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

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32061 IN THE NAME OF SUNCOR IDAHO, LLC	))))	**PROTESTANTS' POST-HEARING BRIEF**

Amidst its rhetoric and unsupported accusations SunCor still fails to: (1) provide the necessary information for approval of its water right application; (2) meet its burden of proof to satisfy the statutory criteria; or (3) demonstrate that it is a "municipal provider." Further, approval of SunCor as a municipal provider would be based on ad-hoc policies developed within the Department of Water Resources. These policies violate the plain language of the statute that "[a]n application proposing an appropriation of water by a municipal provider…shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter." *Idaho Code § 42-202(2).* Thus, SunCor's water right application must be denied.

ARGUMENT

I. SUNCOR'S APPLICATION IS INADEQUATE

As explained in Protestants' Post-Hearing Brief, SunCor's application is inadequate because it failed to provide the additional information required by IDAPA 37.03.08.05(c), and by

Idaho Code 42-202(2) for applications by a municipal provider for reasonably anticipated future needs.

First, SunCor filed two separate water right applications of 5 cfs each – for a total of 10 cfs. At the time of its initial application (# 63-31966) Suncor knew that it would have to apply for additional water beyond the initial 5 cfs. *Protestants' Post Hearing Brief, p. 5 (hereinafter "Protestants' Brief") citing Protestants' Exhibit J, p. 7.* Yet, instead of filing one application, SunCor filed two separate ones so that it would not fall within the regulation's requirement that a permit application for more than 5 cfs must provide substantial additional information. *IDAPA 37.03.08.05(c).* This does not demonstrate good faith and deprives the Department of Water Resources and the public of valuable information necessary to make an informed decision that the water right application is in the public interest, does not impact other water users and is not contrary to the conservation of water resources.

Second, SunCor asserts that its application is a "regular" application and not a "reasonably anticipated future needs" ("RAFN") application, despite the 20-year planning horizon of the project. *Protestants' Brief, p. 14.* SunCor did this to avoid providing information demonstrating that it does, in fact, qualify as a municipal provider, and on reasonably anticipated future needs and the planning horizon, as required by Idaho Code § 42-202(2). Again, this demonstrates bad faith and deprives the Department and the public of valuable and necessary information concerning the qualification of SunCor as a municipal provider and its proposed use of this significant amount of water, which far exceeds the amount SunCor asserts that it actually needs or intends to use. Thus, because SunCor's application is incomplete, it must be denied.

II. SUNCOR DID NOT MEET ITS BURDEN OF PROOF.

SunCor asserts that the Protestants "offered no evidence of any adverse impact to any of their water rights, to anyone's water rights, or to the water resources of the State if this application is granted." *Avimor LLC's Post Hearing Memorandum, p. 1 (hereinafter "Avimor's Mem.").* This is SunCor's staple argument throughout its Memorandum – that the Protestants did not provide their own data and test results, and therefore do not demonstrate any adverse impacts. *See e.g., Avimor's Mem., pp. 12-14.* Yet, it is not the Protestants' burden to offer evidence of adverse impacts, but SunCor's burden to provide the Department and the public evidence that it meets the statutory criteria for approval of a water right application and that there will be no adverse impacts to other water rights and the public interest. *IDAPA 37.03.08.040.04.* This, as explained in detail in Protestants' Post-Hearing Brief, SunCor did not do. Nonetheless, contrary to SunCor's claim, the Protestants provide ample evidence – *using SunCor's own data* - of adverse impacts and its failure to meet the statutory criteria.

In an effort to deflect attention away from its inadequate permit application and failure to meet its burden of proof, SunCor repeatedly accuses the Protestants of using this forum to create a hurdle to completion of its proposed development, and that their concerns are not related to the water right at issue. This accusation is unfounded and unsupported, and is merely an attempt to denigrate the Protestants here. Indeed, Protestants' concerns with, and interests in, this water right application are directly related to the local public interest, as well as the other statutory criteria. As explained at the hearing and in Protestants' Brief, all three Protestants have serious concerns with the impacts that the proposed appropriation will have on the water quality, water quantity, other natural resources (including geothermal resources) and the economics of both the

place of diversion and place of use. All of these concerns fit squarely within the public interest and other criteria. *See Protestants' Brief, pp. 5-13.*

Nor are Protestants' reasons for seeking denial of this application vague and undefined, or solely based on future concerns, as SunCor claims. *See Avimor's Mem., pp. 4-5.* To the contrary, Protestants delineated a number of specific reasons to deny this application, including, but not limited to: the lack of sufficient available water; that the application is speculative and not made in good faith; the lack of economic and environmental analyses; the high arsenic levels in both the Willow Creek and Spring Hill aquifers; and potential impacts to geothermal resources. *Protestants' Brief, pp. 5-13.*

A. The Proposed Use May Reduce the Quantity of Water Under Existing Water Rights and The Water Supply is Insufficient.

First, SunCor itself determined that the amount of water it proposes to appropriate – five cfs - in combination with the water already being withdrawn by the Lynn Family, exceeds the estimated annual recharge of the Willow Creek aquifer. *Protestants' Brief, pp. 5-7.* This contradicts the opinions of SunCor's "expert" hydrologists that other water rights within the Willow Creek aquifer will not be injured and that there is sufficient water supply. *See Avimor's Mem., pp. 12-13.*

In addition, despite SunCor's assertion that its hydrologists extensively studied the Willow Creek and surrounding aquifers (*Avimor's Mem., p. 12)*, SunCor made no effort to determine the water availability in the Payette basin, nor how its proposed water use will impact that basin. SunCor itself determined that the Willow Creek aquifer is part of the Payette River basin and not the Boise River basin - thus, it is SunCor's burden to assess the water availability within the Payette basin and the potential impacts of its proposed appropriation on other water users there. Instead, SunCor asserts that it is up to the Protestants to affirmatively determine that

the Payette is over appropriated. *Id., p. 13.* Yet, again, this is not the Protestants' burden, but SunCor's, which it failed to meet.

Nor has SunCor conducted any long-term testing within the Willow Creek aquifer to support its assertion of an adequate water supply or its estimated annual recharge. *Protestants' Brief, p. 6.* Instead, SunCor relies on a couple of very short term tests and the water level sampling of the Lynn Wells. *See Avimor's Mem., pp. 13-14.* SunCor claims that "[i]f there was a problem of the sustainability of the Willow Creek aquifer, it would have shown on this long-term monitoring." *Id., p. 14.* Yet, the sustainability of the Willow Creek aquifer cannot be based solely on the Lynn Wells' monitoring because SunCor's water use will more than double the water taken out of it – and this water will not be available for recharge because it is being pumped to a completely separate aquifer.

Thus, SunCor has not met its burden to demonstrate that its water right will not reduce the quantity of water under existing water rights (i.e., the Lynn Family's water right) or that there is sufficient water available.

B. SunCor's Application Is Not Made In Good Faith And Is Speculative.

The regulations delineating the criteria for determining whether the application is made in good faith states that "[t]he 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." *IDAPA 37.03.08.045(c).* SunCor's substantive actions here demonstrate that it does not intend to apply the water to beneficial use with reasonable diligence within the five year period of proof. Indeed, SunCor claims that it will only need approximately 2.3 cfs to serve the entire core area, which has a 20-year planning horizon.

See Testimony of Dr. Petrich, Protestants' Brief, pp. 6, 7. Yet, with this water right permit SunCor will have two water rights totaling 10 cfs – far exceeding this estimated use - and SunCor has never explained why it needs the 10 cfs, nor how all of this water will be put to beneficial use within five years, given the 20-year planning horizon.

SunCor attempts to justify its good faith and lack of speculation by explaining the progress made with the Ada County Board of Commissioners and the relevant state administrative agencies. *Avimor's Mem., pp. 15-16.* Yet this "progress" is only for the initial development of approximately 700 units on 840 acres – not for the entire core area. SunCor does not explain the required additional approvals and permits it must obtain for this initial development. Further, the approval process for the vast majority of the core area – the remaining 3400 units and acreage - has not even begun. Requesting water for this remaining development, without considering the 20-year planning horizon or reasonably anticipated future needs, is purely speculative and not in good faith. In addition, asserting that there are no significant impediments that may prevent the successful completion of the core area when it has not even begun the process yet is pure arrogant speculation. The dismissal of Boise City's appeal does not change this fact, as the process of approval for the majority of SunCor's proposed development has yet to even be initiated.

SunCor's intent and actions are clear: it wants as much water as possible without having to file additional and necessary information with its permit application, and without demonstrating that it can and will apply all of its 10 cfs to beneficial uses. Thus, SunCor's permit must be denied as speculative and in bad faith.

C. SunCor's Permit Will Conflict With The Local Public Interest.

SunCor asserts that because Dr. Petrich and Mr. Scanlan testified that there is no injury to the public water resource and because application of water is for irrigation or other beneficial uses, then it is in the public interest. *Avimor's Mem., p. 17.* Yet, again, SunCor failed to meet its burden of proof here, which is to provide evidence of any factor affecting the local public interest of which it is knowledgeable or reasonably can be expected to be knowledgeable. *IDAPA 37.03.08.040.04(b)(ii).*

The Protestants are not treating the local public interest criteria like an Environmental Impact Statement as SunCor asserts. *See Avimor's Mem., p. 17.* To the contrary, the Protestants' arguments are based on the language of the statute itself, as well as the legislative history of the 2003 amendment to the local public interest criteria, which states that "Water Resources should consider all locally important factors affecting the public water resources, including but not limited to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality and the effects of such use on the availability of water for alternative uses of water that might be made within a reasonable time." *Statement of Purpose, H.B. 284 (2003); see also Protestants' Brief, p. 9.*

As evidenced at the hearing and as explained in Protestants' Post-Hearing Brief, SunCor did not provide evidence of how its water use will affect these locally important factors. In particular, SunCor has not provided evidence on: (1) The impacts of its water diversion and injection of water into the Spring Hill aquifer on the water quality and arsenic levels at both the point of diversion and place of use; (2) the impacts on the geothermal resource of the Willow Creek aquifer; (3) the impacts on the economy of the local area – both the point of diversion and the place of use; (4) the impact of the water diversion and use on native wildlife, birds and

sensitive plant species; (5) the fairness of authorizing another municipal water right permit in Basin 63; (6) transportation – there are not transportation studies in the record; and (7) the availability of water within the Willow Creek, Payette and/or Boise River basins for alternative uses of water that might be made within a reasonable time. *Protestants' Brief, pp. 9-11.*

These are the locally important factors directly impacted by SunCor's water right application and about which SunCor should reasonably be expected to be knowledgeable. Yet, as Dr. Petrich and Mr. Scanlan testified at the hearing, they do not know the impacts of their proposed water use on these locally important factors because they did not study them. *Id.* The minimal studies SunCor did conduct are limited to the initial area of development, and not the entire core area for which SunCor claims the water is needed, nor the area of diversion, which is in a completely separate basin than the place of use. Thus SunCor failed to meet its burden that the proposed water use is in the local public interest and must be denied.

D. The Proposed Water Use Is Contrary To The Conservation Of Water Resources Within the State of Idaho.

SunCor asserts that its project "is at the forefront of water conservation efforts" and that the expected water use should be much less than its conservative calculations. *Avimor's Mem., pp. 17-18.* Yet, despite this, and SunCor's claim that it only needs 2.3 cfs of water for the entire core area, approval of this water right application will give SunCor 10 cfs of water - far exceeding the amount of water it claims to need, as well as exceeding the Willow Creek aquifer's estimated annual recharge. While an applicant may not be limited to the bare minimum necessary for survival, this application goes far beyond SunCor's stated bare minimum, and the purportedly unprecedented water conservation measures are irrelevant in light of the excessive amount of water SunCor will lock up with this permit application. Thus, this application is contrary to the conservation of water resources and must be denied.

E. SunCor Did Not Demonstrate That Its Permit Application Will Not Adversely Affect The Local Economy Of The Payette River Watershed.

SunCor asserts that this section is irrelevant because it intends to use the water in the same general locale as the place of diversion. *Avimor's Mem., pp. 18-19.* This is not true because, as SunCor itself asserts, the point of diversion and the place of use are in two separate watersheds – the Payette and Boise River basins. The language of the statute is clear, SunCor must provide evidence of the impacts to the local economy of the watershed or local area within which the source of water for the proposed use originates, where the place of use is outside of the watershed or local area where the source of water originate. *Idaho Code § 42-203A(5)(g).* Here, the place of use - the Spring Hill aquifer in the Boise River watershed - is outside of the watershed where the source of the water originates - the Willow Creek aquifer in the Payette River watershed. Thus, this section does apply here, and as shown in Protestants' Brief, SunCor did not meet its burden because its economic analysis is limited to the 840 acres initially approved for development and no economic analysis was conducted for the Willow Creek or Payette watersheds.

III. SUNCOR DOES NOT QUALIFY AS A MUNICIPAL PROVIDER.

SunCor is correct – it is caught in a Catch-22 situation concerning its qualification as a municipal provider. But the solution is not for the Department of Water Resources to develop an ad-hoc policy that never underwent formal or informal rulemaking procedures, has not been analyzed to determine the potential impacts of this policy change, does not provide protections to water users impacted by the significant increase in municipal provider applications, and that does not provide assurances that it is being implemented with an even hand.

This ad-hoc policy merely provides that "[p]rior to issuing the permit, we require something from them to show that they have been in contact with DEQ and that they are

pursuing proper regulation by DEQ." *See Protestants' Exhibits E, F.* Exactly what this "something" is, is unclear. Such clarity and assurances are particularly important given the unambiguous statutory language that an applicant must include with its application "sufficient information and documentation to establish that [it] qualifies as a municipal provider" (*Idaho Code 42-202(2)*) as well as the significant increase in the number of municipal provider applications being submitted by developers such as SunCor, and the potential impacts that such municipal use will have on other water users and on Idaho's dwindling groundwater supplies.

Simply because other applications, including SunCor's previous application, have been approved pursuant to this ad-hoc policy does not exempt it from challenge here, and does not prove its legality. Indeed, it is certainly questionable whether SunCor's contacts with DEQ here establish that they even meet the vague and minimal requirements of the ad-hoc policy. SunCor asserts that its contacts with DEQ establish that it qualifies as a municipal provider, citing Protestants' Exhibit J. *Avimor's Mem., p. 9.* The email referred to, however, is from 2004, and SunCor provided no additional and more recent evidence that it has been working with DEQ to meet the requirements to establish it a "public water supply." Indeed, Mr. Scanlan testified that nothing further had been done since then. *See Testimony of Terry Scanlan.*

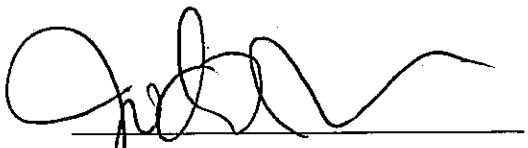
Ultimately, the Department's ad-hoc policy allowing an applicant to provide proof at some later time, and to only submit "something" to show that they have been in contact with DEQ, violates the plain language of the statute. In the alternative, if the Department determines that this ad-hoc policy is lawful, SunCor does not even meet its minimal requirements.

CONCLUSION

For the reasons detailed in Protestants Post Hearing Brief and this Reply Brief, SunCor's water right application must be denied.

Dated this 4th day of December, 2006

Respectfully submitted



Judith M. Brawer
Counsel for Protestants Davidson,
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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December 2006, I caused a true and correct copy of the foregoing PROTESTANTS' POST HEARING REPLY BRIEF to be served on the following persons

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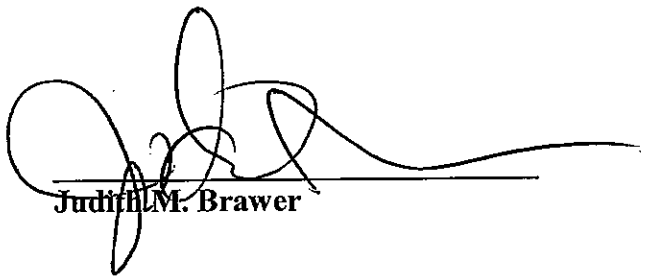

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December 4, 2006

VIA HAND DELIVERY

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Boise, Idaho 83720-0098

Re: In the Matter of Application for Permit No. 63-32061
In the Name of SunCor Idaho LLC

Ladies and Gentlemen:

Enclosed for filing is the original copy of the ***Avimor LLC's Reply to Protestants' Post Hearing Brief*** in the above entitled case. If you have any questions, please feel free to give me a call. Thank you for your assistance in this regard.

Very truly yours,

BARKER ROSHOLT & SIMPSON LLP

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Enclosure

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32061 IN THE NAME OF SUNCOR IDAHO, LLC	**AVIMOR LLC'S REPLY TO PROTESTANTS' POST HEARING BRIEF**

COMES NOW, Avimor LLC, by and through its attorneys of record, and files this response to Protestants' post hearing brief.

Protestants' post hearing brief demonstrates that this proceeding is a vehicle to protest the development of the Spring Valley Ranch property, and the foothills in general.[1] What is abundantly clear in the record, and admitted by each of the Protestants, is that they have absolutely no facts to show that there will be any adverse impact to the water resources of the State of Idaho, or any injury to any water rights, as required by Idaho Code § 42-202B(3). Instead, they seriously misstate the evidence concerning the hydrologic studies that have been

[1] *See* Protestants' concern about increased traffic in the area as a result of the Avimor planned community impacting their interests in driving through the same area. Protestants' Post Hearing Brief, p. 2.

conducted in the Willow Creek aquifer. The basis for this protest is revealed when Protestants assert that their real concern is that the public resources will be degraded "by the associated development enabled by this water right permit." Protestants' Brief, p. 3. In other words, the water right is not as important as the development of the property, and the effects the development will have on Protestants' interests in driving through the area in their convertibles or hunting or hiking or otherwise enjoying the Spring Valley Ranch.

I. Avimor provided all required information.

Protestants first contend that Avimor did not provide "all of the required information as part of its water right application." Protestants Brief, p. 4. Protestants failed to identify what information was not submitted. Not only did Avimor submit all information required by the regulations, IDAPA 37.03.08.040.05, it submitted all additional information requested by the Department. Testimony of Terry Scanlan; Testimony of Steve Lester. Protestants complain that this is really a 10 cfs application, but fail to recognize that the application 63-32061 and the permit 63-31966 involve withdrawals from two separate hydraulically distinct aquifers, and not a combined stress on one aquifer. Contrary to Protestants' claims, all the information is available for public review. This claim is spurious.

II. Avimor established that the proposed water right will not reduce the quantity of water available under existing water rights and that the water right is sufficient for the purpose for which is sought to be appropriated.

Protestants argue that no information was introduced concerning the hydrologic capacity of extent of the Willow Creek aquifer or the potential impacts to existing water users. Protestants then contend that this proof is necessary to protect ***future*** developers. Whether there is sufficient water for other developers to develop their lands in the foothills is a matter that those developers will have to establish. It is not up to Avimor to establish that there is water for future

development in this application. In any event, there are no other applications from other developers for water from the Willow Creek aquifer.

Protestants contend this permit would authorize mining the aquifer. There is absolutely no evidence to support that contention. The studies and recharge calculations conducted by Mr. Scanlan and Dr. Petrich demonstrate that there is sufficient water in the Willow Creek aquifer to support this application. Exs. 27, 58. They also explained how these recharge calculations are conservative because they do not include inflows from other aquifers or upwelling from deeper aquifers.

Protestants argue that the total capacity and extent of the Willow Creek aquifer is not known with certainty, and therefore it is impossible to know if there will be a diminishment of the aquifer. This is patently absurd. Very few aquifers have the total capacity and extent defined to the level of precision that Protestants demand. Dr. Petrich and Mr. Scanlan provided extensive evidence of the general nature of this aquifer. Protestants claim that Avimor simply chose to focus on one right and ignore all other water users from this aquifer. That is not the case. Dr. Petrich and Mr. Scanlan extensively reviewed all of the water rights in the area. Exs. 30, 31, 40. They determined that the Lynn Family represents the most significant water use from the aquifer under the Lynn water rights, and therefore used the Lynn withdrawals in the aquifer withdrawal estimates. Other ground water right holders in this area are domestic users which are *de minimus.*

Protestants continue the misapprehension that a municipal water right constitutes a volumetric demand on the resource. Municipal water rights typically do not have volumetric requirements. Instead, they have instantaneous maximum diversion limits. The maximum diversion limit allows a municipal system to meet peak demand. The average demand in a

municipal system is less than the peak demand. Testimony of Terry Scanlan and Dr. Christian Petrich. Protestants' hypothetical calculations of total withdrawals assume continuous diversion and are just numbers put together by counsel. They do not represent the opinion of any expert witness to attest to the validity of those hypothetical calculations. These numbers were not subject to cross-examination. They are not evidence and not worth the paper they are written on.

Protestants next contend there was no long-term test of the aquifer. This argument ignores the extensive experience that Terry Scanlan has had with the Willow Creek aquifer for over 10 years. It ignores that fact that the record contains water level measurements taken from the aquifer over the past 13 years which show a stable aquifer level. Ex. 38. No facts support the counsel's contention the test conducted by Dr. Petrich and Mr. Scanlan was insufficient to establish the sustainability of the aquifer. In the expert opinion of Mr. Scanlan and Dr. Petrich, they are, in fact, adequate. No expert testified otherwise. The musing of counsel about the adequacy of the testing is irrelevant.

III. Avimor's application is made in good faith and not for delay or speculation.

Protestants continue to assert, in spite of the evidence to the contrary, that this water right application, coupled with permit number 63-31966, totals 10 cfs and that Avimor will draw the full volume of 10 cfs from both aquifers on a constant, 24 hours-a-day, seven days-a-week, 365 days-a-year basis. This is nonsense. The evidence is quite clear Avimor will use this water right for municipal purposes, including peak flow demands during the irrigation season, fire protection needs, storage needs, and aquifer recharge to the Sandy Hill aquifer (on the site of the permissible place of use). Under the Department's procedures, if 5 cfs is pulled out of the Willow Creek aquifer and injected into the Sandy Hill aquifer, and then the same amount removed from the Sandy Hill aquifer, two 5 cfs water rights are necessary, even though the

volume of water ultimately put to beneficial use under this scenario would be limited to the amount of water removed from the Willow Creek aquifer. The maximum diversion from the Willow Creek aquifer is 5 cfs under this right.

Next Protestants assert that it is "arrogant speculation" for Avimor to contend that it will achieve all the permits necessary for this development. Apparently, Protestants would have every water right applicant—a farm or town or a municipality—actually receive final approval from every other agency with possible jurisdiction over any action on that particular property before even coming to the Department to apply for a water right permit. Again, this is nonsense. The Department rules simply require the applicant to demonstrate that it "is in the process of obtaining other permits needed to construct and operate the project." Rule 45.01.C.ii. The Department has never insisted that all of the permits be in place before the water right application is made. Mr. Taunton testified at length, and the exhibits in the record (Exs. 7 -21) demonstrate, that Avimor is in the process of obtaining the necessary permits.

While approval of the requisite governmental entities for every facet of the project is not a foregone conclusion, Avimor has taken very substantial steps toward obtaining the necessary permits. As the motion for leave to augment demonstrates, one additional hurdle has been removed by Judge McKee's decision affirming the County's approvals over the objections of the City of Boise.

IV. Avimor has demonstrated that the application does not conflict with the local public interest as defined as the interest 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.

Protestants' closing brief argues that the Idaho legislature's amendment to the local public interest provisions of Idaho Code § 42-202B have not limited the scope of "public

interest" issues that they can raise in this proceeding. They contend that the Department's 1993 rules were not affected by the 2003 Amendment. The Department has recognized the contrary. *Public Interest Memorandum,* April 15, 2005 (Rule 45.01.3 was superseded by legislature). *See also In the Interest of Miller,* 110 Idaho 298, 299 (1986)("When a statute is amended it is presumed that the legislature intended the statute to have a meaning different from the meaning accorded the statute before amendment."). Given the debate over the local public interest amendment in 2003, Protestants' claim is astonishing. According to the statement of purpose of the bill—the portion not quoted by Protestants—

> The "local public interest" should be construed to ensure the greatest possible benefit from the public waters is achieved; however, ***it should not be construed to require the Department to consider secondary effects of an activity simply because that activity happens to use water . . . .***
>
> In recent years, ***some transactions have been delayed by protests based on a broad range of social, economic and environmental policy issues having nothing to do with the impact of the proposed action on the public's water resources.*** Applicants have experienced costly delays and have been required to hire experts to respond to issues at an agency whose purpose has nothing to do with those issues. . . .
>
> ***This legislation should remove significant financial burdens on the Department of Water Resources and on private parties.***

Statement of Purpose and Fiscal Impact, Bill No. 284 (emphasis added).

Protestants now want to raise issues that the legislature decided in 2003 were outside the scope of water rights proceedings. Protestants say that the potential presence of sensitive plants or birds or wildlife in the area to be developed with this water right requires the Department to consider all secondary impacts from the use of the water. The legislature made it very clear that the issues associated with water quality, wildlife and habitat have to do with

withdrawal of the water from the resource. If there are direct impacts to water quality or to aquatic habitat or species associated with withdrawing the water, then the Department can consider those issues as part of the local public interest. Here, the water is some 400 feet below the surface and not directly connected with any of these hypothetical plant communities, if indeed they exist. The Department is not authorized to do what Protestants have invited the Department to do here—consider the secondary effect of the development on plants, wildlife or traffic. As the legislature noted in the statement of purpose, "it is not the primary job of Water Resources to protect the health and welfare of Idaho citizens and visitors. That role is vested in other agencies." *Id.*

Protestants then list five specific issues:

1. Protestants contend that there was no examination of arsenic levels in the groundwater at Willow Creek and the Spring Hill aquifer in the testimony. That is false. Terry Scanlan testified in some detail about the levels of arsenic in both aquifers, and testified about the necessity of working with the DEQ to ensure that water meeting drinking water standards is injected into the Sandy Hill aquifer and withdrawn and put to use in the public drinking water system. He testified about the relatively low levels and methods that are being investigated to deal with arsenic. *See* Exs. 26, 27, 29. Protestants, on the other hand, produced absolutely zero evidence concerning arsenic levels or water quality impacts.

2. Protestants claim that there was insufficient evidence of impacts to the local economy. Protestants misunderstand the amendments to Idaho Code § 42-203A(5)(g), which provides that the director may reject an application or condition an application if the proposed application "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 legislature clarified in its statement of purpose that this criteria was to "ensure that out of basin transfers do not deprive a local area of the use of the available water supply." Statement of Purpose, Fiscal Impact, Bill No. 284. Here, the water is not being transferred out-of-state to the detriment of the local community. Thus, water is being put to use in the same "local area where the source of water originates."

3. Protestants assert that there will be an adverse impact on the alleged geothermal resource of the Willow Creek aquifer. In fact, Willow Creek aquifer is not a geothermal resource. Testimony of Terry Scanlan. The water temperature is below the levels necessary to qualify as a geothermal resource. Ex. 27; Testimony of Terry Scanlan. While there are additional inflows to the Willow Creek aquifer from another unknown geothermal aquifer, the Willow Creek aquifer is not itself a geothermal resource, as alleged by counsel.

4. The next item of concern is the secondary impact of the development on native wildlife, birds and sensitive plants. Counsel lists a number of plants allegedly on the ranch property, none of which are aquatic. Counsel contends that the Department is to examine the secondary effects of the development on the sensitive species. This is foreclosed. The Willow Creek aquifer has no connection with any of these plants, even if they might be found on the property.

5. Lastly, they question the fairness of authorizing any municipal water right permit. To the contrary, it would be unfair for the Department to retroactively change its processing hold to deny one municipal provider the right to apply for a water right, particularly when the Department has authorized over 70 municipal water right permits in Basin 63 in the past decade, including Permit 63-31966, a municipal water right granted to the applicant.

The Protestants allege a detailed hydrological study of the entire foothills area must be completed before this application can be approved. However, the Director has already determined that there is no such need, prior to approving any additional municipal or other water right applications. Ex. T. The Protestants have failed to demonstrate the facts necessary before the Department could either designate a Ground Water Management Area, a Critical Ground Water Area, or impose a moratorium. The facts are to the contrary. Testimony of Dr. Christian Petrich and the Treasure Valley Water Rights Hydrology Study.

What is telling about the Protestants' public interest argument that the Department should consider all of these secondary impacts is that these very arguments were made to the legislature by many individuals, including representatives of the Sierra Club, Idaho Rivers United, the Idaho Conservation League, and other "conservation" entities. They all attempted to convince the legislature not to pass the 2003 amendments to the water right processing statutes. *See* Minutes, March 3, 2003, House Resources Committee. Ultimately, the bill passed the House and Senate by overwhelming margins. Protestants only cite the Rocky Mountain Land and Cattle Company preliminary order from 2002. That order was issued prior to the 2003 amendments and was regularly described in the legislative hearings as an example of the Department having gone into areas (traffic) that were beyond its expertise, requiring applicants to duplicate efforts in front of multiple agencies.

V. Avimor's application is not contrary to the conservation of water resources within the State of Idaho.

Avimor has demonstrated that its water right application is for a project at the forefront of water conservation in this valley. Avimor's parent, SunCor, has extensive experience in water conservation efforts in its work in New Mexico and Arizona. The County has already approved

xeriscape requirements which are far more stringent than the requirements on any of the land occupied even by the Protestants.

Protestants' only argument about the conservation of water resources in their closing brief is that Avimor has applied for 10 cfs, but only "needs" 2.3 cfs for its planned community. This evinces a misunderstanding of municipal rights. The 2.3 cfs calculation is an average of summer and winter usage for the project. The 10 cfs is made up of two separate water rights: one from the Sandy Hill aquifer, and the other from the Willow Creek aquifer. The 5 cfs right from the Willow Creek aquifer is intended to be used in part to recharge the Sandy Hill aquifer. It also will be used to meet peak demands and fire flow demands necessary for IDEQ approval. This is not an excessive appropriation of water, but is necessary to meet the needs of the development.

VI. Avimor application ensures that use of the water from the Willow Creek aquifer does not deprive any local area of the use of the available water supply.

Protestants contend that Avimor must have a detailed economic study for the impact of this development on the entire foothills area. As shown above, this is a fundamental misunderstanding of Idaho Code § 42-203A(5)(g). Such a study is not required when the water is used in the same "local area."

VII. Avimor is entitled to appropriate water as a municipal water provider.

Under Idaho Code § 42-202B(5)(c), a municipal provider includes not only traditional municipalities, but also any corporation or association which supplies water for municipal purposes in a water system regulated by the State of Idaho as a public water supply. A municipal purpose means, "Water for residential, commercial, industrial and irrigation of parks and open space and related purposes." Idaho Code § 42-202B(6). Protestants did not contend that

Avimor has no intent to develop a public water supply system or that the beneficial uses in this application do not qualify as a municipal purpose. Indeed, Avimor has worked extensively with DEQ and PUC to set up a public water supply system. Highland Water Company and the Foothills Sewer Company were incorporated for this very purpose. Ex. 20. Furthermore, Avimor already holds one municipal permit (63-31966).

Protestants contend that Idaho Code § 43-202(2) requires any municipal provider to establish two things: (1) the reasonably anticipated future needs, service area, and planning horizon; and (2) proof at the time of application that the applicant has been approved by DEQ as a public water supply. Protestants are substantially rewriting the statute to reach that result. Idaho Code § 43-202(2) does not require a municipal provider to file for an application for a reasonably anticipated future needs. The Department has recognized this in its processing of this and other applications. Yet, Protestants claim that, under the Municipal Water Rights Act, municipal providers cannot apply for a water right, except to meet reasonably anticipated future needs. This is an amazing turn of events that no one anticipated when the Municipal Water Rights Act was passed. Its purpose was to ensure that a municipal supplier could, in the right circumstances, seek to obtain more water than it could develop in a typical five year time period to put the water to beneficial use. Now, Protestants claim a municipal supplier can ***only*** seek a reasonably anticipated future need right. The Municipal Water Rights Act mandates no such result.

Protestants' argument derives from their misunderstanding of municipal water rights. Protestants are stuck on the concept that a municipal water right assumes a 24 hour/day, 7 day/week, 365 day/year pumping at that maximum diversion rate. Protestants do not understand municipal water rights. Municipal water rights are established so that the municipal provider has

a maximum diversion rate to meet exigencies. Those exigencies are not the anticipated future needs, which so confuses Protestants. The exigencies include fire flow protection, peak day and hour demand, and, in the instance of this right, the ability to recharge the Sandy Hill aquifer.

As Mr. Scanlan testified, the intent of Avimor is to, within five years, build a system capable of withdrawing 5 cfs from the Willow Creek aquifer. It is possible that Avimor may withdraw only 5 cfs one day, and the next day may withdraw none or 2 cfs or 1 cfs, but never more than 5 cfs. That is the nature of a municipal water right.

Protestants contend that water rights that are not held for reasonably anticipated future needs are not immune from forfeiture. Avimor does not contest that proposition. If Avimor receives a license and then, for a period of 5 consecutive years, does not put the licensed water right to beneficial use, the right will be subject to forfeiture. *See Jenkins v. Idaho Dept. of Water Resources,* 103 Idaho 384, 647 P.2d 1256 (1982). The fact that a water right may be subject to forfeiture if not used is not grounds for refusing to permit the water right.

Protestants are wrong in arguing that the water right will not be put to use until 20 years have passed. Instead, as Mr. Scanlan testified, Avimor intends to put this right to use within five years. Protestants simply confuse the average annual water needs of the community over twenty years with the peak demands necessary for this public water system.

VIII. The Department's municipal provider procedures are not arbitrary and capricious.

The Department has rightly recognized the conundrum of a party seeking to develop a municipal water right. The DEQ will not issue its certificate of a public water supply system until the water system is ready for operation. The applicant cannot build a system for delivery of water and drill the necessary wells without a water right from the Department. The Department

is protected because, when the permit holder seeks a license, the permit holder must demonstrate that it has DEQ's approval. The contrary argument Protestants make is wrong for two reasons. First, Idaho Code § 42-202(2) only applies when there is an application for reasonably anticipated future needs. Second, and more importantly, it merely requires "***sufficient*** information and documentation to establish the applicant qualifies as a municipal provider." Idaho Code §§ 42-202B(5) and (6) provide that a municipal supplier can establish a company to supply water for municipal purposes through a water system regulated by the State of Idaho as a public water supply. Avimor is working with both the DEQ and the PUC to obtain those final approvals. There is no question that Avimor's purposes are municipal purposes as set forth in § 42-202B(6). "Sufficient information" is not limited to a certificate from DEQ.

Protestants claim that a certificate from DEQ is and has always been a prerequisite to applying for an application for a municipal water right. This is not correct. According to the testimony and the evidence, it has long been the policy of the Northern Region to handle the application just this way. Mr. Lester testified that he had not previously handled a municipal water right application of this nature and sought guidance from the State Office. The State Office provided him the same guidance that was used in other parts of the State. In 2002, the Director of the Department approved the Westrock permit, with a condition that Westrock obtain a certificate as a public water supply from DEQ prior to putting the water to beneficial use. *In the Matter of Application for Permit No. 65-22357 in the Name of Westrock Associates LLC* (Dec. 20, 2002)(Conclusion of Law 5, Condition 8.c.). *See also Jug Mountain Ranch,* Water Right No. 65-13930.

Protestants contend that this policy of allowing a municipal provider to submit proof of its certificate from DEQ prior to application to beneficial use was concocted by Mr. Saxton, the

Hearing Officer, in violation of all of the Department's previous directives, and even suggest that Mr. Saxton did so solely for the purpose of granting Avimor's application. The evidence is to the contrary. While the Hearing Officer is clearly cognizant of his former role in the Department, Protestants' spin does not match the evidence. Mr. Lester contacted Mr. Peppersack about this particular application, they discussed it, and Mr. Peppersack advised Mr. Lester that the Department's ability to condition permits was an acceptable method of dealing with the DEQ certification. A standard condition was proposed. Avimor submitted sufficient information with this application, with its prior application, and at this hearing about how it meets the requirements of a municipal provider.

Here, Protestants have no evidence that Avimor does not qualify as a municipal supplier or that it will not build a public water supply system. They simply wish to raise an impossible hurdle for anyone who is not already a municipal provider to be recognized as a municipal provider. Protestants would have Avimor and other potential municipal providers leave the field to United Water or other existing suppliers. Such an economic monopoly for existing municipal suppliers is not in the public interest and is not required by the water rights statutes.

Finally, Protestants claim that this policy is not being treated evenhandedly. Protestants offer not a single instance where a person or entity in the shoes of Avimor was required to jump through the hoop backwards and obtain its DEQ certification prior to obtaining a water right permit. Not one.

CONCLUSION

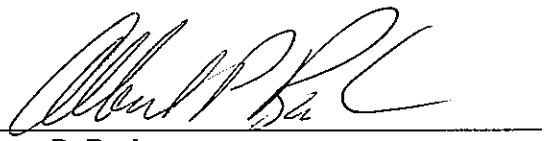
Protestants' brief is filled with rhetoric, with misstatements of fact, and with a fundamental misunderstanding of municipal water rights. If Protestants prevail, a municipal

water right would be only available for an average diversion. A municipal provider could not meet its peak demands if it could only obtain a water right for its average diversions. The Protestants do not care. They do not care because they do not care about this water right. They care about preventing this development. Protestants have no water rights of their own that may be injured. Not a single water right holder who might be affected appeared at this hearing. All protests by other water right holders were resolved by providing information about this right and by agreeing to the monitoring plan (which Avimor suggests should be a condition of this right). The only holdouts are those who want to talk about sensitive species, traffic, and secondary impacts from putting this water right to use on the land. That attempt is foreclosed by the legislature's amendment of Idaho Code § 42-202B.

It is clear that Protestants' claims are wholly unsupported by any evidence or by any reasoned interpretation of Idaho law. As the legislature noted in the Statement of Purpose for House Bill No. 284, the legislation should remove "significant financial burdens on the Department of Water Resources and on private parties." Protestants have failed to heed the direction of the legislature. This application should be approved.

DATED this 4th day of December, 2006.

BARKER ROSHOLT & SIMPSON, LLP



Albert P. Barker
Attorneys for SunCor Idaho, LLC
now known as Avimor LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of December, 2006, I served a true and correct copy of the foregoing **AVIMOR LLC'S REPLY TO PROTESTANTS' POST HEARING BRIEF** on the person(s) listed below, in the manner indicated below:

Idaho Department of Water Resources 322 E. Front Street P. O. Box 83720 Boise, ID 83720-0098	X U.S. Mail, Postage Prepaid ___ Facsimile **287-6700** ___ E-Mail X Hand Delivery
Judith M. Brawer 1502 N. 7th Street Boise, ID 83702	X U.S. Mail, Postage Prepaid ___ Facsimile **343-2070** ___ E-Mail ___ Hand Delivery
Phillip Fry 4122 Homer Road Eagle, ID 83616	X U.S. Mail, Postage Prepaid ___ Facsimile ___ E-Mail: **idphil@earthlink.net** ___ Hand Delivery

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Attorney for Protestants

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32061 IN THE NAME OF SUNCOR IDAHO, LLC	))))	**PROTESTANTS' POST-HEARING BRIEF**

Protestants ROD DAVIDSON, LYLE MULLINS AND GARTH BALDWIN, by and through their attorney of record, Judith M. Brawer, hereby file this Post-Hearing Brief. SunCor Idaho, LLC's (hereinafter "SunCor") permit at issue here must be denied for a variety of reasons, including, but not limited to, the failure of SunCor to meet its burden of proof for satisfying the criteria in Idaho Code § 42-203A(5) for approval of a water right permit application; and the failure of SunCor to demonstrate that it is a "municipal provider" pursuant to the pursuant to Idaho Code § 42-202(b). In addition, the Department's ad-hoc policies concerning the processing and approval of applications by purported municipal providers is arbitrary, capricious and not in accordance with the law.

PROTESTANTS

Protestant ROD DAVIDSON is a native of Idaho, and spent much of his life in the Boise and Valley County. Before moving to eastern Oregon earlier this year, Mr. Davidson lived in Eagle in the Feather Nest subdivision north of Floating Feather road. His two young children still live there.

Mr. Davidson spent his entire life hiking, hunting, camping and otherwise recreating throughout the foothills area, including the area proposed for development by Suncor - both the area of the proposed water diversion as well as the place of use. Mr. Davidson's use and enjoyment of the areas impacted by the proposed water include hiking, hunting, wildlife viewing, camping, and other aesthetic and recreational purposes.

In addition, Mr. Davidson owns several properties in Idaho, including in Whitebird, on Payette Lake, and on the N. Fork of the Payette west of Lake Fork. He regularly visits these properties to relax, hike, hunt, fish and enjoy the clean air and water. To access his properties, Mr. Davidson often drives up Highway 55 past the Suncor property. Mr. Davidson is very concerned about the increased traffic that will occur as a result of the Avimor planned community.

Protestant LYLE MULLINS moved to Eagle's Lexington Hills subdivision from Atlanta, Georgia about two years ago. Mr. Mullins and his wife moved here to be close to their son, daughter-in law and granddaughter, who live near Eagle as well. The Mullins also moved to Eagle because of the rural nature of the area, substantial open space, clean water and air, abundant natural resources and the lack of traffic and associated stress. He enjoys taking his grand daughter on rides into the foothills in and around the area of the proposed Avimor planned community in his convertible. Mr. Mullins now finds himself trying to protect the very values he moved here for.

Protestant GARTH BALDWIN is a long-time resident, real estate developer and owner of the Chevron gas station in the Horseshoe Bend. Mr. Baldwin also spent enjoys hiking, fishing, hunting, bird and wildlife viewing and other recreational activities throughout the areas impacted by SunCor's proposed development and permit application. Mr. Baldwin is further concerned

about the impacts that SunCor's water right permit will have on the Payette drainage, as Mr. Baldwin resides and does business within the Payette drainage.

The interests of each of the protestants are directly affected by the proposed water right permit application, including, but not limited to, its impacts to the areas' water quality, quantity and geothermal resources, as well as to the other natural resources that depend on the clean and remaining available water of the Boise and Payette River basins such as wildlife, birds, plants, riparian areas, and native vegetation – including identified sensitive species. Protestants are concerned that these public resources will be degraded and destroyed by the diversion of water out of the Willow Creek aquifer, which is in the Payette River basin and its transportation and use in the in the area of the Avimor planned community, which is in the Boise River basin, and the associated development enabled by this water right permit.

The interests of Mr. Davidson, Mr. Mullins and Mr. Baldwin have been and will continue to be injured and harmed by the Department's violations of law as complained of herein. These violations include the approval, authorization and implementation of water right permit 63-32061 at issue here.

ARGUMENT

I. SUNCOR DID NOT MEET ITS BURDEN OF PROOF AND THUS FAILS TO SATISFY THE STATUTORY CRITERIA FOR APPROVAL OF ITS WATER RIGHT APPLICATION.

When deciding whether to grant (or deny) a water right permit, the Idaho Department of Water Resources (Department) must determine whether the application satisfies the following statutory criteria:

> 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 therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

Idaho Code § 42-203A(5).

The Department's regulations allocate the burden of proof as follows: The applicant bears the initial burden of coming forward with evidence for the evaluation of criteria (a) through (d); the applicant also bears the initial burden of coming forward with evidence for the evaluation of criterion (e) as to any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant bears the initial burden of coming forward with evidence for those factors relevant to criterion (e) of which the protestant can reasonably be expected to be more cognizant than the applicant. *IDAPA 37.03.08.040.04.* SunCor has not met its burden of proof here.

First, SunCor did not provide all of the required information as part of its water right application, and thus this information was not available for public review. In its Pre-Hearing Memorandum, SunCor asserts that the "Additional Information Requirements" in *IDAPA 37.03.08.040.05* are waived for filings seeking to appropriate five (5) cfs or less, and thus because SunCor's application is for 5 cfs, it does not have to submit this additional information. *See AVIMOR LLC's PREHEARING MEMORANDUM, p. 2, fn. 1.* Yet the Department should not condone SunCor's attempt to skirt this additional information requirement by splitting its water right applications into two separate ones of 5 cfs each. Indeed, SunCor actually seeks to

appropriate a total of ten (10) cfs. Importantly, as SunCor admitted at the hearing, and to the Department, it knew at the time it filed its initial application (permit no. 63-31966) that it would have to apply for additional water beyond the initial five cfs. *See Protestants' Exhibit J, p. 7.* Thus SunCor's application should not be approved until the additional information is provided for public review.

A. Suncor Did Not Meet Its Burden Of Proof That Its Water Right Will Not Reduce The Quantity Of Water Under Existing Water Rights And That The Water Supply Itself Is Sufficient For The Purpose For Which It Is Sought To Be Appropriated,

One of the most glaring problems with SunCor's permit application is the lack of information concerning the actual hydrologic capacity and physical extent of the Willow Creek aquifer, and the potential impacts to existing water users of diverting five cfs from this aquifer. Such information is especially important given the significant amount of development that is proposed by both SunCor and other developers in proximity to the application's proposed point of diversion and area of use, as well as downstream in the Boise and Payette River watersheds.

Idaho law prohibits the so-called "mining" of an aquifer. "Water in a well shall not be deemed available to fill a water right therein" if pumping from the well to satisfy the right would withdraw ground water supply "beyond the reasonably anticipated average rate of future natural recharge." *Idaho Code, § 42-237a(g); See also Baker v. Ore-Idaho foods, Inc.,* 95 Idaho 575, 513 P.2d 627 (1973). Here, SunCor's proposed permit may result in ground water withdrawals beyond the estimated rate of future natural recharge, thus potentially unlawfully "mining" the Willow Creek aquifer, and reducing the quantity of water under existing water permits.

SunCor admitted at the hearing that it does not actually know – and has not attempted to determine – the total capacity or extent of Willow Creek aquifer. Nor did SunCor attempt to determine the total amount of water withdrawals already permitted within the aquifer. Instead,

SunCor only *estimated* the amount of water currently withdrawn by the one largest water user - the Lynn family - which is estimated to be approximately 1480 acre feet per year. *See Cross Examination of Christian Petrich.*

SunCor's diversion will, at a minimum, more than double the amount withdrawn from the Willow Creek aquifer. Indeed, SunCor estimated that the annual volume of water it will extract from the Willow Creek aquifer to supply the Avimor development's "core area" at full build out of 4,292 homes, will be about 1640 acre feet per year, or approximately 2.3 cfs. *See Testimony of Christian Petrich.* Thus, the total of the two withdrawals (SunCor and Lynn family) is approximately 3120 acre feet per year, which approaches SunCor's estimated annual recharge of the Willow Creek aquifer of 3600 acre feet per year.

Yet, because SunCor did not account for any of the other water users of the Willow Creek aquifer, the actual annual withdrawals are unknown. Further, SunCor's assertion that its water withdrawals will not exceed the estimated level of recharge does not account for the fact that its permit application is for a total of five cfs, which equates to approximately 3620 acre feet per year (5 cfs x 723.94 = 3619.70 acre feet per year) – exceeding the estimated recharge amount in and of itself.

SunCor's assertion that the Willow Creek aquifer can sustain the proposed withdrawal without any impacts to other water users is belied by the fact that it did not conduct any long term tests – in fact, SunCor did only one 24-hour test and a shorter so-called term step test. Neither of these tests assess the impacts of long term withdrawals of five cfs on the sustainability of the aquifer and the other water rights users.

Thus, SunCor has not satisfied its burden to demonstrate that there would be no reduction in the quantity of water under existing water rights or that the water supply itself is sufficient for the purposes for which it is sought to be appropriated.

B. SunCor Did Not Meet Its Burden That Its Application Is Made In Good Faith, And Is Not Made For Delay Or Speculative Purposes.

As stated above, SunCor asserts that it will use only 2.3 cfs for the entire "core area" of the Avimor planned community. Yet, if the Department approves this application, SunCor will have two water right permits totaling 10 cfs – far exceeding its stated need. SunCor itself claimed that its permit application did not include reasonably anticipated future needs or a planning horizon, yet it has not explained how and when it will use the excess 7.7 cfs. SunCor's permit application for a water right in such excess of its stated need is both bad faith and speculation, and further does not satisfy the requirement that an appropriation of water must be for a beneficial use (See II, below).

In addition, SunCor's entire development is speculative in nature because of the considerable number of variances, amendments, conditional use permits and other permits that it is currently seeking, and must seek in the future. For example, SunCor currently has an application in front of the Ada County Board of Commissioners for a Conditional Use Permit to allow the construction and operation of a water booster pump station required to provide potable water to the Avimor development, a zoning ordinance map amendment, a zoning ordinance text amendment, a comprehensive plan text amendment, a preliminary plat, a floodplain application for two watercourse crossings and an amendment to the development agreement.

While SunCor asserts that there is no possibility that these or any other future proposed amendments or permits could be denied, this is pure arrogant speculation. In fact, the public is increasing its scrutiny of, and concerns about, the environmental and other impacts (such as

traffic and infrastructure) of the Avimor planned community as well as the many other significant proposed developments in the foothills. These environmental concerns include water quality and quantity, air quality, fish, wildlife and bird habitat protection, aesthetics and recreation. It is certainly possible that the County Commission or a federal or state agency could deny a variance, amendment, or a permit request based on public interest and/or environmental concerns. *See In the Matter of Application for Permit of Water Right No. 61-11954 in the Name of Rocky Mountain Land & Cattle Co. (IDWR Preliminary Order, Oct. 21, 2002).*

C. SunCor Has Not Met Its Burden To Demonstrate That It's Permit Will Not Conflict With The Local Public Interest.

SunCor provided no evidence to support its contention that this water right is in the local public interest. It is SunCor that bears the initial, and ultimate, burden of coming forward with evidence as to any factor affecting the local public interest of which it is knowledgeable or reasonably can be expected to be knowledgeable. *IDAPA 37.03.08.040.04(b)(ii).*

SunCor asserts that it is "unfortunate" that the Department's regulations have not been updated to conform to the 2003 Amendments to Section 42-202B(3) and 42-203A(5)(3), and thus they should not be considered. *See AVIMOR LLC'S PREHEARING MEMORANDUM, p. 5.* If the Department considered the regulations incompatible, it would have updated them in the three years since the 2003 Amendments to the Idaho Code. To the contrary, however, the agency has not changed the regulations. Accordingly, they are still in effect and must be considered in conjunction with the 2003 Amendments.

Indeed, these regulations are consistent with the new "local public interest" definition. According to the legislative history of the 2003 Amendments to the "local public interest" definition:

> Water Resources' role under the "local public interest" is to ensure that proposed water uses are consistent with securing "the greatest possible benefit from [the public waters] for the public." Thus, within the confines of this legislation, Water Resources should consider all locally important factors affecting the public water resources, including but not limited to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality and the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time. This legislation contemplates that "[t]he relevant impacts and their relative weights will vary with local needs, circumstances, and interests."

Statement of Purpose, H.B. 284 (2003).

A number of relevant impacts relating to the local public interest arose in the context of this water right permit application, each of which SunCor reasonably can be expected to be knowledgeable. *IDAPA 37.03.08.040.04(b)(ii).* These include, but are not limited to:

(1) The water quality and arsenic levels at both the point of diversion and the place of use – will the depletion of the Willow Creek aquifer increase the concentration of arsenic in the groundwater there? And what will happen to the arsenic laden groundwater in the Spring Hill aquifer upon injection of the water diverted from the Willow Creek aquifer? These Questions were left unanswered.

(2) The effect on the local economy of the watershed or local area that is the source of the proposed water but not the place of use for the proposed use - i.e., the Willow Creek aquifer and/or Payette River basin. This issue is also addressed in E, below. Indeed, SunCor admitted that its economic analysis was limited to the area initially approved for development by the Ada County Board of Commissioners. *See Exh. 7, p. 23.* This does not include an economic analysis of the impacts to the Willow Creek aquifer or the Payette basin, as the area analyzed in the economic analysis is the proposed permit's place of use, not the point of

diversion. Thus there is no evidence that, economically, the water right permit application is in the local public interest.

(3) The wholly unknown and unstudied impact that the water withdrawal may have on the geothermal resource of the Willow Creek aquifer. As Dr. Petrich testified, the water from the Willow Creek aquifer is warm due to geothermal influences, but SunCor does not know, because it did not analyze, whether or to what extent is pumping the aquifer would affect the geothermal resources.

(4) The impact of the water diversion and use on native wildlife, birds and sensitive plant species. As identified in the Preliminary Feasibility Assessment for the Spring Valley Ranch, four rare plant species were found to be indigenous to the Spring Valley Ranch site: Aase's onion, Mulford's mildvetch, slick-spot peppergrass and Wilcox's primrose. *See Exhibit 54, p. 15.* This Assessment recommended that a more comprehensive survey for the species of concern be conducted during the appropriate time of the year when the target species are in bloom. *Id.* Yet, it does not appear that such studies were completed. Instead, similar to the inadequate economic analysis, despite the permit application's identified place of use as the *entire* core area of 4,200 residential units over 6-7 sections of land, the environmental analysis used by SunCor to support its permit application is limited to the area initially approved by the Ada County Board of Commissioners, which consists of only about 700 units on 840 acres over the next five years. *See Testimony of Bob Taunton.* Thus, SunCor has no idea what species occur on its property, where they are, nor how they will be affected by the changed water use.

(5) The fairness of authorizing another municipal water right permit in Basin 63, which has been the subject of moratoriums on the granting or processing of new ground water right applications – even the Department's own personnel recognize the inherent unfairness of this. *See Testimony of Steve Lester; See also Exhibit D.*

(6) The need for a detailed hydrological study of the water resources in the area prior to the approval of additional municipal and other water right permit applications. As specifically identified and discussed by each of the protestants, as well as by the North Ada County Foothills Association and the Department itself, the significant amount of development already impacting and proposed for Basin 63 demands a detailed and comprehensive assessment of what water resources are available from the various aquifers before they are destroyed and/or over-appropriated. *See Exh. T; See also Water Right Permit file, Letter from David Head, NAFCA to IDWR.*

SunCor asserted in its Prehearing Memorandum that Dr. Petrich and Mr. Scanlan would describe in detail the impact to [sic.] public water resource of this application. *Id.* Instead, Dr. Petrich and Mr. Scanlan testified that they do not, in fact, know the extent of the impact of the application on the public water resource because they have done no long-term tests and thus do not know the extent or capacity of the Willow Creek aquifer. Further, they testified that if the full five cfs were diverted out of the aquifer, that amount in and of itself could exceed the estimated aquifer recharge – and this does not take into account the added impacts of the Lynn family's significant water use. And, Dr. Petrich and Mr. Scanlan testified that they don't actually know the impact of the proposed water withdrawals on the Payette drainage because they didn't analyze it.

Thus, SunCor failed to meet its burden to demonstrate that the proposed water use is in the local public interest. Accordingly, its water right application must be denied.

D. Suncor Failed To Meet Its Burden To Demonstrate That Its Permit Application Is Not Contrary To Conservation Of Water Resources Within The State Of Idaho.

As discussed previously, SunCor has applied for a total of 10 cfs despite the fact that it claims to only need approximately 2.3 cfs to meet the needs of the Avimor planned Community's "core area." Such excessive appropriation of water is contrary to the conservation of water resources within the state of Idaho.

E. Suncor Failed To Meet Its Burden To Demonstrate That That Its Permit Application 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.

As discussed previously, SunCor ignored the potential effect on the local economy of the watershed or local area that is the source of the proposed water diversion - i.e., the Willow Creek aquifer and/or Payette River basin. Instead, SunCor limited its economic analysis to the area of proposed use as initially approved for development by the Ada County Board of Commissioners, which consists of only about 700 units on 840 acres over the next five years. This is particularly important here, where it appears that SunCor's water right exceeds the recharge level of the aquifer. This could have significant ecological and economic impacts on the local economy of the source watershed.

In sum, SunCor failed to meet its burden of coming forward with evidence to support its prima facie case for factors (a) through (d) of *Idaho Code §42-203A,* and also failed to provide evidence for factor (e), the local public interest. There are glaring holes in SunCor's water right

permit application, the result of trying to push it through the process as fast as possible. Thus, the Department should require SunCor to take a step back and provide all of the necessary information and data so that the public and the Department can be fully informed prior to making an important decision on the significant use and development of Idaho's dwindling water resource.

II. SUNCOR DID NOT MEET ITS BURDEN TO DEMONSTRATE THAT IT IS A MUNICIPAL WATER PROVIDER.

Suncor violated Idaho Statute § 42-202(2) by filing its water right application as a "municipal provider" without providing the necessary proof that it is, in fact, a municipal provider, and without providing for reasonably anticipated future needs or a planning horizon.

Idaho Code § 42-202B(5)(c) defines a "municipal provider" as a "corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a 'public water supply' as described in section 39-103(12), Idaho Code. "Municipal purposes refers to water for residential, commercial...irrigation of parks and open space, and related purposes...which a municipal provider is entitled or obligated to supply to all those users within a service area..." *Idaho Code § 42-202B(6).*

Idaho Statute § 42-202(2) requires that "[a]n application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements in this chapter."

"Reasonably anticipated future needs" refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each

municipality within the service area not inconsistent with the comprehensive land use plans approved by each municipality. *Idaho Code § 42-202B(8).* "Planning horizon" refers to the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular provider. *Id., § 42- 202B(7).*

Here, despite applying for a permit well in excess of the amount SunCor itself determined is necessary to supply the "core area" and its 20-year schedule for full development. SunCor and the Department claim that the permit application at issue here is merely a "regular" application and not a so-called "reasonably anticipated future needs" ("RAFN") application. Yet nowhere does the Idaho Code provide for this dichotomy in the kinds of municipal providers or municipal water right applications. To the contrary, throughout the Idaho Code as amended by the 1996 Municipal Water Rights Act, the provisions related to municipal providers assume the necessity to provide for reasonably anticipated future needs and a planning horizon. *See Idaho Code §§ 42-202(2), 42-202B(7), (8), 42-217(4), 42-219(1), (2), 42-222(1), 42-223(3).*

Indeed, enabling a developer such as SunCor to assert that it is not submitting an RAFN application is contrary to common sense as well as the legislative history of the 1996 Municipal Water Rights Act, which was enacted to provide flexibility to, as well as administrative oversight of, a municipal provider's ability to obtain and hold water rights needed to assure an adequate water supply for its future expansion. In fact, pursuant to Section 42-223(3), only those water rights held for reasonably anticipated future needs constitute a "beneficial use" and are immune from forfeiture. Here, SunCor cannot claim – indeed does not claim - that it will be putting all ten cfs to beneficial use within the next five years – thus because it is not anticipating future needs, its water right will not be immune from forfeiture.

The purpose of SunCor's assertion that it's application is "regular" and not RAFN is to skirt the application requirements of Idaho Code § 42-202(2), including to provide the Department and the public the necessary information about the Avimor Planned Community's planning horizon and reasonably anticipated future needs, as well as providing "sufficient information and documentation to establish that the applicant qualifies as a municipal provider." The Department cannot condone this by allowing the applicant to choose what information it is going to provide to the public and the Department. Instead, the Department must be responsible for determining whether a water right permit application is, as the SunCor application is here, one proposing appropriation of water for reasonably anticipated future needs. Simply because SunCor says that it is submitting a regular, not an RAFN application does not mean it is so. As the facts demonstrate here, SunCor's water right permit application goes well beyond the immediate needs of the planned community, and instead, as SunCor admitted at the hearing, is in anticipation of the 20-year planning horizon for full development of the core area.

Protestants are also particularly concerned with the Department's arbitrary determination to ignore to the requirement of Idaho Code § 42-202(2) that a municipal provider submit sufficient information and documentation with its application to establish that it qualifies as a municipal provider. The Department's relatively new "policy" of allowing a purported municipal provider to postpone submitting the required information and documentation for five years – until it submits proof of beneficial use – violates the plain language of the statute, and is a 180 degree change from the way it previously handled this situation. *See Exhibits C, D, E, F, G, O, S.*

According to the testimony of Jeff Peppersack and Steve Lester it was Mr. Glen Saxton who approved this new "policy" in 2003. *See Exhibit G.* This is exactly why the Protestants filed

a motion to disqualify Mr. Saxton as the hearing officer in this case – because he is the Department officer who approved this unofficial "policy," the implementation of which Protestants are challenging here. Thus, Protestants hereby respectfully request that Mr. Saxton reconsider his order denying Protestants' Motion to Disqualify Hearing Officer For Cause.

The Department's "policy" is to enable an applicant such as SunCor to demonstrate that it is being regulated as a public water supply, and is thus a municipal water provider, by merely submitting a copy of correspondence from the Department of Environmental Quality "showing that it has been contacted about the proposed municipal water use and that it is asserting jurisdiction over the well site, engineering plans and specs, etc." *See Exh. G.* First, as stated above, this violates the plain language of the Statute and is thus unlawful. The statute is not ambiguous, but states specifically that the application "shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider." Allowing five years to provide this information and documentation does not comply with the mandatory requirement that this information accompany the application – the statute does not provide that this information and documentation "may" accompany the application; nor does it state that this information and documentation may accompany the proof of beneficial use, as the "policy" allows.

Second, Basin 63, as well as other parts of Idaho are receiving more and more permit applications from subdivision and planned community developers, as well other corporations, asserting status municipal water providers. *See Exhibit G.* Thus, the Department's ad-hoc creation of a more flexible policy concerns the protestants because the agency did not assess the potential impacts of this policy change, and did not provide adequate protections for the water resources and those water users potentially impacted by the expanding and increasing numbers

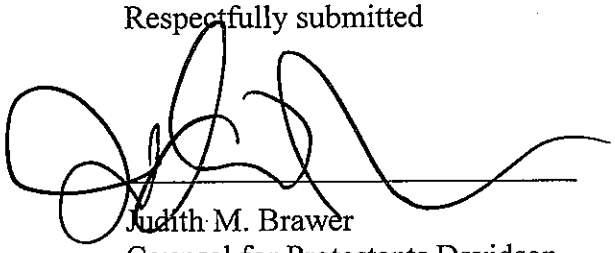
of municipal providers. *See Exhibit D* (despite a moratorium and concerns for the adequacy of the water supply, municipal providers can get approval to divert 10 cfs for an "instant town" while an individual can not obtain a new water permit to irrigate one acre without mitigating that minor use.). Further, there are no assurances that the policy is being implemented with an even hand.

CONCLUSION

For the foregoing reasons, the Applicant, SunCor, did not meet its burden of proof and did not provide the Department or the public with adequate information for processing the permit application for permit number 63-32061, and thus it must be denied. Further, the Department's processing of this permit violates the Idaho Code's requirements regarding permit applications for municipal providers.

Dated this 13th day of November, 2006

Respectfully submitted



Judith M. Brawer
Counsel for Protestants Davidson, Mullins and Baldwin

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November 2006, I caused a true and correct copy of the foregoing PROTESTANTS' POST HEARING BRIEF, and STIPULATED AGREEMENT TO EXTEND TIME FOR FILING RESPONSE BRIEF to be served on the following persons

Via hand deliver:

Albert P. Barker
BARKER ROSHOLT & SIMPSON
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Boise, Idaho 83701-2139

Glen Saxton, Hearing Officer
C/o Debbie Gibson
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Via first class mail postage pre-paid

Phillip Fry
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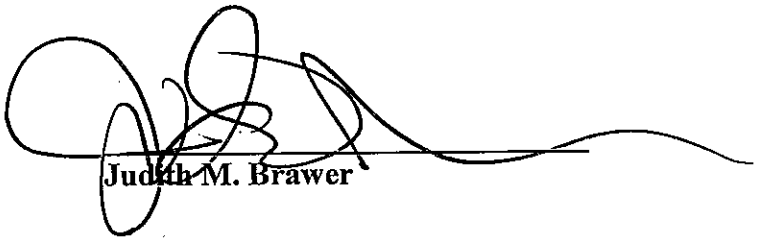
Eagle, ID 83616



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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32061 IN THE NAME OF SUNCOR IDAHO, LLC	**AVIMOR LLC'S POST HEARING MEMORANDUM**

COMES NOW, Avimor LLC, formerly known as SunCor Idaho LLC,[1] and submits this Post Hearing Memorandum in support of its application for water right number 63-32061.

I. Introduction.

Avimor's application was ultimately protested by four individuals. Protestants offered no evidence of any adverse impact to any of their water rights, to anyone's water rights, or to the water resources of the State if this application is granted. The main thrust of Protestants' argument appears to be that they believe it is not in the public interest for Avimor to complete

[1] Mr. Taunton's testimony and Exhibit 1 establish that Avimor is the new name for the Applicant, formerly SunCor Idaho LLC. Accordingly, the permit should be issued in the correct legal name of the Applicant – Avimor LLC.

development of the property known as the Spring Valley Ranch, despite the fact that the Ada County Commission has approved the rezoning necessary for phase one of the project to commence. It is noteworthy that three of the four individuals involved in the protest of this water right have no water rights in the vicinity, and that three of the four Protestants also protested the development to the Ada County Commissioners on other grounds. *See* Exs. 46-48, and Testimony of Messrs. Fry, Davidson and Mullins. Despite their claims to the contrary in this proceeding, they are dead-set against the project and are using this forum to create another hurdle. With the exception of Mr. Fry's domestic well, which is miles away in a different aquifer, none of the Protestants even have a water right to protect. The entities with water rights in the area either did not protest or have withdrawn their protests after looking at the facts. Testimony of Terry Scanlan.

Protestants' so-called public interest objection arises from a fundamental misunderstanding of the public interest criterion as it applies to water rights applications under Idaho law. Protestants seem to think that hiking or hunting on or driving through the McLeod's Spring Valley Ranch in the past gives them some type of public interest right to protest the development of a water right on the property.[2] A great deal of time was spent by Protestants asking about or testifying about wildlife mitigation plans, hiking, hunting, number of homes, density of the development, and general enjoyment of the McLeod's Spring Valley Ranch properties. The Department of Water Resources is simply not the proper forum for those types of arguments to be raised. The Protestants should raise those issues before the Ada County Commission. In a water rights proceeding, the term "local public interest" is specifically defined

[2] Whether any protestant can legally claim a right to hike across another's private property (whether in trespass or with permission) creates a "public interest" to continue to enjoy the use of that private property is a dubious proposition in the first place. Protestants confuse this case with environmental cases involving public use of public property.

by the Idaho Legislature to mean, "The interest that the people in the area directly affected by a proposed water use have and the affects of such use on the public water resource." Idaho Code § 43-202B(3). It is not about the Protestants' interests in hiking or hunting or wildlife or traffic or taxes. It is about the local people's interest in the use of the public water resource, in this case groundwater.

Here, the evidence is undisputed. Avimor seeks a permit to divert water through four points of diversion, all located in the Willow Creek aquifer. Avimor has withdrawn its application for the two proposed points of diversion originally requested in the application located in the Northern Margin aquifer. Testimony of Bob Taunton and Dr. Christian Petrich. The hydrogeologic evidence is clear that the Willow Creek aquifer is hydraulically distinct from the Northern Margin aquifer and other aquifers tributary to the Treasure Valley aquifer system, likely, in part, because of offset strata resulting from faulting. Testimony of Dr. Christian Petrich and Terry Scanlan. Exs. 26-29, 36. The Willow Creek aquifer has different sediment, water chemistry, water temperature, and water level characteristics than the Northern Margin aquifer and other Foothills aquifers. The Willow Creek aquifer is tributary to the lower Payette Basin aquifer and the Payette and Snake Rivers, as illustrated by water level contours in Exhibit 36 and the cross-section in Exhibit 27, Sheet 1. Exhibit 36 and the cross sections in Exhibit 27 (Sheets 1, 2, 3 of 3) also illustrate a hydraulic discontinuity between the Northern Margin aquifer and the Willow Creek aquifer, as evidenced by 150-foot water level differences over short distances. These water level differences represent compelling evidence of separate, hydraulically-distinct aquifers. *Id.* Exs. 27, 32, 33. *See also In the Matter of Application for Permits Nos. 63-11995 and 63-11996, Amended Final Order,* ¶ 11 (May 12, 1995)(regional groundwater in this area is tributary to Payette River).

Under Article 15, Section 3, of the Idaho Constitution, the right to appropriate unappropriated waters for beneficial uses shall not be denied. *Crow v. Carlson,* 107 Idaho 461, 465, 690 P.2d 916, 920 (1984). The studies of Dr. Petrich and Mr. Scanlan have demonstrated (Exs. 27-29)(as expounded in their testimony) that there are unappropriated waters available for appropriation in the Willow Creek aquifer. Protestants seek to deny that constitutional right, not because there is any injury to any existing water right or water users, and not because there is not sufficient water available to appropriate for this water right. Instead, Protestants would like the Department to modify all its procedures, stop all water right application processing in the foothills north of Eagle, and even require all water right applicants to "share" in some undefined way the resource in the future, including giving up Avimor's priority rights. Testimony of Mullins, Fry. Under Idaho law, none of these vague and undefined goals is a proper basis for denying this water right application. If instituted in the manner that the Protestants demand, this procedure would deny Avimor its rights under Title 42 of the Idaho Code and under Article 15, Section 3, of the Idaho Constitution.

The fear that some future appropriator might not find sufficient water in the Willow Creek aquifer or some other nearby aquifer to properly develop some property around Eagle is not grounds for denying this water right application. Each subsequent water right applicant will have to establish that there is unappropriated water available for appropriation, and these future applicants will have to show they will not injure any existing water right, including Avimor's. That is the nature of the prior appropriation doctrine. Art. XV, § 3; *Jenkins v. Department of Water Resources,* 103 Idaho 384, 647 P.2d 1256 (1982). Protestants cannot condition this right on depriving Avimor of its priority rights.

In addition, future protestants to future applications will be able to use the information from this proceeding to evaluate any such future applications when and if they come before the Department. Thus, Avimor has provided a valuable service by providing the Department with these extensive studies of the aquifer systems in the foothills area north of Eagle.

Protestants repeatedly stated that they are more concerned about the potential for future water consumption and future water demands than they are about this application. When future applications and water demands are before the Department, and Protestants will have the ability to bring any facts they can muster to the Department's attention. At this hearing, Protestants produced absolutely no facts suggesting that the water supply is insufficient to provide for this application or that any water right will be injured. Protestants concede they have no facts to show that this water right should be denied. They just want the Department to develop the facts to support their protest. The facts and record before the Department shows no justifiable reason to deny the application. The water resource located in the Willow Creek aquifer is sufficient for this water right. If Avimor's development reaches the point where it needs additional water resources beyond this right, Avimor will have to come back to the Department, apply for additional water rights, and make a showing that there is sufficient water to meet the needs of that future development, or Avimor will have to make arrangements with other water suppliers. Approval of this water right application provides a capacity of 5 cfs from specified points of diversion in the Willow Creek aquifer to specify to place of use on the Spring Valley Ranch. Nothing more. It does not open a floodgate.

II. A moratorium or critical groundwater management area if not justified and a protest to a water permit is not the appropriate forum to seek or impose a new water right moratorium or ground water management area in the foothills.

At the hearing, Mr. Mullins suggested that the Hearing Officer should recommend to the Director that he create a new water right moratorium or designate a new ground water management area in the northern Ada County foothills area. This request should be denied. In a May 2, 2006, letter to David Head, of the North Ada County Foothills Association, the Director considered and denied a similar request. Protestants Ex. T. The Director determined, "presently available information" indicates "that a moratorium on new applications for permits to appropriate ground water is not warranted for northern Ada County" since "unappropriated ground water is available." *Id.* at 2-3. The Director recognized that there is unique geology and hydrology in this area, specifically noted that these aquifers are hydraulically isolated from one another, and specifically included Willow Creek aquifer in that decision. Indeed, the Director determined "it would be inappropriate at this time to deny applicants the opportunity to present technical evidence to demonstrate that unappropriated ground water is available and that additional appropriations can be made." *Id.* at 3. Avimor has presented technical information to show that there is unappropriated water in Willow Creek available for appropriation. Protestants offered no technical evidence of any kind.

Protestants' request also should be denied for failing to follow the prescribed procedures for making such a request. To impose a moratorium or designate a new ground water management area, the Director must make certain findings. The Department's regulations allow the Director to "cease to approve applications for a permit in a designated ... area ***upon finding*** a need to (i) Protect existing water rights; (ii) Insure compliance with the provisions of Chapter 2,

Title 42, Idaho Code; and (iii) Prevent reduction of flows below a minimum stream flow" as "established by the director or the board." (Emphasis added). Furthermore, Idaho Code Section 42-233b requires that the Director, prior to designating a groundwater management area, make a finding that an area "may be approaching the conditions of a critical ground water area." Any individuals seeking to have a certain area designates as a groundwater management area must formally petition the Director to analyze that area under section 42-233b.

In his determination not to impose such a moratorium or groundwater management area, the Director indicated that there are "at least four aquifers that have been identified in the northern Ada County" foothills area. These include the "(1) Northern Margin Aquifer; (2) Willow Creek Aquifer; (3) Sandy Hill Aquifer; and (4) Spring Valley Aquifer." The diversion for the SunCor permit is in the Willow Creek Aquifer. Given the need for a petition and the nature of the findings necessary to impose a new moratorium or designate a new groundwater management area, a protest hearing is not the proper forum for such a decision to be made – especially a protest hearing involving protests to *one* permit application for the diversion of water from *one* of four known aquifers in the northern Ana County foothills area. Accordingly, this request should be denied.

III. Avimor has legal right of access to the points of diversion and places of use.

In addition to the criteria set out in Idaho Code Section 42-203(a)(5), Protestants raise some preliminary issues associated with authorization of a water right to Avimor. These preliminary issues all evidence a misunderstanding of Title 42 and the procedures of the Department. None of them are appropriate grounds for denial of the permit.

Avimor, through SunCor Development Company, its parent, entered into an agreement with the McLeods, the owners of Spring Valley Livestock Company. In that agreement, SunCor

paid the McLeods a sum of money. The Spring Valley Ranch property was placed in trust. When the individual lots are sold to individual buyers, the proceeds will be distributed between Avimor and the McLeods in accordance with the Trust Agreement. Testimony of Bob Taunton, Exs. 4 & 5. Since the Trust Agreement was entered into, the McLeods were able to withdraw some portion of the property subject to the Trust (as they were entitled to do under the Trust Agreement) and entered into a separate purchase and sales agreement with an entity called "AR Boise." Testimony of Bob Taunton, Ex. 6. The property withdrawn from the Trust is not any of the "Core Area" property (which is co-extensive with the place of use in this application). The Core Area remains available to Avimor to develop. In the Trust Agreement, Avimor retained the right of access to the water and the well field which is where the four points of diversion remaining in the application is located. Avimor relinquished the right to install wells in the Northern Margin aquifer, including the two now withdrawn proposed points of diversion. Testimony of Bob Taunton.

Protestants offered no evidence to establish any lack of access, but challenged Mr. Taunton's testimony. On rebuttal, Mr. Taunton testified in greater detail about the Trust Agreement and introduced Exhibits 63 and 64 into evidence. Exhibit 63 is a Declaration recorded in Ada County granting Avimor the right of access through the property removed from the Trust for purposes of operating the wells and transmission system. Exhibit 64 is a letter from the counsel at First American Title, the trustee and legal title holder for the Spring Valley Ranch property, confirming Avimor's right of access under the Trust Agreement to the property where the four points of diversion are to be located. There is no dispute among any of the landowners in this area, including the holder of legal title, First American Title, that Avimor has access to this well field. Protestants' speculations and musings about potential conflicts over access lack

any evidentiary foundation. If the McLeods or AR Boise was concerned about Avimor's access, they would have objected. Yet, neither has protested this or any of Avimor's water right applications. Protestants' suggestion that Avimor lacks access to the property for the points of diversion is completely without merit.

IV. Avimor qualifies as a municipal provider.

It became apparent in the hearing that Protestants opposed the application on the grounds that Avimor is a private entity, rather than a public entity, such as a municipality, and therefore could not possibly obtain a "municipal" water right. As the 2003 amendments to the Idaho Code make clear, a municipal provider includes not only traditional municipalities, but also is "[a]ny corporation or association which supplies water for municipal purposes through a water system regulated by the State of Idaho as a public water supply." Idaho Code § 42-202B(5)(C). "Municipal purpose" means to "water for residential, commercial, industrial and irrigation of parks and open space and related purposes." Idaho Code § 42-202B(6).

The evidence in the case establishes that Avimor intends to develop a public water supply system. Testimony of Bob Taunton and Terry Scanlan. Mr. Scanlan testified about the work he has done and continues to do with the Idaho Department of Environmental Quality (DEQ) to develop a public water supply system so that drinking water could be supplied in conformance with the Safety Drinking Water Act standards. The DEQ confirmed that Mr. Scanlan and Avimor had been in contact with them about such a public water supply. Protestants' Ex. J (last page, e-mail from Charles Ariss from DEQ to Terry Scanlan and Steve Lester). Mr. Lester confirmed that he had ascertained that Avimor had been working with DEQ. Testimony of Steve Lester. Mr. Taunton also testified that Avimor had contacted the Idaho PUC to establish a PUC-regulated facility and that the Highland Water Company and Foothills Sewer Company had been

incorporated for the purposes of providing water and sewer to the property. Ex. 20. The evidence is not disputed that Avimor intends to use the water for residential, commercial, industrial and irrigation of parks and open spaces as required by Idaho Code Section 42-202B(6). Testimony of Bob Taunton, Terry Scanlan.

Protestants contended that, before Avimor was even entitled to apply for a water right, Avimor would have to establish a public water system. As the testimony of Terry Scanlan, Steve Lester and Jeff Peppersack all made clear, there are procedural hurdles with the DEQ, as the DEQ will not issue a certificate as a public water system until the system is built and ready to be put to use. *See* Protestants' Ex. F; Standard Condition #134. Accordingly, Avimor, if the Protestants have their way, would be caught in a Catch-22. Avimor could not get the water right permit until it got the DEQ authorization, but could not get the DEQ authorization until it got the water right permit. The Department has come up with a very sensible and practical approach. The Department employees testified that it is the Department's practice that has been applied to other providers and that a standard policy has been developed allowing the provider to establish at the time of the application to beneficial use that the provider has obtained a certification from DEQ that it qualifies as a public water supply. Indeed, the Director has approved just such a condition in a previous water right. *In the Matter of Application for Permit No. 65-22357 in the Name of Westrock Associates, LLC.* ("*Westrock*")(Dec. 20. 2002)(Conclusion of Law No. 5, and Condition No. 8.c).

Protestants even seem to be suggesting that the Director or the Department lacks the authority to grant a permit conditioned on future performance. Standard Condition 134 was a condition in a prior permit obtained by SunCor Idaho, water right number 63-31966, and other permits. Protestants' Ex. A; Testimony of Steve Lester. Protestants simply do not understand

Idaho water law or the procedures of the Department. Idaho Code Section 42-203A clearly and unambiguously authorizes the Director to condition permits on the establishment of future conditions. Indeed, it is a rare permit issued by the Department that does not require the applicant to demonstrate certain events have taken place prior to the proof of the application for beneficial use and prior place prior to obtaining the license. Protestants' objection to the permit on the grounds that the DEQ has not issued Avimor a certificate as a public water supply system is without merit. Their concerns can easily be resolved by issuing the permit with Standard Condition 134, which is also a condition in Avimor's water right permit number 63-31966.

Moreover, since Avimor is applying for a municipal water right, under the Department's procedures, the right is not subject to the administrative hold on processing applications in Basin 63. Testimony of Terry Scanlan (Department has processed and approved over 70 municipal water rights in Basin 63 since the early 1990s when the moratorium/hold went into effect).

V. The criteria.

The guidelines for granting, denying or conditioning a permit are found in Idaho Code Section 42-203A.

> In all applications ... 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 has the ultimate burden of persuasion. Water Appropriation Rules 40.04.c (IDAPA 37.03.08.40.04.c). The burden of "coming forward with evidence to present a prima facie case" is divided between the applicant and protestant. *Id.* Here, Applicant has come forward with detailed and credible evidence establishing Avimor's compliance with the criteria. On the other hand, Protestants put on no evidence, no facts, but merely expressed fears and speculations related to the public interest criterion in subsection (e). Protestants have failed to meet their burdens of coming forward with any credible evidence. The protestant must come forward with evidence "of which the protestant can reasonably be expected to be more cognizant than the applicant." *Id. See also In the Matter of Application for Permit No. 65-22357 in the name of Westrock Associates, LLC ("Westrock"),* p. 2 (December 20, 2002).

VI. The proposed use will not reduce the quantity of water under any existing water rights.

Dr. Christian Petrich and Mr. Terry Scanlan have extensively studied the Willow Creek aquifer and the surrounding aquifers (Exs. 26-29). Indeed, Mr. Scanlan has been studying the Willow Creek aquifer since the mid-1990s. They surveyed all the nearby water rights, including those of Protestants. Ex. 30. There are no significant groundwater rights in the Willow Creek aquifer, other than the Lynn rights, and the Lynns did not protest this application. *See* Ex. 40. Nor did any of the domestic well owners in Willow Creek aquifer protest this application (in contrast to the Lynn right). The expert hydrologists' opinion is that Willow Creek water rights will not be injured. Dr. Petrich and Mr. Scanlan concluded that this aquifer is hydraulically distinct from the Northern Margin aquifer. Other water rights in the Northern Margin aquifer,

which provides water to the Eagle area, will not be injured by the proposed withdrawals from the Willow Creek aquifer. There is no contrary evidence in this Record. Protestants questioned whether there was water available in the Payette drainage for appropriation, but offered no evidence that the Payette is over-appropriated. The Director has ruled that it is not. *See Westrock* Final Order, ¶ 31.

VII. The water supply is sufficient for the proposed appropriation.

Dr. Petrich's and Mr. Scanlan's undisputed testimony is that the water supply in Willow Creek aquifer is sufficient for the appropriation. The transmissivity tests showed that the aquifer has the capacity to supply the requested 5 cfs diversion rate, e.g., Ex. 27, Section 2.1.4, pg. 9. Aquifer capacity is also demonstrated through the development of ground water for the irrigation of up to 369 acres under the Lynn water rights (63-12450, 63-11996, 63-11995 – see Exhibit 40 for locations) with negligible water level impacts (Exhibit 38). Protestants offered no evidence that this aquifer could not sustain the withdrawals. They did not contest the aquifer studies or well tests. The only issue Protestants raised was whether the well test was of long enough duration. Davidson Testimony. However, development of the Lynn water rights represents a multi-year aquifer stress with negligible water level impacts (Exhibit 38).

Protestants offered no proof or expert testimony to demonstrate that the tests Dr. Petrich and Mr. Scanlan conducted were inadequate to determine the capacity or transmissivity of the Willow Creek aquifer. Mr. Baldwin argued that a longer test was conducted in a small aquifer near Horseshoe Bend, and therefore a longer test was necessary here. Baldwin Testimony; Ex. P. Protestants fail to realize that each situation requires the application of hydrology testing that is appropriate for that particular aquifer. Dr. Petrich and Mr. Scanlan testified that the testing for

the Willow Creek aquifer was appropriate. Protestants wanted the Department to ignore this evidence and to require unspecified "long term testing" before processing this or any application. Protestants miss the fact that there has been long-term testing of the Willow Creek aquifer. Ten years of water level sampling has been collected on the Lynn Wells in the Willow Creek aquifer. Ex. 38; Terry Scanlan Testimony. This data shows that there has been no significant decline on the Willow Creek aquifer over a ten-year period while the Lynns were pumping water to irrigate up to 369 acres of ground authorized under permits approved in the mid 1990s and licensed in 2003. Dr. Christian Petrich Testimony. If there was a problem of the sustainability of the Willow Creek aquifer, it would have shown on this long-term monitoring. There is far more "long-term" data on this aquifer than Protestants demand.

Dr. Petrich also testified that he prepared an estimate of the recharge to the Willow Creek aquifer. Using conservative infiltration estimates, and ignoring any infusion of water from geothermal sources or leakage from the Northern Margin and other Foothills aquifers, Dr. Petrich determined that the recharge potential exceeded the combined withdrawals of the Lynn water right and Avimor's proposed water right. *See also* Ex. 58. Protestants offered no contrary evidence.

VIII. This application was made in good faith and not for delay or for speculative purposes.

Under this criterion, the Director must look at what the Applicant has done to move the project to fruition. Here, Avimor has worked long and hard to bring this project to completion. Mr. Taunton testified in detail about these long-term efforts, Avimor's long-term plan and commitment to this project. Good faith depends on three factors:

i. The applicant has legal access to the property;

ii. The applicant is in the process of obtaining other necessary permits;
iii. No obvious impediments prevent successful completion of the project.

Avimor's legal rights of access are discussed in detail in Section II above. The Department previously determined that Avimor has legal access to the property covered by the POU in this application. *See* Permit No. 63-31966. The process of obtaining the other necessary permits is long and arduous for a project of the magnitude ultimately proposed by Avimor. Notably, this water right is not for ultimate build-out of the property, but is for the Core Area, described as the place of use for this application. Testimony of Bob Taunton and Terry Scanlan. The Place of Use does not include the area over the Horseshoe Bend hill as Protestants complained. Avimor intends to put this 5 cfs water right to use on the Core Area and intends to build a system with that capacity within the five-year period for proof of application to beneficial use. Terry Scanlan Testimony. What might or might no happen outside the Core Area is irrelevant to this criterion.

Mr. Taunton has explained in detail the progress made with Ada County Board of Commissioners. Avimor has a Development Agreement (Ex. 7) and has Phase I rezoned to Planned Community status (the status sought by Avimor). The Development Plan has been approved by the County and the Preliminary Plat was approved by the Planning & Zoning Commission (Ex. 18). Mr. Taunton explained the progress with and permits from the Corps of Engineers (Ex. 9 and 10). IDWR has issued a Stream Channel Alteration permit (Ex. 8). Avimor has worked extensively with DEQ on water and sewer systems (Exs. 11, 12, 13), and with ACHD and IDOT (Exs. 14 & 15) on transportation issues. Grading has begun on Phase I, with Ada County approval (Ex. 18). Avimor has worked with both Ada County and City of Eagle on their respective Comprehensive Plans (Exs. 7 & 19) and will continue to provide

information to the City and County to allow that process. Water and Sewer Companies have been formed (Ex. 20). DEQ and PUC have been engaged on the water and sewer companies. Avimor is committed to this project and has the background in developing projects of this nature in New Mexico and Arizona. This is not a speculative pipe-dream, but a real project in need of a water right.

Protestants' counsel argued that the City of Boise had appealed the County's approval of the project, and intimated that this posed an insurmountable hurdle to the project. Notably, Mr. Baldwin's own consultant told him that there were no insurmountable hurdles to the project. Ex. 54. Indeed, Protestants all seemed to concede that the project itself would be ultimately approved. As Mr. Taunton explained, a successful appeal would not kill the project, only return it to the County for further proceedings. More to the point of Protestants' argument about the City's appeal, that appeal was dismissed by Judge McKee on November 6, 2006. *See* Motion to Augment Record or to Take Official Notice of Judicial Decision, filed contemporaneously.

IX. The Applicant has sufficient financial resources with which to complete the proposed project.

This criteria is not in doubt or challenged by Protestants. Mr. Taunton testified that Avimor has the financial ability to complete the project. Its parent, SunCor Development, has over $200 million in equity, and Avimor has the full support of SunCor Development. Testimony of Bob Taunton. *See* Exs. 2-3. Avimor has the experience and know-how to get this project done. It set up the initial land purchase through the Trust Agreement in a way that allows Avimor to expand its resources on the development and infrastructure necessary to build this project, rather than tie-up capital in land acquisition costs. Bob Taunton Testimony.

X. The application does not conflict with the local public interest (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").

In 2003, the legislature amended Idaho Code § 42-202B(3) to focus water right protests solely on the issue of impact to the water resources when the public interest criteria is evaluated. Dr. Petrich and Mr. Scanlan testified that there is no injury to public water resource through this application. Protestants offered no contrary testimony. Application of water for irrigation or other beneficial uses is in the public interest. *In the Matter of Application of Permit to Appropriate Water No. 65-13971 in the name of Greg and Lori Linsey* (July 23, 2003). Indeed, Idaho Const., Art. XV, § 3 provides that the right to appropriate unappropriated waters for beneficial uses shall never be denied. As noted in Section III above, Protestants have misunderstood the public interest criteria. They are treating this criteria like Environmental Impact Statement litigation and have failed to demonstrate any negative impact on water resources of the Willow Creek aquifer.

XI. The proposed use is not contrary to conservation of water resources.

Ada County has imposed, at Avimor's request, very significant and unprecedented water conservation measures on this project. Ex. 59; Bob Taunton Testimony. The project will have large open spaces which are not irrigated. Avimor will extensively re-use water from its waste water treatment systems on common areas. Bob Taunton and Terry Scanlan Testimony. Xeriscape and native plants are required by the County approved plan. Ex. 59; Bob Taunton Testimony. This project is at the forefront of water conservation efforts and is a leader in that arena. SunCor has extensive experience in water conservation efforts through its history in New Mexico and Arizona and will bring that experience to bear in Idaho. Bob Taunton Testimony.

Protestants seemed confused about the water use projections prepared by Dr. Petrich and Mr. Scanlan. They seemed to think these projections were intended to quantify the actual consumption by Avimor. In fact, these calculations were intended to be conservative, in the sense that they erred on the side of predicting greater water use than Avimor expects, because Dr. Petrich and Mr. Scanlan wanted to compare potential withdrawals from the aquifer with the recharge to the aquifer. As Mr. Taunton testified, actual use should be much less based on Avimor's vision for the property and the unprecedented requirement for xeriscape and native plants in Avimor's development plan approved by the Ada County Commissioners.

In Idaho water law, a water right applicant is not limited to the bare minimum necessary for survival. As the Idaho Supreme Court has stated:

> [I]t has never been held or contended that in making an appropriation of water from a natural stream the appropriator is limited in the right he can acquire to his minimum needs, and no reason is apparent why one who contracts to receive water from another should be limited to such needs. Conservation of water is a wise public policy, but so is the conservation of energy and the well-being of him who uses it. Economy of use is not synonymous with minimum use.

Rayl v. Salmon River Canal Co., 66 Idaho 199, 210-211, 157 P.2d 76, 80 (1945)(quoting *Caldwell v. Twin Falls Salmon River Land & Water Co.*, 225 F. 584 at 595-96 (D. Idaho).

XII. The project will not adversely affect the local economy of the watershed or local area within which the sources of water for the proposed use originates if the proposed use is outside the local area.

This criteria was a 2003 addition to Idaho Code § 42-203A(5)(g). 2003 Sess. Laws, Chap. 298, § 2. This provision was intended to allow the Director to consider local economic impacts if the appropriator intended to take the water outside the local area and put it to use

elsewhere. This section is irrelevant, as Avimor intends to use the water in the same general locale.

XIII. Monitoring plan.

Avimor has committed to a ten-year water level monitoring plan to supplement the current water level monitoring conducted by IDWR and U.S. Geological Survey in this area. Testimony of Terry Scanlan; Ex. 42. This monitoring program will provide additional long-term information relating to the aquifer levels in the aquifers this area. This agreement with the North Ada Foothills Association resolved its protest. Avimor's commitment to the program is tied to approval of this permit. Consequently, Avimor agrees to a condition of this permit that Avimor shall carry out the monitoring program described in Mr. Scanlan's December 7, 2005 letter. Ex. 42.

CONCLUSION

Most of Protestants' concerns about this project do not relate to water and are irrelevant. Protestants have no proof of any injury to any existing water supply or to the water resource. Applicant has a constitutional right to appropriate unappropriated waters. There is no factual dispute. There is unappropriated water available in Willow Creek aquifer. There will be no injury to any water rights. Protestants' efforts to contest Avimor's right to obtain a municipal water right demonstrate their misunderstanding of Idaho water law and procedure. Their argument ignores the legislature's express grant of authority to the Director to condition a permit. The Department unquestionably has this power under the law, and has consistently authorized conditions in the same manner requested herein. Idaho water law of prior

appropriation does not permit the Department to require water users to "equitably share" water with future applicants as Protestants demand. The Department should approve this application.

DATED this 13th day of November, 2006.

BARKER ROSHOLT & SIMPSON, LLP

Albert P. Barker
Attorneys for SunCor Idaho, LLC
now known as Avimor LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of November, 2006, I served a true and correct copy of the foregoing **AVIMOR LLC'S POST HEARING MEMORANDUM** on the person(s) listed below, in the manner indicated below:

Idaho Department of Water Resources 322 E. Front Street P. O. Box 83720 Boise, ID 83720-0098	X U.S. Mail, Postage Prepaid ___ Facsimile **287-6700** ___ E-Mail ___ Hand Delivery
Judith M. Brawer 1502 N. 7th Street Boise, ID 83702	X U.S. Mail, Postage Prepaid X Facsimile **343-2070** ___ E-Mail ___ Hand Delivery
Phillip Fry 4122 Homer Road Eagle, ID 83616	X U.S. Mail, Postage Prepaid X Facsimile ___ E-Mail: **idphil@earthlink.net** ___ Hand Delivery

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Attorney for Protestants

RECEIVED
NOV 13 2006
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32061 IN THE NAME OF SUNCOR IDAHO, LLC	))))	**STIPULATED AGREEMENT TO EXTEND TIME FOR FILING RESPONSE BRIEF**

Protestants ROD DAVIDSON, LYLE MULLINS and GARTH BALDWIN, hereby file this stipulated agreement to extend the time for the filing of response briefs in the above-captioned case. Protestants' counsel, Judith M. Brawer, conferred with the other parties in this case, Mr. Albert Barker, counsel for SunCor Idaho, LLC, and Mr. Phillip Fry and all have agreed to this extension and that the extension will apply to all parties.

On November 1, 2006, at the close of the hearing in the above captioned case, the parties agreed to file their post-hearing briefs on November 13, 2006 and to file their response briefs on November 20, 2006. To assist in their briefing, both Mr. Barker and Ms. Brawer requested copies of the hearing recording on compact disc. The parties have since been notified by IDWR that, due to unforeseen technical difficulties, there will be a substantial delay in completing the transfer of the hearing recording onto compact disc.

Accordingly, at the request of counsel for Protestants Davidson, Mullins and Baldwin, the parties have agreed to postpone the filing of the response brief until December 4, 2006. This

should provide adequate time for IDWR to complete the transfer of the hearing recording onto compact discs and provide them to the parties.

Dated this 8th Day of November, 2006.

Respectfully Submitted,

Judith M. Brawer
Counsel for Protestants Davidson, Mullins and Baldwin

Albert P. Barker
Counsel for Applicant

Albert P. Barker
John A. Rosholt
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Albert P. Barker
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November 13, 2006

Idaho Department of Water Resources
Attn: Deborah Gibson
322 E. Front St.
P.O. Box 83720
Boise, Idaho 83720-0098

Re: In the Matter of Application for Permit No. 63-32061
In the Name of SunCor Idaho LLC

Ladies and Gentlemen:

Enclosed for filing is the original copy of the ***AVIMOR LLC'S POST HEARING MEMORANDUM and AVIMOR LLC's MOTION TO AUGMENT THE RECORD*** in the above entitled case. If you have any questions, please feel free to give me a call. Thank you for your assistance in this regard.

Very truly yours,

BARKER ROSHOLT & SIMPSON LLP

Albert P. Barker /cp

Albert P. Barker

APB/cp

Enclosures

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Attorneys for Suncor Idaho LLC (n.k.a. Avimor, LLC)

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32061 IN THE NAME OF SUNCOR IDAHO, LLC	**AVIMOR LLC'S MOTION TO AUGMENT RECORD**

COMES NOW, Avimor LLC, by and through its attorneys of record, and hereby requests that the Hearing Officer augment the record or take official notice of the Memorandum Decision entered by Judge McKee on November 6, 2006, after the hearing in this case concluded in the case of *City of Boise v. Ada County,* CV-OC-06-04098 (copy attached), dismissing the City of Boise's petition for judicial review of Ada County's approval of Avimor's planned community. This motion is necessitated by the fact that Protestants raised the status of the City of Boise's appeal of Ada County's approval of the planned community before the Hearing Officer, and, that subsequent to the hearing, the appeal was ordered dismissed.

DATED this 13th day of November, 2006.

BARKER ROSHOLT & SIMPSON, LLP

Albert P. Barker
Attorneys for SunCor Idaho, LLC
now known as Avimor LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of November, 2006, I served a true and correct copy of the foregoing **AVIMOR LLC'S MOTION TO AUGMENT RECORD** on the person(s) listed below, in the manner indicated below:

Idaho Department of Water Resources 322 E. Front Street P. O. Box 83720 Boise, ID 83720-0098	X U.S. Mail, Postage Prepaid ___ Facsimile **287-6700** ___ E-Mail ___ Hand Delivery
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Phillip Fry 4122 Homer Road Eagle, ID 83616	X U.S. Mail, Postage Prepaid ___ Facsimile ___ E-Mail: **idphil@earthlink.net** ___ Hand Delivery

Albert P. Barker

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CITY OF BOISE

Petitioner

vs.

ADA COUNTY, BOARD OF ADA COUNTY COMMISSIONERS, SUNCOR DEVELOPMENT COMPANY, INC., SUNCOR IDAHO, INC., and AVIMOR LLC,

Respondents and Intervenors

Case No. CV OC 06 04098

MEMORANDUM DECISION

This case is an administrative appeal filed by Boise City against Ada County over an action by the county approving the development of a planned community on applications filed by SunCor Development Company and its related interests. Boise City was represented by assistant city attorneys Scott B. Muir and Teresa Sobatka, Boise City Attorney's Office. Scott Muir argued. Ada County and the Board of County Commissioners were represented by chief civil deputy prosecuting attorney Theodore E. Argyle and deputy prosecuting attorney Ax Yewer, Ada County Prosecutor's Office. Theodore Argyle argued. The intervenors SunCor Development Company, SunCor Idaho, Inc., and Avimor LLC were represented by Merlyn W. Clark and Geoffrey M. Wardle, Hawley Troxell Ennis & Hawley, Boise. Merlyn W. Clark argued.

For reasons stated herein, the petition of the City of Boise is dismissed.

Summary of Facts and Procedural History

In the summer of 2005, SunCor Development Company, Inc., and its related interests (collectively hereafter, "SunCor") submitted a formal application to develop a "planned community" on approximately 830 acres of land along Highway 55 in northern Ada County to the planning officials of Ada County (the Ada County and its Board are collectively referred to herein as the "County"). The land is not within the city limits or the area of impact of Boise City.

The application was first considered by the Ada County Planning and Zoning Commission, which held hearings and ultimately recommended approval. The application was then considered by the Board of County Commissioners, which also held hearings and issued a ruling approving the development subject to a number of conditions. The adoption proceedings were concluded by action of the commissioners on February 8, 2006, and included the adoption of formal findings of fact and conclusions of law, entry of a decision granting approval subject to conditions, entry of a decision approving a development agreement pertaining to Avimor LLC, and the adoption of two ordinances, County Ordinances 604 and 607, pertaining to zoning issues.

The City of Boise City (hereafter "Boise," or "Boise City") filed this action as a petition for administrative review of the County's actions under IRCP 84. SunCorand its related entities moved to intervene as real parties in interest, which was granted.

Issues and Analysis

The County and SunCor both challenge the standing of Boise City to prosecute this appeal. However, in order to resolve the standing issue, it is first necessary to analyze and effectively resolve the substantive issues presented in the appeal.

The City of Boise appears to raise six discrete issues in its appeal:

1. Errors before the Planning and Zoning Commission fatally infected the proceedings before the County Commissioners;
2. The County acted in excess of statutory authority under The Land Use Planning Act;
3. The County violated county ordinances and its comprehensive plan;
4. The County's decision was made on unlawful procedure;
5. The County's decision is not supported by sufficient evidence; and
6. The failure to disclose a County commissioner's visit to the SunCor properties in Arizona fatally infects the procedures.

The court will first deal with the issues raised by the City.

A. Whether procedural errors before the county P&Z justify relief

The gravamen of the City's argument on this point is that the planning and zoning commission was unduly rushed in its processes leading to its approval of the application. It appears that the commission was swamped on the last day of its deliberation by a mountain of material that it could not possibly have considered before its decision had to be issued. (The planning and zoning commissions must approve or deny land use applications within a specific time frame; the commission here was on its deadline when the last minute materials were submitted.) The City contends that the statutes, I.C. §§ 67-6509 and 67-6535(c), place significant emphasis on the actions of the planning and zoning commissions, and that when their decisions are unduly or unfairly rushed, it creates a procedural due process issue.

The County responds that the action of the planning and zoning commission in this area is advisory only Under the statutes and county ordinances, the Board considers all issues raise *de novo*. The County points out that the Board conducted an entirely separate series of hearings on the applications, and that it is the Board and not the planning and zoning commission that has the actual say on the issues.

I am persuaded by the County's arguments on this issue. While the rushed procedures before the planning and zoning commission might be a problem in other contexts, where findings and rulings of the lower commission are presumptive or conclusive, here the Board of County Commissioners considers the issues anew. Because the County Board started over with an entire deliberative process, including public hearings, there is no demonstrable prejudice in this instance.

B. Whether the County acted in excess of its authority under the Land Use Planning Act or its own comprehensive plan

The essence of this argument is that under the City's interpretation of the Land Use Planning Act and the comprehensive plan, the County is obligated to channel growth into incorporated cities, or at least into the areas of impact of incorporated cities. The City argues that the County should not permit the development of a planned community such as Avimor outside of a city or city area on impact, and that to do so will eventually unfairly and unduly burden the City's infrastructure.

The County replies that development of a planned community outside of incorporated cities or areas of impact is exactly what is contemplated by the act. The County concedes that the LUPA "encourages" development within established cities, but points out that the act clearly recognizes the reality and necessity of allowing for the

development of new communities outside of established cities and areas of impact where growth requires.

Once the Avimor development is constructed, it is not clear at this time whether it will eventually attach itself to Eagle, or to Boise, or incorporate itself into its own city under I.C. § 50-101, or remain an unincorporated community. But if one makes the assumption that the growth contemplated by this development is going to happen somewhere, no matter what, then the potential for pressure on Boise City's infrastructure will result in any event. This is true whether the growth results within the city or its area of impact, in the unstructured areas of the county, in one of the other surrounding bedroom communities, or in a new planned community such as Avimor.

The County points to Policy 5.8-1 of the Comprehensive Plan, which specifically provides for the development of communities outside of areas of city impact. It argues that where a planned community is being considered, the policy of limiting residential development outside of incorporated cities or areas of impact to 5% per year does not apply. The planned community is, by definition, an exception to this 5% limitation.

I am persuaded by the County's position on these arguments. I conclude that there is no showing that the County has acted in excess of its authority under the Land Use Planning Act or the comprehensive plan, or that the planned community in this case is not within the contemplation of the comprehensive plan.

C. Whether the County violated its own ordinances

The City argues on this issue that the findings of the Commission approving the development fail to contain a reasoned statement of the criteria and standards considered, as required by county ordinance, and fails to explain or justify the approval of a

development outside an existing area of impact, as it contends is required by the comprehensive plan. The County responds that the development plan itself provides a sufficient reasoned statement of the criteria and standards applied, and that there is expert testimony in the record that this requirement is satisfied by the developer's submissions. On the issue of the comprehensive plan, as discussed above, planned communities – as opposed to general residential developments – are allowed outside existing areas of impact without special exceptions.

The County observes that there is abundant evidence in the record in the form of testimony and exhibits that supports the overall findings on the sufficiency of planning and adequacy of the development in this case. The City has not pointed to any evidence in the record to challenge these positive findings and conclusions.

D. Whether the process was tainted with improper procedures

The City's argument here is that its rights of due process were violated by certain procedures followed by the county. The County Commissioner held three hearings on the development application – December 14, 2005, January 11, 2006 and February 8, 2006. Witnesses were permitted to testify, and exhibits were received, at the first two of these hearings. At the third hearing, the commissioners advised that they had questions for the developer and the planning staff. Representatives from SunCor and planners from the County planning staff were asked questions by the commissioners for some time; these proceedings take up 92 pages of transcript.

The City now complains that it was not presented the opportunity to rebut anything that was offered in this third proceeding, and that this constitutes a denial of due process. However, there is no showing that the City was not permitted to offer whatever

it wanted in the earlier proceedings, nor is there any showing that the City requested leave to add additional material in reply to the proceedings of February 8. The due process argument should be founded upon a refusal to allow a submission, not on the alleged failure to invite one, and certainly requires that the issue be presented first to the tribunal below, and not to this court for the first time on appeal.

E. Whether the County's decision was supported by sufficient evidence

The court will not substitute its judgment for that of the tribunal below, and will not re-evaluate the evidence submitted. To prevail on its argument, the City must show that there was insufficient evidence in the record as a whole to support the decision of the County. It has not done so.

The only argument offered on this issue is the contention that there were many "unresolved" issues in the County's findings. Upon examination, the argument falls apart. What the City appears to be challenging are a number of conditions imposed upon the developer to work through and satisfy prior to final approval. This is common practice in real property developments, and does not indicate in any sense an insufficiency of evidence at the time of the hearing. What it does demonstrate is that all of these concerns have been addressed and dealt with. The manner in which the County deals with these issues is, in large measure, a matter of executive discretion and not subject to administrative review by the courts.

On balance, I am not persuaded by this argument.

F. Whether the failure to disclose the commissioners visit to a SunCor project in Arizona infects the process.

Apparently, some time in 2004 two of the commissioners traveled to Arizona to attend a national commissioners' conference. While there, they visited one of SunCor's projects. At some point in the proceedings in either December of 2005 or January of 2006, these facts surfaced. There are no details in the record of what project was visited, at whose invitation, who else was present, what was done or said during the visit, what information the commissioners brought back on account of the visit, and the importance, if any, the visit had on the instant proceeding. There is no showing that any request was made to the tribunal below for any further information pertaining to this visit.

The City argues that the existence of the visit alone is sufficient to taint the process, and that the burden shifts to the commissioners to come forward with all the detail. I am not persuaded. The commissioners perform many functions – as executives, legislators, adjudicators and planners. There is no reason to suspect that an incidental visit to a SunCor project made by two commissioners more than 18 months before the instant proceedings were initiated somehow caused prejudice to the interests of the City. The City must show some harm, or some reasonable likelihood of harm from the *ex parte* contact. None was shown in this case.

G. Conclusion: City has failed to offer persuasive arguments on any of the issues raised.

The court is constrained not to attempt to substitute its judgment for that of the County in administrative appeals. A similar rule might apply to the City of Boise; it should not attempt to involve itself in county issues, and suggest that the court should substitute the judgment of the City for that of the County. I conclude on balance, there is

no basis for the court to interfere with the decision of the County in the matter of the application of SunCor.

Standing to Sue

None of the issues raised by the City touch on any of its interest as a property owner within the area impacted by the proposed development.[1] All of the arguments raised are from the viewpoint of the City's interests in future growth of the City, and the alleged impact the Avimor project might have on the City generally. The County and SunCor both argue that this is insufficient to give rise to a standing to sue in this case. Both argue that a disagreement over an action based only upon a general disagreement, and a perceived general harm to the entire community is not sufficient to give rise to a standing to sue. In this case, the City has not offered any instance of specific harm to the City itself that would result from the proposed action of the County.

The County and SunCor also argue that Boise City, as a municipality or governmental entity, is not a "person" within the concept of constitutional due process, and therefore cannot raise any arguments based upon the constitutional denial of due process. Although I do not have to reach this issue, since I conclude that there was not a procedural infirmity to the process in any event, I would conclude that the argument is well taken that the City is not an entity that can claim such in any event.

Overall, this is a case where one municipal entity – the city – has a political disagreement over a decision by another municipal entity – the county – in an area that is clearly within the county's domain, but which indirectly affects at least some aspects of the city. The impact on the city is only indirect, however, and not direct. Absent a direct

[1] The City suggests that its ownership of the sports complex on Hill Road is within the area impacted by the Avimor development, and therefore gives it standing to object.

interference with an aspect that is clearly within the exclusive domain of the city, any political disagreement is clearly not sufficient to justify judicial interference.

I conclude that the City has no standing to maintain the subject action against the County.

Attorney Fees

SunCor seeks its attorney fees under I.C. § 12-117. However, it is not a direct party to this proceeding. It was not sued by the City, and although it will certainly benefit from the result herein, it does not become a "prevailing party" upon the dismissal of this action against the County. It invited itself into the proceeding, which is not sufficient to give it standing to claim fees under this section of the code.

Conclusion

For the foregoing reasons, I conclude that the City of Boise has no standing to maintain its petition for judicial review against Ada County or its Board of County Commissioners for either the procedural complaints or the ultimate decision entered in the matter of the approval of the development of the Avimor planned community. The petition for judicial review is dismissed. The County is entitled to its costs, if any. No attorney fees are awarded.

It is so ordered.

Dated this 6 day of October, 2006.

Sr. Judge D. Duff McKee

CERTIFICATE OF MAILING

I hereby certify that on this 6th day of November 2006, I mailed (served) a true and correct copy of the within instrument to:

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J. DAVID NAVARRO
Clerk of the District Court

By: Martha Lyke
Deputy Court Clerk