

BEFORE THE DEPARTMENT OF WATER RESOURCES
FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS TO) APPROPRIATE WATER NOS. 65-23239) AND 65-23105 AND APPLICATION FOR) TRANSFER NO. 73787 IN THE NAME OF) EAGLE SPRINGS RANCH, LLC) _____)	)	AMENDED PRELIMINARY ORDER
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Eagle Springs Ranch, LLC ("Eagle Springs") filed two applications to appropriate water and Eagle Springs and Barnes Ventures, Inc. ("Barnes") filed one application for transfer with the Idaho Department of Water Resources ("IDWR" or "Department"). The two applications to appropriate water seek to divert a total of 24.0 cubic feet per second ("cfs") from the South Fork Payette River or tributaries to the South Fork Payette River in the Garden Valley, Idaho area. The applications to appropriate water propose use of the water for aesthetic and recreational purposes, including storage volumes for these uses. In addition, the application for transfer proposes to change the nature of use of existing water rights from irrigation to aesthetic and recreational uses. These uses compensate for losses in ponds and water features within the development.

IDWR published notice of the applications. Jayne Reed of Garden Valley, Idaho protested the applications.

IDWR conducted a hearing for the protest on January 14, 2009. Michael Creamer, Attorney at Law, appeared on behalf of Eagle Springs and Barnes. Jayne Reed appeared representing herself.

PETITION FOR RECONSIDERATION

Eagle River identified several errors in the preliminary order that must be corrected. Each issue is separately listed and addressed below.

Identification of Natural Channels for Coski and Charters Creeks

The record did not identify the natural channels for Coski Creek and Charters Creek. Finding of fact no. 17 was amended to correctly identify the channel segments and ponds through which the natural channels flow.

Delivery of Pumped Aesthetic and Recreational Water to the Eagle Springs Property

The hearing officer did not understand the total delivery system proposed by Eagle Springs. After reviewing the record, the hearing officer determined that the applicant presented evidence about a pump station from pond no. 4 that would lift South Fork Payette River water into the highest elevation pond no. 9C. Water would flow from pond 9C into the ponds and channels located on the Eagle Springs property. Any limiting reference to ponds receiving South Fork Payette River water was eliminated. The pond 4 pumping plant, delivery of lifted water to pond 9C, and gravity flow to downstream ponds and channels is described in Finding 33.

Permit no. 65-13399; Irrigation of Eagle Springs Property with South Fork Payette River Water

The hearing officer carefully reviewed the records and found the somewhat obscure references to permit no. 65-13399. The permit was properly not included on the application for transfer, was referenced in the table of multiple water rights of the parties, and mentioned only once during Mr. King's testimony. Consequently, the hearing officer did not recognize the existence of the permit.

Permit no. 65-13399 has not been licensed and its beneficial use is unknown at the present time. The priority date of the permit is later than the water right authorizing diversion of South Fork Payette River water for irrigation of the Barnes property. The findings of facts were amended to recognize the permit, but the conclusions of law and the order still require separation of the pressurized irrigation systems for the Barnes and Eagle Springs properties.

Reference to Incorrect Water District

Conclusion of Law no. 16 now correctly identifies the rights as being regulated by the watermaster of Water District No. 65.

Disclosure of Water Shortage

Eagle Springs argues that a condition requiring disclosure to lot purchasers at the time of sale of possible water shortages cannot be accomplished because some of the lots are already purchased. The hearing officer amended the condition to require disclosure to all future lot holders.

Non-Consumptive Conditions

The nonconsumptive condition was amended to state: "Consumption of water for recreation and aesthetic use of water under this right is mitigated by the reduction of irrigation under water rights 65-5633, 65-8850, and 65-11324."

Irrigation Acreage Limitations for Right Nos. 65-8850 and 65-11324

Right no. 65-8850 and right no. 65-11324 together authorized the irrigation of 110 acres. If 13 irrigated acres are dried up for mitigation, the place of use for right no. 65-8850 will be limited to 90 acres of irrigation and the place of use for right no. 65-11324 will be limited to 97 acres. In combination, the two water rights will only authorize irrigation of 97 acres. The conditions have been amended to limit the combined irrigation by the two water rights to 97 acres.

Flow Rate Limitations for Right No. 65-8850

A portion of flow rate right no. 65-8850 represented delivery losses in the ditch. Eagle Springs seeks recognition of a pro-rata share of the delivery loss for the aesthetic use sought by its application for transfer.

There are questions about where the aesthetic use now begins and where the field headgate for the aesthetic use is located. Exhibit 13 shows the Alder Creek delivery channel as a "diversion ditch." Although not identified as one of the amenity channels, the ditch cuts through or adjoins many lots in the proposed subdivision. The hearing officer cannot determine whether the diversion ditch will be buried, and consequently, does not require the flow rate for loss, or whether the ditch will be an open channel amenity for the adjoining lots.

The delivery losses were decreed to deliver irrigation water to the field headgate of the place of use. The delivery of the reduced irrigation field headgate flow rate may require the same flow rate recognized in the decree for losses. Nonetheless, because the aesthetic water is being delivered through the same channels as the irrigation water, and the applicant has computed mitigation based on the inclusion of the prorata share of the loss quantities, this decision will recognize the full 0.32 cfs for aesthetic purposes.

Subordination to Consumptive Water Rights

Eagle Springs argues that the Department does not have the authority to subordinate the proposed uses of water to future consumptive development.

The Eagle Springs proposal to divert 24.0 cfs from the South Fork Payette River has the potential to prevent smaller future consumptive uses upstream from Eagle Springs development. The likely size of these possible consumptive uses is small given the limited areas for development upstream of the Eagle Springs development, and would, in all likelihood, not cause significant reduction in the Eagle Springs water supply.

IDWR is charged with the responsibility to weigh the local public interest. A reservation of the opportunity for possible small consumptive uses in the future at the expense of this

proposal to appropriate a large portion of unappropriated water in the South Fork Payette River is in the public interest. The condition was amended to subordinate this application and subsequent permit to upstream consumptive uses only.

Future Review Under the Local Public Interest

The hearing officer is concerned that approval of this permit will be an impetus for challenging the existing minimum stream flow right no. 65-12733 in the South Fork Payette River. Nonetheless, the Idaho Water Resource Board likely has the authority to consider modification of a minimum stream flow right on its own volition, even without the express condition of the minimum stream flow water right allowing someone to petition to amend the minimum stream flow. The hearing officer acquiesces that the water rights should be administered according to the prior appropriation doctrine without a provision for reopening a review of water rights issued for application nos. 65-23239 and 65-23105.

FINDINGS OF FACT

1. Eagle Springs proposes to develop a 606 lot subdivision on the south side of the South Fork Payette River approximately due south of Garden Valley, Idaho. The development proposed by Eagle Springs is a planned use development approved in its entirety by Boise County. In addition, plat number one, the first phase of the development, has been approved by Boise County.

2. The development fronts the South Fork Payette River for about two miles and is bounded on the east side by Alder Creek. The development is located within Sections 27, 35, and 36 of Township 9 North, Range 4 East. The property was previously pasture and hay ground that gently slopes from the toe of mountains at the south boundary of the property toward the South Fork Payette River. Three natural drainages discharge and flow through the property: Charters Creek, Coski Creek, and an unnamed stream.

3. The natural channels for these streams as they flowed through the proposed development property were rerouted for farming and irrigation purposes. Nonetheless, there are established channels for these streams flowing through the proposed property to be developed. The channels for these streams will be designated in the findings, conclusions, and the conditions of the order.

4. Application to appropriate water no. **65-23105** proposes the following:

Flow Rate:	12.0 cfs	
Purposes of Use:	Recreation, aesthetic, diversion to storage, recreation storage aesthetic storage	
Storage Volume:	562 acre feet annually ("afa")	
Sources of Water:	South Fork - Payette River, Charters Creek, Coski Creek, Alder Creek, Unnamed Stream, and Ground water (ground water is sought to be appropriated only for water table ground water that seeps into the ponds).	
Proposed priority date:	November 15, 2006	
Period of Use:	All purposes: January 1 through December 31	
Points of Diversion:		
	South Fork - Payette River	No more than two points of diversion in the following locations: SESW ¹ , SWSE, Section 27; NWNE, SENE, Section 34; SWNW (two points), Section 35, all located in Township 9 North, Range 4 East
	Alder Creek	SWNE, Section 2, Township 8 North, Range 4 East
	Charters Creek	SWNE, Section 34, Township 9 North, Range 4 East
	Coski Creek	NESE, Section 34, Township 9 North, Range 4 East
	Unnamed Stream	NWSE, Section 34, Township 9 North, Range 4 East
	Ground Water	18 ponds at the following locations: SESW, Section 27; NWNE (3 ponds), SENE (2 ponds), NESE, NWSE, Section 34; SWNW, NESW (4 ponds), NWSW, SWSW, SESW, NWSE, SWSE, Section 35; all located within Township 9 North, Range 4 East
Place of Use:	Township 9 North, Range 4 East:	
	Section 27	NESW, S1/2 SW1/4
	Section 34	NE1/4, E1/2 NW1/4, N1/2 SE1/4
	Section 35	SWNW, SW1/4 and W1/2 SE1/4

5. Application no. 65-23105 proposes diversion of 12.0 cfs from several streams and from ground water as described above. The application does not expressly quantify the flow rates for each of the streams. Evidence presented at the hearing establishes the following maximum flows that can be diverted from each of the streams:

¹ In this decision, the public land survey numeric descriptor "1/4" is assumed to follow each two alpha character public land survey locator when the numeric descriptor is missing. For instance, in this example, the full description would be the SE1/4SW1/4, Section 27, Township 9 North, Range 4 East, Boise Meridian.

Alder Creek	7.7 cfs
Coski Creek	2.0 cfs
Charters Creek	1.0 cfs
Unnamed streams	0.5 cfs

6. Application to appropriate water no. **65-23239** proposes diversion of additional water as follows:

Flow Rate:		12 cfs
Purpose of Use:		Recreation and Aesthetic
Source:		South Fork - Payette River
Proposed Priority:		November 23, 2007
Period of Use:		Year round
Points of Diversion:		Not more than two points of diversion located in one of the following: SESW, SWSE, Section 27; NWNE, SENE, Section 34; SWNW (two points), Section 35, all located in Township 9 North, Range 4 East
Place of Use:		Township 9 North, Range 4 East:
	Section 27	NESW, S1/2 SW1/4
	Section 34	NE1/4, E1/2 NW1/4, N1/2 SE1/4
	Section 35	SWNW, SW1/4 and W1/2 SE1/4

7. Application for Transfer no. 73787 was jointly filed by Eagle Springs and Barnes. Barnes holds water right nos. 65-11324 and 65-8850. Eagle Springs holds water right nos. 65-5633 and 65-5696.

8. The Barnes rights were decreed by the Snake River Basin Adjudication ("SRBA") Court on November 3, 2000 (65-11324) and April 11, 2002 (65-8850). The rights were decreed as follows:

Water Right No. 65-8850		
Flow Rate:	Irrigation	2.51 cfs
	Stockwater	0.60 cfs
Total Flow Rate:		2.57 cfs
Purposes of Use:	Irrigation and Stockwater	
Source of Water:	Alder Creek	
Priority Date:	April 1, 1900	
Point of Diversion:	SWNE, Section 2, Township 8 North, Range 4 East	
Place of Use:		Number of Acres:
	Township 9 North, Range 4 East, Section 35, Lot 6 (NESW)	27
	Lot 5 (NWSW)	51
	SWSW	10
	SESW	8
	Lot 7 (SWSE)	7
Total acres irrigated:		103

Water Right No. 65-11324		
Flow Rate:	Stockwater	0.05 cfs
	Irrigation	2.20 cfs
Total Diversion Authorized:		2.20 cfs
Purposes of Use:	Stockwater and Irrigation	
Source of Water:	South Fork, Payette River	
Priority Date:	September 3, 1966	
Points of Diversion:	Lot 5 (SOWN), Lot 7, (NWSE), Lot 6, (NESW), Section 35, Township 9 North, Range 4 East	
Place of Use:		Number of Acres:
	(Stockwater tracks same 40 acre parcels as the irrigation) Township 9 North, Range 4 East, Section 35:	
	Lot 5 (SOWN)	12
	Lot 6 (NESW)	35
	Lot 5 (NWSW)	36
	SWSW	10
	SESW	10
	Lot 7 (NWSE)	7
Total Acres Irrigated:		110

9. Water rights held by Eagle Springs were decreed by the SRBA court on November 3, 2000. The rights decreed are described as follows:

Water Right no. 65-5633		
Flow Rate:	5.27 cfs	
Purpose of Use:	Irrigation	
Sources of Water:	Charters Creek, Coski Creek and Alder Creek	
Priority Date:	April 1, 1900	
Points of Diversion:	SE1/4NW1/4 (Charters Creek), NESE (Coski Creek), Section 34, Township 9 North, Range 4 East; SWNE (Alder Creek) Section 2, Township 8 North, Range 4 East.	
Place of Use:		Number of Acres:
	Township 9 North, Range 4 East, Section 27, Lot 7 (SESW)	17
	Section 34, Lot 2 (NWNE)	36
	SWNE	40
	Lot 3 (SENE)	50
	NENW	40
	SENE	6
	NESE	19
	NWSE	8
Total Acres Irrigated:		216

Water Right No. 65-5696	
Flow Rate	0.04 cfs
Purpose of Use:	Irrigation
Source of Water:	Alder Creek and Coski Creek
Priority Date:	April 1, 1966
Points of Diversion:	SWNE, Section 2 (Alder Creek); and NESE Section 34 (Coski Creek); Township 9 North, Range 4 East
Place of Use:	Township 9 North, Range 4 East, Section 34, NESE
Number of acres:	3

10. Cumulatively, water rights held by Barnes authorize the irrigation of 110 acres. Cumulatively, water rights held by Eagle Springs authorize the irrigation of 219 acres.

11. The application for transfer proposes to change the nature of use for a portion of the above described water rights from irrigation to aesthetic use.

12. The application for transfer proposes a reduction in the total acres irrigated by the Eagle Springs rights (65-5633) by 26 acres leaving 193 acres to be irrigated within a larger 332 acre place of use. The application for transfer proposes reduction in the number of acres irrigated by the Barnes water rights (65-8850 and 65-11324) of 13 acres to 97 acres of irrigated ground within a larger 136 acre place of use. The total reduction in irrigated acreage is 39 acres. The 39 acres of proposed reduction in irrigated land corresponds to 39 acres of pond and other water surface areas proposed by the two applications to appropriate water filed by Eagle Springs.

13. The proposed place of use for the Eagle Springs water rights and the Barnes water rights are tabulated as follows:

Eagle Springs Proposed Irrigation Place of Use	Number of Acres
T9N R4E, Section 27, Lot 6 (SWNW)	24
Lot 7 (NESW)	1
Lot 6 (NWSW)	13
SWSW	30
Lot 7 (SESW)	22
Lot 7 (SWSE)	1
Section 28, Lot 3 (SWNE)	1
Lot 4 (SENE)	27
Lot 4 (NESE)	10
Section 34, Lot 3 (NENE)	14
Lot 2 (NWNE)	29
SWNE	34
Lot 3 (SENE)	33
NENW	35
NWNW	10
SENW	14
NESE	20
NWSE	14
Total Acres	332
Permissible Acres	193

Barnes Proposed Irrigation Place of Use	
T9N, R4E, Section 35, SWNW	10
SENW	6
NESW	35
NWSW	36
SWSW	11
SESW	18
NWSE	17
SWSE	3
Total Acres	136
Permissible Acres	97

14. Discontinuation of irrigation of 39 acres will reduce the consumptive use by 83 acre feet annually. Evaporation from the ponds is estimated to consumptively use 63 acre feet (See Applicant's Exhibit 20). The reduction in consumptive use resulting from crops no longer grown more than compensates for the increase in evaporative consumption from ponds and streams within the development.

15. By written agreement, Barnes authorized Eagle Springs to develop both the Eagle Springs and Barnes properties and to hold new water rights representing the water needs of the

development. Barnes will continue to hold ownership of its surface water rights that are the subject of the application for transfer.

16. The application for transfer proposes construction of 18 to 22 ponds on the property, and channels that discharge into and out of the ponds. The ponds and channels are depicted on Applicant's Exhibit 13. The ponds are identified on the map with Arabic numbers and alphabetical characters appended to each number if more than one pond bears the same number. The channels are identified on the map by Roman numerals.

17. The natural stream channels must be identified as they flow through the development. The channel identifiers are taken from Applicant's Exhibit 13. Coski Creek is identified as follows: The natural channel of Coski Creek until it flows into pond 8, an unnamed channel and channel III as it flows from pond 8 to pond 3, the channel through ponds 3 and 4, and channels XIII and XIV from pond 4 to the confluence with channel VI. Charters Creek is identified as follows: The natural channel of Charters Creek, the channel through ponds 9B and 9A, channel VI to its confluence with channel XIV, channel XIV from its confluence with channel VI to pond 5A, the channel through pond 5A, channel XV, the channel through pond 5B, channel XVI, the channel through pond 5C, and the channel discharging water back to the South Fork Payette River.

18. Most of the proposed channels are oriented in a north-south direction as water is captured from the natural stream channels of Coski Creek, Charters Creek, and the unnamed stream. In addition, water can be diverted from Alder Creek into a ditch that follows the toe of the approximate south, uphill boundary of the subdivision. Finally, the application proposes two points of diversion from the South Fork Payette River. One point of diversion would be located near the east boundary, also near the Alder Creek Bridge. This point of diversion would pump water into the same toe-of-the-slope ditch into which Alder Creek water is diverted.

19. The applications to appropriate water also propose an additional point of diversion from the South Fork Payette River. This second point of diversion will be located either in Section 34 or 35 to provide water for the northwest portion of the subdivision.

20. Eagle Springs holds permit to appropriate water no. 65-13399. The point of diversion described by permit no. 65-13399 is located in the NENE of Section 34. The second point of diversion discussed above will also serve as a point of diversion for permit no. 65-13399.

21. Permit no. 65-13399 authorizes the following:

Flow Rate:	3.00 cfs
Purpose of Use:	Irrigation
Sources of Water:	South Fork Payette River
Priority Date:	July 6, 1992
Points of Diversion:	SESENE, Section 34, T9N, R4E
Place of Use	Number of Acres - 200
T9N R4E, Section 27, Lot 6 (SWNW)	8
Lot 7 (NESW)	3
Lot 6 (NWSW)	30
SWSW	40
Lot 7 (SESW)	36
Lot 7 (SWSE)	7
Section 28, Lot 3 (NWNE)	12
Lot 3 (SWNE)	30
Lot 4 (SENE)	25
Lot 2 (NENW)	5
Lot 4 (NESE)	29
Section 34, Lot 3 (NENE)	5
Lot 2 (NWNE)	30
SWNE	40
Lot 3 (SENE)	37
NENW	40
NWNW	40
SENE	30
NESE	30
NWSE	35
Total Acres	512
Permissible Acres	200

22. The previous owner of the Eagle Springs property filed proof of beneficial use for permit no. 65-13399 in 1995.

23. IDWR staff has not yet conducted a beneficial use field examination. At the present time, IDWR does not know the extent to which water was diverted and beneficially used under permit no. 65-13399.

24. The developable place of use identified by permit no. 65-13399 overlaps, for the most part, the place of use proposed by the application for transfer for the decreed Barnes water rights.

25. The applications to appropriate water and the application for transfer propose an east-west channel along the northern end of the property that somewhat parallels the South Fork Payette River. Segments of this channel are identified on Exhibit 13 by Roman numerals X, XI,

X11, XIII, XIV, XV, and XVI. This channel carries water diverted from the South Fork Payette River through a series of ponds and also captures water flowing to it from the north-south oriented channels within the subdivision. Water diverted or captured in this channel will ultimately discharge into the South Fork Payette River in the northwest portion of the subdivision just upstream of a location referred to as "the island."

26. The various ponds and streams are intended to be water amenities for the subdivision. The amenities will be stocked with red-band trout. The Idaho Department of Fish and Game requires Eagle Springs to isolate the planted fish in the subdivision surface water system from the native fish residing in the South Fork Payette River.

27. Approximately sixty-six percent (66%) of the total land in the subdivision will be open space and common area for the enjoyment of the residents of the subdivision.

28. Eagle Springs has granted a conservation easement to the Idaho Foundation for Parks and Lands along the South Fork Payette River where it borders the subdivision. The conservation easement encumbers a ribbon of land varying from 100 to 200 feet in width along the South Fork Payette River. Development is prohibited within the conservation easement. In addition, public access is allowed within the conservation easement.

29. Concessionaires will operate a fly fishing school and a kayaking school within the confines of the proposed subdivision. The record is unclear about where the kayaking school will operate. The hearing officer assumes that kayaking instruction will be conducted on the South Fork Payette River, although one document in the record suggests that some of the kayaking may occur in the channels of water constructed within the proposed subdivision.

30. The ponds and streams constructed within the subdivision will be accessible to the residents or land owners within the subdivision. In addition, the general public will be able to access the ponds and streams by enrolling in the fly fishing school or by lodging at a motel proposed for the Eagle Springs development.

31. During the period of snowmelt runoff, sufficient water flows in Coski Creek, Charters Creek, Alder Creek, and the unnamed stream to provide for irrigation within the subdivision as proposed by the application for transfer and also to provide adequate water to the ponds for the aesthetic and recreational uses proposed by the applications to appropriate water.

32. As water flows in the creeks decline, water in the channels and ponds will be supplemented by diversions from the South Fork Payette River as sought by the applications to appropriate water. Approval of the two applications to appropriate water could result in the diversion of up to 24.0 cfs of water from the South Fork Payette River. Some of the water could be pumped and supply water to ponds within the Barnes property in Section 35. The water would be pumped from the South Fork Payette River through a pipeline into a small pond, labeled on Exhibit no. 14 as pond no. 14 that also receives water from Alder Creek. The pond discharges into a ditch following the contours along the toe of a hill near the south boundary of the development. This ditch can discharge through channels into ponds labeled 1, 2, 3, 11, 12, and 14 (See Applicant's Exhibit 13). The outflow from pond two discharges into ponds 3 and 4. Ponds 3 and 4 are close to the banks of the South Fork Payette River.

33. A pumping station (the second point of diversion from the South Fork Payette River proposed by the applications) will divert South Fork Payette River water that will discharge into either pond 3 or 4, and flow in a channel approximately parallel to the bank of the South Fork Payette River into ponds 5A, 5B, and 5C. In addition, South Fork Payette River water may be pumped from pond no. 4 into a pressurized pipeline and lifted until it is discharged in pond 9C. From pond 9C, water lifted from the South Fork Payette will gravity flow through the ponds and natural channels on the Eagle Springs property. The water will then discharge back into the South Fork Payette River.

34. The water diverted from Alder Creek for irrigation has traditionally been split between the Barnes and Eagle Springs properties pursuant to the respective water rights for the two properties bearing identical priority dates.

35. During the irrigation season, flows from Alder Creek and Coski Creek will flow into pond 3. Eagle Springs proposes construction of a pressurized irrigation pump station in pond 3 that would supply surface water for irrigation of the entire subdivision.

36. Water right no. 65-11324 authorizes diversion of water from the South Fork Payette River of 2.2 cfs for irrigation purposes on the Barnes property. Water right no. 65-11324 bears a priority date of September 3, 1966. Permit no. 65-13399 authorizes diversion of water from the South Fork Payette River of 3.0 cfs for irrigation of the Eagle Springs property. Eagle Springs implicitly proposes to commingle water diverted from the South Fork Payette River for irrigation pursuant to water right no. 65-11324 and permit no. 65-13399 with water diverted for irrigation from other sources, including Alder Creek.

37. Eagle Springs proposes to deliver irrigation water to the proposed subdivision by pumping water from pond no. 3 and pressurizing the irrigation water in a pipeline network. Water diverted from the South Fork Payette River under Eagle Springs' permit no. 65-13399 logically would be diverted into pond no. 4 (downstream of pond no. 3) and could not be diverted into the pressurized pipeline. It is possible to pump South Fork Payette River water from the point of diversion for permit no. 65-13399 into pond no. 3 by extending a pipeline from the river pump to pond no. 3. The physical interaction of water diverted under permit no. 65-13399 with other water that would be diverted under the rights sought to be transferred is unclear.

38. South Fork Payette River water diverted under water right no. 65-11324 for irrigation of the Barnes property could be delivered out of pond no. 3 into the pressurized irrigation system.

39. During base flow periods of the year, there will likely be insufficient surface water to fully irrigate all of the lands proposed for development. The Barnes property can probably be irrigated with water diverted as authorized by water right no. 65-11324.

40. Eagle Springs holds permit to appropriate water no. 65-23089, which authorizes diversion of groundwater for municipal use within the development. Permit no. 65-23089 authorizes the use of ground water for irrigation when surface water is not available.

41. Owners of homes within the Eagle Springs property will expect the privilege of irrigating with surface water delivered through the secondary irrigation system during the same period of time surface water is delivered to the homeowners within the Barnes property boundary. This expectation will promote illegal irrigation with surface water from the South Fork Payette River by homeowners within the Eagle Springs property.

42. The illegal use of water on the Eagle Springs property is likely given the proposed configuration of the secondary irrigation system. The pumping plant for the secondary irrigation system is located in pond 3. Water diverted from the South Fork Payette River is delivered into pond 3. Without some change in physical configuration of the ponds, the secondary irrigation system, or both, water diverted from the South Fork Payette River will be rediverted out of pond 3 to irrigate the entire development without any separation of water diverted under water rights with different priority dates.

43. During the winter months, maintenance of flows in the open ditches and channels may be difficult because of icing problems. The ponds are being constructed to depths that will sustain open water and sufficient oxygen levels to sustain fish from year to year.

44. The portion of the development property owned by Eagle Springs was historically known as "Charters Ranch." Jayne Reed testified that, in many visits to the Charters Ranch over the years, she noticed that the land was not being irrigated. Her testimony is contradicted by written staff observations in the files of IDWR that the place of use was and had been irrigated. Recent SRBA decrees of the water rights proposed for transfer also recognize the validity of the water rights as of the date of the decree, and that the water has been used for the purposes described in the decree.

45. Eagle Springs has installed power lines throughout the proposed development. Eagle Springs has constructed a membrane waste water treatment plant that exceeds the needs of the development, and has the extra capacity to provide additional waste water treatment to existing developments on the north side of the river. High speed broadband has been installed. The pond and delivery system have been constructed.

46. Private investors financed the development. Presently, Eagle Springs has no indebtedness for the development other than commitments to the investors.

47. Eagle Springs has satisfied the requirements of waste water discharge according to standards required by the Department of Environmental Quality. Fisheries biologists determined that a flow rate of 24.0 cfs was necessary to adequately sustain the recreational and aesthetic uses within the subdivision.

48. The proposed ponds and streams will primarily benefit the homeowners within the subdivision. Some minor benefit might accrue to the general public if they enroll in the fly fishing school or the kayaking school. There will be some benefits to the fishery in the South Fork Payette River resulting from additional insect production. This benefit is documented by testimony of the biologists at the hearing and by the Idaho Department of Fish and Game.

49. During high and moderate flows in the South Fork Payette River, a diversion of 24.0 cfs will not significantly impact the river flows. During low flows in the river, a diversion of 24.0 cfs could significantly deplete the flows.

50. Water right no. 65-12733 is a minimum stream flow held by the State of Idaho, Idaho Water Resource Board decreed by the SRBA Court on March 18, 2009. Water right no. 65-12733 protects a minimum stream flow for the South Fork Payette River and the Payette River beginning at the Sawtooth Wilderness boundary near Grandjean, Idaho, and extending downstream to the confluence of the mainstem of the Payette River with the North Fork Payette River. Water right no. 65-12733 identifies several subreaches within the larger minimum stream flow, each authorizing a different flow rate. The minimum stream flow right bears a priority date of April 26, 1985.

51. The Eagle Springs development borders the South Fork Payette River within Subreach D of the larger length of the minimum stream flow. The minimum stream flow for Subreach D protects a flow rate of 337 cfs from January 1 through April 14, a flow of 1100 cfs from April 15 through August 31, and a flow of 337 cfs from September 1 through December 31.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A states in pertinent part:

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

2. Idaho Code § 42-202B(3) defines local public interest “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.”

3. Idaho Code § 42-222 states, in pertinent part:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or

upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not 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, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area.

4. The applicant bears the burden of proving the criteria the director must review contained in Idaho Code § 42-203A and Idaho Code § 42-222.

5. Stream channels for Coski Creek and Charters Creek must be identified through the development for purposes of maintaining flood channels and passing unappropriated water, if necessary.

6. Because this decision identifies stream channels for Coski Creek and Charters Creek, IDWR standard convention would require some of the ponds to be identified as on-stream storage, and any diversions of water from these channels would be identified as separate points of diversion. This convention would require complication and change in the applications. Because the proposed water activities are wholly contained within the Eagle Springs development, water will be discharged to the South Fork Payette River, and the watermaster will not be required to deliver water through a storage reservoir to a downstream user, the standard convention is not necessary in this case. The points of diversion can remain as identified in the application with a recognition that water flowing in the channels of Coski and Charters Creek is appropriated to the extent it is stored or beneficially used as set forth in the following order, but the water flowing in the channel does not become a minimum stream flow as described in Chapter 15, Title 42 of the Idaho Code.

Application to Appropriate Water no. 65-23105:

7. Flows authorized by a permit to appropriate water issued for application no. 65-23105 should be limited to the following maximum flows that can be diverted from each of the streams:

Alder Creek	7.7 cfs
Coski Creek	2.0 cfs
Charters Creek	1.0 cfs
Unnamed streams	0.5 cfs

8. In addition, ground water may seep to the ponds and discharge to the streams at a rate of 12.0 cfs. Nonetheless, a limitation should be placed on this right to insure that water is not diverted to any of the ponds or water courses from ground water by any mechanical or power equipment.

9. There is sufficient water during many times of the year to sustain the uses as proposed. Water is not available during the entire year for the use as proposed, however. As a result, the water user and subsequent lot owners must clearly understand that the full measure of use cannot be sustained for the entire year.

Applications to Appropriate Water nos. 65-23105 and 65-23239

10. Diversion of water as proposed would not reduce the quantity of water available for other water rights except a minimum stream flow held by the Idaho Water Resource Board as described in the findings. Measuring devices must be installed to assure that other water right holders are not injured.

11. Expenditures for the development improvements and approvals by Boise County and other regulating entities establish that the application is not filed for purposes of speculation, delay, or in bad faith.

12. The significant expenditures supporting the current development, the lack of indebtedness, and the support of private investors establishes that the applicant has sufficient financial resources to complete the project as proposed.

13. Development and use of water for domestic and municipal purposes is generally in the local public interest. The local public interest in the diversion of a significant quantity of water for aesthetic and recreational purposes, particularly when it might conflict with other uses, is less clear. There is some testimony in the record to support a determination that the 24.0 cfs sought for appropriation may be necessary, at times, to support the proposed fisheries in the channels and in the ponds. Nonetheless, an applicant seeking to appropriate water for aesthetic and recreational purposes must base the magnitude of the proposed appropriation on personal sentiment rather than the more rigorous mathematical determinations based on actual consumptive uses or uses that produce a fixed determinable product.

14. Based on the local public interest, IDWR must be cautious in approving large appropriations of water for non-consumptive uses that may frustrate or prevent future needed appropriations of water or may directly conflict with important public values such as a minimum stream flow. As a result, the approval of this application should be subject to future consumptive uses.

15. Given the public interest conditions previously discussed that would conserve water for other purposes, this right is consistent with principals of conservation of the waters of the state of Idaho.

Application for transfer no. 73787

16. If the rights sought for transfer are regulated by the water master of water district 65, the transfer of the water rights, as proposed, will not injure other water rights.

17. The proposed configuration of the ponds, and the proposed diversion of surface water from pond no. 3 to the entire subdivision for irrigation, will may result in an enlargement of use of Barnes water right no. 65-11324 authorizing diversion from the South Fork Payette River for irrigation for the following reasons. First, water right no. 65-11324 bears a priority date approximately 30 years earlier than permit no. 65-13399, and may be deliverable when permit no. 65-13399 is not deliverable. Second, IDWR does not presently know the extent of development of permit no. 65-13399 during the development period. Finally, the record is not clear whether water diverted under permit no. 65-13399 will be delivered into pond no. 3 ahead of the pumping station for the subdivision pressurized irrigation system. As a result, prior to any distribution of water through the pressurized irrigation system to the subdivision, Eagle Springs must physically divide the water being delivered from the South Fork Payette River so the Barnes property is irrigated by a separate system and the Eagle Springs property is irrigated by a different separate system.

18. Furthermore, because the water from Alder Creek has traditionally been split between the Barnes and Eagle Springs properties, the Barnes property cannot be irrigated with South Fork Payette River water while Alder Creek water that would have irrigated the Barnes property irrigates the Eagle Springs property. This would result in an enlargement of use of the Barnes South Fork Payette River water right and an enlargement of the Eagle Springs Alder Creek water rights. Prior to any distribution of water through the irrigation system to the subdivision, Eagle Springs must construct a physical structure that can proportionally divide the water being diverted from Alder Creek to the Barnes property and the Eagle Springs property according to water right nos. 65-5633, 65-5696, and 65-8850 ("Alder Creek water rights"). At any time South Fork Payette River water is diverted or used for irrigation of the Barnes property under water right no. 65-11324, Alder Creek water diverted under the Alder Creek water rights must be proportionally divided according to the Alder Creek water rights, and delivered and physically applied to the place of use described by each of the Alder Creek water rights.

19. Losses in the ponds due to evaporation and seepage will be fully compensated by the retirement and nonirrigation of 39 acres of irrigated land. The change to aesthetic use proposed by the transfer will not result in an enlargement of use.

20. The use of water for aesthetic purposes is in the local public interest.

21. Compensation for losses will result in the conservation of waters of the State of Idaho.

ORDER

IT IS HEREBY ORDERED that applications to appropriate water nos. 65-23105 and 65-23239 and transfer no. 73787 are **Approved**.

IT IS FURTHER ORDERED that, prior to any distribution of water through the pressurized irrigation system to the subdivision, Eagle Springs or its successor shall construct a delivery structure to (1) physically separate the water being diverted for irrigation under rights 65-11324 and 65-8850 (the Barnes water rights) so it can only be applied to the place of use for the Barnes rights, and (2) physically separate the water being diverted for irrigation under rights 65-5633, 65-5696, and 65-13399 (the Eagle Springs water rights) so it can only be applied to the place of use described by the Eagle Springs water rights.

IT IS FURTHER ORDERED that, prior to any distribution of water through the pressurized irrigation system to the subdivision, Eagle Springs or its successor shall construct a physical delivery structure that can proportionally divide the water being diverted from Alder Creek to the Barnes property and the Eagle Springs property according to water right nos. 65-5633, 65-5696, and 65-8850 ("Alder Creek water rights"). At any time South Fork Payette River water is diverted or used for irrigation of the Barnes property under water right no. 65-11324, Alder Creek water diverted under the Alder Creek water rights shall be proportionally divided according to the Alder Creek water rights, and delivered and physically applied to the place of use described by each of the Alder Creek water rights. A plan for this physical separation and delivery of water shall be submitted to and approved by the Department prior to construction.

IT IS FURTHER ORDERED that the flow rates authorized for diversion from Alder Creek, Coski Creek, Charters Creek, and the unnamed streams identified as sources of supply under right 65-23105 shall be limited as follows:

Alder Creek	7.7 cfs
Coski Creek	2.0 cfs
Charters Creek	1.0 cfs
Unnamed streams	0.5 cfs

IT IS FURTHER ORDERED that the stream segments assigned to Coski Creek and Charters Creek in the findings of fact shall be the natural channels of Coski and Charters Creek.

IT IS FURTHER ORDERED that right no. 65-23105 shall be conditioned as follows:

This right only recognizes diversion of ground water through water table inflow into the ponds and water courses described as a place of use. Ground water shall not be diverted to any of the ponds or water courses by any mechanical or power equipment.

Water stored under this right is subject to fluctuations of the water table caused by changes in the flow of local streams and by diversions under prior ground water rights. This right does not guarantee the maintenance of any particular ground water level.

Prior to diversion of South Fork Payette River and Alder Creek water under this right, the right holder shall install and maintain measuring devices and lockable controlling works acceptable to the Department to provide the watermaster suitable control at the points of diversion.

Aesthetic storage and recreation storage are for 18 interconnected ponds that shall not exceed a storage capacity of 562 af.

IT IS FURTHER ORDERED that right no. 65-23239 shall be conditioned as follows:

Aesthetic and recreation uses provide water to flow through a series of interconnected ponds, streams, and water features described in right 65-23105.

Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department that will provide the watermaster suitable control at the point of diversion.

IT IS FURTHER ORDERED that right nos. 65-23105 and 65- 65-23239 shall be conditioned as follows:

Proof of application of water to beneficial use shall be submitted on or before April 1, 2014.

Subject to all prior water rights.

Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 65 Payette River and Tributaries.

During many years, the full measure of use authorized by this water right cannot be sustained for the entire year. The developer and/or owner of the development served by this water right shall disclose to future lot purchasers at the time of the sale of the lots in the subdivision that full flow in the aesthetic streams and full storage in the ponds may not be possible because of senior priority minimum stream flow water rights in the South Fork Payette River or by climatic conditions.

Water shall not be diverted from the South Fork Payette River under this right when flows in the South Fork Payette River are below established minimum flow amounts.

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 the permit holder had no control.

This right shall be junior and subordinate to future upstream water rights authorizing the diversion and use of water from the Payette River and its tributaries, including ground water, for consumptive uses, except that this right shall not be subordinate to future water rights for similar recreation and/or aesthetic uses.

This right does not grant any right-of-way or easement across the land of another.

The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon

migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

Rights 65-5633, 65-8850, and 65-11324 provide replacement water for the evaporative losses associated with the storage described by this right.

Consumption of water for recreation and aesthetic use under this right is mitigated by the reduction of irrigation under water rights 65-5633, 65-8850, and 65-11324.

Water diverted under this right for aesthetic and recreation uses shall be returned to the South Fork Payette River.

Prior to the diversion and use of water under this approval, the right holder shall comply with all fish screening and/or fish passage requirements of the Idaho Department of Fish and Game.

Application for transfer no. 73787

Right no. 65-5633

This right is limited to the irrigation of 190 acres within the place of use described above in a single irrigation season.

Right no. 65-5696

This right is limited to the irrigation of 3 acres within the place of use described above in a single irrigation season.

Right no. 65-8850

Prior to diversion of Alder Creek water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department that will provide the watermaster suitable control at the point of diversion.

This right is limited to the irrigation of 97 acres within the place of use described above in a single irrigation season.

Right no. 65-11324

Prior to diversion of South Fork Payette River water under this right, the right holder shall install and maintain a measuring device and lockable controlling works acceptable to the Department to provide the watermaster suitable control at the point of diversion. This right is limited to the irrigation of 97 acres within the place of use described above in a single irrigation season.

Rights 65-5633 and 65-5696

Prior to diversion of Alder Creek water under this right, the right holder shall install and maintain a measuring device and lockable controlling works acceptable to the Department to provide the watermaster suitable control at the point of diversion.

When water is being diverted from the South Fork Payette River for irrigation purposes pursuant to right no. 63-11324, the holder of rights 65-5633 and 65-5696 shall physically separate water diverted, delivered, and used for irrigation under rights 65-5633 and 65-5696 to prevent it from being commingled with water diverted under right number 65-8850, 65-11324, and/or other irrigation water rights not appurtenant to the same place of use as right 65-5633 and 65-5696. Water diverted pursuant to rights 65-5633 and 65-5696 shall only be used on the place of use expressly described and authorized for rights 65-5633 and 65-5696.

Rights 65-8850 and 65-11324

Rights 65-8850 and 65-11324 when combined shall not exceed 0.26 cfs for aesthetic use nor exceed 1.94 cfs for irrigation use, and shall not exceed the irrigation of 97 acres in a single irrigation season.

When water is being diverted from the South Fork Payette River for irrigation purposes pursuant to right no. 63-11324, the holder of rights 65-8850 and 65-11324 shall physically separate water diverted, delivered, and used for irrigation under rights 65-8850 and 65-11324 to prevent it from being commingled with water diverted under rights 65-5633, 65-5696, and/or other irrigation water rights not appurtenant to the same place of use as rights 65-8850 and 65-11324. Water diverted pursuant to rights 65-8850 and 65-11324 shall only be used on the place of use expressly described and authorized for rights 65-8850 and 65-11324.

Rights 65-5633, 65-8850 and 65-11324

Rights 65-5633, 65-8850, and 65-11324 authorize the diversion and consumptive use of an annual total of up to 83 af for aesthetic and recreational uses to replace losses caused by evaporation from the 39 acre total surface area of 18-22 ponds and associated water features authorized under right 65-23105.

Rights 65-5633, 65-5696, 65-8850, and 65-11324

Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 65.

This right when combined with all other rights shall provide no more than 0.02 cfs per acre and no more than 3.5 afa per acre at the field headgate for irrigation of the lands above.

This approval does not grant any right-of-way or easement across the land of another.

The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.

Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

Rights 65-5633, 65-5696, 65-8850, and 65-11324 when combined shall not exceed the irrigation of 290 acres in a single irrigation season.

Prior to the diversion and use of water under this approval, the right holder shall comply with all fish screening and/or fish passage requirements of the Idaho Department of Fish and Game.

Dated this 25th day of June, 2009.

A handwritten signature in black ink, reading "Gary Spackman", written over a horizontal line.

Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June, 2009, a true and correct copy of the foregoing document(s) described below was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

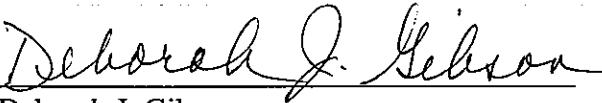
Document(s) Served: Amended Preliminary Order, and Statement of Available Procedures and Applicable Time Limits for responding to Preliminary Orders

JEFFREY C FEREDAY
MICHAEL C CREAMER
MICHAEL P LAWRENCE
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720

BARNES VENTURES INC
SCOTT CAMPBELL
MOFFATT THOMAS
PO BOX 829
BOISE ID 83701-0829

JAYNE REED
450 SOUTH FORD RD
GARDEN VALLEY ID 83622

SPF WATER ENGINEERING
ATTN SCOTT KING
600 E RIVER PARK LN STE 105
BOISE ID 83706


Deborah J. Gibson
Administrative Assistant