and operating prior to the commencement of pumping well no. 3 by the city. Based on the record, however, there is near certainty that pumping well no. 3 will interrupt or significantly diminish the water pumped from the small irrigation well. Actual injury does not occur, however, until the Chase Estate attempts to exercise its water right, and cannot divert the full measure of the right because of the actions of the City of Eagle. Because the Chase Estate has not used the small irrigation well for many years, the urgency of constructing the system for compensation may be diminished. Should the Chase Estate attempt to exercise its small irrigation well ground water right, however, and cannot produce the measured flow rate capacity of the small irrigation well's pumping system after the City of Eagle begins to pump well no. 3, the Department will swiftly issue a notice of violation to the city, assess maximum penalties, and possibly cancel the permit under Idaho Code § 42-311. Upon notice from the Chase Estate that it intends to exercise water right no. 63-5229, I suggest the city expeditiously employ the method of compensation as soon thereafter as possible.

Sincerely,


Gary Spackman

**IDAHO DEPARTMENT OF
WATER RESOURCES**

FAX

**To: Charles Honsinger
Tammy Zokan**

**From: Deborah J. Gibson
(208) 287-4942**

Fax: 342-4657 & 331-1202

Date: November 16, 2006

Phone:

Pages: 3

**Re: City of Eagle Amended Permit
no. 63-12448**

**CC: John Westra, Western Reg.
334-2348**

Urgent For Review Please Comment Please Reply Please Recycle

Attached is a letter from the Department responding to your requests for a decision regarding the City of Eagle's well no. 3 and the Chase Estate.

Please contact me at the above number if you have any problems with the transmission of this fax, or contact Mr. Spackman if you have any questions.

* * * Personal Journal (Nov. 16. 2006 4:42PM) * * *

1) Idaho Dept of Water Resources
2)

(Manual print)

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RX Count

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: Batch
M : Memory
S : Standard
> : Reduction
Q : RX Notice Req.

C : Confidential
L : Send later
D : Detail
H : Stored/D. Server
A : RX Notice

\$: Transfer
@ : Forwarding
F : Fine
* : LAN-Fax

P : Polling
E : ECM
U : Super Fine
+ : Delivery

* * * Personal Journal (Nov. 16. 2006 5:25PM) * * *

1) Idaho Dept of Water Resources
2)

(Manual print)

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TX Count

034280

RX Count

022673

: Batch
M : Memory
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C : Confidential
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S : Transfer
@ : Forwarding
F : Fine
* : LAN-Fax

P : Polling
E : ECM
U : Super Fine
+ : Delivery

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW
950 W. BANNOCK STREET, SUITE 520
BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

WA

STEPHANIE J. BONNEY
SUSAN E. BUXTON*
PAUL J. FITZER
MICHAEL C. MOORE†
BRUCE M. SMITH
PAUL A. TURCKE*
CARL J. WITHROE»*
TAMMY A. ZOKAN*

* NOV 17 2006 * Faxed copy received 11/16/06 - dy
JOHN J. MCFADDEN**
of Counsel

» Also admitted in California
* Also admitted in New Mexico
* Also admitted in Oregon
* Also admitted in South Dakota
† Also admitted in Washington

November 16, 2006

Charles L. Honsinger
Ringert Clark
455 South 3rd
Boise, Idaho 83701-2773
Fax: 342-4657

Gary Spackman
Idaho Department of Water Resources
Idaho Water Center
P.O. Box 83720
Boise, Idaho 83720-0098
Fax: 287-6700

John Westra
Idaho Department of Water Resources
2735 Airport Way
Boise, Idaho 83705-5082
Fax: 334-2348

Re: Chase Estate's November 15, 2006, Letter - City of Eagle Water Right Permit No. 63-12448

Dear Charlie:

Unfortunately, the Chase Estate unnecessarily persists in its efforts to continue the battle over the City's approved Well No. 3. Such skirmishes are unnecessary and costly to all concerned. However, no matter the allegations of the Chase Estate, the Final Order does not require the City to install mitigation measures prior to construction of the City's Well. (Although the City has done its best to gain access and install mitigation prior to well construction. In fact, the City is scheduled to install the connection in the right-of-way today.) The Order requires the City to mitigate for injury "caused by diverting ground water from Eagle well no. 3." Order at (1), p. 31. The City has always committed to mitigate for injury caused by Eagle Well No. 3 and will do so in accordance with the Order. Again, any further delay is uncalled for and would be contrary to the Order and prejudicial to the City.

Sincerely,

MOORE SMITH BUXTON & TURCKE, CHARTERED



Tammy A. Zokan

cc City of Eagle
City Engineer

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW
950 W. BANNOCK STREET, SUITE 520
BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

STEPHANIE J. BONNEY
SUSAN E. BUXTON*
PAUL J. FITZER
MICHAEL C. MOORE*
BRUCE M. SMITH
PAUL A. TURCKE*
CARL J. WITTHROEN*
TAMMY A. ZOKAN*

JOHN J. McFADDEN*
Of Counsel

* Also admitted in California
* Also admitted in New Mexico
* Also admitted in Oregon
* Also admitted in South Dakota
* Also admitted in Washington

November 16, 2006

Charles L. Honsinger
Ringert Clark
455 South 3rd
Boise, Idaho 83701-2773
Fax: 342-4657

Gary Spackman
Idaho Department of Water Resources
Idaho Water Center
P.O. Box 83720
Boise, Idaho 83720-0098
Fax: 287-6700

John Westra
Idaho Department of Water Resources
2735 Airport Way
Boise, Idaho 83705-5082
Fax: 334-2348

Re: Chase Estate's November 15, 2006, Letter - City of Eagle Water Right Permit No. 63-12448

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Sincerely,

MOORE SMITH BUXTON & TURCKE, CHARTERED


Tammy A. Zokan

cc City of Eagle
City Engineer

*NOV 16 2006

DEPARTMENT OF
WATER RESOURCES

*Faxed copy rec'd
11/15/06 - dg

Laura E. Burri
Jeffrey R. Christenson
David P. Clalborne
D. Blair Clark
S. Bryce Farris
Jon C. Gould
David Hammerquist
Charles L. Honsinger
James P. Kaufman
Jennifer Reid Mahoney
James G. Reld
Daniel V. Steenson

William F. Ringert, of Counsel
Allyn L. Sweeney of Counsel
Samuel Kaufman (1921-1986)

November 15, 2006

Transmitted by Facsimile and By U.S. Mail

Mr. Gary Spackman
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
Fax: (208) 287-6700

Mr. John Westra
Idaho Dept. of Water Resources
2735 Airport Way
Boise, ID 83705-5082
Fax: (208) 334-2348

Re: City of Eagle's letter dated November 15, 2006 - Permit No. 63-12448

Gentlemen:

I am writing to respond to the above referenced letter from the City of Eagle's attorney that is addressed to the three of us, but is directed toward me.

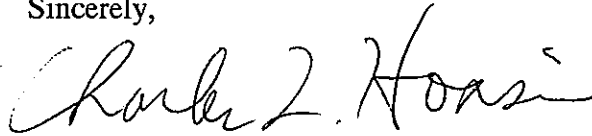
My client vehemently disagrees with the City's characterization of the Chase Estate as "delaying" this process. Through copies of correspondence, I can establish that my clients responded quickly to the City's initial September 1, 2006 request for an Agreement to access the Chase Estate Property to install a backup water supply for the dairy-domestic well, and that it took the City almost a month to respond to the concerns raised by my client regarding that Agreement. I can similarly respond to the other accusations in the City's letter with citations to correspondence and to the record regarding the City's accusations, and hereby reserve the right to do so if necessary in the future.

However, the purpose of my correspondence of November 14, 2006 was to inform you that the City has failed to compensate the Chase Estate for impacts to either the dairy-domestic well or the small irrigation well prior to drilling its well - as is required by the Final Order. Notably, the City does not deny either that the compensation has not been completed or that it is in the process of drilling its Well No. 3. The evidence at hearing and the Final Order itself established that the City's Well No. 3 will negatively impact the Chase Estate's water rights, not that it might do so. To prevent this damage the Director issued a Final Order requiring that the

Gary Spackman
John Westra
November 15, 2006

Chase Estate be compensated before Well No. 3 is drilled. My client simply requests that IDWR and the Director ensure that the intent of the Final Order is implemented - to prevent injury to the Chase Estate before such injury occurs.

Sincerely,

A handwritten signature in cursive script that reads "Charles L. Honsinger". The signature is written in black ink and is positioned above the printed name.

Charles L. Honsinger

cc: Tammy Zokan

**RINGERT CLARK CHARTERED
FAX COVER LETTER**

From: Daniel V. Stecnson
Charles L. Honsinger
S. Bryce Farris
455 South Third Street
Boise, Idaho 83702
ph: (208) 342-4591
fax: (208) 342-4657

Time:

Date: November 15, 2006

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: **Gary Spackman**

WITH: **Idaho Department of Water Resources**

CITY & STATE: **Boise, Idaho**

TELEPHONE NO.: **(208)**

FAX. NO.: **(208) 287-6700**

SENDER: **Charles L. Honsinger**

WE ARE TRANSMITTING **3** PAGES (INCLUDING THIS COVER LETTER)

ADDITIONAL INFORMATION:

**RINGERT
CLARK**
CHARTERED
LAWYERS

November 15, 2006

Transmitted by Facsimile and By U.S. Mail

Mr. Gary Spackman
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
Fax: (208) 287-6700

Mr. John Westra
Idaho Dept. of Water Resources
2735 Airport Way
Boise, ID 83705-5082
Fax: (208) 334-2348

Re: City of Eagle's letter dated November 15, 2006 - Permit No. 63-12448

Gentlemen:

I am writing to respond to the above referenced letter from the City of Eagle's attorney that is addressed to the three of us, but is directed toward me.

My client vehemently disagrees with the City's characterization of the Chase Estate as "delaying" this process. Through copies of correspondence, I can establish that my clients responded quickly to the City's initial September 1, 2006 request for an Agreement to access the Chase Estate Property to install a backup water supply for the dairy-domestic well, and that it took the City almost a month to respond to the concerns raised by my client regarding that Agreement. I can similarly respond to the other accusations in the City's letter with citations to correspondence and to the record regarding the City's accusations, and hereby reserve the right to do so if necessary in the future.

However, the purpose of my correspondence of November 14, 2006 was to inform you that the City has failed to compensate the Chase Estate for impacts to either the dairy-domestic well or the small irrigation well prior to drilling its well - as is required by the Final Order. Notably, the City does not deny either that the compensation has not been completed or that it is in the process of drilling its Well No. 3. The evidence at hearing and the Final Order itself established that the City's Well No. 3 will negatively impact the Chase Estate's water rights, not that it might do so. To prevent this damage the Director issued a Final Order requiring that the

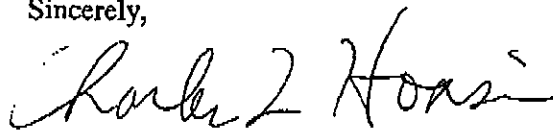
Laura E. Burr
Jeffrey R. Christenson
David P. Claiborne
D. Blair Clark
S. Bryce Fortis
Jon G. Gould
David Hamnerquist
Charles L. Hunsinger
James P. Kaufman
Jennifer Reid Mahoney
James G. Reid
Daniel V. Steenson

William P. Ringert, of Counsel
Allyn L. Swecoby, of Counsel
Samuel Kaufman (1931-1988)

Gary Spackman
John Westra
November 15, 2006

Chase Estate be compensated before Well No. 3 is drilled. My client simply requests that IDWR and the Director ensure that the intent of the Final Order is implemented - to prevent injury to the Chase Estate before such injury occurs.

Sincerely,



Charles L. Honsinger

cc: Tammy Zokan

RECEIVED

WA

*NOV 16 2006

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

WATER PERMIT

*Rec'd by fax 11/15/06.

950 W. BANNOCK STREET, SUITE 520
BOISE, ID 83702

TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

STEPHANIE J. BONNEY
SUSAN E. BUXTON*
PAUL J. FITZER
MICHAEL C. MOORE†
BRUCE M. SMITH
PAUL A. TURCKE‡
CARL J. WITHROE»*
TAMMY A. ZOKAN*

JOHN J. MCFADDEN*†
Of Counsel

» Also admitted in California
* Also admitted in New Mexico
* Also admitted in Oregon
‡ Also admitted in South Dakota
† Also admitted in Washington

November 15, 2006

Charles L. Honsinger
Ringert Clark
455 South 3rd
Boise, Idaho 83701-2773
Fax: 342-4657

Gary Spackman
Idaho Department of Water Resources
Idaho Water Center
P.O. Box 83720
Boise, Idaho 83720-0098
Fax: 287-6700

John Westra
Idaho Department of Water Resources
2735 Airport Way
Boise, Idaho 83705-5082
Fax: 334-2348

Re: Chase Estate's November 14, 2006, Letter - City of Eagle Water Right Permit No. 63-12448

Dear Charlie:

We are very disturbed by your November 14, 2006, letter, which is completely misleading. As you know, in January 2006, the City offered and the Chase Estate accepted the City's proposed mitigation for the Chase Estate water right no. 63-15820 in the amount of 0.04 cfs and claim no. 63-05226 in the amount of 0.13 cfs. As you also know, the City has attempted since September 1, 2006, to get the Chase Estate to agree to allow the City access to the Chase Estate property to install the agreed upon water pipeline. We did not receive the Chase Estate's permission until yesterday, November 14, 2006. The more than 2-month delay in gaining access to install mitigation works was due to the Chase Estate's refusal to cooperate with the City. For example, despite the City's promise to use its best efforts to install the pipeline in the most timely and least intrusive manner possible, the Chase Estate demanded that the City guarantee access through the construction area – the very area selected by the Chase Estate -- or else be obligated to buy all the milk produced by the dairy during construction.

The Chase Estate's November 14, 2006, demand for a cease and desist order is nothing more than a continuation of the Chase Estate's handling of this matter in a way designed to needlessly drive up legal costs for the City and the Chase Estate. The Chase Estate's litigation strategy, its unsubstantiated legal position and its refusal to accept mitigation, have caused the City to suffer substantial delays and significant costs. Even after the City prevailed in this matter, the Chase Estate needlessly delayed and caused expense by refusing to allow the City to provide the mitigation approved by IDWR and the Chase Estate.

Any further delay by the Chase Estate is simply unacceptable.

Supplemental Water Claim No. 63-05229 - Small Irrigation Well

Regarding the small irrigation well, neither the Chase Estate nor the City had any significant information about the well until the Chase Estate was required to conduct a pump test. According to the information submitted by the Chase Estate during the hearing process, claim no. 63-05229 is supplemental to other surface water rights. The Chase Estate acknowledged that it has not pumped the small irrigation well for well over 20 years -- since 1983.

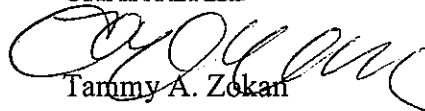
In accordance with section (2) of the Director's Final Order, the Chase Estate finally conducted a pump test of the small irrigation well after modifying the system. The City Engineer reviewed the pump test results report by the Chase Estate and agreed to accept the production capacity of 67 gpm (0.149 cfs) for the small irrigation well after the well system had been modified. The results of the pump test show that production capacity at the small irrigation well is much less than the Chase Estate's claim to 0.42 cfs (188.5 gpm).

The City is not obligated to mitigate for damage that does not occur. Until there is a pump test of the City's well, there is no way to know whether there is any impact to the small irrigation well -- precisely because of the lack of information about the well. We have finally established the well's capacity. The City is prepared to mitigate pursuant to the Order if there is injury. Your demand asks for mitigation in advance, which is not required by Idaho case law, statutes, or the IDWR Order.

The City requests that the Chase Estate simply cooperate to get this work done instead of trying to block every step in the process.

Sincerely,

MOORE SMITH BUXTON & TURCKE,
CHARTERED



Tammy A. Zokan

cc City of Eagle
City Engineer

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AT LAW

550 W. BANNOCK, SUITE 520
BOISE, ID 83712
TELEPHONE (208) 331-1500 FAX (208) 331-1202

FACSIMILE COVER SHEET

DATE: 11-15-06 CLIENT: 1019-3 Chase

TO: Charlie Hnsinger FAX NO.: 342-4657
Gary Spackman FAX NO.: 287-6700
John Westra FAX NO.: 334-2348
City of Eagle FAX NO.: 939-6827
City Engineer FAX NO.: 642-2159
 FAX NO.: _____

RE: City of Eagle Permit No. 63-12448

FROM: _____

NUMBER OF PAGES INCLUDING THIS COVER SHEET: 3

ORIGINAL WILL NOT BE SENT
 ORIGINAL WILL BE SENT BY FIRST CLASS MAIL
 ORIGINAL WILL BE SENT BY FEDERAL EXPRESS

ADDITIONAL COMMENTS:

Please see attached

***** IMPORTANT MESSAGE *****

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MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

950 W. BANNOCK STREET, SUITE 520
BOISE, ID 83702

TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

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TAMMY A. ZOKAN*JOHN J. McFADDEN*
of Counsel* Also admitted in California
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November 15, 2006

Charles L. Honsinger
Ringert Clark
455 South 3rd
Boise, Idaho 83701-2773
Fax: 342-4657Gary Spackman
Idaho Department of Water Resources
Idaho Water Center
P.O. Box 83720
Boise, Idaho 83720-0098
Fax: 287-6700John Westra
Idaho Department of Water Resources
2735 Airport Way
Boise, Idaho 83705-5082
Fax: 334-2348Re: Chase Estate's November 14, 2006, Letter - City of Eagle Water Right Permit No.
63-12448

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Charlie Honsinger
November 15, 2006
Page 2

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Sincerely,

MOORE SMITH BUXTON & TURCKE,
CHARTERED


Tammy A. Zakan

cc City of Eagle
City Engineer

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NOV 15 2006

November 14, 2006

DEPARTMENT OF
WATER RESOURCES

Laura E. Burri
Jeffrey R. Christenson
David P. Claiborne
D. Blair Clark
S. Bryce Farris
Jon C. Gould
David Hammerquist
Charles L. Honsinger
James P. Kaufman
Jennifer Reid Mahoney
James G. Reid
Daniel V. Steenson

William F. Ringert, of Counsel
Allyn L. Sweeney of Counsel
Samuel Kaufman (1921-1986)

Transmitted by Facsimile and By U.S. Mail

Mr. Gary Spackman
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
Fax: (208) 287-6700

Mr. John Westra
Idaho Dept. of Water Resources
2735 Airport Way
Boise, ID 83705-5082
Fax: (208) 334-2348

Re: City of Eagle's failure to Compensate Prior to Drilling Well under Permit No. 63-12448

Gentlemen:

As you may be aware, this law firm represents the Chase Estate with respect to the above referenced matter.

On September 22, 2005, the Director issued the Final Order In the Matter of Amendment of Application for Permit No. 63-12448 in the Name of the City of Eagle. That Final Order approved the City's Application, allowing for two additional points of diversion - Eagle City Wells Nos. 3 and 4. The Director conditioned approval of the new points of diversion, requiring the City to compensate the Chase Estate for loss of production from its dairy-domestic well and for loss of the sustainable diversion rate from its small irrigation well prior to drilling Eagle Well No. 3. *See Final Order*, In the Matter of Amendment of Application for Permit No. 63-12448 in the Name of the City of Eagle, pp. 31 - 32 (Sept. 22, 2005).

The Chase Estate and the City of Eagle have recently been negotiating a license to permit the City to construct a backup water supply to compensate the Chase Estate for the expected losses in its dairy-domestic well. It is expected that the backup water supply will be constructed, although we are not aware of the date that the City intends to begin such construction. The City has not even discussed compensation to the Chase Estate for loss of the sustainable diversion rate from the Chase Estate's small irrigation well, other than to deny its responsibility to compensate for such loss before Eagle City Well No. 3 is drilled.

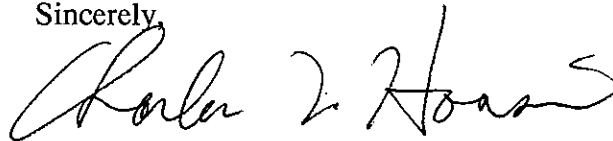
Gary Spackman
John Westra
November 14, 2006
Page 2

Earlier today, Mike Chase, one of the Chase Estate's representatives noticed a drilling rig and backhoe in the location of Eagle City's proposed Well No. 3. (Please see copies of photos attached hereto). Mr. Chase spoke with the drillers and learned that they planned to begin drilling Eagle City Well No. 3 this coming Thursday, November 16.

The City of Eagle's actions to drill Well No. 3 prior to compensating the Chase Estate may very well result in losses of the Chase Estate's ability to pump water from either their dairy-domestic well, or their small irrigation well, and may substantially damage their business. In fact, the evidence at the hearing in this matter established that the Chase Estate's wells would be injured by the City's new well no. 3 and is exactly the reason the Chase Estate protested this Application in the first place. The protections outlined in the Director's September 22, 2005 Final Order were designed and intended to prevent damage to the Chase Estate from the City's proposed new wells. The City's actions in preparing to drill appear to violate the Director's September 22, 2005 Final Order requiring compensation prior to drilling Well No. 3.

Based upon the above, my client respectfully requests that IDWR require the City of Eagle to cease and desist its drilling activities, until it compensates the Chase Estate as required in the Final Order.

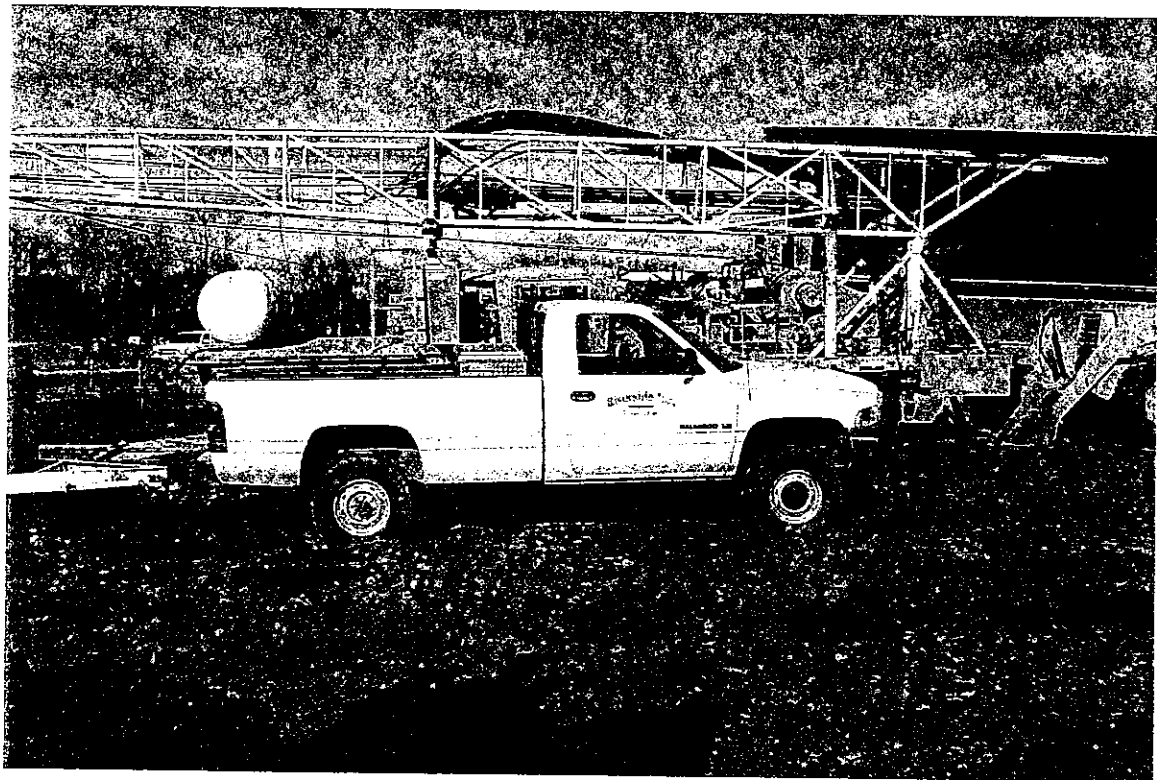
Sincerely,



Charles L. Honsinger

enclosure

cc: Tammy Zokan







ERO Resources Corp.
 3314 Grace Street
 Boise, ID 83703-5836
 (208) 373-7983
 Fax: 373-7985
 Denver • Boise • Durango
 www.eroresources.com
 eroboise@eroresources.com

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FEB 16 2006

DEPARTMENT OF
 WATER RESOURCES

February 14, 2006

Mr. Gary Spackman
 Water Allocation Bureau Chief
 Idaho Department of Water Resources
 P.O. Box 83720
 Boise, ID 83720-0098

RE: Chase Estate Small Irrigation Well Pump Test Results

Dear Gary:

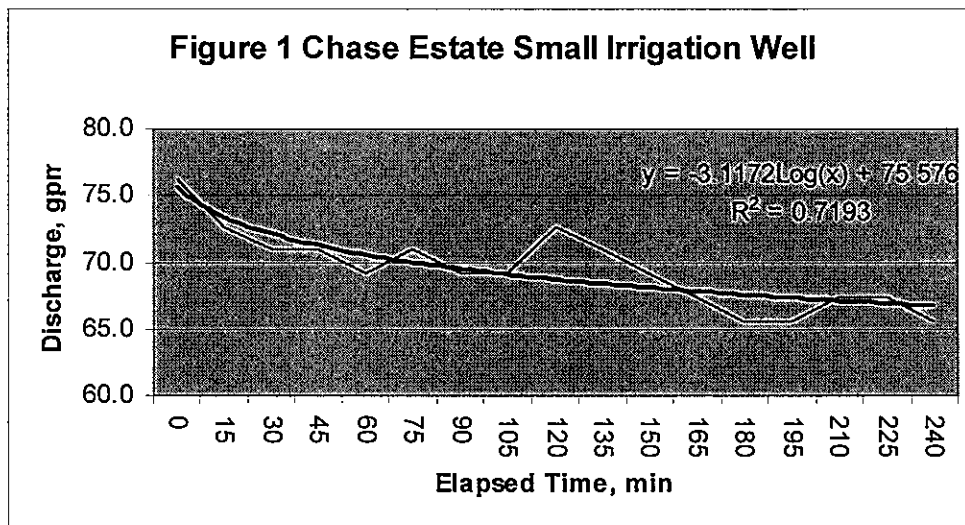
The pump test for the above referenced well was conducted on Friday, February 10, 2006 pursuant to the Final Order in the matter of Application for Amendment of Permit No. 63-12448. Paul Drury, P.E. with ERO Resources Corp. representing the Chase Estate measured the pump discharge through a 3-inch Parshall flume. Ryan Plank, E.I.T. with Holladay Engineering Co. representing the City of Eagle observed the pump test and confirmed the discharge had stabilized. Cynthia Clark with the Idaho Department of Water Resources was also present to observe the pump test. Mike Chase operated the tractor powered generator and well pump for the duration of the test.

The test was conducted in accordance with the accepted Pump Test Proposal dated December 13, 2005. The discharge was measured at 15 minute intervals beginning approximately 9:33 am. After four hours of pumping the rate of change in head on the 3-inch Parshall flume was less than 0.01 feet per hour. The pumping rate was considered sustainable at the conclusion of the test. Table 1 shows the test results.

| Table 1 Chase Estate Small Irrigation Well Pump Test Results | | | | |
|---|-------------------|----------------|----------------|----------------|
| Start Time | Elapsed Time, min | Upper Head, ft | Discharge, cfs | Discharge, gpm |
| 9:33 | 0 | 0.32 | 0.17 | 76.3 |
| | 15 | 0.31 | 0.162 | 72.7 |
| | 30 | 0.305 | 0.158 | 70.9 |
| | 45 | 0.305 | 0.158 | 70.9 |
| | 60 | 0.3 | 0.154 | 69.1 |
| | 75 | 0.305 | 0.158 | 70.9 |
| | 90 | 0.3 | 0.154 | 69.1 |
| | 105 | 0.3 | 0.154 | 69.1 |
| | 120 | 0.31 | 0.162 | 72.7 |
| | 135 | 0.305 | 0.158 | 70.9 |
| | 150 | 0.3 | 0.154 | 69.1 |
| | 165 | 0.295 | 0.15 | 67.3 |
| | 180 | 0.29 | 0.146 | 65.5 |
| | 195 | 0.29 | 0.146 | 65.5 |
| | 210 | 0.295 | 0.15 | 67.3 |
| | 225 | 0.295 | 0.15 | 67.3 |
| | 240 | 0.29 | 0.146 | 65.5 |

The discharge shown in Table 1 was determined from Table 27 – Free-flow discharge through 3-inch Parshall measuring flume in second-feet published in the Water Measurement Manual, second edition, 1967 by the United States Department of the Interior Bureau of Reclamation.

A graphical plot of the discharge over time is shown in Figure 1. The regression equation shown in Figure 1 estimates a flow rate of 68.2 gallons per minute after four hours. For the purpose of this analysis, the sustainable rate of diversion of 66.4 gallons per minute from the small irrigation well is determined from the average discharge during the final hour of the test.




The electrical power voltage and amperage supplied by the tractor powered generator was measured periodically during the pump test and the results are presented in Table 2. The amperage draw at the measured voltage is consistent with a 2 horsepower motor with a 60% efficiency – power factor rating.

| Time | Voltage | Amperage | |
|-------|---------|----------|--------|
| | | Line 1 | Line 2 |
| 10:10 | 237 | 9 | 10 |
| 11:00 | 235 | 10.5 | 9.7 |
| 12:10 | 235 | 10.5 | 10.6 |
| 13:10 | 234 | 10.4 | 10.6 |

The pump test results indicate the sustainable rate of diversion from the small irrigation well is 66.4 gallons per minute. Please call me at (208) 373-7983 if you have any questions regarding this matter.

Sincerely,

A handwritten signature in cursive script that reads "Dave".

David B. Shaw

cc: Mike and Bill Chase
Charlie Honsinger
Bruce Smith
Cynthia Clark
Ryan Plank

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420
BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

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JAN 18 2006
DEPARTMENT OF
WATER RESOURCES

STEPHANIE J. BONNEY
SUSAN E. BUXTON*
MICHAEL C. MOORE†
BRUCE M. SMITH
PAUL A. TURCKE‡
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TAMMY A. ZOKAN*

JOHN J. MCFADDEN*
of Counsel

* Also admitted in Oregon
† Also admitted in Washington
‡ Also admitted in South Dakota
+ Also admitted in New Mexico

January 16, 2006

Karl J. Dreher, Director
Idaho Department of Water Resources
Idaho Water Center
P.O. Box 83720
Boise, Idaho 83720-0098

Re: City of Eagle Water Right Permit No. 63-12448

Dear Mr. Dreher:

In accordance with section (1) of the Director's Final Order, the Chase Estate has accepted the City's offer to provide water service from the City's municipal water system without additional cost to the Chase Estate for water right no. 63-15820 in the amount of 0.04 cfs and claim no. 63-05226 in the amount of 0.13 cfs., as more specifically described in the letters and illustrations dated December 12, 2005, and January 6, 2006, attached hereto.

Please contact me with any questions.

Sincerely,

MOORE SMITH BUXTON & TURCKE,
CHARTERED



Tammy A. Zokan

Enclosures

cc City of Eagle
City Engineer
Charlie Honsinger, Esq.
Gary Spackman, IDWR

January 10, 2006

****Transmitted by Facsimile****

Bruce Smith
Tammy Zokan
Moore Smith Buxton & Turcke, Chtd
225 N. 9th St., Ste. 420
Boise, ID 83702
Fax: (208)331-1202

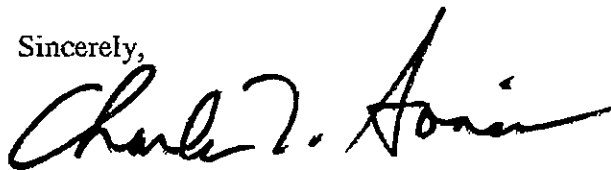
Re: City of Eagle Application to Amend Permit No. 63-12448

Dear Tammy:

Thank you for your letters of December 12, 2005 and January 6, 2006 which, taken together, comprise the City of Eagle's offer to provide service from the City's municipal water system to the Chase Estate without cost to the estate in the amount of 0.04 cfs for water right no. 63-15820 and 0.13 cfs for water right no. 63-05226. This will notify you that the Estate hereby accepts the City's offer as contained in both of your letters with the understanding that the distances in the schematic plan attached to your January 6, 2006 correspondence are estimates, and may need to be adjusted during implementation and construction.

Please contact me with any questions or concerns.

Sincerely,



Charles L. Honsinger

cc: Clients

1017-3
Chase

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420
BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

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JOHN J. MCFADDEN*†
of Counsel

* Also admitted in Oregon
† Also admitted in Washington
‡ Also admitted in South Dakota
* Also admitted in New Mexico

January 6, 2006

Via Hand Delivery

Charles L. Honsinger
Ringert Clark
455 South 3rd
Boise, Idaho 83701-2773

Re: City of Eagle Water Right Permit No. 63-12448

Dear Charlie:

In response to the Chase Estate's request, the City Engineer met on-site with representatives of the Chase Estate on December 28, 2005, to discuss the location of the proposed water supply line. The Chase Estate asked that the water supply line be located on the other side of their house. The City Engineer has made the requested change and the City hereby revises its December 12, 2005, proposal as shown on the attached diagram and schematic.

Since the City granted the Chase Estate's request, the Chase Estate should not have any problem providing written acceptance of the City's offer on or before the January 13, 2006, response deadline. If we do not receive a written acceptance or rejection by January 13, 2006, we will understand that the Chase Estate has rejected the City's offer and the City will proceed in compliance with the Final Order.

Please contact me with any questions.

Sincerely,

MOORE SMITH BUXTON & TURCKE,
CHARTERED



Tammy A. Zokan

Enclosures

cc City of Eagle
City Engineer

50 0 50 100

SCALE: 1 INCH=50 FEET

PIPE NOT TO SCALE



LEGEND

-  12" CITY OF EAGLE
-  16" UNITED WATER CO.
-  12" EAGLE WATER CO.
-  2" WATER SERVICE
-  CHASE WATER DISTRIBUTION LINE
-  CHASE DAIRY DOMESTIC WELL

NOTES:

- ① AERIAL PHOTO ALIGNMENT AND SCALE APPROXIMATE
- ② ROAD RIGHT OF WAY NOT SHOWN

HE HOLLADAY ENGINEERING CO.
 ENGINEERS • CONSULTANTS
 32 N. MAIN P.O. BOX 235 PAYETTE, ID 83661
 (208) 642-3304 • FAX# (208) 642-2159
 EMAIL: hec@holladayengineering.com

REUSE OF DOCUMENTS
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**CITY OF EAGLE, BROOKWOOD WELL
 CHASE MITIGATION PLAN
 MAP OF DIAGRAM ITEM 1**

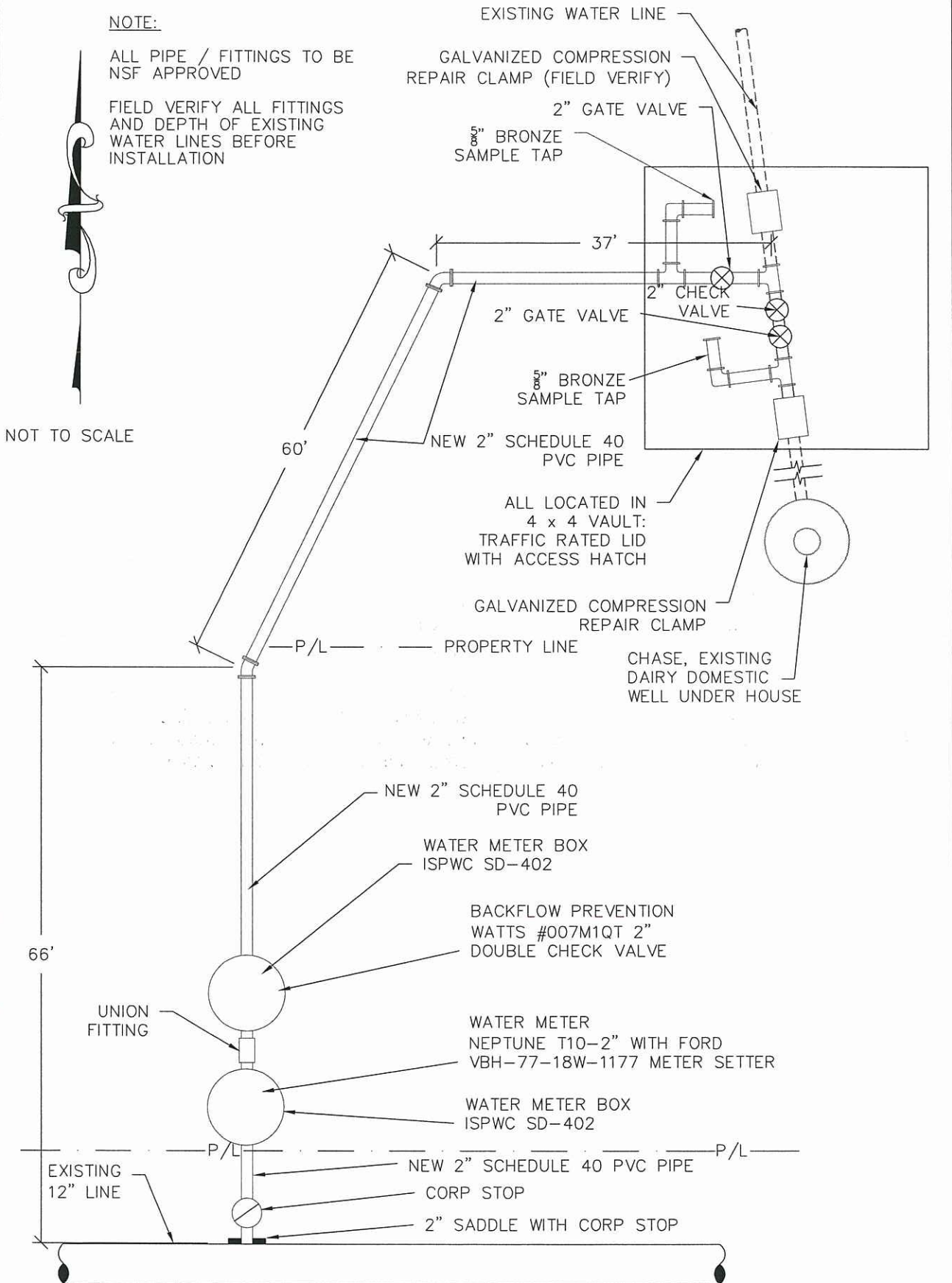
JOB NO: EG014100
 DATE: 10/25/05
 PLOTTED: 10/25/05
 CADD FILE: S:\EG\014100\014100_BOS.DWG
 DRAWN BY: CHD
 CHECKED BY: FGD
 PAGE

NOTE:

ALL PIPE / FITTINGS TO BE NSF APPROVED

FIELD VERIFY ALL FITTINGS AND DEPTH OF EXISTING WATER LINES BEFORE INSTALLATION

NOT TO SCALE



HE HOLLADAY ENGINEERING CO.
 ENGINEERS • CONSULTANTS
 32 N. MAIN P.O. BOX 235 PAYETTE, ID 83661
 (208) 642-3304 • FAX# (208) 642-2159
 EMAIL: hec@holladayengineering.com

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CITY OF EAGLE, BROOKWOOD WELL CHASE MITIGATION PLAN SCHEMATIC ITEM 1

| | |
|-------------|----------------------------|
| JOB NO. | 014100_05 |
| DATE: | 10/25/05 |
| PLOTTED | 10/25/05 |
| CADD FILE: | C:\EG\014100\014100_05.DWG |
| DRAWN BY: | CHD |
| CHECKED BY: | FGD |

Chase Estate Small Irrigation Well
Pump Test Proposal
December 13, 2005

This proposal is prepared in response to condition (2) in the approval of application for amendment of permit no. 63-12448 in the name of the City of Eagle, Final Order dated September 22, 2005. Condition (2) states, in relevant part:

Before construction of Eagle well no. 3 in SWSW, Section 4, T4N, R1E, is completed and ground water is diverted from Eagle well no. 3, the Chase Estate may conduct a pump test using the small irrigation well. The Department must pre-approve the test, and the City of Eagle must be allowed to participate in the test. The test must use presently in-place pumping equipment and be conducted for a sufficient duration to establish the current sustainable rate of diversion. Any sustainable rate of diversion within the diversion rate limitation of claim no. 63-05229 (0.46 cfs) will be recognized as diversion capacity that will no longer be available because of declines caused by diverting ground water from Eagle well no. 3 in the SWSW, Section 4, T4N R1E (sic) The City of Eagle must compensate the Chase Estate for an loss of proven, sustainable diversion rate from the small irrigation well.

Finding of Fact 29 in the Final Order approving the application for amendment of permit no. 63-12448 correctly describes the small irrigation well as having a 4-inch casing where it is exposed and it is reported to be 280 feet deep. The well is equipped with a 2 horsepower, centrifugal, end suction pump that was used historically to divert from this well and will be used for the pump test. The well bore cannot be accessed while the pump is installed so drawdown measurements will not be possible during the test.

Contrary to Finding of Fact 29, the well casing does not rise to ground surface. The casing ends below ground surface in a pit where the pump is installed immediately above the casing. The pit is approximately 13 feet deep and was in place when the pump and well were last used. The pump discharges through the side of the pit into a conveyance to the field where the water is applied for irrigation purposes.

The condition of the pipes discharging from the pump through the side of the pit and into the conveyance ditch was unknown at the time the above order was issued. The pipes were removed and an open ditch is currently in place where the pipes were located. The open ditch will facilitate measurement of the pump discharge and make the discharge visible to those observing the pump test.

The purpose of the proposed pump test is to determine the "... current sustainable rate of diversion ..." rather than to determine aquifer characteristics or possible impacts on other wells in the area. This proposal is to pump the small irrigation well until the discharge is stabilized. That stabilized discharge will be the required sustainable rate of diversion.

Measurement of the pump discharge will be by a 3-inch Parshall flume installed in the open ditch downstream from the pump discharge. The 2 horsepower, centrifugal, end suction pump will be powered by a tractor driven generator since power is not currently installed at the pump site. Voltage and amperage will be monitored to be certain the power supplied by the generator is the same as the name plate rating of the pump motor.

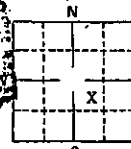
In November 2003 the Chase Estate large irrigation well was pumped for about 4½ hours at over 600 gpm. The water level in the well was measured while the well was being pumped and for an additional 2 hours after the pump was turned off. The drawdown and recovery curves do not show any unexpected variations indicating boundary conditions had been encountered. The large irrigation well is located about 1,600 feet northwest of the small irrigation well. A copy of the well log for the large irrigation well is attached to this plan. The land surface elevation at the large irrigation well is about 25 feet higher than the land surface elevation at the small irrigation well.

The length of time to pump the small irrigation well to determine a sustainable discharge will be a minimum of 4 hours or until the rate of change of the discharge has stabilized, whichever is longer. If the 4 hours of pumping has expired and the rate of change in discharge as measured by the change in head on the 3-inch Parshall flume is less than 0.01 feet per hour the discharge rate will be considered to be sustainable. The discharge as measured by the 3-inch flume will be reported as the sustainable discharge rate for the Chase Estate small irrigation well in compliance with condition (2) of the Final Order.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
WELL DRILLER'S REPORT

USE TYPEWRITER OR
BALLPOINT PEN

State law requires that this report be filed with the Director, Department of Water Resources
within 30 days after the completion or abandonment of the well.

| <p>1. WELL OWNER</p> <p>Name <u>Eleanor Chase</u></p> <p>Address <u>Eagle, Idaho 83616</u></p> <p>Owner's Permit No. <u>63-8663</u></p> | <p>7. WATER LEVEL</p> <p>Static water level <u>35</u> feet below land surface.</p> <p>Flowing? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No G.P.M. flow _____</p> <p>Artesian closed-in pressure _____ p.s.i.</p> <p>Controlled by: <input type="checkbox"/> Valve <input type="checkbox"/> Cap <input type="checkbox"/> Plug</p> <p>Temperature _____ °F. Quality _____</p> | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
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| <p>2. NATURE OF WORK</p> <p><input checked="" type="checkbox"/> New well <input type="checkbox"/> Deepened <input type="checkbox"/> Replacement</p> <p><input type="checkbox"/> Abandoned (describe method of abandoning) _____</p> | <p>8. WELL TEST DATA</p> <p><input checked="" type="checkbox"/> Pump <input type="checkbox"/> Sailer <input type="checkbox"/> Air <input type="checkbox"/> Other _____</p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <th>Discharge G.P.M.</th> <th>Pumping Level</th> <th>Hours Pumped</th> </tr> <tr> <td>1753</td> <td>68</td> <td>3</td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> </table> | Discharge G.P.M. | Pumping Level | Hours Pumped | 1753 | 68 | 3 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Discharge G.P.M. | Pumping Level | Hours Pumped | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 1753 | 68 | 3 | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
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| <p>3. PROPOSED USE</p> <p><input type="checkbox"/> Domestic <input checked="" type="checkbox"/> Irrigation <input type="checkbox"/> Test <input type="checkbox"/> Municipal</p> <p><input type="checkbox"/> Industrial <input checked="" type="checkbox"/> Stock <input type="checkbox"/> Waste Disposal or Injection</p> <p><input type="checkbox"/> Other _____ (specify type)</p> | <p>9. LITHOLOGIC LOG 86839</p> <table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th rowspan="2">Hole Diagn.</th> <th colspan="2">Depth</th> <th rowspan="2">Material</th> <th colspan="2">Water</th> </tr> <tr> <th>From</th> <th>To</th> <th>Yes</th> <th>No</th> </tr> </thead> <tbody> <tr><td>28</td><td>0</td><td>3</td><td>Topsoil</td><td></td><td></td></tr> <tr><td></td><td>3</td><td>37</td><td>Brn. Clay w/Sand streaks</td><td></td><td></td></tr> <tr><td></td><td>37</td><td>65</td><td>Sand, Gravel, Rock</td><td></td><td></td></tr> <tr><td></td><td>65</td><td>76</td><td>Brn. Clay</td><td></td><td></td></tr> <tr><td></td><td>76</td><td>78</td><td>Brn. Sand</td><td></td><td></td></tr> <tr><td></td><td>78</td><td>108</td><td>Brn. Clay</td><td></td><td></td></tr> <tr><td></td><td>108</td><td>118</td><td>Brn. Sand Med. to Crse.</td><td></td><td></td></tr> <tr><td></td><td>118</td><td>128</td><td>Gray & White Sand Crse.</td><td></td><td></td></tr> <tr><td></td><td>128</td><td>131</td><td>Brn. Clay</td><td></td><td></td></tr> <tr><td></td><td>131</td><td>158</td><td>Brn. Sand Med.</td><td></td><td></td></tr> <tr><td></td><td>158</td><td>173</td><td>Brn. Clay w/Sand Streaks</td><td></td><td></td></tr> <tr><td></td><td>173</td><td>193</td><td>Brn. Sand Fine to Med.</td><td></td><td></td></tr> <tr><td></td><td>193</td><td>198</td><td>White Sand w/Small Gravel</td><td></td><td></td></tr> <tr><td></td><td>198</td><td>216</td><td>Brn. Sand Med.</td><td></td><td></td></tr> <tr><td></td><td>216</td><td>218</td><td>Brn. Clay w/Sand Streaks</td><td></td><td></td></tr> <tr><td></td><td>218</td><td>228</td><td>Brn. Sand Med.</td><td></td><td></td></tr> <tr><td></td><td>228</td><td>234</td><td>Brn. Clay</td><td></td><td></td></tr> <tr><td></td><td>234</td><td>248</td><td>Brn. & White Sand Med. to Crse.</td><td></td><td></td></tr> <tr><td></td><td>248</td><td>327</td><td>Brn. Sand Fine to Med.</td><td></td><td></td></tr> <tr><td></td><td>327</td><td>338</td><td>Brn. Clay</td><td></td><td></td></tr> </tbody> </table> | Hole Diagn. | Depth | | Material | Water | | From | To | Yes | No | 28 | 0 | 3 | Topsoil | | | | 3 | 37 | Brn. Clay w/Sand streaks | | | | 37 | 65 | Sand, Gravel, Rock | | | | 65 | 76 | Brn. Clay | | | | 76 | 78 | Brn. Sand | | | | 78 | 108 | Brn. Clay | | | | 108 | 118 | Brn. Sand Med. to Crse. | | | | 118 | 128 | Gray & White Sand Crse. | | | | 128 | 131 | Brn. Clay | | | | 131 | 158 | Brn. Sand Med. | | | | 158 | 173 | Brn. Clay w/Sand Streaks | | | | 173 | 193 | Brn. Sand Fine to Med. | | | | 193 | 198 | White Sand w/Small Gravel | | | | 198 | 216 | Brn. Sand Med. | | | | 216 | 218 | Brn. Clay w/Sand Streaks | | | | 218 | 228 | Brn. Sand Med. | | | | 228 | 234 | Brn. Clay | | | | 234 | 248 | Brn. & White Sand Med. to Crse. | | | | 248 | 327 | Brn. Sand Fine to Med. | | | | 327 | 338 | Brn. Clay | | |
| Hole Diagn. | Depth | | Material | Water | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | From | To | | Yes | No | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 28 | 0 | 3 | Topsoil | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 3 | 37 | Brn. Clay w/Sand streaks | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 37 | 65 | Sand, Gravel, Rock | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 65 | 76 | Brn. Clay | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 76 | 78 | Brn. Sand | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 78 | 108 | Brn. Clay | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 108 | 118 | Brn. Sand Med. to Crse. | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 118 | 128 | Gray & White Sand Crse. | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 128 | 131 | Brn. Clay | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 131 | 158 | Brn. Sand Med. | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 158 | 173 | Brn. Clay w/Sand Streaks | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 173 | 193 | Brn. Sand Fine to Med. | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 193 | 198 | White Sand w/Small Gravel | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 198 | 216 | Brn. Sand Med. | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 216 | 218 | Brn. Clay w/Sand Streaks | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 218 | 228 | Brn. Sand Med. | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 228 | 234 | Brn. Clay | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 234 | 248 | Brn. & White Sand Med. to Crse. | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 248 | 327 | Brn. Sand Fine to Med. | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | 327 | 338 | Brn. Clay | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| <p>4. METHOD DRILLED</p> <p><input type="checkbox"/> Rotary <input type="checkbox"/> Air <input type="checkbox"/> Hydraulic <input checked="" type="checkbox"/> Reverse rotary</p> <p><input type="checkbox"/> Cable <input type="checkbox"/> Dug <input type="checkbox"/> Other _____</p> | <p>10.</p> <p>Work started <u>10-6-80</u> finished <u>10-13-80</u></p> | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| <p>5. WELL CONSTRUCTION</p> <p>Casing schedule: <input checked="" type="checkbox"/> Steel <input type="checkbox"/> Concrete <input type="checkbox"/> Other _____</p> <table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th>Thickness</th> <th>Diameter</th> <th>From</th> <th>To</th> </tr> </thead> <tbody> <tr> <td><u>.312</u> inches</td> <td><u>16</u> Inches</td> <td><u>2</u> feet</td> <td><u>144</u> feet</td> </tr> <tr> <td><u>.312</u> inches</td> <td><u>16</u> Inches</td> <td><u>224</u> feet</td> <td><u>244</u> feet</td> </tr> <tr> <td><u>.312</u> inches</td> <td><u>16</u> Inches</td> <td><u>324</u> feet</td> <td><u>332</u> feet</td> </tr> </tbody> </table> <p>Was casing drive shoe used? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>Was a packer or seal used? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>Perforated? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>How perforated? <input type="checkbox"/> Factory <input type="checkbox"/> Knife <input type="checkbox"/> Torch</p> <p>Size of perforation _____ inches by _____ inches</p> <table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th>Number</th> <th>From</th> <th>To</th> </tr> </thead> <tbody> <tr> <td>_____ perforations</td> <td>_____ feet</td> <td>_____ feet</td> </tr> <tr> <td>_____ perforations</td> <td>_____ feet</td> <td>_____ feet</td> </tr> <tr> <td>_____ perforations</td> <td>_____ feet</td> <td>_____ feet</td> </tr> </tbody> </table> <p>Well screen installed? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Manufacturer's name <u>Roscoe Moss</u></p> <p>Type _____ Model No. _____</p> <p>Diameter <u>16</u> Slot size <u>80</u> Set from <u>144</u> feet to <u>224</u> feet</p> <p>Diameter <u>16</u> Slot size <u>80</u> Set from <u>244</u> feet to <u>324</u> feet</p> <p>Gravel packed? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Size of gravel <u>3/8</u> minus</p> <p>Placed from <u>70</u> feet to <u>338</u> feet</p> <p>Surface seal depth <u>70</u> Material used in seal: <input checked="" type="checkbox"/> Cement grout</p> <p><input type="checkbox"/> Puddling clay <input type="checkbox"/> Well cuttings</p> <p>Sealing procedure used: <input type="checkbox"/> Slurry pit <input type="checkbox"/> Temp. surface casing</p> <p><input checked="" type="checkbox"/> Overbore to seal depth</p> <p>Method of joining casing: <input type="checkbox"/> Threaded <input checked="" type="checkbox"/> Welded <input type="checkbox"/> Solvent Weld</p> <p><input type="checkbox"/> Cemented between strata</p> <p>Describe access port <u>2" pipe welded on side of casing</u></p> | Thickness | Diameter | From | To | <u>.312</u> inches | <u>16</u> Inches | <u>2</u> feet | <u>144</u> feet | <u>.312</u> inches | <u>16</u> Inches | <u>224</u> feet | <u>244</u> feet | <u>.312</u> inches | <u>16</u> Inches | <u>324</u> feet | <u>332</u> feet | Number | From | To | _____ perforations | _____ feet | _____ feet | _____ perforations | _____ feet | _____ feet | _____ perforations | _____ feet | _____ feet | <p>11. DRILLERS CERTIFICATION</p> <p>I/We certify that all minimum well construction standards were complied with at the time the rig was removed.</p> <p>Firm Name <u>PETE COPE DRILLING CO., INC.</u> Firm No. <u>213</u></p> <p><u>P.O. Box 561</u></p> <p>Address <u>Meridian, ID 83642</u> Date <u>10-18-80</u></p> <p>Signed by (Firm Official) <u>Pete Cope</u></p> <p>and</p> <p>(Operator) <u>Jessie Jones</u></p> | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Thickness | Diameter | From | To | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| <u>.312</u> inches | <u>16</u> Inches | <u>2</u> feet | <u>144</u> feet | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| <u>.312</u> inches | <u>16</u> Inches | <u>224</u> feet | <u>244</u> feet | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| <u>.312</u> inches | <u>16</u> Inches | <u>324</u> feet | <u>332</u> feet | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Number | From | To | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| _____ perforations | _____ feet | _____ feet | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| _____ perforations | _____ feet | _____ feet | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| _____ perforations | _____ feet | _____ feet | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| <p>6. LOCATION OF WELL</p> <p>Sketch map location must agree with written location.</p>  <p>Subdivision Name _____</p> <p>Lot No. _____ Block No. _____</p> <p>County <u>Ada</u></p> <p><u>NW</u> $\frac{1}{4}$ <u>SE</u> $\frac{1}{4}$ Sec. <u>5</u> T. <u>4N</u> N/S, R. <u>1E</u> E/W.</p> | <p>USE ADDITIONAL SHEETS IF NECESSARY — FORWARD THE WHITE COPY TO THE DEPARTMENT</p> | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |

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NOV 28 1980

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Department of Water Resources
Western Regional Office

KARL

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420
BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

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DEC 13 2005

DEPARTMENT OF
WATER RESOURCES

STEPHANIE J. BONNEY
SUSAN E. BUXTON*
MICHAEL C. MOORE†
BRUCE M. SMITH
PAUL A. TURCKE‡
CHRISTOPHER E. YORGASON
TAMMY A. ZOKAN*

TODD M. LAKEY
Of Counsel

JOHN J. MCFADDEN*‡
Of Counsel

* Also admitted in Oregon
‡ Also admitted in Washington
† Also admitted in South Dakota
* Also admitted in New Mexico

December 12, 2005

Charlie Honsinger
Ringert Clark Chtd.
P.O. Box 2773
Boise, Idaho 83701-2773

Re: City of Eagle Water Right Permit No. 63-12448


Dear Charlie:

In accordance with section (1) of the Director's Final Order, we hereby offer, subject to final approval by the City Council upon your acceptance, to provide service from the City's municipal water system without additional cost to the Chase Estate for water right no. 63-15820 in the amount of 0.04 cfs and claim no. 63-05226 in the amount of 0.13 cfs. See Final Order at p. 31. Upon acceptance and approval, the City will install a 2-inch municipal water service connection from the City's water main. A water meter and backflow prevention valves will be installed in a subsurface meter box in the location of the connection to the City's water main. Sample taps, a backflow protection valve, and a shut-off valve will be placed in a subsurface vault in the location of the connection to the Chase Estate's existing waterline. I have attached a map and schematic showing the service connection and pipe locations.

Please provide the Chase Estate's written acceptance or rejection of the City's offer as soon as possible but no later than January 13, 2006, so that the City can proceed with necessary design and construction. If we do not receive a written acceptance or rejection by January 13, 2006, we will understand that the Chase Estate has rejected the City's offer and the City will proceed in compliance with the Final Order.

Sincerely,

MOORE SMITH BUXTON & TURCKE,
CHARTERED


Tammy A. Zokan

Enclosures

cc Director, Department of Water Resources
City of Eagle
City Engineer



SCALE: 1 INCH=50 FEET
PIPE NOT TO SCALE

LEGEND

- 12" CITY OF EAGLE
- 16" UNITED WATER CO.
- 12" EAGLE WATER CO.
- 2" WATER SERVICE
- CHASE WATER DISTRIBUTION LINE
- ⊙ CHASE DAIRY DOMESTIC WELL

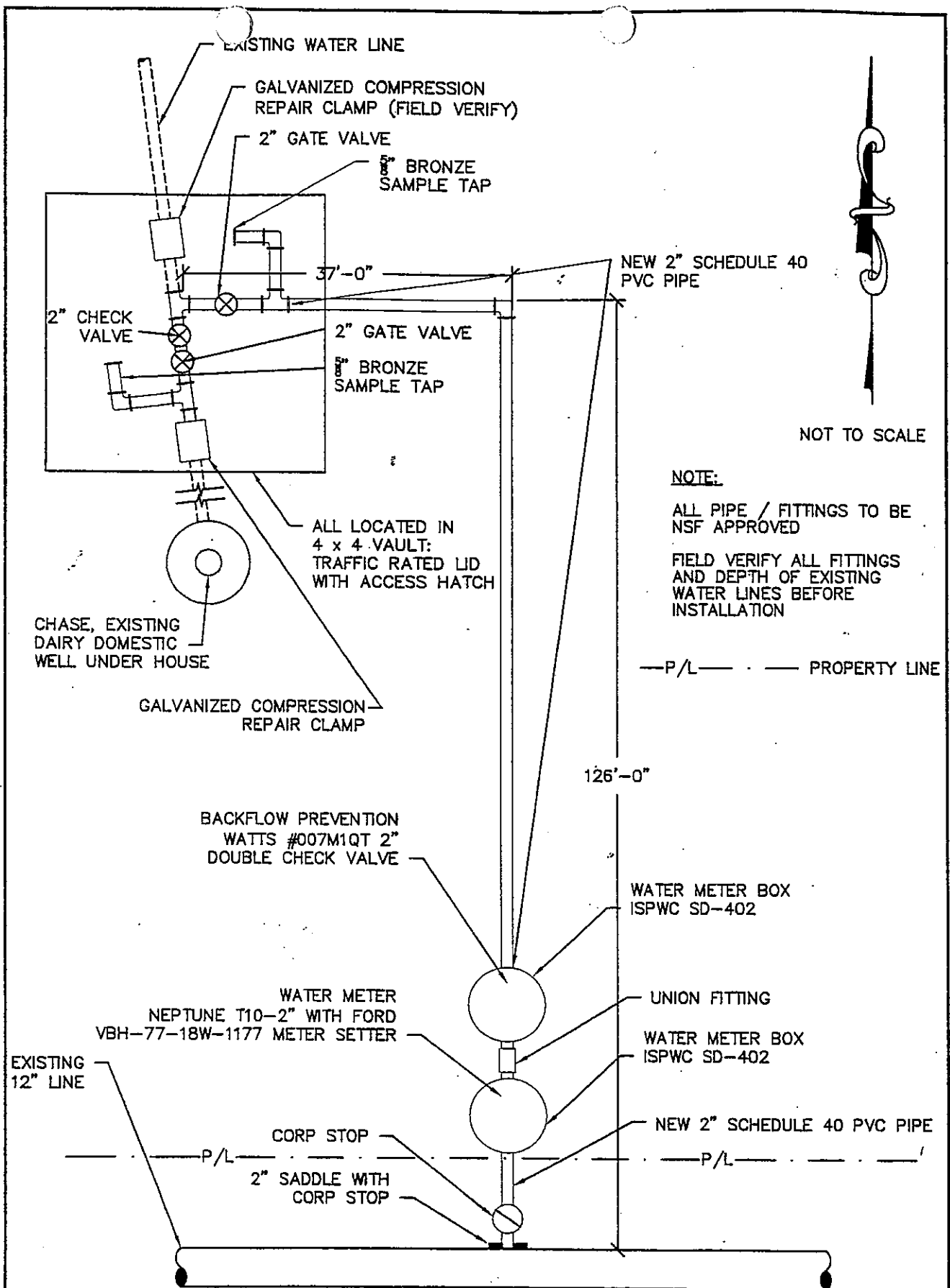
NOTES:

- ① AERIAL PHOTO ALIGNMENT AND SCALE APPROXIMATE
- ② ROAD RIGHT OF WAY NOT SHOWN

HE HOLLADAY ENGINEERING CO.

**CITY OF EAGLE, BROOKWOOD WELL
CHASE MITIGATION PLAN
MAP OF DIAGRAM ITEM 1**

| |
|----------|
| EG014100 |
| 10/25/05 |
| 10/25/05 |
| CHD |
| FGD |



HOLLADAY ENGINEERING CO.
 ENGINEERS • CONSULTANTS
 32 N. MAIN P.O. BOX 235 PAYETTE, ID 83661
 (208) 642-3304 • FAX# (208) 642-2159
 EMAIL: hec@holladayengineering.com

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CITY OF EAGLE, BROOKWOOD WELL CHASE MITIGATION PLAN SCHEMATIC ITEM 1

014100_05
 DATE: 10/25/05
 PLOT: 10/25/05
 CHECKED BY: CHD
 DRAWN BY: EGD
 LAYOUT SHEET

RECEIVED

MAY 14 2005

Department of Water Resources

CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

Attorneys for the Estate of Eleanor I. Chase

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

| | | |
|-------------------------------------|---|-----------------------------|
| _____ |) | |
| IN THE MATTER OF AMENDMENT OF |) | RESPONSE TO OBJECTION TO |
| APPLICATION FOR PERMIT NO. 63-12448 |) | MEMORANDUM OF ATTORNEY FEES |
| IN THE NAME OF THE CITY OF EAGLE |) | AND COSTS |
| |) | |
| _____ |) | |

COMES NOW the Estate of Eleanor I. Chase (hereinafter the "Estate" or "Chase"), by and through its attorneys of record, Ringert Clark Chartered, and hereby submit this *Response* to the City of Eagle's (hereinafter the "City") *Objection to Memorandum of Attorney Fees and Costs* (hereinafter "*Objection*"). This *Response* is supported by the record herein.

ARGUMENT

In its *Objection*, the City attempts to refocus the Director's attention on Chase by using a questionable tactics: first, fail to address the merits of Chase's argument that the City acted unreasonably in this litigation; second, blame the victim of the City's unreasonable conduct for that very same conduct; and third, comb inadmissible correspondence between the parties for statements that purportedly support its irrelevant position and attempt to toss into the record only those selected statements without showing the rest of the correspondence that further establishes the City's unreasonable position in this matter. The Director should reject the City's questionable tactics, focus

on the issue of the City's conduct during these proceedings, and order an award of attorney fees to Chase.

I. The City is Not the Prevailing Party

The City argues that it is the prevailing party in this litigation and that Chase is therefore not entitled to an award of attorney fees. The city's argument that it is the prevailing party is based upon the fact that its application to amend its permit was granted. However, the City either refuses or fails to recognize that although the application was granted, IDWR has ruled "in favor of" Chase because it granted the specific relief sought by Chase: protection or compensation for the loss of production from its dairy-domestic well to the full extent of the diversion rate authorized under water right nos. 63-15820 and 63-05226 caused by diversion of ground water from proposed Eagle well #3. *Final Order*, p. 31-32. Apparently, the City believes that regardless of the conditions that are imposed, so long as their Application is granted they have "prevailed." The City's position contradicts Idaho law which states that "[i]n determining which party an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation of the relief sought by the respective parties." I.R.C.P. 54(d)(1)(B). The fact is, as mentioned above and as discussed in Chase's prior briefing, that Chase obtained exactly the relief it requested through this proceeding, and is now entitled to an award of its attorney fees.¹

II. The City Acted Unreasonably in the Litigation

The City fails to address the merits of Chase's arguments as set forth in its *Brief in Support*

¹ Rather than reiterate at length its argument that it is the prevailing party in this litigation, Chase refers the Director to its *Brief in Support of Request for Attorney Fees and Costs Pursuant to I.C. §12-117(1)* at pp. 3 - 5.

of Request for Attorney Fees and Costs Pursuant to I.C. §12-117. The City does not acknowledge or even address the fact that its positions in this litigation were that “[t]here is no evidence in the record that water rights within 2000 ft. of well #3 will be injured”, and that “drawdowns are not likely to be significant” as a result of the City’s pumping. *Applicant’s Exceptions to Recommended Decision and Order to be Filed with Director*, p. 8. Fortunately, these positions are a matter of record, despite the City’s apparent attempt to refocus the director’s attention on anything but its unreasonable positions.

The City again argues that IDWR’s approval of its application is conclusive evidence that it acted reasonably in this litigation. This despite the fact that the evidence is to the contrary. For example, although the City submitted information in support of its application, it simply refused to admit that the Strowd Report that it submitted established that Chase’s water rights would be injured. Instead, the City continued to argue after the submission of this evidence that “[t]here is no evidence in the record that water rights within 2000 ft. of well #3 will be injured”, and that “drawdowns are not likely to be significant” as a result of the City’s pumping. *Applicant’s Exceptions to Recommended Decision and Order to be Filed with Director*, p. 8. Although Eagle testified at hearing that it was willing to mitigate for impacts its pumping would cause, its subsequent refusal to accept its own expert’s conclusions belie that commitment.

III. The City Does Not Offer All of the Correspondence Regarding “Settlement Offers”

The City offered correspondence that it submitted under seal in an effort to establish that it had acted reasonably with respect to the so called “mitigation” and “settlement” offers it made leading up to and during the litigation. Unfortunately, the City only provides certain correspondence

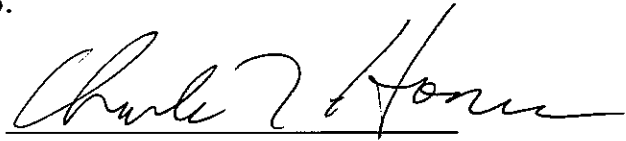
with its filing, notably including only correspondence from the City's counsel to Chase's counsel, without providing the responses to the City's correspondence. Upon review of all of the correspondence, it is obvious that it was the City that acted unreasonably with respect to settlement offers. Because the City filed only certain correspondence with IDWR, Chase must complete the record. Accordingly, just as with the City's filing, Chase files documents herewith under seal to assist the Department in determining the nature of the City's conduct during this litigation. Just as with the City's filing, these documents are not intended to be a part of the record in the underlying case, but are offered to rebut the City's contention that Chase has made false accusations, and should be reviewed with that purpose in mind.

IV. Discretionary Costs, Together with Costs and Attorney Fees Must be Awarded to Chase

The City's argument that Chase is not entitled to discretionary costs to reimburse it for its expert witness fees is exactly the same as its argument that Chase is not entitled to costs and fees at all. That is, that the City is the prevailing party, and conducted this litigation reasonably. Additionally, the City argues that there was no need for Chase's expert given the City's "commitment" to mitigate for impacts caused by its pumping. It is difficult to understand how this position can be squared with the record in which the City specifically disavows impacts to Chase's water rights and argues that drawdowns would not be significant. Regardless, Mr. Shaw's testimony was essential to these proceedings in that it established beyond question that the City's proposed pumping would injure Chase's water rights. In light of the City's position contradicting these conclusions, Mr. Shaw's testimony was both necessary and exceptional, and his fees should be awarded to Chase.

Finally, as to the necessity and reasonableness of the attorney fees claimed, the City makes vague assertions that “most” of the fees and costs were “unnecessary” and then cites to one example in the record without addressing directly the factors listed in I.R.C.P. 54(e)(3). Accordingly, the Director should order an award of fees and costs for Chase in the amount claimed.

DATED This 14th day of November, 2005.


Charles L. Honsinger
RINGERT CLARK, CHARTERED

CERTIFICATE OF SERVICE

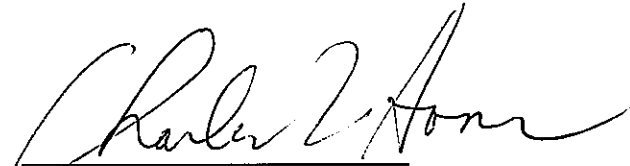
The undersigned certifies that on the 14th day of November, 2005, a true and correct copy of the within and foregoing document was sent to the following person(s) by the method indicated below:

Jim Burton *U.S. Mail*
1896 N. Eagle. Rd.
Eagle, ID 83616

Weldon Fisher *U.S. Mail*
546 E. Beacon Light Rd.
Eagle, ID 83616

Molly O'Leary, Esq. *U.S. Mail*
Richardson & O'Leary, PLLC
P. O. Box 1849
Eagle, ID 83616

Bruce Smith, Esq. *U.S. Mail*
Moore Smith Buxton & Turcke, Chtd
225 N. 9th St., Ste. 420
Boise, ID 83702


Charles L. Honsinger

CHARLES L. HONSINGER (ISB #5240)
RINGERT CLARK CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

RECEIVED
MAY 14 2005
Department of Water Resources

Attorneys for the Estate of Eleanor I. Chase

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

IN THE MATTER OF AMENDMENT OF)
APPLICATION FOR PERMIT NO. 63-12448)
IN THE NAME OF THE CITY OF EAGLE)
_____) DOCUMENTS FILED UNDER SEAL
IN RESPONSE TO OBJECTION TO
MEMORANDUM OF ATTORNEY FEES
AND COSTS

DOCUMENTS FILED UNDER SEAL IN RESPONSE TO OBJECTION TO MEMORANDUM
OF ATTORNEY FEES AND COSTS- Page 1

ORIGINAL

CERTIFICATE OF SERVICE

The undersigned certifies that on the 14th day of November, 2005, a true and correct copy of4 the within and foregoing document was sent to the following person(s) by the method indicated below:

IDWR Director
State Office
322 E. Front St.
Boise, ID 83720

Hand Delivery

Bruce Smith, Esq.
Moore Smith Buxton & Turcke, Chtd
225 N. 9th St., Ste. 420
Boise, ID 83702

U.S. Mail



Charles L. Honsinger

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OCT 19 2005

**DEPARTMENT OF
WATER RESOURCES**

Bruce M. Smith, ISB #3425
Tammy A. Zokan, ISB #5450
MOORE SMITH BUXTON & TURCKE, CHARTERED
Attorneys at Law
225 North 9th Street, Suite 420
Boise, ID 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202

Attorneys for the City of Eagle

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

| | | |
|-------------------------------------|---|-------------------------------|
| IN THE MATTER OF |) | |
| |) | OBJECTION TO |
| CITY OF EAGLE, PETITIONER |) | MEMORANDUM OF ATTORNEY |
| |) | FEES AND COSTS |
| APPLICATION FOR PERMIT NO. 63-12448 |) | |
| |) | |

The City of Eagle, by an through its attorneys of record MOORE SMITH BUXTON & TURCKE, CHARTERED, hereby object to the Memorandum of Costs and Attorney Fees dated October 6, 2005, for the reasons that the Protestant Chase Estate's Memorandum is frivolous and Protestant Chase Estate is not entitled to attorney fees and costs under Section 12-117(1), Idaho Code or Idaho Rule of Civil Procedure 54(d) or (e). The Memorandum of Costs and Fees should be disallowed.

INTRODUCTION

The Applicant, the City of Eagle, is a municipal corporation formed and doing business under the laws of the State of Idaho. On June 8, 2001, the Applicant filed an application to amend its existing water right permit 63-12448 to include two (2) points of diversion (Well #s 3 and 4) to supply water to municipal users within the Applicant's municipal service area. Final

ORIGINAL

Order at p. 2. The Applicant submitted sufficient information about its application for the Department to conduct its evaluation. See Final Order at p. 30. The application was protested and proceedings on the application were delayed while the Applicant attempted to negotiate a settlement of the protests. Final Order at p. 2. A hearing on the application was held on November 13-14, 2003. At the hearing the Applicant testified that it would mitigate for impacts it caused to senior water rights. Final Order at p. 23. The Hearing Officer issued a Recommended Decision and Order and the Applicant filed a Petition for Reconsideration. The Hearing Officer granted reconsideration and issued a Recommended Decision and Order Following Reconsideration (the "Decision"). The Applicant and the Protestant Chase Estate filed Exceptions to the Decision.

The Director then issued a Final Order on September 22, 2005. The Final Order approved Applicant's request to amend its water right to add two (2) points of diversion. Final Order at p. 31. The Final Order further provides that the Applicant mitigate for proven impacts to senior water rights, just as Applicant committed to do throughout this matter. On October 6, 2005, the Protestant Chase Estate filed a Memorandum of Costs and Attorneys Fees and supporting documentation, alleging the Protestant is entitled to Attorney Fees and Costs under Section 117(1), Idaho Code.

The Applicant's application to amend its water to add two (2) points of diversion was approved therefore the Applicant is the prevailing party in this matter. Furthermore, the Applicant acted with a reasonable basis in law and fact throughout the proceedings in this matter. The Protestant Chase Estate's request for costs and attorney fees is not authorized by law, is frivolous and should be disallowed. As this matter has been ongoing since 2001, it is obvious the parties have already devoted extensive time and resources to these proceedings. In the interest of

quickly disposing of this most recent frivolous filing by the Protestant Chase Estate, which has no basis in law or fact, and limiting further burden on the Applicant, the Applicant will be brief and limit the references to the extensive record of this case.

LEGAL STANDARDS

1. Award of Fees and Expenses under Idaho Code § 12-117(1)

Idaho Code § 12-117(1), provides:

Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the *prevailing party* reasonable attorney fees, witness fees and reasonable expenses, *if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.*

Idaho Code § 12-117(1) (emphasis added).

“Attorney’s fees and expenses shall be awarded if: (1) the court finds in favor of the person [requesting fees and costs]; and (2) the governmental party in the litigation acted without reasonable basis in fact or law.” *In the Matter of Application for Transfer 5691 in the Name of Jerome Cheese Company*, Order Denying Motion for Attorney’s Fees, p. 3 (IDWR Nov. 24, 2000) (citing *Stewart v. Department of Health and Welfare*, 115 Idaho 820, 822-23, 771 P.2d 41, 43-44 (1989), *Ockerman v. Ada County Bd. of Comm’rs*, 130 Idaho 265, 267, 939 P.2d 584, 586 (Ct. App. 1997), *State Dep’t of Fin. v. Resource Service Co. Inc.*, 134 Idaho 282, 283-84, 1 P.3d 783, 784-85 (2000)).¹ When the Department approves an application, the applicant is the prevailing party. *Id.* at pp. 3-4.

The purpose of Section 12-117, is: “(1) to serve as a deterrent to groundless or arbitrary agency action; (2) to provide a remedy for persons who have borne unfair and unjustified

¹ A copy of the referenced decision is attached for convenience.

financial burdens defending against groundless charges or attempting to correct mistakes agencies never should have made.” *In the matter of the Estate of Joe Kaminsky, State of Idaho v. Estate of Joe Kaminsky*, --- Idaho ---, --- P.3d ---, 2005 Opinion No. 48 (March 30, 2005) (quoting *Idaho Dept. of Law Enforcement v. Kluss*, 125 Idaho 682, 685, 873 P.2d 1336, 1339 (1994) quoting *Bogner v. State Dept. of Revenue and Taxation*, 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984)).

2. Proceedings Before the Department

The Applicant had the burden of proof for the factors the Department must consider for Applications motion to amend its permit. *Cantlin v. Carter*, 88 Idaho 179, 187, 397 P.2d 761 (1964); *Shokal v. Dunn*, 109 Idaho 330, 339, 707 P.2d. 441 (1985). However, “a protestant who claims a harm peculiar to himself should have the burden of going forward to establish that harm.” *Id.* at 339 (quoting from decision below).

ARGUMENT

1. The Applicant is the Prevailing Party.

The Protestant Chase Estate (“Protestant”) is not entitled to attorney fees and costs under Section 12-117(1), Idaho Code. First, the Protestant has not met the first requirement for entitlement to fees and costs under Section 12-117(1) because Protestant is not the prevailing party. The Department found in favor of the Applicant’s request to add two (2) points of diversion as identified in its application, which was granted as requested. As explained in the case cited by Protestant, *In the Matter of Application for Transfer 5691 in the Name of Jerome Cheese Company, supra*, if an application is granted, the applicant is the prevailing party. *Id.* at pp. 3-4. The same is true in this case wherein the Applicant met its burden of proof and the Department approved the amendment to the Applicant’s water right as requested. Therefore the

Applicant is the prevailing party. Since Protestant is not the prevailing party, its request for costs and attorney's fees should be denied.

2. The Applicant Acted With a Reasonable Basis in Fact and Law.

The Department's approval of Applicant's application is conclusive evidence that the Applicant acted with a reasonable basis in fact and law. Even if we were to pretend that Protestant were the prevailing party, Protestant would not be able to meet the second requirement for an award of fees and costs under Section 12-117(1), because the Applicant acted with a reasonable bases in fact and law throughout this lengthy proceeding: (1) Applicant submitted sufficient information in support of its Application; (2) Applicant met its burden of proof; (3) Applicant committed to mitigate for injury to senior water rights caused by its project; and (4) after hearing and briefing, the Applicant's application was granted.

The Applicant submitted significant reports and testimony in support of its application. See Final Order at pp. 5-6. The Applicant committed to mitigate for impacts the proposed project has on senior water rights. *Id.* at 23. (See also, for example, Exhibit 23, which provides pump replacement options as one of the options for mitigation of impacts to the Chase Dairy Well.) The Applicant also attempted to settle this matter over a period of years before the hearing on this matter. *Id.* at 2, and section 3, below. Finally and most significantly, the Department approved the amendment to Applicant's water right as requested. Clearly, the Applicant's actions were well grounded in fact and law therefore Protestant's request for costs and attorney's fees should be disallowed.

Contrary to Protestant's allegations, it is Protestant who acted without a reasonable basis in fact or law. It is Protestant who failed to meet its burden of proof on its claims of injury and

allegations related to public interest. See Final Order at pp. 12, 14-15, 17, 28-30. Protestant's allegations are frivolous and its request for fees and costs should be denied.²

3. The Award of Costs and Attorney Fees in this Case would be Contrary to the Policy Reasons for Section 12-117(1), Idaho Code.

For the reasons stated herein, the policy reasons for Section 12-117(1), do not support an award of costs and attorney fees to Protestant. There has been no groundless or arbitrary action on the part of the Applicant. Nor have there been groundless charges levied against Protestant or mistakes by Applicant that never should have been made causing Protestant to bear unfair and unjustified financial burdens. The Applicant made an application to add two (2) points of diversion to its municipal water system. Applicant conducted extensive review of its proposal and submitted substantial information in support thereof and committed to mitigate for any injury to senior water rights. Even so, Protestant objected to the application and asked that the Department deny the application. See e.g. Final Order at p. 4. Applicant's application was granted. Now that the application has been granted, Protestant asserts it is the prevailing party. Protestant's assertions are not supported by the lengthy record in this case and its claims for costs and attorney fees are groundless and frivolous. Awarding Protestant costs and fees under these circumstances would be in direct conflict with the reason for allowing such awards. Protestant is not entitled to fees and costs and its request should be disallowed.

4. The Applicant's Settlement Offers Provide Further Proof of Applicant's Ongoing Reasonableness throughout these Proceedings.

In addition to the evidence in the record clearly showing the Applicant acted with a reasonable basis in law and fact, there are years of settlement offers by the Applicant to the

² Applicant should be awarded its fees and costs incurred responding to Protestant's frivolous Motion.

Protestant corroborating the evidence in the record. The Protestant has alleged that it prevailed because mitigation was ordered in this matter and that the Applicant acted unreasonably because it did not agree to provide an alternative water supply or well. These claims are preposterous not only on the record but also in light of the Applicant's repeated offers to provide such mitigation. By making these fallacious claims, the Protestant has made an issue of what was offered to the Protestant before hearing and waived any claim of confidentiality privilege. Consequently, the Applicant is herewith submitting, *under seal*, photocopies of settlement offers by Applicant to the Protestant.³

The settlement offers are not offered as part of the record in the underlying case, which has already been decided in Applicant's favor. The settlement offers are not offered to show bad faith in negotiations to entitle the Applicant to its costs and attorney fees. Instead, these documents are offered to impeach the false accusations asserted by Protestant in its request for costs and attorney fees. These documents are also offered to provide further documentation that the Protestant is not the prevailing party and that the Applicant acted with a reasonable basis in law and fact. In the case the Department requires information regarding mitigation the Applicant offered to Protestant before the hearing, which was more favorable than that ordered, these documents should be reviewed.

5. The Claimed Fees and Costs are Unreasonable and Protestant is not Entitled to Discretionary Costs.

Protestant is not the prevailing party and therefore it would be unreasonable to award Protestant such fees and costs. Even if Protestant were entitled to fees and costs, the claimed

³ Applicant is herewith serving sealed documents on the Protestant Chase Estate and the Department.

fees and costs are not reasonable under Idaho Rule of Civil Procedure 54(e)(3). First, as explained herein, the Applicant filed and supported its application in accordance with applicable rules and regulations, committed to mitigate for impacts it caused, made substantial efforts to settle matter before hearing, and Applicant's application was granted. Additionally, it was the Protestant, not the Applicant who failed to meet its burden on claims of injury and local public interest. See Final Order at pp. 12, 14-15, 17, 28-30. Indeed, most of the claimed fees and charges were unnecessary under the facts as circumstances. The "depositions" and "enormous piles of evidence and documents" "reviewed and analyzed" and "discussed with expert witnesses" and the amount of time incurred by Protestant on this matter were the result of Protestant's witch hunt in support of its request that the Application be denied. For example, the Protestant spent an exorbitant amount of time and resources attempting to support its argument that it is not in the public interest for Applicant to provide water to its citizens and an alternative water provider, and not the Applicant, should provide water to Applicant's citizens. This was a big part of Protestant's case however the Department did not agree with Protestant's position and found in favor of the Applicant. Final Order at p. 30; see, for example, Affidavit of Matt Howard in Support of Memorandum of Costs and Fees at 9/30/05 billing statement; Protestant Exhibits 107, 113-119, 136-140. Moreover alleged "discovery disputes" and "pre-hearing motions" were wholly the creation of Protestant and were without basis and fees and costs incurred thereon are unreasonable. The claimed fees and costs were incurred for unnecessary tasks related to unreasonable and unsuccessful allegations by Protestant. Therefore it is unreasonable to impose such fees and costs on the Applicant.

Finally, Protestant has not made a showing that the claimed discretionary costs are exceptional costs that must be born by the Applicant. For the reasons stated herein the Applicant

was more than reasonable throughout this matter, including in its commitment to mitigate for impacts cause by its proposed project. Even so, the Protestant claims it needed to incur expert fees because the Applicant refused to recognize the need to mitigate for such impacts. The record shows the Protestant's claims are absolutely disingenuous. The claimed discretionary costs for expert fees should not be allowed. In addition, the discretionary costs for faxes, copies, postage, and supplies requested by Protestant are standard fees and costs common to all litigation. Protestant's request for discretionary costs should be disallowed.

CONCLUSION

The Applicant is the prevailing party in this matter. Despite this fact, Protestant has alleged it is the prevailing party and has requested its fees and costs. Protestant's request is without basis and frivolous. For the reasons stated herein Protestant's Memorandum for Costs and Attorney's Fees should be denied and all requested costs and fees disallowed, and Applicant should be awarded the attorney fees and costs it incurred in responding to Protestant's frivolous motion.

MOORE SMITH BUXTON & TURCKE,
CHARTERED



Tammy A. Zokan
Attorneys for City of Eagle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of October, 2005, I caused to be served a true and correct copy of the foregoing OBJECTION TO PROTESTANT CHASE ESTATE'S COSTS ATTORNEY'S FEES by the method indicated below, and addressed to the following:

IDWR
Western Region
2735 Airport Way
Boise, Idaho 83705

U.S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile

Charles L. Honsinger
Ringert Clark Chtd.
P.O. Box 2773
Boise, Idaho 83702

U.S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile

Molly O'Leary
Eagle Water Co.
P.O. Box 1849
Eagle, ID 83616

U.S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile

Jim Burton
1896 N. Eagle Road
Eagle, ID 83616

U.S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile

IDWR Director
State Office
1301 N. Orchard Street
Boise, Idaho 83706

U.S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile



TAMMY A. ZOKAN



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

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5691 IN THE)
NAME OF JEROME CHEESE)
COMPANY)
_____)

**ORDER DENYING MOTION
FOR ATTORNEY'S FEES**

Jerome Cheese Company filed a Motion for Attorney's Fees, Witness Fees, and Reasonable Expenses, pursuant to Idaho Code § 12-117(1), seeking to recover these costs from the City of Jerome. The Idaho Department of Water Resources denies the request for fees and expenses on the grounds that the City of Jerome acted with a reasonable basis in fact and law in objecting to Jerome Cheese's transfer application.

BACKGROUND

This proceeding is an action before the Idaho Department of Water Resources ("Department") to transfer the point of diversion, place of use, season of use, and nature of use of parts of decreed water right nos. 36-02461 and 36-02554 in the name of Jerome Cheese Company ("Jerome Cheese" or "applicant"). Application for Transfer No. 5691 ("application") was filed on March 15, 2000. The City of Jerome ("city" or "protestant") filed an objection to the application on April 7, 2000.

The Department held a hearing on the protested application in Twin Falls on July 25 and 26, 2000. The Department hearing officer, Glen Saxton, presided over the hearing. Attorney Christopher H. Meyer represented Jerome Cheese. Attorney Patrick D. Brown represented the city. At the hearing, sworn testimony was received, exhibits were admitted into evidence, and the application was taken under advisement by hearing officer Saxton.

The primary issue before the Department was whether the economic impact of a departing municipal water customer on the remaining water customers of the city was within the purview of the local public interest criterion of Idaho Code § 42-222 (Finding of Fact No. 7 of Final Order dated November 24, 2000). Thereafter, the Department answered this question in the affirmative, finding that the economic impact of a departing municipal water use customer on the remaining water customers of the city is within the purview of the local public interest criterion and that the Department must consider it (Conclusion of Law No. 6 of Final Order dated November 24, 2000). However, in considering the local public interest, the Department determined that the economic cost to the city and its customers in comparison to other public interest factors did not warrant denial of the transfer application or compensation to the city for lost revenues resulting from the transfer (Conclusion of Law No. 14 of Final Order dated November 24, 2000).

Jerome Cheese subsequently filed its Motion and Brief in Support of Motion for Attorney's Fees, Witness Fees, and Reasonable Expenses. The City thereafter filed its Brief in Opposition to Jerome Cheese's Motion for Attorney's Fees. In support of its motion, Jerome Cheese asserts that it is entitled to attorney's fees and related expenses pursuant to Idaho Code § 12-117(1). Jerome Cheese argues that it is entitled to these fees because the Department found in its favor by granting the water rights transfer and because the city acted without a reasonable basis in fact or law when it objected to the proposed transfer. In its brief, the city argues that it had a reasonable basis in fact and law for its objection.

DEPARTMENT'S AUTHORITY TO GRANT ATTORNEY'S FEES

Generally, an administrative agency has no power to award attorney's fees unless specifically authorized by statute or agreement between parties. See *Idaho Power Co. v. Idaho Public Utilities Comm'n*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981). Idaho Code § 12-117(1) provides a narrow statutory exception to the general rule. Under this statute, a court is authorized to

award attorney's fees and other expenses to private parties who prevail in litigation with certain governmental entities. Specifically, Idaho Code § 12-117(1) (1999)¹ states:

In any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the person reasonable attorney's fees, witness fees and reasonable expenses, if the court finds in favor of the person and also finds that the state agency, the city, the county or the taxing district acted without a reasonable basis in fact or law.

In 1989, the Idaho Supreme Court held that the power to award fees and expenses under Idaho Code § 12-117(1) rests not only with a court, but also with an administrative agency. *Stewart v. Department of Health and Welfare*, 115 Idaho 820, 822-23, 771 P.2d 41, 43-44 (1989). This reading is supported by subsequent case law. See *Ockerman v. Ada County Bd. of Comm'rs*, 130 Idaho 265, 267, 939 P.2d 584, 586 (Ct. App. 1997). The fees and expenses under Idaho Code § 12-117(1) are not discretionary. Attorney's fees and expenses shall be awarded if: (1) the court finds in favor of the person²; and (2) the governmental party in the litigation acted without reasonable basis in fact or law. See *State, Dep't of Fin. v. Resource Service Co. Inc.*, 134 Idaho 282, 283-84, 1 P.3d 783, 784-85 (2000).

APPLICATION OF IDAHO CODE § 12-117(1)

Under Idaho Code § 12-117(1), the first test is that the agency must have found "in favor of" the non-governmental litigant. Applied to this case, the first test has been met as the Department approved the transfer application, even though a significant legal issue was decided in

¹ This statute was recently amended to permit recovery of attorney's fees by the "prevailing party" and not just by a "person" in the action. See 2000 Idaho Sess. Laws 675. However, the 2000 amendment does not apply to this proceeding. Section 2 of the session law states, "This act shall be in full force and effect on and after July 1, 2000, and shall apply to all administrative or civil actions filed on or after the effective date of this act." *Id.* at 676. The transfer application that initiated this contested case was filed on March 15, 2000. Thus, since the transfer application was filed before the effective date of the 2000 amendment, the amendment is not applicable to this case.

² Person is defined broadly and includes corporations. See Idaho Code § 12-117(4)(a).

the city's favor. Jerome Cheese filed Application for Transfer No. 5691 with the Department, requesting a water right transfer of 2.7 cubic feet per second ("cfs") and 516 acre feet per annum ("AFA"). The Department's Final Order dated November 24, 2000, approved the transfer in the full amount requested. Thus, under the plain meaning of the language in Idaho Code § 12-117(1), the Department has ruled "in favor of" Jerome Cheese.

The second inquiry under Idaho Code § 12-117(1) is whether the city acted with a reasonable basis in fact and law. A number of Idaho Appellate cases have examined what qualifies as acting "without a reasonable basis in fact or law" under Idaho Code § 12-117(1). Courts have imposed attorney's fees and expenses where a governmental litigant acted without statutory authority, *Lockhart v. Department of Fish & Game*, 121 Idaho 894, 828 P.2d 1299 (1992); and when a governmental agency acted beyond the authority of a punishment provision of its own rules, *Moosman v. Idaho Horse Racing Comm'n*, 117 Idaho 949, 793 P.2d 181 (1990). Requests for fees under Idaho Code § 12-117(1) have been denied where a governmental party advanced a reasonable, though erroneous, interpretation of an ambiguous statute. See *Rincover v. State, Dep't of Fin.*, 132 Idaho 547, 976 P.2d 473 (1999); *Cox v. Department of Ins.*, 121 Idaho 143, 823 P.2d 177 (Ct. App. 1991); *Idaho Potato Comm'n v. Russet Valley Produce, Inc.*, 127 Idaho 654, 904 P.2d 566 (1995).

The Department finds that this case closely resembles the situation in *Rincover*, *Cox* and *Idaho Potato Comm'n*. The city has advanced a reasonable interpretation of an ambiguous statute, even though the Department ultimately disagreed with the application of the facts of this case to the statute. As noted previously, the city objected to the application of Jerome Cheese to transfer water rights on the basis that it was not in the local public interest. Specifically, the city argued that the economic effect of a departing municipal water use customer on the remaining water customers should be included within the purview of the local public interest. In addition, the city argued that the specific loss of revenue facing the city was significant enough to warrant protection under the

local public interest statute. Jerome Cheese countered, arguing that the economic effect of a departing municipal water customer on the remaining customers is not part of the local public interest.

To support their argument, the city relied on the definition of the local public interest in Idaho Code § 42-203A and the Idaho Supreme Court case *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985). The “local public interest” is defined broadly as “the affairs of the people in the area directly affected by the proposed use...” Idaho Code § 42-203A(5)(e). The Idaho Supreme Court in *Shokal* recognized the vagueness in the legislature’s definition of the local public interest. The court laid out a number of different elements of the local public interest, but also realized that the list was not exhaustive and that elements of the local public interest will not have equal weight in every situation. *Shokal*, 109 Idaho at 338-39, 707 P.2d at 449-50. The court realized that the local public interest was a fact based investigation and that the local public interest varies in different cases. *Shokal*, 109 Idaho at 339, 707 P.2d at 450 (“The relevant elements and their relative weights will vary with local needs, circumstances and interests.”). The court stated that ultimately, the determination of what elements of the public interest are impacted and what the public interest requires is committed to the Department’s sound discretion. *Shokal*, 109 Idaho 330, 339, 707 P.2d 441, 450.

The Department agreed with the city and found that the economic impact of the transfer on the city was part of the local public interest. This was based upon the broad definition of the local public interest set forth in Idaho Code § 42-203A(5) and the broad analysis required under *Shokal v. Dunn* (see Conclusion of Law Nos. 1 - 3 of the Final Order dated November 24, 2000). However, the Department determined that the economic costs to the city do not outweigh the economic and operational interests of the applicant and resulting benefits (see Finding of Fact No. 24 of Final Order dated November 24, 2000). The Department further determined that the economic impacts would not cause excessive harm to the city (see Conclusion of Law No. 7 of Final Order dated

November 24, 2000). When the economic impact to the city was weighed against other public interests, the Department approved the transfer application. However, this does not mean that the city's arguments were without a reasonable basis in fact or law. The questions presented in this case were questions of first impression before the Department. This, coupled with the vague nature of the local public interest and the broad discretion given to the Department in determining what is in the local public interest, suggests that some flexibility should be afforded in litigating these issues.

The purpose of Idaho Code § 12-117 is to: (1) serve as a deterrent to groundless or arbitrary action; and (2) provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made. See *Rincover*, 132 Idaho at 549, 976 P.2d at 475. The Department cannot find that the argument by the city was groundless, arbitrary, or required Jerome Cheese to bear an unfair or unjustified expense. Therefore, the Department cannot hold that the City of Jerome acted without a reasonable basis in law or fact.

IT IS, THEREFORE, HEREBY ORDERED that the applicant's motion for an award of attorney's fees before the Department in this proceeding is DENIED.

IT IS FURTHER ORDERED that this is an Interlocutory Order and that this order shall be considered part of the Department's final order on Application for Transfer No. 5691.

DATED this 24th day of November, 2000

__Signed__
Karl J. Dreher
Director

Bruce M. Smith, ISB #3425
Tammy A. Zokan, ISB #5450
MOORE SMITH BUXTON & TURCKE, CHARTERED
Attorneys at Law
225 North 9th Street, Suite 420
Boise, ID 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202

Attorneys for the City of Eagle

RECEIVED

OCT 19 2005

DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF)

CITY OF EAGLE, PETITIONER)

APPLICATION FOR PERMIT NO. 63-12448)

) FILED UNDER SEAL

) DOCUMENTS FILED UNDER
) SEAL IN SUPPORT OF

) APPLICANT'S OBJECTION TO
) MEMORANDUM FOR COSTS AND
) ATTORNEY'S FEES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of October, 2005, I caused to be served a true and correct copy of the foregoing DOCUMENTS FILED UNDER SEAL by the method indicated below, and addressed to the following:

IDWR
Western Region
2735 Airport Way
Boise, Idaho 83705

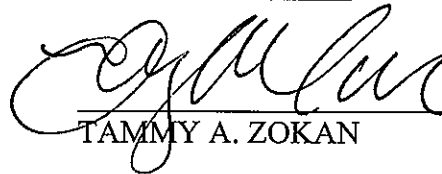
U.S. Mail *FAZ*
 Hand Delivered
 Overnight Mail
 Facsimile

Charles L. Honsinger
Ringert Clark Chtd.
P.O. Box 2773
Boise, Idaho 83702

U.S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile

IDWR Director
State Office
1301 N. Orchard Street
Boise, Idaho 83706

U.S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile



TAMMY A. ZOKAN