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**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)	RECOMMENDED DECISION
OF EAGLE)	AND ORDER FOLLOWING
_____)	RECONSIDERATION

STANDARD FOR DECISION

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

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

* * *

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

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

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

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

IDWR, having examined the application and the written record, and having heard the testimony of the parties, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. Course of Proceedings.

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

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

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

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

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

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

6. A second prehearing conference was held on September 18, 2002. A *Prehearing Order* issued following that conference that (1) pursuant to Eagle's request gave the parties until November 1, 2002, to negotiate regarding settlement of the protests, (2) tentatively scheduled a

¹ James. Burton identified himself as the spokesperson of a number of concerned citizens living on Eagle Road who signed the protest. Letter Received August 13, 2001, at IDWR's Western Region. Many of the signatures on the protest forms were illegible. Only one protest fee of \$25 was received from Darrell E. Davis with this protest. Using the forms and othe submissions in the record the concerned citizens included Darrell Davis, James Burton,

hearing for February 26, 2003, and (3) authorized informal discovery. A *Notice of Hearing* issued on January 10, 2003, setting a hearing for February 26, 2003. That hearing was vacated and formal discovery was authorized on February 4, 2003, in the *Order Granting Petition for Reconsideration and Authorizing Discovery*.

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

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

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

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

Stan Stevens, Stanton Niccolls, Melissa Sadlek, Jason Stinar, William Miller, Chris Brooke, Sheri Kinzer, Steve Capellar, Shelby Conrad, Michael Kilfoyle, Laren Walker, Gary Heikes.

11. Following issuance of the Hearing Officer's *Recommended Decision and Order* on March 8, 2004, Eagle filed a *Petition for Reconsideration of Recommended Decision and Order*. A hearing on the *Petition* was held on April 8, 2004. Following the hearing the *Petition for Reconsideration of Recommended Decision and Order* was granted. Parties were allowed until April 21, 2004, to file briefing on any of the issues raised in the *Petition* or discussed at the hearing. Eagle and James Burton submitted comments.

II. Evidence Considered.

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

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

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

Exhibit 3: Illustration of Eagle Water System.

Exhibit 4: Illustration of Protestants & Eagle Wells.

Exhibit 5: Chart of Eagle Water System changes.

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

Exhibit 7: Municipal Production Bar Graph.

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

Exhibit 9: Eagle Water Company Annual Well Production.

Exhibit 10: Eagle Annual Well Production.

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

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

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

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

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

Exhibit 16: Agreement to Provide Supplemental Fire Flows.

Exhibit 17: Water Line Agreement.

Exhibit 18: December 2, 1997 Agreement.

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

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

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

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

Eagle also joined with the Chase Estate in offering Exhibits 102, 103, 104, 105 and 106, which are described in Finding 13. Exhibits offered by Eagle and admitted in rebuttal to the Protestants' case and part of the record are as follows:

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

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

Exhibit 25 was not admitted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit 136: City of Eagle United Water Operations Reports.

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

Exhibit 138: Cooperative Agreement.

Exhibit 139: Water Line Agreement.

Exhibit 140: Agreement dated December 2, 1997.

Exhibit 141: Well Purchase Agreement.

Exhibit 142: Notice of Claim 63-5224.

Exhibit 143: Partial Decree 63-5225.

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

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

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

Exhibit 147: Notice of Claim 63-8663.

Exhibit 148: License 63-8663.

Exhibit 149: IDWR Field Report 63-8663.

Exhibit 150: Partial Decree 63-15820.

Exhibit 151: Partial Decree 63-18731.

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

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

Exhibit 154: Beneficial Use Field Report 63-12192.

Exhibit 155: Diagram of Selected Well Locations.

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

Exhibit 157: 1952 photograph of barn.

Exhibit 158: 1952 photograph of barn and Chase dairy.

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

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

15. The following individuals testified on behalf of Eagle:

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

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

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

- a. Mr. Mike Chase, Chase Estate.
 - b. Mr. Dave Shaw, ERO Resources, Inc.
 - c. Mr. Bill Chase, Chase Estate.
 - d. Mr. Vernon Brewer, representative of Eagle City Engineer, Holladay Engineering Co.
17. No other party offered exhibits or testimony for IDWR's consideration.

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

III. Applicant and Permit No. 63-12448.

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

Source of Water:	Ground water from the water bearing zone from 183 to 602 feet.
Point(s) of Diversion:	NW¼, SW¼ Sec. 3, T4N, R1E, B.M., Ada County, Idaho. SW¼, SW¼ Sec. 3, T4N, R1E, B.M., Ada County, Idaho. SE¼, SW¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.
Use(s):	Municipal.
Total Quantity:	3.25 cfs/ 1455.0 acre feet annually (AFA).
Period of Use:	January 1 – December 31 (year-round).
Place of Use:	Within the city limits of Eagle and surrounding service area.

A. Source of Water.

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

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

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

B. Points of Diversion.

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

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

production and water quality complaints from well owners generally diminish with distance in a southwesterly direction from the Boise foothills and this well. Ex. 102 at 3.

23. Floating Feather Well: This well, located in the SE¼, SW¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho, is owned and operated by United Water Idaho. The Floating Feather well provides Eagle with a second well to satisfy minimum municipal water system requirements pursuant to a number of agreements between Eagle and United Water Idaho. Exs. 16, 17, 18.

C. Use.

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

D. Total Quantity.

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

E. Period of Use.

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

F. Place of Use.

27. A general representation of Eagle's water service area boundary is shown on Exhibits 3 and 4. A general representation of the actual area served by Eagle's water system is shown on the second map in Appendix I of Exhibit 106. The physical characteristics of the planning area are accurately described as follows:

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

Exhibit 106 at 12.

IV. Proposed Project.

28. Eagle's Application requests that two additional points of diversion be approved by IDWR for Permit No. 63-12448, without any increase in the diversion rate under the permit. Eagle needs two wells for its municipal system. The Idaho Department of Environmental Quality requires that community water systems supplying groundwater to more than twenty-five (25) homes have a minimum of two (2) sources. IDAPA 58.01.08.550.03.p. Beyond this legal requirement having two wells provides Eagle many technical advantages. Two wells provide redundancy in case either well fails or needs maintenance. Two wells provide greater capacity to provide emergency supply. Water supplies are more reliable with two wells. Having two wells gives Eagle the ability to rest a well and extends the life of pumps.

Having two wells also spreads the impact on the aquifer. Finally, if Eagle could develop Eagle Well #3 in the Dry Creek valley its elevation would improve the efficiency of the two-zone system, because it is more efficient to pump two wells to pump to different levels.

29. For policy reasons the current governing administration of Eagle desires to develop an independent City-owned municipal water system that does not rely on contracts with third-parties. If the Application is not approved Eagle would have to continue its contractual relationship with United Water Idaho to use the Floating Feather Well.

A. Eagle Well #3 (Brookwood Well)

30. The first additional point of diversion requested by the Application is forty acres within Eagle's city limits described as the SW¼ SW¼, Sec. 4, T. 4 N., R. 1 E., B.M., Ada County. Specifically, Eagle intends to construct a well located at the northeast corner of the intersection of Eagle and Floating Feather Roads that would be known as Eagle Well #3 or the Brookwood well. This location would provide Eagle with a source point in the lower zone of its service area.

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

well design has been resubmitted for approval. The well location is located outside of the floodplain of Dry Creek.

32. Construction of Eagle Well No. 3 is a condition of development of the Brookwood subdivision by Aries Development, LLC. Aries Development, LLC agreed to construct Eagle Well No. 3 as a joint venture with Eagle. Ex. 141 Eagle would purchase the well upon completion pursuant to a *Well Purchase Agreement* with Aries Development, LLC. Eagle has budgeted \$200,000.00 for Eagle Well #3 in the City's *Capital Improvement Plan* for the upcoming fiscal year. The City has already made significant investments in the proposed well site.

B. Eagle Well #4.

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

V. Impact On Water Quantity Under Existing Water Rights.

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

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

36. The IDWR open file report, Ex. 103, prepared in 1991, analyzed the CH2M Hill aquifer test, water well measurements, and other data to assess concerns regarding the effects of expanding development in the Dry Creek Area. The report also used the CH2M Hill data to further develop predictions on well interference caused by well pumping in the Dry Creek Area. The key development in this analysis was a diagram of the predicted "cone of depression" caused by pumping of the Eagle #1 well at 1000 gpm for 6 months. Ex. 103, p. 21, fig. 11. The prediction used a more conservative transmissivity value than the CH2M Hill report.

37. The Scanlan Report, Ex. 105, prepared in 1995, described the results of a pump test of United Water Idaho's Floating Feather well, located approximately ½ mile west of the proposed Eagle #3 well location. The test monitored wells in the vicinity of the Floating Feather well for drawdown effects during a 51-hour pump test at an average rate of 1,500 gpm. One monitored well was the Vail domestic well, approximately 250 feet from the Floating Feather well. Observed drawdown in the Vail well was 1.4 feet. However, Mr. Scanlan calculated that the drawdown would have been 8.7 feet if the aquifer zone tapped by the Vail well was directly connected to the zones tapped by the Floating Feather well. Ex. 105, p. 4. Another monitored well was called the Chase domestic well, approximately 1000 feet from the Floating Feather well. Observed drawdown in the Chase domestic well was approximately 1.5 feet. However, Mr. Scanlan calculated that the drawdown would have been 5.7 feet if the aquifer zone tapped by the Chase domestic well was directly connected to the zones tapped by the Floating Feather well. Ex. 105, p.

5. Mr. Scanlan suggested in his report that there are three aquifer zones in this area: a shallow unconfined aquifer zone to a depth of 50 feet, an upper confined aquifer zone extending from 100 to 170 feet, and a lower confined aquifer zone extending from 170 feet to depths of more than 335 feet. The Vail and Chase domestic wells described in the report penetrated the middle aquifer zone, while the Floating Feather well penetrated the lower aquifer zone.

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

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

⁴ This same extrapolation can be used for the actual permit limit of 902 gpm over six months by multiplying the calculated impact in the Strowd Report by 0.90 (902 gpm/1000 gpm).

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

A. Impact on Chase Estate Wells.

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

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

Priority Date:	January 1, 1920.
Source of Water:	Ground water.
Point(s) of Diversion:	SE¼, SE¼, SE¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.
Use(s):	Domestic.
Total Quantity:	0.04 cfs.
Period of Use:	January 1 – December 31.
Place of Use:	SE¼, SE¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.

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

41. If Eagle Well #3 withdraws 900 gpm over 6 months it would likely cause 7 to 9 feet of drawdown in the dairy-domestic well. If Eagle Well #3 withdraws 280 gpm over 6 months it would likely cause 2.2 to 2.8 feet of drawdown in the dairy-domestic well. Based on the Scanlan Report, the short-term impact of the Eagle Well #3, if pumped at the full water right amount of 1458.7 gpm for 51 hours, could be a drawdown of approximately 8.7 feet in the dairy-domestic well.

42. Water Right No. 63-5226. This beneficial use water right has been claimed by the

Chase Estate in the SRBA, and is described in the claim as follows:

Priority Date:	January 1, 1950.
Source of Water:	Ground water.
Point(s) of Diversion:	SE¼, SE¼, SE¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.
Use(s):	Stockwater, Commercial, Domestic.
Total Quantity:	0.31 ⁵ cfs.
Period of Use:	January 1 – December 31.
Place of Use:	SE¼, SE¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.

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

cows could die, irreparably damaging the Chase Dairy's closed herd.

43. The impact on this water right from Eagle Well #3 would be the same as that described in Finding No. 39.

44. Water Right No. 63-5229. This beneficial use water right has been claimed by the

Chase Estate in the SRBA, and is described as follows:

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

This water right is withdrawn from a well known as the "small irrigation well," reportedly 280 feet deep with a 4-inch casing at surface. The small irrigation well is equipped with a 2 hp centrifugal end suction pump. The water withdrawn from this well is supplemental to

⁵ Michael Chase testified that the correct quantity for this water right is 0.13 cfs.

wastewater the Chase Estate uses at the same place of use and has not been needed since 1983. The small irrigation well is located 820 feet from the proposed site of Eagle Well #3.

45. If Eagle Well #3 withdraws 902 gpm over 6 months it would likely cause 7' to 9 feet of drawdown in the small irrigation well. If Eagle Well #3 withdraws 280 gpm over 6 months it would likely cause 2.2 to 2.8 feet of drawdown in the small irrigation well. Based on the Scanlan Report, the short-term impact of the Eagle Well #3, if pumped at the full water right amount of 1458.7 gpm for 51 hours, could be a drawdown of approximately 5.7 feet in the small irrigation well.

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

Priority Date:	April 6, 1977.
Source of Water:	Ground water.
Point(s) of Diversion:	NW¼, SE¼, Sec. 5, T4N, R1E, B.M., Ada County, Idaho.
Use(s):	Irrigation of 100 acres, Stockwater.
Total Quantity:	2.0 cfs, 452.7 afa.
Period of Use:	Irrigation: 3/15 to 11/15; Other: January 1 – December 31.
Place of Use:	NW¼, SE¼ and SW¼, SE¼ and SE¼, Sec. 5, T4N, R1E, B.M., Ada County, Idaho.

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

47. If Eagle Well #3 withdraws 902 gpm over 6 months it would likely cause 3.6 to 4.5 feet of drawdown in the large irrigation well. If Eagle Well #3 withdraws 280 gpm over 6 months it would likely cause 1.1 to 1.4 feet of drawdown in the large irrigation well. Based on actual

observations in the Scanlan Report, the short-term impact of the Eagle Well #3, if pumped at the full water right amount of 1458.7 gpm for 51 hours, could be a drawdown of approximately 1 foot in the large irrigation well.

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

B. Impact on Burton Group Wells.

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

C. Impact on Other Wells.

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

VI. Local Public Interest.

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

CONCLUSIONS OF LAW

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

I. Quantity of Water Under Existing Rights.

1. The prior appropriation doctrine is the foundation of Idaho's water laws. Idaho Constitution, Art. XV, Sec. 3. The basic formulation of this doctrine is that during times of shortage a water right with a senior priority date is entitled to its water supply before a water right with a junior priority date. As a consequence, the water permitting statute provides that the Director of IDWR may reject a new water right application if "it will reduce the quantity of water under existing rights." Idaho Code § 421-203A.

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

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

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

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

103 Idaho at 514. IDWR, as an executive agency, does not have the equitable powers of a court to order the Chase Estate to accept payment from Eagle for the impact on the Estate's right.

However, for IDWR to deny the Applications would appear to foreclose for Eagle the option of approaching a district court for equitable relief. A middle approach is for IDWR to authorize Eagle to construct Eagle Well No. 3, then more precisely study the well's impacts, allow the parties to negotiate regarding compensation for those impacts at Eagle's proposed levels of operation⁶, and finally allow Eagle to approach a district court for equitable relief if necessary. The Director concludes that such a procedure would protect water right no. 63-15820 and allow for the development of Eagle Well #3.

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

4. Water right no. 63-5229 is a supplemental irrigation water right that has not been used since 1983. The Director concludes that the supplemental nature of this water right makes it unlikely that its enforcement would preclude the development of Eagle Well #3.

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

6. The Director concludes that it is reasonably likely that the quantities under other existing water rights will not be reduced so long as the prior appropriation doctrine is enforced. However, based upon the information in the Strowd and Scanlan Reports there are a large number of senior, domestic water rights in the Burton Group Wells up to 2000 feet distant that may experience drawdowns because of Eagle's pumping from Eagle Well #3. A party applying

⁶ The Hearing Officer struggled with providing an additional time period for the Chase Estate and Eagle to negotiate a resolution to the impacts on water right no. 63-15820. More than adequate time has already been unsuccessfully given for Eagle and the Chase Estate to reach a negotiated settlement in this matter. Two factors suggest additional time would be beneficial. First, allowing Eagle to construct Eagle Well No. 3 and performing a pump test will allow the impacts of the well to be more precisely known. Second, the parties may have been uncertain regarding the legal protection afforded the Chase Estate's domestic water right and, conversely, the district court's equitable power to force the Chase Estate to accept compensation for changing the dairy-domestic well.

for a permit is not required to show that the proposed use will never interfere with an existing water use. Occasional impacts on senior water rights are resolved by the application of the priority system. In ground water interference cases, between hydraulically connected ground water rights, the placement of the burden of proof on the junior water right to disprove interference, ensures that senior water users are not harmed by a junior water user. *See Martiny v. Wells*, 91 Idaho 215 (1966). With such condition, which places the risk solely on Eagle, IDWR determines whether there is a reasonable probability that the applicant will find sufficient water to complete the proposed water use without interfering with senior water rights.

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

II. Adequacy of the Water Supply.

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

III. Good Faith, Delay or Speculation.

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

c. Criteria for determining whether the application is made in good faith. The criteria requiring that the director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence. Speculation does not prevent an applicant from subsequently selling the developed project for a profit or from making a profit from the use of the water. An application will be found to have been made in good faith if:

- i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and
- ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and
- iii. There are no obvious impediments that prevent the successful completion of the project.

IDAPA 37.03.08.045.01.c.

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

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

who develop water rights in the vicinity of Eagle Well #4 under the assumption that it will never be developed.

IV. Sufficiency of Financial Resources.

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

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

V. Local Public Interest.

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

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

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

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

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

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

"Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

I.C. § 202B(3).

15. Eagle submitted sufficient details of the proposed design, construction and operation of Eagle Well #3 and directly associated operations, to allow the water resource

impact of the project to be evaluated. Because the Application requests that Permit No. 63-12448 be amended only to add new points of diversion the only area directly affected by the Application is the area within the immediate vicinity of the proposed wells.

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

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

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

VI. Conservation of Water Resources.

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

VII. Affect on Local Economy.

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

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

VIII. Requirements of Idaho Code § 42-211.

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

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

RECOMMENDED ORDER

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

Water Right Permit No. 63-12448 will be amended to allow for an additional point of diversion in the SW¼ SW¼, Sec. 4, T. 4 N., R. 1 E., B.M., Ada County, Idaho with the following conditions:

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

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

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

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

3. Eagle shall immediately cease diversion of water at this point of diversion in the event that any senior, licensed or decreed, ground water right holder water within a

radial distance of 2,000 feet of this point of diversion is not able to pump the full quantity of water under the senior right because of declines in ground water levels, until such time as Eagle establishes to IDWR's satisfaction that either:

- a. The unsatisfied water right is not being materially affected by the diversion of water under this water right, or
 - b. Other defenses to such regulation, such as the use of an unreasonable means of diversion or the presence of an approved mitigation plan, are present.
4. The priority date for Water Right Permit No. 63-12448 at this point of diversion shall be June 8, 2001.

Water Right Permit No. 63-12448 will be not amended to allow for an additional point of diversion in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 4, T. 4 N., R. 1 E., B.M., Ada County, Idaho.

PROCEDURAL RIGHTS

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

Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the Director or Director's designee on any issue in the proceeding. If no party files exceptions to the

recommended order with the Director or Director's designee, the Director or Director's designee will issue a final order within fifty-six (56) days after:

- i. The last day a timely petition for reconsideration could have been filed with the hearing officer;
- ii. The service date of a denial of a petition for reconsideration by the hearing officer; or
- iii. The failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

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

DATED this 30th day of April, 2004.


PETER R. ANDERSON
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of May, 2004, the above and foregoing document 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:

Bruce Smith
Tammy Zokan
225 N 9th St., Suite 420
Boise, ID 83701-2720

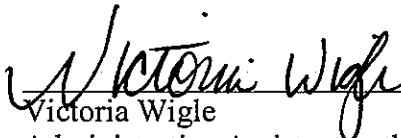
Jim Burton
1896 N. Eagle Rd.
Eagle, ID 83616

Weldon Fisher
546 E. Beacon Light Rd.
Eagle, ID 83616

Matt Howard
P.O. Box 190012
Boise, ID 83719

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

John Westra
IDWR – Western Region
2735 Airport Way
Boise, ID 83705-5082


Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES

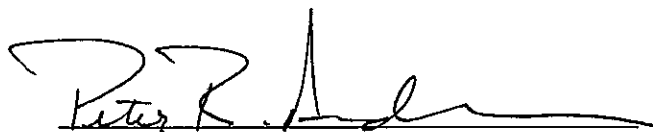
IN AND FOR THE STATE OF IDAHO

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

ORDER GRANTING CITY OF
EAGLE'S MOTION FOR
RECONSIDERATION

Following issuance of the Hearing Officer's *Recommended Decision and Order* on March 8, 2004, Applicant City of Eagle filed a *Petition for Reconsideration of Recommended Decision and Order*. A formal hearing on the *Petition* was set for April 8, 2004. At that hearing the Applicant requested that the hearing be held informally to allow for a more frank discussion of the issues. Following the discussion at the hearing it is ORDERED that the *Petition for Reconsideration of Recommended Decision and Order* is GRANTED. Parties may file briefing on any of the issues raised in the *Petition* or discussed at the hearing until April 21, 2004.

Dated this 9th day of April, 2004.



Peter R. Anderson
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of April, 2004, the above and foregoing document 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:

Bruce Smith
Tammy Zokan
225 N 9th St., Suite 420
Boise, ID 83701-2720

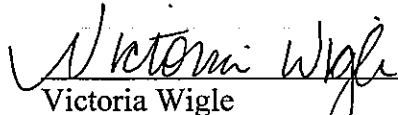
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P.O. Box 1849
Eagle, ID 83616

John Westra
IDWR – Western Region
2735 Airport Way
Boise, ID 83705-5082


Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

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

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

STANDARD FOR DECISION

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

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

* * *

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

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

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

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

IDWR, having examined the application and the written record, and having heard the testimony of the parties, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. Course of Proceedings.

1. On June 8, 2001, the City of Eagle submitted an application to amend existing water right permit no. 63-12448 to add two additional points of diversion (the "Application"). The proposed points of diversion are located in Eagle, Idaho in the SW¼ SW¼ Sec. 4 T4N R1E (Eagle Well #3 aka Brookwood well) and NE¼ SE¼ Sec. 4 T4N R1E (Eagle Well #4). .
2. Notice of the Application was published in The Idaho Statesman of Boise, Idaho on or about June 21 and 28, 2001.

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

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

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

6. A second prehearing conference was held on September 18, 2002. A *Prehearing Order* issued following that conference that (1) pursuant to Eagle's request gave the parties until November 1, 2002, to negotiate regarding settlement of the protests, (2) tentatively scheduled a hearing for February 26, 2003, and (3) authorized informal discovery. A *Notice of Hearing* issued on January 10, 2003, setting a hearing for February 26, 2003. That hearing was vacated and formal discovery was authorized on February 4, 2003, in the *Order Granting Petition for Reconsideration and Authorizing Discovery*.

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

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

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

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

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

II. Evidence Considered.

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

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

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

Exhibit 3: Illustration of Eagle Water System.

Exhibit 4: Illustration of well locations.

Exhibit 5: Chart of Eagle Water System changes.

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

Exhibit 7: Municipal Production Bar Graph.

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

Exhibit 9: Eagle Water Company Annual Well Production.

Exhibit 10: Eagle Annual Well Production.

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

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

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

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

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

Exhibit 16: Agreement to Provide Supplemental Fire Flows.

Exhibit 17: Water Line Agreement.

Exhibit 18: December 2, 1997 Agreement.

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

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

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

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

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

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

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

Exhibit 25 was not admitted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit 136: City of Eagle United Water Operations Reports.

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

Exhibit 138: Cooperative Agreement.

Exhibit 139: Water Line Agreement.

Exhibit 140: Agreement dated December 2, 1997.

Exhibit 141: Well Purchase Agreement.

Exhibit 142: Notice of Claim 63-5224.

Exhibit 143: Partial Decree 63-5225.

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

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

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

Exhibit 147: Notice of Claim 63-8663.

Exhibit 148: License 63-8663.

Exhibit 149: IDWR Field Report 63-8663.

Exhibit 150: Partial Decree 63-15820.

Exhibit 151: Partial Decree 63-18731.

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

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

Exhibit 154: Beneficial Use Field Report 63-12192.

Exhibit 155: Diagram of Selected Well Locations.

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

Exhibit 157: 1952 photograph of barn.

Exhibit 158: 1952 photograph of barn and Chase dairy.

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

Exhibit 400: Summary of water rights located in the NE¼ of SE¼, Section 5, T4N, R1E in Ada County.

14. The following individuals testified on behalf of Eagle:
 - a. Ms. Lynne Sedlacek, Eagle City Councilmember.
 - b. Mr. Vernon Brewer, representative of Eagle City Engineer, Holladay Engineering Co.
 - c. Mr. Terry M. Scanlan, P.E., P.G., Scanlan Engineering.
 - d. Nancy Merrill, Eagle Mayor.³
15. The following individuals testified on behalf of the Chase Estate:
 - a. Mr. Mike Chase, Chase Estate.
 - b. Mr. Dave Shaw, ERO Resources, Inc.
 - c. Mr. Bill Chase, Chase Estate.
 - d. Mr. Vernon Brewer, representative of Eagle City Engineer, Holladay Engineering Co.
16. No other party offered exhibits or testimony for IDWR's consideration.
17. All parties present at the hearing were afforded the opportunity to cross-examine the opposing side's witnesses.

III. Applicant and Permit No. 63-12448.

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

Source of Water:	Ground water from the water bearing zone from 183 to 602 feet.
Point(s) of Diversion:	NW¼, SW¼ Sec. 3, T4N, R1E, B.M., Ada County, Idaho. SW¼, SW¼ Sec. 3, T4N, R1E, B.M., Ada County, Idaho. SE¼, SW¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.
Use(s):	Municipal.
Total Quantity:	3.25 cfs/ 1455.0 acre feet annually (AFA).
Period of Use:	January 1 – December 31 (year-round).

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

Place of Use: Within the city limits of Eagle and surrounding service area.

A. Source of Water.

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

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

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

B. Points of Diversion.

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

21. Eagle Well #2: This well, located in the NW¼, SW¼ Sec. 3, T4N, R1E, B.M., Ada County, Idaho and also known as Lexington Hills Well Number 2, is no longer used due to high iron content in the water and excessive sand production. No evidence was offered to explain why a new well could not be drilled at this point of diversion, although water production and water quality complaints from well owners generally diminish with distance in a southwesterly direction from the Boise foothills and this well. Ex. 102 at 3.

22. Floating Feather Well: This well, located in the SE¼, SW¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho, is owned and operated by United Water Idaho. The Floating Feather well provides Eagle with a second well to satisfy minimum municipal water system requirements pursuant to a number of agreements between Eagle and United Water Idaho. Exs. 16, 17, 18.

C. Use.

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

D. Total Quantity.

24. Permit No. 63-12448 authorizes Eagle to instantaneously pump up to 3.25 cfs and pump, on an annual basis, 1455.0 acre-feet. The 3.25 cfs instantaneous rate converts to a maximum of 1458.7 gpm. The 1455.0 acre-feet annual volume converts to a continuous average

pumping rate of 902 gpm. This limitation applies to the quantities pumped under all of Eagle's water rights—63-11413, 63-12017 and 63-12448. Because Eagle does not have storage in its system it must meet peak demands with its maximum diversion rate

E. Period of Use.

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

F. Place of Use.

26. A general representation of Eagle's water service area boundary is shown on Exhibits 3 and 4. A general representation of the actual area served by Eagle's water system is shown on the second map in Appendix I of Exhibit 106. The physical characteristics of the planning area are accurately described as follows:

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

Exhibit 106 at 12.

IV. Proposed Project.

27. Eagle's Application requests that two additional points of diversion be approved by IDWR for Permit No. 63-12448, without any increase in the diversion rate under the permit. Eagle needs two wells for its municipal system. The Idaho Department of Environmental Quality requires that community water systems supplying groundwater to more than twenty-five (25) homes have a minimum of two (2) sources. IDAPA 58.01.08.550.03.p. Beyond this legal requirement having two wells provides Eagle many technical advantages.

Two wells provide redundancy in case either well fails or needs maintenance. Two wells provide greater capacity to provide emergency supply. Water supplies are more reliable with two wells. Having two wells gives Eagle the ability to rest a well and extends the life of pumps. Having two wells also spreads the impact on the aquifer. Finally, if Eagle could develop Eagle Well #3 in the Dry Creek valley its elevation would improve the efficiency of the two-zone system, because it is more efficient to pump two wells to pump to different levels.

28. For policy reasons the current governing administration of Eagle desires to develop an independent City-owned municipal water system that does not rely on contracts with third-parties. If the Application is not approved Eagle would have to continue its contractual relationship with United Water Idaho to use the Floating Feather Well.

A. Eagle Well #3 (Brookwood Well)

29. The first additional point of diversion requested by the Application is forty acres within Eagle's city limits described as the SW¼ SW¼, Sec. 4, T. 4 N., R. 1 E., B.M., Ada County. Specifically, Eagle intends to construct a well located at the northeast corner of the intersection of Eagle and Floating Feather Roads that would be known as Eagle Well #3 or the Brookwood well. This location would provide Eagle with a source point in the lower zone of its service area.

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

design and well site for Eagle Well #3, although the well construction approval has expired. The well design has been resubmitted for approval. The well location is located outside of the floodplain of Dry Creek.

31. Construction of Eagle Well No. 3 is a condition of development of the Brookwood subdivision by Aries Development, LLC. Aries Development, LLC agreed to construct Eagle Well No. 3 as a joint venture with Eagle. Ex. 141 Eagle would purchase the well upon completion pursuant to a *Well Purchase Agreement* with Aries Development, LLC. Eagle has budgeted \$200,000.00 for Eagle Well #3 in the City's *Capital Improvement Plan* for the upcoming fiscal year. The City has already made significant investments in the proposed well site.

B. Eagle Well #4.

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

V. Impact On Water Quantity Under Existing Water Rights.

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

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

35. The IDWR open file report, Ex. 103, prepared in 1991, analyzed the CH2M Hill aquifer test, water well measurements, and other data to assess concerns regarding the effects of expanding development in the Dry Creek Area. The report also used the CH2M Hill data to further develop predictions on well interference caused by well pumping in the Dry Creek Area. The key development in this analysis was a diagram of the predicted "cone of depression" caused by pumping of the Eagle #1 well at 1000 gpm for 6 months. Ex. 103, p. 21, fig. 11. The prediction used a more conservative transmissivity value than the CH2M Hill report.

36. The Scanlan Report, Ex. 105, prepared in 1995, described the results of a pump test of United Water Idaho's Floating Feather well, located approximately ½ mile west of the proposed Eagle Well #3 location. The test monitored wells in the vicinity of the Floating Feather well for drawdown effects during a 51-hour pump test at an average rate of 1,500 gpm. One monitored well was the Vail domestic well, approximately 250 feet from the Floating Feather well. Observed drawdown in the Vail well was 1.4 feet. However, Mr. Scanlan calculated that the drawdown would have been 8.7 feet if the aquifer zone tapped by the Vail well was directly connected to the zones tapped by the Floating Feather well. Ex. 105, p. 4. Another monitored well was called the Chase domestic well, approximately 1000 feet from the Floating Feather well. Observed drawdown in the Chase domestic well was approximately 1.5 feet. However, Mr. Scanlan calculated that the drawdown would have been 5.7 feet if the aquifer zone tapped by the Chase domestic well was directly connected to the zones tapped by the Floating Feather well. Ex. 105, p.

5. Mr. Scanlan suggested in his report that there are three aquifer zones in this area: a shallow unconfined aquifer zone to a depth of 50 feet, an upper confined aquifer zone extending from 100 to 170 feet, and a lower confined aquifer zone extending from 170 feet to depths of more than 335 feet. The Vail and Chase domestic wells described in the report penetrated the middle aquifer zone, while the Floating Feather well penetrated the lower aquifer zone.

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

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

⁴ This same extrapolation can be used for the actual permit limit of 902 gpm over six months by multiplying the calculated impact in the Strowd Report by 0.90 (902 gpm/1000 gpm).

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

A. Impact on Chase Estate Wells.

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

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

Priority Date:	January 1, 1920.
Source of Water:	Ground water.
Point(s) of Diversion:	SE¼, SE¼, SE¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.
Use(s):	Domestic.
Total Quantity:	0.04 cfs.
Period of Use:	January 1 – December 31.
Place of Use:	SE¼, SE¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.

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

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

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

Priority Date:	January 1, 1950.
Source of Water:	Ground water.
Point(s) of Diversion:	SE¼, SE¼, SE¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.
Use(s):	Stockwater, Commercial, Domestic.
Total Quantity:	0.31 cfs.
Period of Use:	January 1 – December 31.
Place of Use:	SE¼, SE¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.

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

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

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

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

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

44. If Eagle Well #3 withdraws 902 gpm over 6 months it would likely cause 7 to 9 feet of drawdown in the small irrigation well. If Eagle Well #3 withdraws 280 gpm over 6 months it would likely cause 2.2 to 2.8 feet of drawdown in the small irrigation well. Based on the Scanlan Report, the short-term impact of Eagle Well #3, if pumped at the full water right amount of 1458.7 gpm for 51 hours, could be a drawdown of approximately 5.7 feet in the small irrigation well.

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

Priority Date:	April 6, 1977.
Source of Water:	Ground water.
Point(s) of Diversion:	NW¼, SE¼, Sec. 5, T4N, R1E, B.M., Ada County, Idaho.
Use(s):	Irrigation of 100 acres, Stockwater.
Total Quantity:	2.0 cfs, 452.7 afa.
Period of Use:	Irrigation: 3/15 to 11/15; Other: January 1 – December 31.
Place of Use:	NW¼, SE¼ and SW¼, SE¼ and SE¼, SE¼ Sec. 5, T4N, R1E, B.M., Ada County, Idaho.

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

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

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

B. Impact on Burton Group Wells.

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

C. Impact on Other Wells.

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

VI. Local Public Interest.

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

CONCLUSIONS OF LAW

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

I. Quantity of Water Under Existing Rights.

1. The prior appropriation doctrine is the foundation of Idaho's water laws. Idaho Constitution, Art. XV, Sec. 3. The basic formulation of this doctrine is that during times of shortage a water right with a senior priority date is entitled to its water supply before a water right with a junior priority date. As a consequence, the water permitting statute provides that the Director of IDWR may reject a new water right application if "it will reduce the quantity of water under existing rights." Idaho Code § 421-203A.

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

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

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

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

103 Idaho at 514. IDWR, as an executive agency, does not have the equitable powers of a court to order the Chase Estate to accept payment from Eagle for the impact on the Estate's right. However, for IDWR to deny the Applications would appear to foreclose for Eagle the option of approaching a district court for equitable relief. A middle approach is for IDWR to authorize

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

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

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

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

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

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

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

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

II. Adequacy of the Water Supply.

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

III. Good Faith, Delay or Speculation.

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

c. Criteria for determining whether the application is made in good faith. The criteria requiring that the director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence. Speculation does not prevent an applicant from

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

subsequently selling the developed project for a profit or from making a profit from the use of the water. An application will be found to have been made in good faith if:

- i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and
- ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and
- iii. There are no obvious impediments that prevent the successful completion of the project.

IDAPA 37.03.08.045.01.c.

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

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

IV. Sufficiency of Financial Resources.

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

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

V. Local Public Interest.

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

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

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

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

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

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

"Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

I.C. § 202B(3).

15. Eagle submitted sufficient details of the proposed design, construction and operation of Eagle Well #3 and directly associated operations, to allow the water resource impact of the project to be evaluated. Because the Application requests that Permit No. 63-12448 be amended only to add new points of diversion the only area directly affected by the Application is the area within the immediate vicinity of the proposed wells.

16. The biggest local public interest concern is that if a water shortage should occur in the area of Eagle Well #3, an immediate conflict would arise between the dispassionate

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

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

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

VI. Conservation of Water Resources.

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

VII. Affect on Local Economy.

20. Because the amount of water withdrawn under Permit No. 63-12448 will not be increased, with the conditions stated in Conclusions 2, 6 and 16 which mitigate local impacts, Eagle has satisfied its burden of showing that approving the Application will not adversely affect the local economy.

VIII. Requirements of Idaho Code § 42-211.

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

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

RECOMMENDED ORDER

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

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

1. Wells constructed at this point of diversion shall be constructed in accordance with the rules of the Idaho Department of Water Resources regarding well construction standards and measurement of diversions and the rules of the Department of Environmental Quality for Public Drinking Water Systems, IDAPA 58.01.08.
2. Before Eagle Well #3, or any other well at this point of diversion, may be connected to Eagle's municipal water system Eagle shall conduct a pump test and analysis of the well, pre-approved by IDWR, that describes the characteristics of the well, the aquifer from which it draws, and the expected impacts of its use, and Eagle will fulfill

Conditions a.,b., and c., below. Upon the completion of the pump test and analysis Eagle shall:

- a. Determine the maximum level of sustained average pumping and maximum instantaneous diversion it wishes to operate at this point of diversion. In no event shall such maximum levels exceed those levels currently established in Water Permit No. 63-12448. Upon submitting Eagle's determination to IDWR, such level shall be a limiting condition of Water Right Permit No. 63-12448 on the operation of the well(s) at this point of diversion.
 - b. Submit to IDWR a negotiated agreement with the Chase Estate, or its successor, that fully mitigates the impact of the levels of pumping designated pursuant to Condition 2.a. on Water Right No. 63-15820. In the event that no agreement is reached, Eagle must comply with Condition 2.c.
 - c. If an agreement is not reached with the Chase Estate, or its successor, as described in Condition 2.b., Eagle must receive equitable relief from an appropriate district court to impose a mitigation agreement pursuant to Parker v. Wallentine 103 Idaho 506, 514 (1982).
3. Eagle shall immediately cease diversion of water at this point of diversion in the event that any senior water right diverting its water within a radial distance of 2,000 feet of the point of diversion is not being completely satisfied, until such time as Eagle establishes to IDWR's satisfaction that either:
- a. The unsatisfied water right is not being materially affected by the diversion of water under this water right, or
 - b. Other defenses to such regulation, such as the use of an unreasonable means of diversion, are present.

4. The priority date for Water Right Permit No. 63-12448 at this point of diversion shall be June 8, 2001.

Water Right Permit No. 63-12448 will be not amended to allow for an additional point of diversion in the NE¼ SE¼, Sec. 4, T. 4 N., R. 1 E., B.M., Ada County, Idaho.

PROCEDURAL RIGHTS

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

Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the Director or Director's designee on any issue in the proceeding. If no party files exceptions to the recommended order with the Director or Director's designee, the Director or Director's designee will issue a final order within fifty-six (56) days after:

- i. The last day a timely petition for reconsideration could have been filed with the hearing officer;
- ii. The service date of a denial of a petition for reconsideration by the hearing officer; or
- iii. The failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

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

DATED this 5th day of March 2004.


PETER R. ANDERSON
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of March 2004, I mailed a true and correct copy of the foregoing **RECOMMENDED DECISION AND ORDER** on the following persons listed below by U.S. mail, postage prepaid and addressed as follows:

Glen Saxton
Idaho Dept. of Water Resources
1301 N. Orchard Street
Boise, ID 83706

Bruce Smith
225 N 9th St., Suite 420
Boise, ID 83701-2720

Jim Burton
1896 N. Eagle Rd.
Eagle, ID 83616

Weldon Fisher
546 E. Beacon Light Rd.
Eagle, ID 83616

Matt Howard
P.O. Box 190012
Boise, ID 83719

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

John Westra
IDWR – Western Region
2735 Airport Way
Boise, ID 83705-5082



Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

**STARTING
RIGHT
SIDE OF
FILE**

RECEIVED
NOV - 3 2004
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	)	CHASE ESTATE'S RESPONSE TO CITY
APPLICATION FOR PERMIT NO. 63-12448	)	OF EAGLE'S PROPOSED MITIGATION
IN THE NAME OF THE CITY OF EAGLE	)	PLAN
_____	)	
	)	

COMES NOW the Estate of Eleanor I. Chase, by and through its attorneys of record, Ringert Clark Chartered, and hereby submit this Response to the *Proposed Mitigation Plan* filed by the City of Eagle in the above-captioned matter.

INTRODUCTION

After hearing, the Hearing Officer issued his *Recommended Decision and Order* on March 5, 2004. The Chase Estate filed its *Exceptions to the Recommended Decision* on March 22, 2004, and the City of Eagle filed a *Petition for Reconsideration* of the *Recommended Decision* on the same date. The Hearing Officer issued his *Recommended Decision and Order Following Reconsideration* on April 30, 2004. Both the Chase Estate and the City of Eagle filed *Exceptions* to the *Recommended Decision and Order Following Reconsideration*, and each party responded to the other's *Exceptions* by June 1, 2004. The City of Eagle filed its *Proposed Mitigation Plan* on October 22, 2004, proposing mitigation of the injury that its proposed amendments to Permit No. 63-12448

will cause to the Chase Estate by supplying City water to only one of the three wells which will be injured, and by “testing” the Chase Estate’s small irrigation well to put off to a later date a determination of the amount of mitigation to be supplied.

ARGUMENT

The City of Eagle has chosen a curious point in time to file a *Proposed Mitigation Plan* in this matter. The hearing at which evidence and testimony was taken has been held, a *Recommended Decision* has been entered, and *Exceptions* and *Reponses* thereto have been filed by both parties. According to the Idaho Department of Water Resources’ Rules of Procedure, the next step is for the Director to either issue a final order in this matter, or remand the matter for additional evidentiary hearings if necessary to further develop the factual record in order to issue a final order. IDAPA 37.01.01. 720.02.c.

Idaho’s Administrative Procedure Act, I.C. §67-5201 *et. al.*, provides authority for the director’s review of the *Recommended Decision* issued by the hearing officer in this case. Under that authority, the Director may not consider or look to pleadings such as the *Proposed Mitigation Plan* filed in this matter well after the record was closed:

Under I.C. § 67-5244, the head of the agency shall exercise all the decision-making power on review of the recommended decision that he or she would have had if the agency head had presided over the hearing. The hearing officer's decision being only advisory, then, the director is free to affirm the decision or to reverse, reject or alter the findings of the hearing officer and make his own determination. The ultimate question is whether the director's order is supported by findings of fact which are based exclusively on the evidence in the record and on matters officially noticed in that proceeding. I.C. § 67-5248.

N. Frontiers v. State ex rel. Cade, 129 Idaho 437, 440 (App., 1996) (underlined emphasis added).

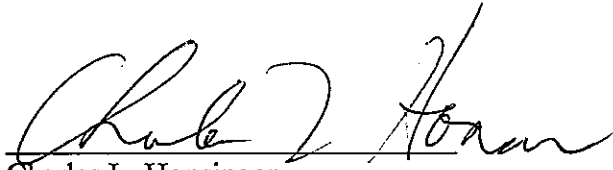
Unfortunately for the City of Eagle, there is no provision in the Idaho Administrative

Procedure Act, or the Department's Rules of Procedure for the augmentation of the record with the *Proposed Mitigation Plan* which it has filed. Instead, the Director must make his decision, as he is required to do by I.C. §67-5248, on the same record on which the Hearing Officer made his decision, and should amend the *Recommended Decision* to result in a *Final Order* denying the City's Application to Amend its permit application, as is further discussed in the Chase Estate's prior briefing.

To the extent that the City of Eagle desires that its *Proposed Mitigation Plan* be considered in this matter, it will simply have to wait to see the result of the Director's review of the *Recommended Decision*, as the Director cannot consider even the existence of the *Proposed Mitigation Plan* at this time. After the Director issues his Order, it will become more clear to both parties what steps they should take with respect to that *Proposed Mitigation Plan*. For now, it is simply a procedural gaffe: an apparent attempt by the City to inject a pleading into the record which simply cannot be allowed, and therefore must remain outside the record for possible action at a later time.

The Chase Estate reserves the right to respond more fully and substantively to the Proposed Mitigation Plan at the time that it is, if ever, appropriately considered by the Idaho Department of Water Resources and/or the hearing officer in this matter.

DATED This 3rd day of November, 2004.


Charles L. Honsinger
RINGERT CLARK, CHARTERED

CERTIFICATE OF SERVICE

The undersigned certifies that on the 3rd day of November, 2004, 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
1896 N. Eagle. Rd.
Eagle, ID 83616

U.S. Mail

Weldon Fisher
546 E. Beacon Light Rd.
Eagle, ID 83616

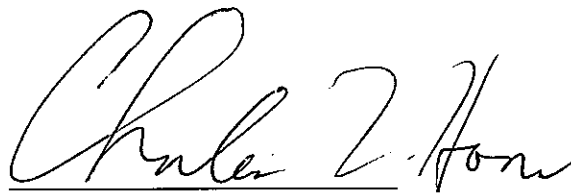
U.S. Mail

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

U.S. Mail

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

U.S. Mail


Charles L. Honsinger

RECEIVED

OCT 18 2004

DEPARTMENT OF
WATER RESOURCES

BRUCE M. SMITH, ISB # 3425
TAMMY A. ZOKAN, ISB # 5450
MOORE SMITH BUXTON & TURCKE, CHARTERED
225 North 9th, Suite 420
Boise, Idaho 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202

RECEIVED
OCT 22 2004
WATER RESOURCES
WESTERN REGION

Attorneys for the City of Eagle

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)

PROPOSED MITIGATION PLAN

This matter is now pending before the Department of Water Resources (the "Department"). The City of Eagle has previously developed a mitigation plan based upon available information, Idaho law, and Department policy. The City of Eagle by and through its attorney, Moore Smith Buxton & Turcke, Chartered, hereby provides documentation of its proposed mitigation plan:

1. The Chase Estate claims two water rights as follows:

Water Right No. 63-15820 -- .04 cfs decreed for domestic use ("domestic right") and

Water Right No. 63-5226 -- .13 cfs claimed for dairy use ("dairy right")

Mitigation: The City of Eagle will supply .17 cfs (76 gpm) of City water to the current point of diversion for water right nos. 63-15820 and 63-5226. The City of Eagle will supply its

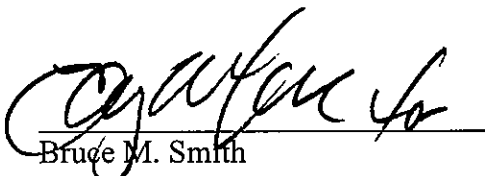
City water at the same cost of diverting the domestic and dairy rights using the current water system. The City will install service lines necessary to supply City water.

2. The Chase Estate also claims a water right as follows:

Water Right No. 63-5229 -- .42 cfs claimed for supplemental irrigation use ("small irrigation well") (this water right is supplemental to the primary water right, water right no. 63-5227)

Mitigation: The proposed mitigation for the small irrigation well depends upon how much, if any, water is available at this point of diversion. The City requests that the Department order the Chase Estate to allow the City access to the site to test the small irrigation well, or alternatively, that the Department undertake its own test of the well. Once the amount of water the small irrigation well is capable of producing is determined, the City of Eagle will develop a system to supply and deliver that amount of water for the for the purpose of supplemental irrigation use.

DATED this 23 day of October, 2004.


Bruce M. Smith
Attorney for the City of Eagle

CERTIFICATE OF SERVICE

The undersigned certifies that on the 22 day of October 2004, a true and correct copy of the Mitigation Plan was sent to the following person(s) as indicated below:

IDWR
Western Region
2735 Airport Way
Boise, Idaho 83705

☐ U.S. Mail
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Charlie Honsinger
Chase Estate
P.O. Box 2773
Boise, Idaho 83701-2773

☒ 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



BRUCE M. SMITH

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

**WATER RESOURCES
WESTERN REGION**

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

APPLICATION FOR PERMIT NO. 63-12448

CITY OF EAGLE'S BRIEFING ON RECONSIDERATION

The informal discussion of issues at the April 8, 2004 hearing on the City's Motion for Reconsideration was helpful in understanding the intent of the Recommended Order. Given the discussion during the hearing, it is evident that it is possible to resolve the issues related to the Recommended Decision and Order so that all parties are protected, the parties' obligations are clear, and the City can meet its obligations to its citizens. The following modifications to the Recommended Decision and Order would satisfy the stated concerns.

1. Condition 2 – Recommended Order

Condition 2 of the Recommended Order requires that the City complete a pump test, establish a pumping rate “cap,” and then negotiate an agreement with the Chases to resolve any impact the identified pumping rate might have on the Chase water right no. 63-15820. Recommended Order at ¶2, p. 27-28. If the Chases refuse the City’s mitigation proposal for whatever reason, the Order sends the parties to District Court. Id. This condition was designed to address the Department’s desire that the City have a mitigation plan in place to address any potential material injury. However, as written, the condition does not appear to completely fulfill that objective. The City proposes that condition 2 be modified to provide as follows:

The City will develop a pump test of Eagle well #3 and submit it to the Department for review and approval. The City will conduct the pump test, establish a maximum operating diversion rate not to exceed that permitted by water right permit 63-12448, and use the results of the pump test to develop a mitigation plan for Department review and approval in accordance with Parker v. Wallentine, 103 Idaho 506 (1982). The maximum diversion rate shall be a limiting condition of water right permit no. 63-12448 on the operation of the well at this point of diversion. The mitigation plan shall mitigate any injury to the Chase Estate’s domestic water right no. 63-15820 consistent with Parker v. Wallentine, 103 Idaho 506 (1982), caused by the City’s diversion of water right no. 63-12448 from Eagle well #3. Once approved by the Department, the City shall implement the mitigation measures in accordance the approved plan. Any subsequent claims of material injury to water right no. 63-15820 shall be

evaluated under the Department's Rules in existence at the time the allegation of injury is made.

2. Condition 3 - Recommended Order

Condition 3 of Recommended Order requires the City to turn off its pump if any senior water right within 2000 ft. is not being "completely satisfied." Recommended Order at ¶ 3, p. 28. This condition is designed to recognize the City's obligations to neighboring water users and encourage the City to have a mitigation plan in place before pumping water from well #3. This condition, however, is vague, does not fulfill the purposes the condition seeks to achieve, and is unworkable since the term "completely satisfied" is not a standard used in Department rules or Idaho statutes. Use of such terms would likely lead to further litigation. However, it is possible to achieve the intent of this provision within the existing framework of the rules and regulations. To better meet the objectives of this condition and protect all interested parties, the condition should be modified as follows:

Upon the completion of the City's pump test of Eagle well #3, the City shall develop a mitigation plan for Department review and approval in accordance with Parker v. Wallentine, 103 Idaho 506 (1982). The mitigation plan shall mitigate any injury to senior water rights within a radial distance of 2,000 feet of the point of diversion for Eagle well #3 consistent with Parker v. Wallentine, 103 Idaho 506 (1982), caused by the City's diversion of water right no. 63-12448 at Eagle well #3. Once approved by the Department, the City shall implement the mitigation measures in accordance with the plan. Any subsequent claims of material injury to water rights shall be evaluated under the Department's Rules in existence at the time the allegation of injury is made.

3. Condition 4 – Recommended Order

Condition 4 assigns Eagle well #3 a June 8, 2001 priority date. This date was proposed to protect users who drilled wells between the date of the original application for 63-12448, April 8, 1998, and the date the application to amend permit 63-12448 was filed, June 8, 2001. Wells #3 and #4 reflected approved points of diversion for some of the City's water rights. In fact, the points of diversion for Eagle wells #3 and #4 are still part of the City's water right permits. See Department water right information for water rights 63-12017 and 63-11413 printed on April 14, 2004, attached as Exhibits A and B. If anyone reviewed the City's water rights up to and on April 14, 2004, they would have had notice that the points of diversion that were identified for Eagle wells #3 and #4 were already approved for a municipal well. Since the public had notice that municipal wells could be constructed at these points of diversion based on the Department's own records, it does not appear that anyone could argue that they did not have notice that municipal wells #3 and #4 could be constructed at these locations.

Furthermore, the 2001 priority date subverts the City's agreement with United Water Idaho related to the parties' water rights. As evidenced by the Department's records, the City has an annual 1455 acre ft. "cap" on its water rights. The City agreed to the cap in exchange for United Water agreeing that the City could file its application first and acquire priority over United Water's water right no. 63-12452. See Exhibit 131 at fn. 2 (March 31, 2000 letter to Jeff Peppersack). As the result of the parties' agreement, the priority date for United Water's water right no. 63-12452 is April 15, 1998 (see Exhibit C, attached hereto) and the priority date for the City's water right no. 63-12448 is April 8, 1998. The proposed priority date completely undermines City's senior interest in water right no. 63-12448.

The Decision should be amended to include the correct priority date, April 8, 1998.

4. The Point of Diversion for Eagle Well No. 4 Should be Allowed as an Additional Point of Diversion.

The point of diversion for well #4 was previously authorized as a point of diversion for the City's water rights 63-11413 and 63-12017. Indeed, the point of diversion for well site #4 is still included on water rights 63-11413 and 63-12017. See Exhibits A and B. Thus, the Department's own records provide an adequate basis for approving the point of diversion for well site #4. In addition to the Department's previous findings, no one, including the Department, objected to the inclusion of a point of diversion for well #4, neither the location nor the owner of the site for well #4 has changed since first identified in 1991,¹ and the City provided testimony to support its plans to construct a well at point of diversion #4. The Recommended Decision and Order should be revised to reinstate the point of diversion for well #4.

MOORE SMITH BUXTON & TURCKE, CHARTERED



Tammy A. Zokan
Attorneys for City of Eagle

¹ The developers of the Brookwood Subdivision first identified the sites where they wanted wells #3 and #4 located on land owned by the developers. These are the same well sites the City desires to develop through its application to amend water right 63-12448. In fact, Brookwood developer Mike Hormaechea attended the November 2003 hearing on the City's application and voiced no objection or protest to the City's testimony regarding use of point of diversion #4.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of April, 2004, I caused to be served a true and correct copy of the foregoing BRIEF ON RECONSIDERATION 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

Matt Howard
P.O. Box 190012
Boise, Idaho 83719

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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

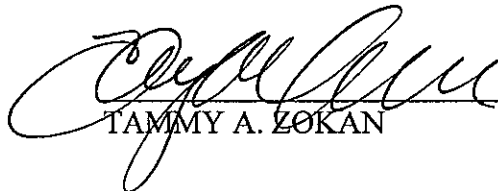
☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Jim Burton
1896 N. Eagle Road
Eagle, ID 83616

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Peter Anderson
Hearing Officer
729 W. Braemere Road
Boise, ID 83702

☐ U.S. Mail
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile


TAMMY A. ZOKAN

IDWR Water Right and Adjudication Search

Note: This search tool identifies active water rights and active transfers. If you want to search both active and inactive water rights, please check the box below.

☐ Search for both active and inactive water right records.

Search Results

Type of Query

USAGE INSTRUCTION

☐ All SRBA & Water Rights

SRBA

☐ Claims

☐ Recommendations

☐ Both

Water Rights

☐ Applications

☒ Permits

☐ Decrees, Licenses and Statutory Claims

☐ Transfers

☐ All of the above

Basin

Who

What

When

Where

Clear

Search

Help

Query parameters:

basinFrom = 63

basinTo = 63

sequenceNumberFrom = 11413

Search for: active Records

Information for type: Permit

	Record	Basin	Sequence	Suffix	Version	Basis	Status	Priority Date	Diversion Rate	Source List	W
Details General Provision	1	63	11413				Active	1991-04-02	3.15	GROUND WATER	MU

Number of records = 1

EXHIBIT

A

[Close](#)IDAHO DEPARTMENT OF WATER RESOURCES
Water Permit Report

04/14/2004

WATER RIGHT NO. 63-11413

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	CITY OF EAGLE 310 E STATE ST PO BOX 1520 EAGLE, ID 83616 (208)939-6813
Attorney	CITY OF EAGLE 310 E STATE ST PO BOX 1520 EAGLE, ID 83616 (208)939-6813
Original Owner	FLOATING FEATHER HILLS INC 2417 BANKS DR STE 101 BOISE, ID 83705 (208)343-6500
Original Owner	TREASURE VALLEY VILLAGE LIMITED PARTNERSHIP 4720 EMERALD BOISE, ID 83706 (208)336-3393

Priority Date: 04/02/1991

Status: Active

<u>Source</u>	<u>Tributary</u>
GROUND WATER	

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
MUNICIPAL	1/01	12/31	3.15 CFS	540 AFA
Total Diversion			3.15 CFS	

Location of Point(s) of Diversion:

GROUND WATER	NWSW	Sec. 03	Township 04N	Range 01E	ADA County
GROUND WATER	SWSW	Sec. 03	Township 04N	Range 01E	ADA County
GROUND WATER	SWSW	Sec. 04	Township 04N	Range 01E	ADA County
GROUND WATER	NESE	Sec. 04	Township 04N	Range 01E	ADA County

Place(s) of use: No POUs found for this right

Conditions of Approval:

1.	004	The issuance of this right does not grant any right-of-way or easement across the land of another.
2.	01M	After specific notification by the department, the right holder shall install a suitable measuring device or shall enter into an agreement with the department to determine the amount of water diverted from power records and shall annually report the information to the department.
3.	046	Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.

Remarks:

1.	General	The right holder is responsible on an on-going basis to provide a well suitable for monitoring as determined by the Department. The right holder is responsible to insure that pumpage under this water right does not directly cause the water level to significantly decline in any domestic well drilled and in use prior to March 29, 1978, or to cause the water level in any other well having a prior right to exceed a reasonable pumping level, unless the right holder provides reasonable compensation or mitigation to the prior water right holder for the reduced water levels as determined by the Director. Farmers Union Canal Company water shall be utilized for the irrigation of the lots in Lexington Hills and Trail Creek Ranch parcels equal to or greater than one-half acre in size during periods when water is being delivered in the canal. This water right may be used for irrigation purposes only if the entire amount of water from the Farmers Union Canal Co. remains with the lands in Lexington Hills and Trail Creek Ranch. Sale or transfer of surface water from any portion of these properties will be cause for the Department to further limit the use of this right. The right holder shall permanently maintain totalizing flow measurement devices of a type approved by the Department at each well. The water right holder shall provide flow measurements to the Department on a frequency determined by the Department. Each lot which receives water under this right shall be metered. Rights 63-11413, 63-12017, and 63-12448 when combined shall not exceed a total diversion rate of 3.25 cfs. Rights 63-12017 and 63-12448 also diverted through the point (s) of diversion described above. Points of diversion were formerly known as Hormaechea Wells 1 and 2 and Lexington Wells 1 and 2. They are currently known as City of Eagle Wells 1-4. Place of use is located within the city limits of Eagle and the surrounding service area.
----	---------	---

Dates:

Proof Due Date: 09/01/2000

Proof Made Date: 08/29/2000

Approved Date: 09/11/1991

Moratorium Expiration Date:

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Application Received Date: 03/14/1991

Protest Deadline Date:

Number of Protests: 0

Field Exam Date::

Date Sent to State Off:

Date Received at State Off:

Other Information:

State or Federal:

Owner Name Connector:

Water District Number:

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

IDWR Water Right and Adjudication Search

Note: This search tool identifies active water rights and active transfers. If you want to search both active and inactive water rights, please check the box below.

☐ Search for both active and inactive water right records.

Search Results

Type of Query

USAGE INSTRUCTION

☐ All SRBA & Water Rights

SRBA

☐ Claims

☐ Recommendations

☐ Both

Water Rights

☐ Applications

☒ Permits

☐ Decrees, Licenses and Statutory Claims

☐ Transfers

☐ All of the above

Basin

Who

What

When

Where

Clear

Search

Help

Query parameters:

basinFrom = 63

basinTo = 63

sequenceNumberFrom = 12017

Search for: active Records

Information for type: Permit

	Record	Basin	Sequence	Suffix	Version	Basis	Status	Priority Date	Diversion Rate	Source List	V
Details General Provision	1	63	12017				Active	1993-07-27	1.56	GROUND WATER	AE AE STO DIV TO RE RE STO WI WI STO

Number of records = 1

EXHIBIT

B

IDAHO DEPARTMENT OF WATER RESOURCES
Water Permit Report

04/14/2004

WATER RIGHT NO. 63-12017

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	CITY OF EAGLE C/O CHRISTOPHER H MEYER PO BOX 2720 BOISE, ID 83701-2720 (208)388-1200
Original Owner	LEXINGTON HILLS INC 1815 E STONEYBROOK CT EAGLE, ID 83616 (208)939-6000
Original Owner	TREASURE VALLEY VILLAGE LTD PARTNERSHIP 1815 E STONEYBROOK CT EAGLE, ID 83616 (208)939-6000

Priority Date: 07/27/1993

Status: Active

<u>Source</u>	<u>Tributary</u>
GROUND WATER	

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
WILDLIFE	1/01	12/31	1.56 CFS	
WILDLIFE STORAGE	1/01	12/31		15 AFA
RECREATION	1/01	12/31	1.56 CFS	
RECREATION STORAGE	1/01	12/31		15 AFA
AESTHETIC	1/01	12/31	1.56 CFS	
AESTHETIC STORAGE	1/01	12/31		15 AFA
DIVERSION TO STORAGE	1/01	12/31	1.56 CFS	
Total Diversion			1.56 CFS	

Location of Point(s) of Diversion:

GROUND WATER	NWSW	Sec. 03	Township 04N	Range 01E	ADA County
GROUND WATER	SWSWSW	Sec. 03	Township 04N	Range 01E	ADA County
GROUND WATER	SWSW	Sec. 04	Township 04N	Range 01E	ADA County
GROUND WATER	NESE	Sec. 04	Township 04N	Range 01E	ADA County

Place(s) of use:

Place of Use Legal Description: WILDLIFE ADA County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
04N	01E	3		SWNE			NWSW			SWSW			SESW	
				NESW			SESE							
				NWSE										

Place of Use Legal Description: RECREATION same as WILDLIFE

Place of Use Legal Description: AESTHETIC same as WILDLIFE

Conditions of Approval:

1.	004	The issuance of this right does not grant any right-of-way or easement across the land of another.
2.	01C	A flow measurement port or other device as specified by the Department shall be installed by the right holder to provide for the installation of measuring equipment and the determination of the rate of diversion by the Department.
3.	020	Use of water under this right may be affected by an agreement between the protestant and the right holder.
4.	046	Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
5.	26A	Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.
6.	46A	A well drilled pursuant to this permit must be located at least 500 feet from any existing well. Well spacing closer than 500 feet must be approved by the Department of Water Resources.
7.	46B	The right holder shall comply with Idaho well construction standards when constructing a well pursuant to this right.

Remarks:

1.	General	Place of use is located within Lexington Hills and Trail Creek Subdivisions.
----	---------	--

Dates:

Proof Due Date: 01/01/1999

Proof Made Date: 04/08/1999

Approved Date: 01/24/1994

Moratorium Expiration Date:

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Application Received Date: 04/21/1993

Protest Deadline Date:

Number of Protests: 0

Field Exam Date::

Date Sent to State Off:

Date Received at State Off:

Other Information:

State or Federal:

Owner Name Connector:

Water District Number: 63

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

IDWR Water Right and Adjudication Search

Note: This search tool identifies active water rights and active transfers. If you want to search both active and inactive water rights, please check the box below.

☐ Search for both active and inactive water right records.

Search Results

Type of Query

USAGE INSTRUCTION

☐ All SRBA & Water Rights	
☐ SRBA	Water Rights
☐ Claims	☐ Applications
☐ Recommendations	☒ Permits
☐ Both	☐ Decrees, Licenses and Statutory Claims
	☐ Transfers
	☐ All of the above

Basin	Who	What	When	Where	Clear	Search	Help
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Query parameters:

basinFrom = 63

basinTo = 63

sequenceNumberFrom = 12452

Search for: active Records

Information for type: Permit

	Record	Basin	Sequence	Suffix	Version	Basis	Status	Priority Date	Diversion Rate	Source List	Water Uses	Owner List
Details General Provision	1	63	12452				Active	1998-04-15	4.5	GROUND WATER	MUNICIPAL	UNITED WATER IDAHO INC (Current)

Number of records = 1



[Close](#)IDAHO DEPARTMENT OF WATER RESOURCES
Water Permit Report

04/15/2004

WATER RIGHT NO. 63-12452

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	UNITED WATER IDAHO INC 8248 W VICTORY RD PO BOX 190420 BOISE, ID 83719-0420 (208)362-7358

Priority Date: 04/15/1998

Status: Active

<u>Source</u>	<u>Tributary</u>
GROUND WATER	

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
MUNICIPAL	1/01	12/31	4.5 CFS	
Total Diversion			4.5 CFS	

Location of Point(s) of Diversion:

GROUND WATER	SESW	Sec. 05	Township 04N	Range 01E	ADA County
GROUND WATER	SWNW Lt 2	Sec. 07	Township 04N	Range 01E	ADA County

Place(s) of use: No POUs found for this right

Conditions of Approval:

1.	046	Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
2.	26A	Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.

Remarks:

1.	General	Point of diversion located within SESW, S05, T04N, R01E is also known as Floating Feather Well. Point of diversion located within SWNW, S07, T04N, R01E is also known as Redwood Creek Well #1. Place of use is located within the service area of United Water Idaho. The right holder shall continue to monitor domestic wells located across from the Floating Feather well and a monitoring well located on the Hormachea property to determine if water levels are changing as a result of pumping under this water right. The right holder shall measure its diversions from the Floating Feather well, and report water diverted and water levels measured to the department upon request. Water bearing zone to be appropriated is from 183 to 401 feet.
----	---------	--

Dates:

Proof Due Date: 09/01/2008

Proof Made Date:

Approved Date: 09/03/1998

Moratorium Expiration Date:

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Application Received Date: 04/15/1998

Protest Deadline Date:

Number of Protests: 0

Field Exam Date::

Date Sent to State Off:

Date Received at State Off:

Other Information:

State or Federal:

Owner Name Connector:

Water District Number:

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False



1896 North Eagle Road
Eagle, Idaho 83616
April 21, 2004
jimburtan3@aol.com

Mr. Peter R. Anderson
Idaho Department of Water Resources
1301 North Orchard Street
Boise, Idaho 83706

Re: Protestants' Response for Reconsideration of Recommended Decision and Order
for Application for Amendment of Permit No. 63-12448 in the name of
City of Eagle

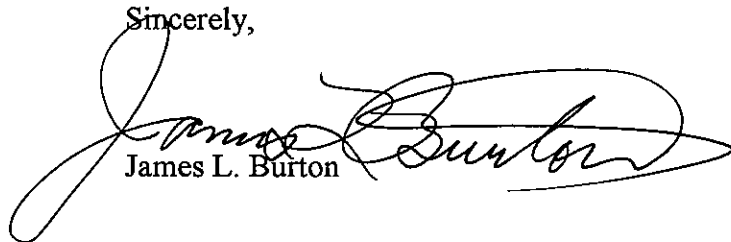
Dear Mr. Anderson:

We applaud your placing the burden of proof on the applicant to protect senior water rights in the Recommended Decision. We only ask that you ensure this work survives the reconsideration process.

The only change we would request is to enhance the Recommended Decision to eliminate or at least discourage the need for any further litigation should harm occur by clearly outlining the steps for mitigation.

Again, thank you.

Sincerely,



James L. Burton

C: Bruce Smith & Tammy Zokan
Weldon Fisher
Matt Howard
Molly O'Leary
John Westra

ROSTER OF ATTENDANCE

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

April 8, 2004
HEARING 2:00
Beginning at ~~1:30~~ p.m.
Conducted by Peter Anderson
Hearing Officer

NAME

ADDRESS

REPRESENTING

MAU Howard P.O. Box 190012 Boise 83719 chase Estate

Mike Chase 3482 Hwy 30W New Plymouth ID 83655 " "

Molly O'Leary 99 E. State Street, Suite 200, Eagle, ID 83616 - Eagle Water
Lynda Sedlaczek 310 E State St Eagle ID 83616 City of Eagle

CHRIS Duncan Holiday Eng, Payette, ID City of Eagle

Tammy Zolcan 225 N. 9th St, Suite 420 Boise 83702 City of Eagle

Bruce Smith " " "

ROBERT DESHAZO P.O. Box 455 EAGLE EAGLE WATER CO

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AT LAW

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

FACSIMILE COVER SHEET

DATE: April 29, 2004 Recipient's Fax: (208) 327-7866
TO: Victoria Wigle Client: 1019-03 (Chase)
Director's Administrative Assistant
FROM: Tammy Zokan/Jennifer
RE: City of Eagle/Chase Estate
NUMBER OF PAGES INCLUDING THIS COVER SHEET: 19

☒ Original will not be sent
☐ Original will be sent by first class mail
☐ Original will be sent by federal express

ADDITIONAL COMMENTS:

Per your request, please find attached a copy of the Petition for Reconsideration of Recommended Decision and Order regarding above referred to matter.

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

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

1019-3chese
Pleadings

RECEIVED
MAR 22 2004
WATER RESOURCES
WESTERN REGION

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	)	
	)	PETITION FOR
CITY OF EAGLE, PETITIONER	)	RECONSIDERATION OF
	)	RECOMMENDED DECISION
APPLICATION FOR PERMIT NO. 63-12448	)	AND ORDER
	)	

The City of Eagle, by and through its attorneys of record MOORE SMITH BUXTON & TURCKE, CHARTERED, hereby petitions for reconsideration of the Hearing Officer's Recommended Decision and Order dated March 8, 2004, in accordance with Idaho Code 67-5243(3) and Department Rule 720.02.

INTRODUCTION

The City of Eagle is a municipal corporation formed and doing business under the laws of the State of Idaho. The City is entitled to supply water within the City's municipal service area and obligated to supply water to the citizens who depend on the City's municipal water system. The City's current municipal water system consists of only one (1) City-owned well, Eagle well #1 (aka Lexington Hills #1). The City's other City-owned well, Eagle well #2 (aka Lexington Hills #2), does not produce the quality and quantity of water suitable for the City's needs. Because the City owns only one operating well, it must depend on contracts with United Water

Idaho, Inc. to meet minimum regulatory requirements for community water systems and emergency demand. Consequently, the City filed an application to amend its existing water right permit 63-12448 to include two (2) points of diversion (Well #s 3 and 4). The needed diversions are located in Eagle, Idaho in the SW¼ SW¼ Sec. 4 T4N R1E (Eagle well #3 aka Brookwood well) and NE¼ SE¼ Sec. 4 T4N R1E (Eagle well #4). The proposed wells would be used to supply water to municipal users within the City's municipal service area, which is illustrated on Exhibit 3.

The Hearing Officer issued a Recommended Decision and Order (the "Decision") in the matter of the City's application. The Decision contains Findings of Fact, Conclusions of Law, and a Recommended Order. The Decision denies the City's request to reinstate the point of diversion known as Eagle well #4 and imposes unreasonable and unsubstantiated restrictions on the City's development of Eagle well #3. Some of the Findings are contrary to the evidence in the record and portions of the Decision are arbitrary and capricious, constitute an abuse of discretion, and are contrary to law.

The Decision forces the City to immediately stop producing water for its citizens when any claim that a water right is not being "completely satisfied" is made. The City is then prohibited from pumping any water until the allegations are resolved. The Decision sets forth no standard for what a complainant must show, or if the complainant must show anything at all, to shutdown the City's water supply. The Decision is silent as to any procedure or process required for making or evaluating complaints. Consequently, anyone can claim their water right is not being "completely satisfied" for whatever reason and the City will have to cease diverting until the complaint is resolved. These conditions put the City in the position of proving a negative

anytime a water right is not being completely satisfied regardless of the reason. That poses real and significant harm to the City's citizens.

The Decision also orders that the priority date on the amended permit shall be June 8, 2001, which is not the date of the original permit. Not only is the June 8, 2001 priority date contrary to law, it completely undermines the City's preexisting agreement with United Water Idaho. As reflected in the Department's records and the record below, the City agreed to cap its existing water rights at 1455 afa in exchange for the City maintaining priority over United Water's nearby Floating Feather well. The 2001 priority date significantly undermines the City's water right.

The order denying the reinstatement of the point of diversion for well site #4 is not supported by the record. The City presented evidence that it needed the two (2) points of diversion to comply with minimum regulatory requirements and standards, and the recommendations of the City Engineer. The City submitted sworn testimony that the City could and would develop well #4 if needed to meet its citizens' water needs. No contradictory evidence was offered by any interested party. In fact, no protestant even objected to the development of well #4. Indeed, no party even bothered to address well # 4 at all in their post-hearing briefing. See Chase Estate Post-Hearing Brief; Eagle Water Company Post Hearing Memorandum; and Burton Group post-hearing correspondence.

The Decision ignores the evidence relating to the protestants' water rights. The City submitted substantial evidence showing that the current diversion works for senior water rights within the area of well #3 are not even capable of pumping the claimed quantities. Even the Chase Estate testified that it is not using all the water claimed under its "dairy/domestic" adjudication claim. The Decision does not address this evidence. Instead, the Decision obligates

the City to ensure these water rights are "completely satisfied," which suggests the City must make these water rights better than they currently exist.

For these reasons stated herein, the Hearing Officer should reconsider his Decision. The Decision should be revised to conform to the evidence in the record and controlling law.

STANDARD OF REVIEW

A. Contested Case Proceeding

This matter is before the Idaho Department of Water Resources (Department) on the City of Eagle, Idaho's application to amend existing municipal water right permit no. 63-12448 to add two (2) points of diversion. Applications to amend an existing permit are processed under Idaho Code §§ 42-211 and 42-203A. Section 42-211 provides in part:

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

* * *

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

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

[s]uch hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

The applicant bears the burden of proof for the factors the Department must consider.

Cantlin v. Carter, 88 Idaho 179, 187 (1964); Shokal v. Dunn, 109 Idaho 330, 339 (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). Both the applicant and protestant have the burden of coming forward with information concerning factors affecting the local public interest. Department Appropriation Rule 40. The Idaho Department of Water Resources has adopted rules applicable to the factors for processing of the application and setting forth the criteria for evaluating the factors. Department Appropriation Rules 40 and 45.

B. On Appeal

An agency's order may be overturned where its findings: (1) violate statutory¹ or constitutional provisions; (2) exceed the agency's statutory authority; (3) are made upon unlawful procedure; (4) are not supported by substantial evidence in the record; or (5) are arbitrary, capricious, or an abuse of discretion. Idaho Code § 62-5279(3); Matter of Permit No. 65-12842, 122 Idaho 59, 61, 831 P.2d 527 (1992).

"A finding of fact without any basis in the record would be clearly erroneous. Also a finding of fact lacking substantial and competent evidence to support it is clearly erroneous. In order to uphold an agency's finding, we must find more than a mere scintilla of evidence." Id. at 62 (internal citations omitted). For an agency's decision to avoid being found to be arbitrary and capricious, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. See Motor Vehicle Mfr's Ass'n v. State Farm Mutual Auto. Ins. Co., 103 S.Ct. 2856, 2866, 463 U.S. 29, 77 L.Ed.2d 443 (1983). An agency action is arbitrary and capricious if the agency has relied on factors which the legislature has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. See 103 S.Ct at 2867.

If an agency order is not affirmed, "it shall be set aside in whole or in part, and remanded for further proceedings as necessary." Idaho Code § 67-5279(3).

¹ Policies enacted by administrative agencies have the force and effect of statutory law. Zattiero v. Homedale School Dist. No. 370, 137 Idaho 568, 571, 51 P.3d 382 (2002).

ARGUMENT

A. The Decision's Requirement that the City Must Cease Diversion Upon a Claim that a Water Right is not Completely Being Satisfied is Not Supported by the Evidence in the Record and Imposes Severe Constraints and Impacts on the Citizens of the City of Eagle.

The Decision requires the City to turn off its pump if any water right within 2000 ft. is not being "completely satisfied." Recommended Order at ¶ 3, p. 28. The Decision never defines what it means to not be "completely satisfied." The condition also affords the City no due process; its right to divert water is simply lost if a water right is not "completely satisfied" regardless of whether the City is responsible. More importantly, it provides for a continuous shutdown while the matter is tied up in investigations. The Decision does not include any requirement that a complainant show or even allege that the City is responsible for any alleged "dissatisfaction" before the City must shut down. A City cannot simply turn off its water supply on a whim. A complainant must have a reasonable basis and information for an allegation of injury.

The Decision also ignores the Department's own rules that "apply to all situations in the state where the diversion and use of water under junior-priority ground water rights ... cause[] material injury to uses of water under senior-priority water rights." Department Conjunctive Management Rule 20. In accordance with Rule 20, when a "call" for water is made, the Department must determine whether the complainant's water use is reasonable, whether there is material injury, whether an alternative supply of water available, whether a mitigation plan is in place, and other relevant factors. See Department Conjunctive Management Rules 30 and 42. Additionally, the City must be afforded due process before its rights are taken away. See Department Conjunctive Management Rule 30.

Moreover, in accordance with the terms of the Decision, before the City is ever allowed to use well #3 it must have a negotiated mitigation plan in place. Recommended Order at ¶2, p. 27-28. Under Department Conjunctive Management Rule 42(2), a senior water right holder cannot make a call on water when there is a mitigation plan in place. Department Conjunctive Management Rule 42(2). Under the terms of the Decision, such mitigation plan will be in place; thus, under the Department's own rules, no water right holder would be able to make a call on water. Id.

The Decision also has no basis for obligating the City to "completely satisfy" water rights with a 2000 ft. radius. There is no evidence in the record that water rights within 2000 ft. of well #3 will be injured. Only one protestant submitted information regarding potential injury: the Chase Estate submitted allegations related to well #3. The Eagle Water Company did not present any testimony or witnesses at hearing. Likewise, the Burton Group did not present any exhibits, testimony or witnesses. The City on the other hand did offer expert testimony relating to potential impacts. Mr. Terry Scanlan, P.E., P.G., testified that pumping from the proposed points of diversion may increase the depth to water in some wells immediately adjacent to the proposed wells. However, drawdowns are not likely to be significant. According to Mr. Scanlan's analysis, based upon the distance of the Burton Group wells from the proposed wells, the depth of the Burton Group wells and the results of monitoring United Water Idaho, Inc.'s Floating Feather well's impact on similarly situated domestic wells, the proposed points of diversion are not likely to injure the Burton Group water rights. Neither the Burton Group nor Eagle Water Company contradicted the City's expert, identified any water rights at issue, or defined any alleged injury. Regarding the water right holders identified on Exhibit 400, they similarly did not

allege injury and there is no evidence in the record that the water rights listed on Exhibit 400 will be injured.

The Decision cites no evidence in support of the Finding that the Burton Group wells "would be hydraulically connected" to well #3, the potential impact to the Burton Group wells is "expected to range between the small and large irrigation wells," or that the Burton Group water rights or the water rights on Exhibit 400 will be injured. See Section V at ¶ 48, p. 20. Indeed, there is no such evidence in the record.²

The Decision's conditions relating to the City's obligation to insure the "complete satisfaction" of water rights 2000 ft. and the requirement that the City cease pumping should be vacated. These conditions are contrary to law and not supported by the evidence in the record. See Department Conjunctive Management Rules 20, 30 and 42. At the very least the Decision should be modified to comply with the Department's rules and to clearly set forth reasonable obligations if a situation occurs. Simply shutting down the City systems because of a claim is not reasonable.

B. The Priority Date Assigned by the Decision is Contrary to Law and Constitutes an Abuse of Discretion.

The Decision establishes a June 8, 2001 priority date for water right no. 63-12448. Recommended Order at ¶4, p. 29. However, the City's water right no. 63-12448 has a priority date of April 8, 1998. Idaho Code § 42-211 provides that the priority date of an amended permit shall be the date of the original permit. Therefore the June 8, 2001 priority date has no basis in law and should be removed from the Decision. Additionally, the June 8, 2001 priority date subverts the City's agreement with United Water Idaho related to the parties' water rights. As

evidenced by the Department's records, the City has an annual 1455 acre ft. "cap" on its water rights. The City agreed to the cap in exchange for United Water agreeing that United Water's water right no. 63-12452 would be junior in priority to the City's rights. Under the priority date unilaterally created by the Decision, water right 63-12448 retains the cap imposed by United Water but is now junior to United Water and other water rights not even part of this proceeding. This subrogation causes significant harm to the City's water right.

The Decision cites Fremont-Madison v. Ground Water Approp., 129 Idaho 454, 461 (1996), in support of the June 8, 2001 priority date. Fremont-Madison does not authorize the Department to ignore the plain language of Idaho Code § 42-211. Fremont-Madison acknowledged that a priority date could be modified to mitigate enlargement in accordance with Idaho Code § 42-1426. Idaho Code § 42-1426 authorizes adjusting a priority date to one day later than a junior water right when (1) there is enlargement resulting in injury (2) and the resulting injury cannot otherwise be mitigated. Idaho Code § 42-1426; 129 Idaho at 461. Such circumstances are not present in this case. Indeed, the Decision concludes that the use of water under the amended permit "will not be increased." Conclusions of Law at ¶21, p. 26.

The Decision should be amended to include the correct priority date, April 8, 1998.

C. The Denial of Eagle Well No. 4 is Not Supported by the Evidence in the Record, is Arbitrary and Capricious, Constitutes an Abuse of Discretion, and is Contrary to the Law.

The Decision denies the City's application to reinstate the point of diversion for Eagle well site #4. Conclusions at ¶7, p. 23, ¶11, p. 24, ¶13, p. 25. As shown by the evidence in the record and the Department's records, the point of diversion for well #4 was previously authorized

² The Decision's Finding relating to "hydraulic connection" is a gross oversimplification of the relevant hydrology that is at odds with the Department's own analysis of groundwater conditions in the area. See Exhibit 103 at p. 19-20.

as a point of diversion for the City's 1991 water right, permit no. 63-11413.³ Thus, the Department has already reviewed well #4 and concluded that it is not speculative and that it does meet legal standards. There is no evidence in the record that the circumstances have changed since the Department last approved well #4.

Additionally, notice of the City's application to amend permit no. 63-12448 to add well site #3 and well site #4 was duly published in accordance with law. While some protests were filed relating to well site #3, no one protested well site #4. No one claimed or established any harm related to well site #4. See Shokal v. Dunn, 109 Idaho at 339. The City proposed well site #4 so that it had another well site option in case well #3 did not work out or if an additional well site were otherwise needed. Sworn testimony indicated that the City could and would develop well #4 if needed to provide water to its citizens. No contradictory evidence was presented. There is no evidence in the record supporting the denial of the point of diversion for well #4 and the City's application to reinstate the point of diversion for well #4 to water right permit 63-12448 should be granted.

D. The Decision's Findings Relating to the Chase Estate's Water Rights are Not Supported by the Evidence in the Record and Hold the City to an Unobtainable Standard.

The Decision's Findings of Fact describe the neighboring senior Chase Estate water rights as they appear on paper. See Section V, Impact on Water Quantity Under Existing Water Rights at ¶¶ 38-47, p. 17-20. The Decision then obligates the City to mitigate for impacts to the Chase Estate water rights and ensure that all neighboring water rights are being completely satisfied as they appear on paper. See Recommended Order at ¶¶ 2b and 3, p. 28. There is no basis for Decision's Findings relating to the Chase Estate's water rights.

³ In fact, the Department has considered and approved the points of diversion for Eagle wells #3 and #4 for water

The City submitted significant evidence demonstrating that the Chase Estate diversions are not capable of pumping the amount of water claimed. Mr. Scanlan testified that, based on the design configuration of the "dairy/domestic" well, it is not currently capable of producing the .13 cfs claimed by the Chase Estate. Furthermore, the Chase Estate's "dairy/domestic" diversion is currently on the verge of failure using the current pumping configuration. Mr. Scanlan testified that the existing well and pump configuration are not reliable under current water level conditions, and that the 100-year old well's 3-inch diameter bore hole and unknown construction design is not reliable as the sole water source for a dairy. Mr. Scanlan testified that it is not prudent to rely on the "dairy/domestic" well for a dairy operation and that if the Chase Estate desired a reliable water supply, it should be making improvements and upgrading its diversions regardless of the City's project.

Mr. Scanlan further testified that the existing well and pump configuration at the "small irrigation well" could definitely not pump the .42 cfs claimed by the Chase Estate and that given the age and antiquated pumping system in place, the well does not represent a reasonable means of diversion. Mr. Scanlan described the Chase Estate's dairy/domestic and small irrigation wells as antiquated, unreasonable means of diversion. Mr. Shaw did not rebut Mr. Scanlan's testimony about the dairy/domestic and small irrigation wells. This evidence is ignored by the Decision.

Significantly, the Chase Estate testified that water right nos. 63-5226 and 63-15820 should be less than they appear on paper: Mr. Mike Chase testified that the "dairy/domestic" right, water right nos. 63-5226 (dairy) and 63-15820 (domestic) should be .13 cfs, not .31 cfs. Despite the information and testimony in the record, the Decision reflects water rights based on some unidentified source. Since the water rights have not been used as they appear on paper and

right nos. 63-11413 and 63-12017.

cannot be completely satisfied today, the Decision appears to obligate the City to mitigate for impacts it did not cause.

Additionally, the conditions imposed on water right permit no. 63-12448 undermine Idaho law making unappropriated waters available for appropriation and Idaho policy promoting the application of water to its maximum use and benefit. See Parker v. Wallentine, 103 Idaho at 513. "[W]hile the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable groundwater pumping levels as may be established by the director of the department of water resources as herein provided." Idaho Code § 42-226. The information in the record shows that the approval of the City's application is not likely to significantly affect reasonable pumping levels.⁴ The evidence in the record shows that the Chase Estate's antiquated diversions are not reasonable and are incapable of pumping the claimed water rights.

The Decision should be revised to obligate the City to mitigate only for material injury to valid water rights, if the City's diversion is the cause of said injury. The Department should determine allegations of injury and appropriate mitigation under the Department's existing rules developed specifically for such situations. See Section A, above and Section E, below.

E. The Negotiated Mitigation Provisions are Not Supported by the Evidence in the Record or the Law and Constitute an Abuse of Discretion.

The Decision mandates that the City complete a pump test, establish a pumping rate "cap," and then negotiate an agreement with the Chases to resolve any impact the identified pumping rate might have on the Chase water rights. Recommend Order at ¶2, p. 27-28. This

⁴ While domestic water rights are exempt from reasonable pumping level standards, other water rights are not exempt and are subject to Idaho Code § 42-226. Parker v. Wallentine, 103 Idaho 506 (1982).

approach does not make sense. First, this provision seems to presume that material injury to a water right will occur but the Decision never makes any finding as to injury.⁵ Furthermore, any such presumption is contradicted by the evidence in the record. The City presented the expert testimony of Mr. Terry Scanlan, P.E., P.G., which is contrary to the Decision's presumption and was largely ignored by the Decision. For example, after significant investigation and analyses, Mr. Scanlan concluded in part that (1) there is adequate groundwater to satisfy existing water rights plus new uses; (2) the anticipated pumping from the new wells is not going to significantly affect groundwater levels; (3) the Protestants' water rights are not likely to be injured; (4) the Chase Estate dairy/domestic and small irrigation wells and pumps are not currently capable of producing the amount of water claimed at these diversions; (5) in the unlikely event that the City's proposed points of diversion were to have a significant impact on groundwater levels in the vicinity of the dairy/domestic and small irrigation wells, there are alternative ways to continue current water use. Neither the record nor the Decision indicates that material injury to a water right will occur; consequently there is no basis for ordering the City to mitigate for an unidentified injury.

Second, the Decision has made a determination on some mitigation related issues but then says the City has to go to District Court to resolve others. Not only does this also not make sense, it is contrary to the Department's own rules, which provide a process for developing a mitigation plan and Department approval of such plans. Under Department Conjunctive Management Rule 42, a mitigation plan shall be submitted to the Department. The Department then gives notice, holds a hearing if necessary, and evaluates the plan under Idaho Code § 42-222, just as for a transfer of water rights. Department Conjunctive Management Rule 42.

⁵ The Decision makes Findings regarding what drawdowns could potentially be but makes no Finding that the

Included in the factors the Department considers when evaluating mitigation plans is whether replacement water or other compensation will be provided to offset injury to senior water rights. Id. Accordingly, matters concerning mitigation should be determined by the Department. The Department cannot disregard its own Rules and simply shift its obligations to the District Court.

The Decision should be revised to provide that a mitigation plan will be developed in accordance with Department Rules. The City will then propose a mitigation plan to the Department in accordance with Parker v. Wallentine, 103 Idaho 506 (1982) and the Department's Rules. Any other result is contrary to law and subjects the City to the burden and delays of yet another time consuming and costly process.

F. The Decision's Condition Imposing a Diversion/Pumping Limit is Not Supported by the Evidence in the Record, is Arbitrary and Capricious, and Constitutes an Abuse of Discretion.

The Decision requires the City to conduct a pump test, determine the maximum rate it will pump at well #3, and determine what the impacts to neighboring water rights would be at that rate. Recommended Order at ¶2, p. 27. The maximum rate would then be a limiting condition on well no. 3 and the City would be obligated to mitigate at that rate. Id. Presumably, if the City later needed to increase that amount, it would have to make application to the Department and there would be an opportunity for protests. This is unworkable from a municipal provider's perspective. To best provide for its municipal users, the City must be able to utilize its water supplies at all times. As the record reflects, the proposed wells would be used in conjunction with Eagle well #1 to supply water to users within the City's municipal service area. While the City anticipates pumping an average of 200-250 gpm from proposed Eagle well #3 on average, a significant reason for a multi-well system is back-up supply. The City will need to

approval of the City's application will amount to material injury to any water right.

rely on well #3 in the event of a well or pump failure, and must be able to adjust its pumping rate accordingly. Thus, the condition puts the City between a rock and a hard place. If the City sets the "cap" to reflect emergency conditions, the Decision suggests the City will have to mitigate for conditions present only in emergency situations. On the other hand, if the City sets the "cap" at the average anticipated diversion rate, it will be unable to utilize the diversion in emergency situations. Finally, the diversion cap is contrary to the Department's own rules for the reasons stated in Sections A and E, above, and should be removed from the Decision.

G. The Decision's Findings Related to the Existing Permitted Point of Diversion, Eagle Well No. 2 is Not Supported by the Evidence in the Record.

The Decision finds that "no evidence was offered to explain why a new well could not be drilled at this point of diversion...." Section III, Applicant and Permit No. 63-12448, at ¶ 21, p. 11. This Finding is completely unsupportable given the record. The evidence in the record shows that well logs and recorded well performance indicate that aquifer conditions tend to improve in areas farther west of the foothills in the area of Eagle, Idaho. Additionally, both Mr. Scanlan and Mr. Vernon Brewer opined that the water quality and quantity are better at well site #3 than in the area of well #2. These opinions are confirmed by the Department's own report. See Exhibit 103 at p. 24-26; see also Exhibit 102 at p. 3. The City also presented evidence describing the problems with well #2, the problems with the general water quality in the area of well #2, the efforts the City had undertaken in attempt to fix well #2, and the City Engineer's recommendation that the City not expend any more money trying to fix well #2. Id.; see also Exhibit 106 at p. 4. Thus, the purpose of the City's application is to replace failed Eagle well #2 and equip the City with the desired City-owned multi-well system. The Findings relating to well #2 should be revised to conform to the evidence in the record.

CONCLUSION

In summary, the Decision's Findings, Conclusions, and Recommended Order are not based on the evidence in the record and are contrary to law. Additionally, the Recommended Order is arbitrary and capricious in that it is completely unworkable from the standpoint of municipal provider. A municipal provider cannot "immediately cease" diverting water without putting its citizens at substantial risk. At the very least, there should be clear a standard and process for determining whether a water right "is not being completely satisfied" before the City is ordered to cease pumping water; and any mitigation should only obligate the City to make a valid water right whole, not better. Additionally, the establishment of a mitigation plan and administration of the prior appropriation doctrine must be in accordance with Idaho law and the Department's own rules. The Decision should be revised in accordance with the information contained herein.

Oral argument on the City's Petition is requested.

MOORE SMITH BUXTON & TURCKE, CHARTERED



Tammy A. Zokan
Attorneys for City of Eagle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of March, 2004, I caused to be served a true and correct copy of the foregoing PETITION FOR RECONSIDERATION 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

Matt Howard
P.O. Box 190012
Boise, Idaho 83719

☒ 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

Peter Anderson
Hearing Officer
729 W. Braemere Road
Boise, ID 83702

☐ U.S. Mail
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile


TAMMY A. ZOKAN

BEFORE THE DEPARTMENT OF WATER RESOURCES
IN AND FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR AMENDMENT OF PERMIT NO. 63-12448 IN THE NAME OF THE CITY OF EAGLE 	)))))	AMENDED NOTICE OF HEARING ON PETITION FOR RECONSIDERATION
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The hearing on petition(s) for reconsideration in this matter previously scheduled for Thursday, April 1, 2004, is **VACATED**. Notice is hereby given that the Department of Water Resources has rescheduled this matter for a formal hearing on petition(s) for reconsideration for **April 8, 2004, beginning at 2:00 p.m. in Conference Room A/B at the offices of the Idaho Department of Water Resources, located at 1301 N. Orchard St., Boise, Idaho.** The presiding officer at the hearing will be Peter R. Anderson.

The hearing will be held in accordance with the provisions of Chapters 2 and 17, Title 42 and Chapter 52, Title 67, Idaho Code, and the adopted Rules of Procedure of the department. IDAPA 37.01.01. A copy of the rules may be obtained from the department upon request.

The hearing will be conducted in a facility meeting the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please advise the Department within five (5) days prior to the hearing.

Dated this 20th day of March, 2004.



Peter R. Anderson
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of March, 2004, the above and foregoing document 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:

Bruce Smith
Tammy Zokan
225 N 9th St., Suite 420
Boise, ID 83701-2720

Jim Burton
1896 N. Eagle Rd.
Eagle, ID 83616

Weldon Fisher
546 E. Beacon Light Rd.
Eagle, ID 83616

Matt Howard
P.O. Box 190012
Boise, ID 83719

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

John Westra
IDWR – Western Region
2735 Airport Way
Boise, ID 83705-5082


Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

MATT J. HOWARD

ATTORNEY AT LAW

P. O. BOX 190012

BOISE, IDAHO 83719

TELEPHONE (208) 333-0622

FACSIMILE (208) 333-8409

EMAIL MHOWARD@FIBERPIPE.NET

FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Peter Anderson	Matt J. Howard
COMPANY:	DATE:
	March 26, 2004
FAX NUMBER:	TOTAL NO. OF PAGES INCLUDING COVER:
395-0222	2
RE:	
In the Matter of Application for Amendment of Permit 63-12448 / City of Eagle	
NOTES/COMMENTS:	

Cc:
IDWR State Office (via fax 327-7866)
John Westra (via fax: 334-2348)
Molly O'Leary (via fax: 938-7904)
Bruce Smith (via fax: 331-1202)
Jim Burton (via U. S. Mail)
Weldon Fisher (via U. S. Mail)
Client

CONFIDENTIAL & PRIVILEGED INFORMATION

This facsimile is confidential & privileged. It is for use of the individual(s) named on this cover sheet. If you are not the intended recipient, do not read this facsimile. Any further inspection, dissemination, or copying of this facsimile is prohibited. If you have received this facsimile by error, please notify us by phone immediately, and we will arrange to have it returned to us. Thank you.

MATT J. HOWARD

ATTORNEY AT LAW

P. O. BOX 190012

BOISE, IDAHO 83719

TELEPHONE (208) 333-0622

FACSIMILE (208) 333-8409

EMAIL: MHOWARD@FIBERPIPE.NET

March 26, 2004

Via Facsimile

Peter R. Anderson
729 W. Braemere Road
Boise, ID 83702

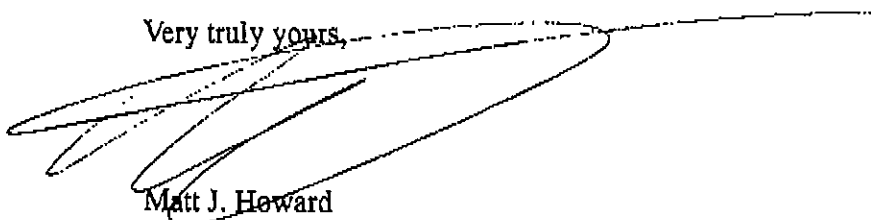
RE: In the Matter of Application for Amendment of Permit No. 63-12448

Dear Mr. Anderson:

I received in the mail today a *Notice of Hearing on Petition for Reconsideration* (Mar. 25, 2004) in the above-referenced matter scheduling a hearing for April 1, 2004. That is the one day of the week, I am not available. I am available on April 2nd between 3pm and 5pm. I am also available anytime the following week, April 5th through the 9th. Thus, I would ask that you please reschedule the hearing so that the Chase Estate can be represented at the hearing.

The notice also states that the hearing will be held on "petitions for reconsideration." I have only been served with a petition for reconsideration from the City. If there is another petition that you are considering in this matter, would please let me know. Thank you.

Very truly yours,



Matt J. Howard

Cc: IDWR State Office (via fax)
John Westra, IDWR Western Region (via fax)
Molly O'Leary, Esq. (via fax)
Bruce Smith, Esq. (via fax)
Jim Burton (via U.S. Mail)
Weldon Fisher (via U.S. Mail)
Client

BEFORE THE DEPARTMENT OF WATER RESOURCES
IN AND FOR THE STATE OF IDAHO

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

**NOTICE OF HEARING
ON PETITION FOR
RECONSIDERATION**

PLEASE TAKE NOTICE that a formal hearing on petitions for reconsideration is set for this matter on **April 1, 2004, beginning at 11:00 a.m. in Conference Room A/B at the offices of the Idaho Department of Water Resources, located at 1301 N. Orchard St., Boise, Idaho.** The presiding officer at the hearing will be Peter R. Anderson.

The hearing will be held in accordance with the provisions of Chapters 2 and 17, Title 42 and Chapter 52, Title 67, Idaho Code, and the adopted Rules of Procedure of the department. IDAPA 37.01.01. A copy of the rules may be obtained from the department upon request.

The hearing will be conducted in a facility meeting the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please advise the Department within five (5) days prior to the hearing.

Dated this 25th day of March, 2004.



Peter R. Anderson
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of March, 2004, the above and foregoing document 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:

Bruce Smith
Tammy Zokan
225 N 9th St., Suite 420
Boise, ID 83701-2720

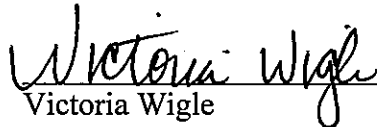
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546 E. Beacon Light Rd.
Eagle, ID 83616

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P.O. Box 190012
Boise, ID 83719

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

John Westra
IDWR – Western Region
2735 Airport Way
Boise, ID 83705-5082


Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

RECEIVED

MAR 22 2004

Department of Water Resources

MATT J. HOWARD
Attorney at Law
P. O. Box 190012
Boise, Idaho 83719
Telephone: (208) 333-0622
Facsimile: (208) 333-8409

Attorney 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) CHASE ESTATE'S EXCEPTIONS TO THE
IN THE NAME OF THE CITY OF EAGLE) HEARING OFFICER'S RECOMMENDED
DECISION AND ORDER

INTRODUCTION

This appeal takes exception to the inadequate and improper conditions recommended by the hearing officer as mitigation for the adverse impacts to the Chase¹ water rights. The hearing officer's recommended conditions when removed from abstract theory and put into practice provide no meaningful or real protection to the Chases' rights to water for dairy, irrigation, and domestic purposes. The recommended conditions also threaten to leave the Chase dairy without a continuous supply of water that is critical to the daily operation of the dairy and health of the dairy herd. This appeal also takes exception to other significant errors identified below in the List of Exceptions and Issues.

¹ The "Estate," "Chases," and/or "Chase" as used herein refer to the Estate of Eleanor I. Chase.

This case stems from an Application for Amendment of Permit No. 63-12448 filed by the City of Eagle ("City") seeking to add two new points of diversion. One of the points of diversion, referred to as the "Brookwood well," is proposed to be located directly across the street from the Chase dairy within 509 feet of the Chase dairy well. The proposed Brookwood well is designed to be a high-capacity municipal well capable of diverting the maximum authorized diversion rate of 3.25 cfs (about 1,460 gpm) or sustaining 1,000 gpm withdrawals.

The Chases operate three wells in close proximity to the proposed Brookwood well: the dairy well², the small irrigation well, and the large irrigation well. There is no serious dispute that the Chases will be unable to divert water from either the dairy well or the small irrigation well after the Brookwood well is developed and producing water at 1,460 gpm, 1,000 gpm or even less. The viability of the large irrigation well is also threatened by development of the Brookwood well.

Rather than deny the application based upon a finding of adverse impacts under Idaho Code § 42-211, the hearing officer recommends development of the Brookwood well and suggests that the "adverse impacts" can be mitigated or negated by a series of unorthodox conditions, one of which expressly calls out for more litigation. As discussed below, these conditions provide no real protection to Chases' senior water rights and only invite more litigation between the parties to remedy the adverse impacts to the Chase water rights that will be caused by development of the proposed Brookwood well.

² The recommended order refers to the dairy well as the "dairy-domestic well." The dairy well actually diverts water for commercial, stock water and domestic purposes. The evidence and testimony in the record refers to the dairy well as the "dairy well." Therefore, to avoid any confusion, it will continue to be referred to herein as the "dairy well."

LIST OF EXCEPTIONS AND ISSUES

1. The hearing officer failed to identify all of the Chase water rights that are protected to historical ground water pumping levels pursuant to *Parker v. Wallentine*.
2. The hearing officer's independent calculations of projected drawdowns in the Chase dairy well, small irrigation well, and large irrigation well are not consistent with the evidence and expert opinions in this case.
3. The hearing officer's finding that the dairy well can produce only 0.067 cfs is not supported by the evidence.
4. The hearing officer's implicit conclusion that because right no. 63-5229 is a "supplemental" water right it is not entitled to the same degree of protection is contrary to Idaho law.
5. The hearing officer's determination that right no. 63-8663, which is diverted from the large irrigation well, will not be materially impacted is inconsistent with uncontroverted expert testimony and not supported by the evidence.
6. The hearing officer erred in determining that the application meets the local public interest criteria.
7. The conditions proposed by the hearing officer violate Idaho Code § 42-211 and Idaho law.

On December 15, 2003, the Chase Estate filed with IDWR, in the above captioned case, the *Chase Estate's Post-Hearing Brief* (hereinafter "Post-Hearing Brief."). The Post-Hearing Brief provides a detailed summary of the relevant evidence and testimony as well as application of that evidence to Idaho law. The entire contents of the Post-Hearing Brief are expressly incorporated herein by reference. For sake of brevity and avoiding unnecessary duplication of legal/evidentiary analysis, citations will be made to relevant portions of the Post-Hearing Brief as appropriate.

DISCUSSION

I. ADVERSE IMPACTS TO THE CHASE WATER RIGHTS HAVE BEEN ESTABLISHED.

A. **LEGAL STANDARD.** Pursuant to Idaho Code § 42-211, the application cannot be approved “if the rights of others will be . . . adversely affected thereby.” (emphasis added). In this case, there is no serious dispute that the Chase water rights will be adversely affected. The hearing officer’s attempt to create conditions to negate the adverse impacts to the Chase water rights highlights the real impact to the Chase water rights.

The hearing officer initially errs in concluding that only one water right, no. 63-15820, will be “legally impact[ed]” pursuant to *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982). *Rec. Order at p. 21, ¶ 2*. As discussed in the Post-Hearing Brief, the following Chase water rights are protected to historical ground water pumping levels under *Parker*:

- The Dairy Well: 63-5226 (commercial, domestic, and stock water) and 63-15820 (domestic);
- The Small Irrigation Well: 63-5229 (irrigation, stock water, and domestic); and
- The Large Irrigation Well: 63-8663 (stock water portion only).

See Post-Hearing Brief at pp. 4-9. Consequently, the hearing officer’s failure to identify the “legal impacts” to 63-5226, 63-5229, and the stock water portion of 63-8663 is in error and inconsistent with Idaho law.

B. **ESTIMATES OF ANTICIPATED DRAWDOWNS.** The hearing officer’s calculations of drawdown in the dairy well, small irrigation well, and large irrigation well are not consistent with evidence and expert opinions offered at the hearing. At trial, the parties introduced a report entitled “Summary of Groundwater Conditions in the Vicinity of Proposed Brookwood Subdivision Well Site” prepared by Bill Strowd, P.G., an expert formerly retained by the City (hereinafter “the Strowd report”). According to the Strowd report, wells located within the inner

circle of the “Bullseye”³ will most likely experience drawdowns in excess of 8 or 10 feet.

Experts for both parties agreed that the Strowd report provides “the best estimate available” for estimating drawdowns to the Chase wells caused by the proposed Brookwood well. *Post-Hearing Br. at pp. 10-11.*

In his recommended order, the hearing officer presents new drawdown calculations for the dairy well and small irrigation well but fails to explain the methodology or basis for those calculations. *See Rec. Order at p. 17, ¶ 40, and p. 19, ¶ 44.* Without knowing how the hearing officer arrived at his new drawdown calculations, it is impossible to determine the reliability of the hearing officer’s drawdown estimates. IDAPA 37.01.01.712 requires that the findings of fact contain “a concise and explicit statement of the underlying facts of record supporting the finding.” Because the hearing officer does not disclose the underlying basis and methodology for his new drawdown estimates, IDAPA 37.01.01.712 has not been satisfied. However, because the order has been submitted to the Director as a “Recommended Order,” it is unnecessary to remand this matter to the hearing officer for the determination of drawdown estimates. The Director is free to review the Strowd report and other data in the record and arrive at his own estimates of drawdown based upon a proper methodology.

The hearing officer also erroneously concludes that the Strowd report sets out a “worst case” scenario because it is based upon 1,000 gpm withdrawals, whereas the City testified that it did not “expect” to exceed 280 gpm sustained withdrawals. *See Rec. Order at p. 16, ¶ 37.* The hearing officer’s reliance on 280-gpm withdrawals is inconsistent with the diversion rate *actually requested* in the application, the fact that the Brookwood well is being *designed* to accommodate

³ The Bullseye is actually entitled “Estimated 6-Month Draw Down Based on 1000 GPM Sustained Pumping” *Exhibit 102*, but was referred to by both parties as the Bullseye.

sustained 1,000 gpm withdrawals, and the *prior analysis* performed by IDWR when it considered the anticipated impacts from the City's Lexington No. 1 well. *See Post-Hearing Br. at pp. 10-13.*

The hearing officer's finding that the Stowd report's 1,000 gpm withdrawals is a worst case scenario ignores the uncontroverted testimony in this case. Specifically, on cross examination, the City's engineer, Vern Brewer, testified that withdrawals from the Brookwood well could exceed 1,000 gpm if the City were to provide water throughout its entire service area. *See Post-Hearing Br. at p. 12.* Thus, a true "worst case" scenario would be the pumping of water from the Brookwood well at the full permitted rate of 3.25 cfs for an extended period of time. This would create even more severe drawdowns in the Chase wells than those predicted in the Stowd report.

The hearing officer also errs in his estimates of drawdown in the large irrigation well based upon adopting the "actual observations" in the Scanlan report. *See Rec. Order at p. 19, ¶ 46.* The Scanlan report gives several reasons why the "observed" drawdown was less than the calculated drawdown in the large irrigation well. *See Exhibit 105, pp. 5-6, 9-10.* The Scanlan report indicates that the "actual value" would more likely be in the range of "3 to 6 feet." *Id. at pp. 9.*⁴

C. THE DAIRY WELL.

The hearing officer erroneously concludes that the dairy well is capable of producing only 0.067 cfs. *See Rec. Order at p. 17, ¶ 39.* That conclusion is based upon a one-time static

⁴ For purposes of clarification, the Scanlan report refers to the large irrigation well as the "Chase irrigation well." Also, the "Chase Domestic well" identified in the Scanlan report is a small domestic well owned by the Chases that is located close to the Floating Feather well; it should not to be confused with the Chase dairy well, which is located further east near the intersection of Eagle and Floating Feather roads.

water level measurement taken during the “lowest” part of the annual water cycle for the area. *See Post-Hearing Br. at pp. 14-17.* The hearing officer’s conclusion also appears to be based on an assumption that the discharge pressure for the pumps in the dairy well is 30 psi. There is no evidence in the record to support that assumption; it is merely a guess contained in the City’s Exhibit 23. Consequently, if the discharge pressure is less than 30 psi, which it very well could be, the pumps would be capable of producing even more water. In short, the hearing officer’s conclusion that the dairy well can produce only 0.067 cfs is not supported by the evidence.

In terms of impact, the hearing officer appears to conclude that the Brookwood well will adversely impact the dairy well, rendering it unusable. Based upon the evidence, the dairy well can only withstand a maximum of 4 to 5 feet of drawdown before the pumps quit working. *Post-Hearing Br. at pp. 17-22.* Whether drawdowns are estimated to be in excess of 8 to 10 feet based on the Strowd Report or between 7 to 9 feet as calculated by the hearing officer, the same result occurs: The dairy well will cease functioning, and the Chase dairy will be without water.

D. THE SMALL IRRIGATION WELL.

It is unclear what the hearing officer means by the following statement: “the supplemental nature of this right [63-5229]⁵ makes it unlikely that its enforcement would preclude the development of [the Brookwood well].” *Rec. Order at p. 22, ¶ 4.* This statement seems to suggest that because this water right is supplemental, it is entitled to less protection than other water rights. Under Idaho Code § 42-211, development of the Brookwood well cannot occur “if the rights of others will . . . be adversely affected thereby.” This provision of law does not exclude supplemental water rights from protection.

⁵ The hearing officer incorrectly identifies the water right from the small irrigation well as 63-5226. The correct number is 63-5229.

The small irrigation well is expected to suffer the same fate as the dairy well. Based upon the evidence, the small irrigation well will be unable to produce water if drawdowns are 5 feet or even less. *Post-Hearing Br. at pp. 25-30.* Whether drawdowns are estimated to be in excess of 8 to 10 feet based on the Strowd Report or between 7 to 9 feet as calculated by the hearing officer, the same result occurs: The Chases will be unable to divert water from the small irrigation well.

E. THE LARGE IRRIGATION WELL.

The hearing officer seems to conclude that water right no. 63-8663 will not be adversely impacted because the large irrigation well is located “sufficiently distant” from the proposed Brookwood well. *See Rec. Order at p. 22, ¶ 5.* That conclusion is totally unsupported by the evidence and testimony offered by both experts at the hearing. Based on the Strowd report, the large irrigation well could expect drawdowns in the range of about 4.5 feet. The hearing officer also estimated drawdowns would likely range from 3.6 to 4.5 feet if the Brookwood well were producing 902 gpm over 6 months.

Now compare those drawdown estimates to the uncontroverted testimony of both experts at the hearing. Both parties’ experts agreed that if the pumping level in the large irrigation well dropped below 80 feet, the pump would cease producing water or quit functioning properly. The question, therefore, is whether the estimated 4.5 feet of drawdown will cause the pumping level in the large irrigation well to drop below the threshold level of 80 feet, thus adversely impacting 63-8663. The City could not answer that question because it had not collected the necessary pumping level data for the large irrigation well prior to the hearing in this case. In short, the City failed to properly prepare its case to carry its burden of proof to show no adverse impacts to the large irrigation well. Therefore, at the hearing, the City could not offer an opinion with any

degree of reasonable certainty as to whether or not the estimated 4.5 feet of drawdown would adversely impact 63-8663. *Post-Hearing Br. at pp 30-32.*

Also, there is no question that if the pumping level fell below the 80-foot threshold, the impact would impose a significant cost on the Chases. Evidence in the record indicates that in such event, the Chases could incur costs for pulling the pump, adding more column, tube and shaft, and possibly replacing the bowls. *Post-Hearing Br. at p. 32.* In light of the evidence presented in this case, the hearing officer's conclusion that 63-8663 will not be adversely impacted by the proposed Brookwood well is unsupported by the evidence.

II. THE APPLICATION IS NOT IN THE LOCAL PUBLIC INTEREST.

The hearing officer does not provide a reasoned analysis explaining how he determined that the Application is in the local public interest. The hearing officer's determination in this regard is especially problematic given that he has determined that *adverse impacts* from the proposed Brookwood well will likely occur. The hearing officer's public-interest finding juxtaposed with his adverse-impacts finding are inconsistent with *Shokal v. Dunn, 109 Idaho 330, 338, 707 P.2d 441, 449 (1985)* wherein one of the elements to be considered in determining whether an application is in the local public interest is the "harm to other persons resulting from the proposed appropriation." If there are going to be adverse impacts, how can an application be in the public interest absent a finding that there are factors that outweigh the harm to other persons? *See e.g., Shokal, 109 Idaho at 338, 707 at 449* ("The burden of proof is upon the applicant to show that the project is either in the local public interest or that there are factors that outweigh the local public interest in favor of the project). The hearing officer suggests that his proposed conditions will negate the adverse impacts. However, as discussed below, those conditions provide no real protection and simply invite more litigation.

The hearing officer also indicates that IDWR will not “second guess” the Applicant’s decision in this case. *Rec. Order at p. 26, ¶ 17.* No one is asking IDWR to second guess an Applicant’s decision to file an application. Rather, the question is whether *the evidence* in the record can support a finding that the proposed Brookwood well is in the local public interest, especially since harm to other water users is going to occur. In this case, the evidence shows that the City has no present or immediate need for the Brookwood well. *See e.g., Post-Hearing Br. at pp. 32-39.* It can continue indefinitely to supply its municipal users through the use of the city-owned Lexington #1 well and the Floating Feather well owned by United Water of Idaho (UWI), through existing long-term contractual arrangements with UWI. *See e.g., Post-Hearing Br. at pp. 32-39.*

As the evidence shows, the proposed Brookwood well is not about public necessity. It is about the current city council’s desire to become less reliant on its contractual arrangements with UWI. The current council’s decision is a reversal of actions by the prior city councils, which actively encouraged UWI’s involvement in providing water service to Eagle area residents. *Post-Hearing Br. at pp. 32-39.* While the short term cyclical on-again-off-again relationship between the Applicant and UWI may be sufficient reason for the Applicant to currently seek ownership of a second city-owned municipal well, it should not be the bases for a public interest finding for the Brookwood well that will have long-term, permanent and detrimental impacts to neighboring wells. Moreover, as the evidence clearly shows, the proposed Brookwood well (in terms of municipal water supply) provides no benefit that is not already being provided to City residents by the Floating Feather well. *See e.g., Post-Hearing Br. at pp. 32-39.* In short, as the evidence in the record demonstrates, there is no basis to support a public interest finding in this case. *Id.*

III. “CONDITIONS” PROPOSED BY THE HEARING OFFICER WILL NOT NEGATE THE ADVERSE IMPACTS TO THE CHASE WATER RIGHTS.

The hearing officer does not deny there will be adverse impacts to the Chase water rights. Rather than deny the application based upon a finding of adverse impacts under Idaho Code § 42-211, the hearing officer recommends development of the Brookwood well. He then suggests that the adverse impacts can be mitigated or negated by a series of unorthodox conditions, which include performing a pump test, holding more settlement discussions, filing a lawsuit in district court, and shutting down the City’s well while future well interference claims are adjudicated. As discussed below, the conditions proposed by the hearing officer do not “mitigate” the adverse impacts to the Chase water rights. They only invite more years of litigation.

A. The Hearing Officer’s Proposed “Test Well” Procedure is Inconsistent with IDWR Practice and Imposes an Unfair Risk of Loss on the Chase Dairy.

The hearing officer indicates that IDWR should first approve the application and then allow the City to construct the Brookwood well so the City can “study the well’s impacts.” *Rec. Order at p. 22, ¶ 2 and p. 27, ¶ 2.* This proposal violates Idaho Code § 42-211 because it is improper to grant the application, in the first place, if there is a finding of adverse impacts, which exists in this case.

This proposal is also inconsistent with current IDWR practice. Pursuant to its authority under Chapter 17, Title 42, Idaho Code, IDWR has, in limited circumstances, allowed applicants prior to obtaining approval of the application to drill a well and perform a pump test so the applicant could gather more data. This is allowed only on a case-by-case basis where IDWR believes there is insufficient evidence to estimate impacts of the project proposed by the application. In this case, there has been no showing that there is insufficient evidence to estimate impacts by the proposed Brookwood well. To the contrary, there are numerous reports and

studies that have been performed in the area near the proposed Brookwood well. *Post-Hearing Br. at p. 13*. Even the City's expert acknowledged that there exists a lot of hydrological data for the Eagle area as compared to other parts of the state. *Id.*

Why should the City be treated any different than other applicants? Moreover, if the City would not have been able to drill a test well prior to its application being approved, what is the justification for allowing the City to drill a test well after the application is approved? The hearing officer's proposal gives the City the best of both worlds: It gets to proceed with a test well and have its application approved at the same time. If the hearing officer's proposal is followed in this case, does this open the door for other applicants to be afforded the same opportunity in the future? If not, is there a rationale basis for such deferential treatment for the City in this case?

In addition to the legal questions, the test well imposes real hardship on the Chases. As found by the hearing officer, the Chase dairy cannot go without water for more than four to six hours without suffering hardship:

The water used under [63-5226] is used for critical activities at the Chase dairy. Loss of water under this water right for as short a period as four to six hours in the summer could injure the cows, and after one to three days cows could die, irreparably damaging the Chase Dairy's closed herd.

Rec. Order at p. 18, ¶ 41. If during this proposed pump test, the dairy well ceases to produce water (which the hearing officer has found is likely to occur), what is going to happen to the Chase dairy herd?

According to Bill Chase, the dairy manager, there is no air conditioning inside the dairy to keep the cows cool. Thus, water is especially critical during the summer months. *See Post-Hearing Br. at p. 22-23*. According to Mr. Chase, if the dairy cows are without water for over six hours, productivity will decrease, the cows may become stressed and sick, and if it is a hot

day, they can die. *Id.* Even the City's expert agreed that the dairy could not go much more than a few hours without suffering a real hardship. *Id.*

The Chases' expert, Dave Shaw, estimated that it could take 12 hours or more for water levels in the dairy well to fully recover after the Brookwood well is shut down. *Id.* This estimate was based upon similar recovery times observed during the 1995 pump test performed on the Floating Feather well. *Id.* This estimated recovery time coupled with an estimated 8 to 10 (or more) feet of drawdown in the dairy well indicates that the dairy will definitely be without water for a period of time sufficient to cause substantial damages to the Chase dairy and dairy herd.

Obviously the question arises as to who is going to be responsible for the damages to the dairy and dairy herd as a result of the pump test? The more difficult question is the likely dispute over the dollar amount of damages. Will the City require the Chases to hire a dairy-cow expert to prove a causal connection between the damages (i.e. reduced milk production and/or onset of disease as a result of the cows being stressed) and the deprivation of water? Even after a causal connection between lack-of-water and damages is established, will the City argue that the Chases failed to mitigate against the damages to their dairy? Also, will the City try to avoid liability for damages by filing a third-party complaint against IDWR for authorizing the pump test and development of the Brookwood well knowing that damages to the Chase dairy were likely to occur?

These questions highlight the problems inherent with allowing development of the Brookwood well without mitigation in place prior to pumping of the well. A reasonable mitigation option would be for the City to drill a new well for the Chase dairy that would not be materially impacted by the proposed Brookwood well. *See Post-Hearing Br. at p. 21.* This

would properly shift the risk of loss off of the Chase dairy. Without this form of mitigation in place prior to pumping the Brookwood well, the Chases will be forced to bear the risk of loss. There is little dispute that, if the Brookwood well is developed and pumped, the Chase dairy well will cease to produce water and the Chase dairy will incur hardship and damages. The only question is how much hardship and damages. It is improper and unfair to force the Chase dairy to bear the risk of loss, especially where the evidence indicates that such loss is likely to occur.

B. Condition No. 2: Condition Requiring Litigation Before the District Court is Not Mitigation and Improperly Shifts Responsibility Onto Courts to Determine Mitigation.

The hearing officer's underlying premise appears to be that mitigation of adverse impacts should be determined *after* the application is approved. This premise is inconsistent with current IDWR practice that requires, in cases such as this where injury is likely to occur, that specific mitigation proposal(s) be submitted with the application and considered as part of the application process and not afterwards. This practice by the IDWR helps ensure that applications, which pose injury to other water rights, are not approved without mitigation in place. This practice greatly reduces the likelihood of future litigation over adverse impacts caused by newly approved applications. Moreover, it is not IDWR's responsibility to prepare a mitigation plan for an applicant. The applicant, in order to satisfy its burden of proof under Idaho Code § 42-211, has the duty to submit a mitigation plan for review by the protestants and IDWR. The City has filed no mitigation plan in this case.

The hearings officer's proposal is also inconsistent with Idaho Code § 42-211, which requires that the application be denied if it will adversely affect the rights of others. The hearing officer cannot make a finding of adverse impacts and then claim that those impacts can be mitigated by future litigation. Under that rationale, every adverse impact could be mitigated by a

condition that says, “go to district court to get a mitigation plan.” That is not mitigation, it is litigation. The former is prospective; the latter is inherently retrospective.

In effect, the hearing officer puts the cart before the horse. He creates a scenario where the application (which creates the adverse impacts) is approved first and then leaves mitigation (which is supposed to negate the adverse impacts) to be determined by the district court at a later date. How does this scenario allow IDWR to make a finding of no adverse impacts under Idaho Code § 42-211, which is a necessary prerequisite prior to approval of the City’s application? All IDWR has accomplished under the hearing officer’s scenario is that it has made a finding of adverse impacts and then shipped the case off to district court to determine what constitutes appropriate mitigation for those adverse impacts.

The hearing officer suggests that IDWR, as an executive agency, does not have the equitable powers of a court to force mitigation upon the Chases. *Rec. Order at p. 21, ¶ 2*. But the hearing officer gets way ahead of himself. His statement begs the question: Where is the mitigation plan? There currently exists no specific mitigation plan to offer, much less force upon, the Chases. That is the problem. Rather than steadfastly deny that its proposed Brookwood well was going to adversely impact the Chase water rights, the City could have opted to submit with its application a detailed mitigation plan specifically stating how it was going to mitigate for the anticipated adverse impacts to the Chase water rights. The City never did that. It opted for an all-or-nothing approach—i.e., that IDWR would find no adverse impacts and approve the application, or IDWR would find adverse impacts and not approve the application.

Under the scenario created by Condition No. 2, the City is supposed to develop a mitigation proposal after the pump test (and after the application is approved) and share it with

the Chases. If the Chases do not accept the City's proposal, then the City is instructed by IDWR to file a lawsuit against the Chases in district court to determine what constitutes appropriate mitigation to negate the adverse impacts to the Chase water rights. This scenario creates serious problems. First, it puts the district court in the position of determining what constitutes sufficient mitigation to offset the adverse hydrological impacts to the Chase water rights, where IDWR is the agency vested with the expertise to make such hydrological determinations. Second, it allows IDWR to avoid its statutory duty under Idaho Code § 42-211 to ensure that an application will not adversely affect other water rights. By leaving it up to the district court to determine mitigation, IDWR has effectively avoided its duty to determine that there will be no adverse impacts to the Chase water rights.

C. Condition No. 3: Condition Requiring Parties to Litigate Future Well Interference Claims Does Not Constitute Mitigation of the Adverse Impacts to the Chase Water Rights.

Clearly, the evidence shows and the hearing officer's findings suggest, that the Chase water rights will be adversely affected. Also, as discussed above, the evidence shows that there exists a real likelihood that the large irrigation well may be adversely impacted as well. What is not clear is the legal authority the hearing officer is relying on to suggest that these "adverse impacts" should not trigger denial of the application under Idaho Code § 42-211. It appears that the hearing officer simply believes that Condition No. 3 of the recommended order provides sufficient mitigation to negate the anticipated adverse impacts to the Chase water rights.

Condition No. 3 does not provide for mitigation of the foreseeable impacts to the Chase water rights. It simply invites more litigation over well interference claims that the Chases will be forced to file to protect their water rights from adverse impacts that are virtually certain to occur. Why should a senior water user, who has endured nearly three years of litigation and

incurred substantial litigation expenses, be forced to endure more litigation simply to have IDWR arrive at the same conclusion a second time, i.e., that the Brookwood well adversely impacts the Chase water rights? In other words, does more litigation constitute “mitigation” as suggested by the hearing officer?

If the hearing officer’s conditions were implemented, it is foreseeable that litigation could expand into three forums: before a district court judge on judicial review of the current decision, before another district court judge to adjudicate mitigation (as suggested by the hearing officer), and litigation before IDWR concerning well interference claims (as suggested by the hearing officer). While judicial review of an agency decision is a typical process for individuals who are aggrieved by an agency decision to seek relief from the district court, the latter two litigation options suggested by the hearing officer are atypical and unnecessary. Indeed, any decision, such as the hearing officer’s recommended order, that purports to create multiple levels of litigation ought to send up a red flag.

More litigation also imposes an unfair burden on the Chases. As indicated in the recommended order, the Chases would be at a disadvantage to protect their senior water rights:

The critical needs of the Chase dairy and individual domestic water users would be hard pressed to defend their senior water rights in the face of the pressing needs of a larger group of municipal water users.

Rec. Order at 26, ¶ 16.

Aside from the additional litigation created by Condition No. 3, the condition is also vague and unrealistic. The condition suggests that IDWR will “immediately” shut down the City’s Brookwood well in the event any senior water user within 2,000 feet is “not being completely satisfied.” *See Rec. Order at p. 28, ¶ 3.* First, what does “not being completely satisfied” mean? What proof will a senior water user have to present to IDWR to satisfy that

threshold requirement? Will the City, prior to being “immediately” shut off, be able to contest whether or not a senior user is, in fact, being completely satisfied? If the City is allowed to contest that issue, will the senior user have to endure months of discovery and litigation before IDWR renders a decision as to whether or not the senior user is being completely satisfied or not? During those months of litigation is the senior user expected to go without water or a substantially diminished flow of water? Alternatively, does Condition No. 3 mean the City cannot initially contest whether or not a senior user is being satisfied? If so, is it wise to have a municipal water supply system subject to being immediately shut off on such short notice? Also, does IDWR want to place itself in the likely position of having to curtail water use to a large number of Eagle area residents?

The above questions illustrate the real problems created by Condition No. 3 as proposed by the hearing officer. In the abstract, the proposed condition may look harmless, but in practice, it is fraught with problems. It simply invites more litigation and puts IDWR in a precarious position of having to protect senior water rights by immediately shutting down a municipal well for an extended time or even indefinitely. *See e.g., Rec. Order at p. 26, ¶ 16* (“Eagle bears the small risk, but risk nonetheless, that it may never be able to use [the Brookwood well] because of impacts on senior water rights”).

Moreover, this is not a case of merely hypothetical well interference claims. As the evidence demonstrates and as the hearing officer found, the Chase water rights will likely be impacted. Given that reality—the reality that the Chases need water and their water rights will be impacted by the Brookwood well—future litigation is much more than a mere hypothetical. It is a necessity that will be created by the development of the proposed Brookwood well. Even the

hearing officer recognizes that the Chase dairy has “an immediate and critical need for water.”

Rec. Order at p. 20, ¶ 50 (emphasis added).

CONCLUSION

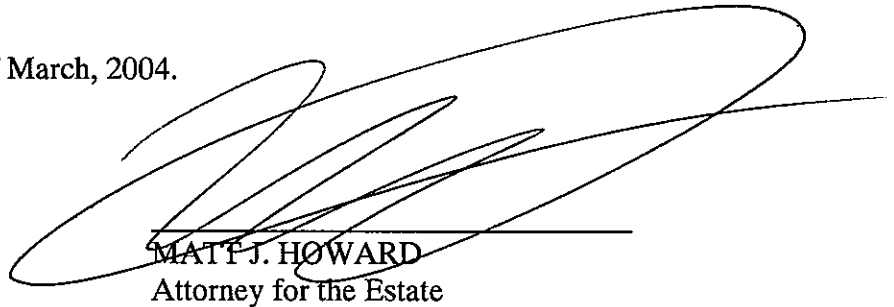
In the end, the hearing officer takes his analysis one step too far. He properly found that there will be adverse impacts to the Chase water rights. Pursuant to Idaho Code § 42-211, he should have denied the application. However, rather than deny the application, the hearing officer offers up a well-intended, but misguided, set of conditions that simply invite more litigation. The unorthodox nature of the hearing officer’s conditions highlights the fact that the proposed Brookwood well is a poor location for a high-capacity municipal well because of its adverse impacts on other water rights. The solution is not more litigation before the district court and IDWR, as suggested by the hearing officer.

The Chases have already incurred substantial costs and attorney fees after enduring nearly three years of litigation to protect their water rights. In the face of overwhelming data and the report from its own expert, Bill Strowd, the City has steadfastly refused to acknowledge that its proposed Brookwood well would adversely impact the Chase wells and water rights. The City’s unreasonable refusal to accept responsibility for reasonably foreseeable impacts on the Chase wells has imposed substantial litigation costs on the Chases. Now that the hearing officer has determined there will likely be adverse impacts to the Chase water rights, he lays out a road map for more litigation. More litigation is not a solution.

The proper solution is to follow the statute, Idaho Code § 42-211. Deny the application based upon a finding that the proposed Brookwood well will adversely impact the Chase senior water rights. The City is free to re-file its application accompanied by a detailed mitigation plan that specifies how it will mitigate for the adverse impacts to the Chase water rights. Once that

occurs, the application and mitigation plan would be subject to review by the parties, and IDWR would be in a position to properly evaluate whether or not the mitigation plan would properly negate the adverse impacts to the Chase water rights and allow the application to pass muster under Idaho Code § 42-211.

DATED this 22nd day of March, 2004.



MATT J. HOWARD
Attorney for the Estate

CERTIFICATE OF SERVICE

The undersigned certifies that on the 22nd day of March, 2004, 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
1896 N. Eagle. Rd.
Eagle, ID 83616

U.S. Mail

Weldon Fisher
546 E. Beacon Light Rd.
Eagle, ID 83616

U.S. Mail

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

U.S. Mail

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

U.S. Mail



MATT J. HOWARD

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

RANSOM J. BAILEY
SUSAN E. BUXTON*
MICHAEL C. MOORE†
BRUCE M. SMITH
PAUL A. TURCKE‡
CHRISTOPHER E. YORGASON
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

RECEIVED
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Department of Water Resources

February 2, 2004

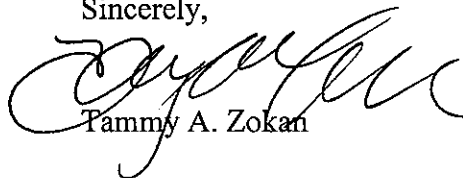
Ms. Victoria Wigle
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, Idaho 83706

RE: City of Eagle Application for Amendment of Permit No. 63-12448

Dear Ms. Wigle:

By letter dated January 29, 2004, Mr. Peter R. Anderson requested that I send you a copy of the document entitled *Sworn Testimony of Nancy Merrill, Mayor, City of Eagle, In Support of City's Application to Amend Permit No. 63-12448* so that the document could be placed in the record. A photocopy of Mr. Anderson's letter and the requested document is attached. For your information, I am sending a copy of the document and this transmittal letter to the protestants' representatives.

Sincerely,



Tammy A. Zokan

Enclosure

cc City of Eagle
Matt Howard
Molly O'Leary
Jim Burton

PETER R. ANDERSON
729 W. BRAEMERE RD.
BOISE, ID 83702
(208) 336-7020

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2004
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FEB 2 - 2004
MSB&T, CTD.

FAX: (208) 395-0222

E-MAIL: PRANDERSON@WHITTIES.ORG

January 29, 2004

Tammy A. Zokan
Moore Smith Buxton & Turcke Chartered
225 North 9th St., Suite 420
Boise, ID 83702

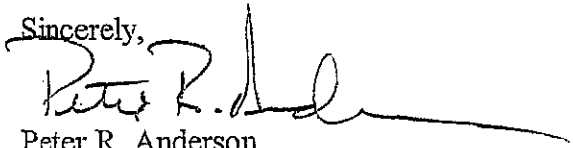
Re: City of Eagle Application for Amendment of Permit No. 63-12448

Dear Ms. Zokan,

During my review of the record in the above-referenced matter I have been unable to locate the document entitled *Sworn Testimony of Nancy Merrill, Mayor, City of Eagle, In Support of City's Application to Amend Permit No. 63-12448*. If you would, please send a copy of this document to the state office of the Idaho Department of Water Resources, care of Victoria Wigle, for placement in the record. Please provide a copy of your submission to the protestants.

I apologize to you and your client for any inconvenience this may cause.

Sincerely,


Peter R. Anderson
Hearing Officer

Cc Matt Howard
P.O. Box 190012
Boise, Idaho 83719

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

Jim Burton
1896 N. Eagle Rd.
Eagle, ID 83616

water system better able to serve the City's citizens, municipal users who the City is obligated and entitled to serve. The City desires only to add points of diversion to an existing water right. The City is not seeking to increase the amount of water it can divert or use under its existing water right. It is crucial that the City's application be granted so that the City can move forward with its plans to develop a water system that can best meet the City's needs. I urge the Department to approve the City's application.

4. The City strongly desires to provide the best water service at the least amount of cost to its citizens. At the present time, the City does not have a water system that meets minimum regulatory requirements or recommended minimum operating standards. Presently, the City has only one (1) City-owned well serving its citizens. This well is commonly referred to as the Lexington Hills Well No. 1 and is also known as City of Eagle Well No. 1. Water quality and sand problems have rendered the City's other well, commonly known as Lexington Hills Well No. 2 and City of Eagle Well No. 2, unusable.

5. A one-well system is problematic from a City's perspective. Simply put, a City must serve its citizens around the clock. This service must meet minimum emergency, capacity, pressure and other threshold requirements. Moreover, when a well in a one-well system breaks down, a whole City is without water. Additionally, if an emergency situation like a structure fire ties up the water system, the rest of the City may not get much water, if any at all. It also makes sense for a City provider to balance its withdrawals from the groundwater resource. Unlike a domestic well, the City serves a community of water users, which means its pumps are going to work harder and are going to withdraw more water than a domestic well. It is in the public's interest for the City to share its withdrawals among various diversion points. Having more than one diversion allows the City to take part of its water right from one location and part from

another, reducing the impact of a single, larger withdrawal. Various points of diversion would also reduce operation and maintenance expenses to City citizens by spreading the workload among points of diversion and thereby improving the longevity of pumps owned by the City.

6. As the Mayor, I strongly believe that the citizens of Eagle would be best served by a City owned system that is not dependent on contracts with outside providers. In fact, the City has always planned to have its own full-service water system. Unfortunately, until the City makes improvements to its system, the City must continue to rely on contracts with third parties. Although currently necessary, having third parties involved in the City's water service is not in the best interest of the City of Eagle. It is also my opinion that it is in the best interest of the City's citizens for water service to be provided by a government run system that is service oriented, not profit driven. A non-profit system can provide water service at the lowest possible cost and take advantage of grants and tax-exempt financing. In addition, a non-profit system allows the local community to maintain control of decisions related to water service

7. Prior to becoming Mayor of the City of Eagle, I was on the Eagle City Council. I joined the Eagle City Council in 1995. From 1995 to Lynne Sedlacek's appointment to the Council, I was the Eagle Councilmember responsible for tracking water issues facing the City and developing policy and direction for our growing water needs. When Councilwoman Lynne Sedlacek joined the Eagle City Council in 1997, the water liaison assignment was transferred to her. Since that time, Councilwoman Sedlacek has been heavily involved in the City's water matters and has been an excellent advisor to the City Council.

8. A lot has changed since I first joined the City Council. The City has grown tremendously. The City's direction has and continues to evolve as our population grows, local economy develops, and new representatives are elected to manage our community. The only

thing that has not changed is the City's commitment to act in the best interest of its citizens. Approval of the additional points of diversion sought by City's application is in the best interest of the inhabitants of the City of Eagle.

9. As the Mayor I am committed to monitor and/or mitigate as appropriate and if necessary to ensure valid, senior water rights are not injured by the City's additional points of diversion.

I declare, under penalty of perjury, that the foregoing is true and correct.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 11th day of November, 2003.


NANCY MERRILL

SUBSCRIBED AND SWORN TO before me this 11th day of November, 2003.




NOTARY PUBLIC FOR IDAHO
Residing at: Boise, Id
My Commission Expires: 4-19-08

**PETER R. ANDERSON
729 W. BRAEMERE RD.
BOISE, ID 83702
(208) 336-7020**

FAX: (208) 395-0222

E-MAIL: PRANDERSON@WHITTIES.ORG

January 29, 2004

Tammy A. Zokan
Moore Smith Buxton & Turcke Chartered
225 North 9th St., Suite 420
Boise, ID 83702

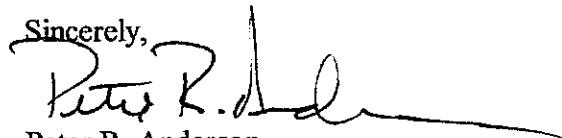
Re: City of Eagle Application for Amendment of Permit No. 63-12448

Dear Ms. Zokan,

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I apologize to you and your client for any inconvenience this may cause.

Sincerely,



Peter R. Anderson
Hearing Officer

Cc Matt Howard
P.O. Box 190012
Boise, Idaho 83719

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

Jim Burton
1896 N. Eagle Rd.
Eagle, ID 83616



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

January 14, 2004

KARL J. DREHER
Director

CITY OF EAGLE
CITY HALL
PO BOX 1520
EAGLE ID 83616

Re: Request for Extension of Time for filing Proof of Beneficial Use; Permit No.
63-12448

Dear Permit Holder:

This letter acknowledges receipt of a request for extension of time for filing proof of beneficial use for permit to appropriate water no. 63-12448. An application to amend permit no. 63-12448 is presently pending before the Idaho Dept. of Water Resources (IDWR) as a contested case. A hearing has been held and a decision will be forthcoming.

Because of the pending contested case, and the effect it may have on the water right permit, IDWR will hold the request for extension of time without action until the contested case is resolved. The request has been timely filed and satisfies the requirements of the law related to filing proof of beneficial use or a request for extension of time.

Sincerely,


Gary Spackman

Cc: Bruce Smith
Jim Burton
Weldon Fisher
Matt Howard
Molly O'Leary
Western

Bruce Smith
225 N 9th St., Suite 420
Boise, ID 83701-2720

Jim Burton
1896 N. Eagle Rd.
Eagle, ID 83616

Weldon Fisher
546 E. Beacon Light Rd.
Eagle, ID 83616

Matt Howard
P.O. Box 190012
Boise, ID 83719

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