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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMIT NOS. 63-32089 AND 63-32090 IN THE NAME OF THE CITY OF EAGLE	BRIEF OF APPLICANT CITY OF EAGLE PURSUANT TO IDWR ORDER DATED MARCH 25, 2008

BACKGROUND

On January 19, 2005, the City of Eagle filed two applications for permits to appropriate water numbered 63-32089 and 63-32090 for municipal use. The applications were protested by a number of parties. A contested case hearing was conducted on December 7, 8, 11, 12, and 18, 2006, by Hearing Officer Gary Spackman. On February 27, 2007, IDWR staff Sean Vincent submitted additional information to the Hearing Officer. On July 17, 2007, the Hearing Officer issued a Preliminary Order approving the applications. A number of Protestants and the City of Eagle petitioned for reconsideration. Protestant United Water withdrew its petition for reconsideration on August 2, 2007. On October 4, 2007, the Hearing Officer issued an Amended Preliminary Order. On October 17, 2007, Protestant Moyle filed a Petition for Reconsideration of Amended Preliminary Order. On October 18, 2007, the City of Eagle filed its Exceptions to

Amended Preliminary Order issued October 4, 2006, and Supporting Memorandum. On February 26, 2008, the Director issued a Final Order. On March 11, 2008, the City of Eagle and Protestant Moyle each filed a Petition for Reconsideration of the Final Order. On March 25, 2008, the Director granted the Petitions for Reconsideration and established a briefing schedule and oral argument before the Director. [1] This memorandum is the City of Eagle's opening brief.

INTRODUCTION

The City of Eagle has petitioned for reconsideration of Issues 1 and 2 as set out in the Final Order. These issues deal with the Final Order's redesignation of the City's applications for 8.91 cubic feet per second (cfs) of Municipal water rights to 2.23 cfs Municipal and 1.77 cfs for Fire Protection for application number 63-32089 and to 4.91 cfs for Fire Protection for application number 63-32090.[2] The City of Eagle requests that the Director correct the Final Order to state that the City of Eagle's permits reflect a total of 8.91 cfs of Municipal water rights based on the record before the Director.

Protestant Moyle seeks reconsideration of: (1) the Final Order holding that certain ground water right pumping levels are not protected under the Idaho Ground Water Act and (2) the holding that he must test the artesian head pressure in his domestic wells in order to determine if his water rights suffer actual injury due to a reduction in flow. Because the City of Eagle also filed an exception to the Amended Preliminary Order pointing out that artesian pressure is not an

[1] The March 25, 2008, Order Granting Moyle's Petition for Reconsideration of the Final Order and Scheduling Order indicated that parties Eugene Muller, Charles W. Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanny Farms, Inc. also filed petitions for reconsideration. This is incorrect and the City of Eagle assumes this was a ministerial error in drafting the order in that none of the indicated Protestants has sought reconsideration.

[2] In its Petition for Reconsideration of Issues 1 and 2 of the Final Order, the City reserved its rights with regard to the other exceptions noted in its Exceptions to Amended Preliminary Order issued October 4, 2007. The City hereby continues that reservation in that the Final Order failed to address many of the exceptions. To the extent the Final Order did not address the exceptions or correct them, the City reasserts those exceptions.

element of a water right and a reduction in artesian pressure is not an "injury" that may have to be mitigated, the City also addresses that issue in its opening brief.

I. THE CITY IS ENTITLED TO HAVE ITS APPLICATIONS GRANTED AS MUNICIPAL WATER RIGHTS, AND THE FINAL ORDER'S DETERMINATION TO REDESIGNATE AS "MUNICIPAL AND FIRE PROTECTION" IS ARBITRARY AND CAPRICIOUS

The Final Order correctly reflects that the City's applications sought a total of 8.91 cfs of Municipal water rights. The designation of the rights as Municipal followed from the fact that the City of Eagle is a municipality providing municipal water to its citizens for all the purposes covered by a municipal water right. The City did not ask for or file for "Fire Protection" water rights because fire protection use is already covered in a municipal water right, along with other uses.

In the Preliminary Order issued July 17, 2007, the City's permit applications were correctly approved for Municipal use consistent with the applications. The change to the City's permit applications from Municipal to Municipal and Fire Protection first occurred in the Amended Preliminary Order issued October 4, 2007. The redesignation carried forward to the Final Order. However, the explanations for why the change was made differed between the Amended Preliminary Order and the Final Order. The Amended Preliminary Order justified the redesignation by asserting that the City did not submit evidence about a planning horizon. The Amended Preliminary Order further stated that "The Department also recognizes it cannot allocate, through an approved permit to appropriate water, a substantial quantity of ground water to the municipal provider for fire protection that could become a significant additional block of water ostensibly reserved for reasonably anticipated future needs, particularly when the applicant has not sought water for reasonably anticipated needs and offered no evidence to support the appropriation of additional water."

In its Exceptions to the Amended Preliminary Order, the City noted that evidence as to a planning horizon is in the record. Acknowledging that the record does contain the information, the Final Order now seeks to justify the redesignation by stating "Even if the exhibits received into evidence contained some information regarding population projections, the planning horizon, and water needs in the future, Eagle did not rely on the information to make a case for an appropriation of water for reasonably anticipated future needs." Such post hoc rationalization strongly suggests that the arbitrary decision to change the City's permits will be defended, notwithstanding the record, even if a new reason must be found to support the decision.

This type of arbitrary, post hoc reasoning is evident elsewhere in the record. The Amended Preliminary Order stated with regard to the issue of reasonably anticipated future needs that "Furthermore, testimony established that the area sought to be served by water under Eagle's proposed appropriation is within both the impact areas of the City of Eagle and the City of Star." This assertion followed a previous statement in the Amended Preliminary Order that " . . . water rights for reasonably anticipated future needs cannot be granted to a municipal provider in areas 'overlapped by conflicting comprehensive land use plans.' " The City again cited to the record pointing out that it did not demonstrate that there were any conflicting comprehensive plans at issue. So how was this line of reasoning handled in the Final Order? By suddenly announcing that "The Amended Preliminary Order's refusal to approve a municipal water right for reasonably anticipated future needs was not based on a conflict between comprehensive plans." Then why did the Amended Preliminary Order say as much?

These examples of changes from the Amended Preliminary Order to the Final Order suggest that even though the record is the same, the conclusion will be defended. Another way of saying this is "The Department is not going to grant the requested municipal water rights even if it has to keep changing its reasons for doing so ---notwithstanding the record." Justifying a conclusion by continually changing the rationale for it defines "arbitrary."

Although not stated explicitly, what the Final Order seems to suggest is that the Department is trying to characterize the record so as to protect an outcome by redefining the City's intent with regard to its applications. The City would submit that this is improper, ignores the record, and constitutes arbitrary and capricious decision making.

The Final Order offers as a rationale for redesignating the nature of use of the applications roughly eight lines of testimony from the entire hearing by the City engineer stating that the applications were not filed as "future needs water rights." Trying to characterize the record and the City's intent with regard to its applications based on a single excerpt of testimony while ignoring the rest of the record simply overlooks the scope of a municipal right, the applications, and the entire record.

In fact, the record is replete with information and explanation as to the City's intent in filing the applications. The City filed for 8.91 cfs of Municipal water rights because this was the City's assessment of its current needs. The City intended to immediately build its system and use its Municipal water rights for all the purposes a Municipal water right covers. What the Final Order has implicitly accomplished is to exclude use of a Municipal water right for the purpose of fire protection by segregating fire protection from the Municipal designation.

The City of Eagle determined what its current needs were and concluded that a total of 8.91 cfs of Municipal water rights covered those needs. Even the Final Order recognizes this

by stating "Eagle expressly stated in its initial documents supporting its application that it was seeking to appropriate water for its immediate needs."

Eagle determined that, based on its planning efforts, it likely needed 8.91 cfs of Municipal water rights within five years. Eagle also recognized through its planning efforts that securing the 8.91 cfs Municipal rights would accommodate some degree of future growth if the City were able to manage its water in a conservation oriented manner. What the Final Order evidences is a recharacterizing of the City's intent to say that Eagle was applying for 2.23 cfs of Municipal and 6.68 cfs of Fire Protection. That was and remains incorrect and is rebutted by the record.

The primary documents evidencing Eagle's intent are the applications themselves which seek a total Municipal water right for 8.91 cfs. There is no indication in the applications that Eagle was seeking 2.23 cfs of Municipal and 6.68 cfs for Fire Protection. In fact the applications correctly reflect the appropriate designation of Municipal use for a municipal provider – a point recognized in the Amended Preliminary Order at page 9 and Idaho Code § 42-202(B)(b).

Another part of the record that evidences Eagle's intent is the March 7, 2005 Information Report submitted to the Department in response to a request for further information. The Information Report contains a detailed explanation of the City's applications and planning. The Final Order selects a single response from the entire Information Report to help justify the change in the Municipal designation for the applications. Examining all the information in the Information Report, the City's intent is clear. The Information Report indicates the City is applying for 8.91 cfs of Municipal water rights, and, consistent with Idaho Department of Environmental Quality (IDEQ) rules, that this designation will meet the 6.68 cfs fire flow demand "as required under the IDEQ Public Water System rules for residential and commercial developments, and a 1-hour peak demand of 2.23 cfs based upon approximately 2,000 residential

customer unit connections in the western service area." This same information was carried over into the City's Exhibit 7. City of Eagle Exhibit 7 demonstrates compliance with IDEQ requirements, not IDWR rules for appropriation. The Final Order's (and Amended Preliminary Order's) reliance on Exhibit 7 as explaining the City's intent to seek only 2.23 cfs Municipal water rights is misguided. It highlights both the hearing officer's and the protestants' confusing of IDEQ requirements with Idaho statutory rules for appropriation of water. Exhibit 7 does not reflect the City's intent to appropriate 2.23 cfs of Municipal right, but rather demonstrates that the City's requested 8.91 cfs of Municipal rights comport with other agencies' requirements.[3]

The Department's misunderstanding of some of the City's exhibits and the record was not limited to Exhibit 7. For instance, Finding of Fact 5 in the Final Order indicates that

> The Public Utilities Commission granted Eagle a certificated area of service for the Eagle municipal water system that also includes lands outside of the City boundaries. The certificated area for service by the Eagle municipal water system is depicted in Eagle Exhibit 6 and is color-coded pink.

The City of Eagle is a municipality. It is not regulated by, or subject to the jurisdiction of, the Idaho Public Utilities Commission (IPUC). Exhibit 6 does not depict an IPUC certificated area for the City of Eagle. It shows the City's service area, as suggested in Idaho Code § 42-202(B)(9).

The misinterpretation of Exhibits 6 and 7 as reflected in the Final Order is not surprising in that Department staff cannot be expected to be conversant on agency requirements for every agency in the State. However, where a misinterpretation and misunderstanding of those

[3] In the proceeding a number of protestants continually argued about land use planning issues and suggested that IDEQ's requirements precluded development of the City's annexed areas.

requirements is used to evaluate the City's applications, the result is an incomplete and unfair evaluation.

The March 7, 2005, Information Report explicitly set out exactly the City's intent and how it planned to develop its water system, including its water rights. The Information Report explains how the applications for the 8.91 cfs of Municipal rights met IDWR appropriation requirements and IDEQ requirements for fire flow. The Information Report also addressed how future development of storage could take place in order to help deal with the approximately 22,000 residents anticipated in the 20 year planning period demonstrated in the City's 2 volume Municipality Owned Water System Amended Master Plan which is Exhibit 5 in the record.

> The City plans to construct a 1.5-million gallon storage system, when approximately 2,000 residential service connections are completed and revenue becomes available for construction. The peak fire flow requirements will then be primarily supplied by the storage system. This will allow for a reduction in the required peak groundwater diversion rate. The surplus capacity in the well system will be used to meet the growing daily use requirements as urbanized development continues in the City of Eagle service area.

March 7, 2005, Information Report, at 2.

The IDWR staff who requested the additional information contained in the March 7, 2005, Information Report had no questions or concerns about the provided information. Staff understood the report and the applications.

Yet additional evidence supporting the applications was provided through the testimony of Vern Brewer and Chris Duncan, each of whom offered testimony consistent with the applications and supporting information and the other information contained in the City's exhibits. Specifically, Vern Brewer testified to the fact that the applications reflected the immediate current needs of the City, and that the applications were not filed for reasonably anticipated future needs because the water rights were needed immediately and were going to be immediately developed,

not held for some future use. In the Final Order approximately eight lines of testimony by Mr. Brewer is selectively quoted to justify the modification of the City's applications. Just as with the previously mentioned exhibits, the hearing officer misinterpreted the testimony which supported the applications and the other information supplied to the Department. The Final Order certainly does not reflect the complete record.

The Final Order does not represent a fair, reasoned, and comprehensive evaluation of the City's applications. Rather the Final Order appears to reflect the hearing officer's interpretation of I.C. § 42-202 et seq. Under Idaho Code § 42-202, a municipal provider can apply for and receive water rights for reasonably anticipated future needs. These types of rights are special in that a municipal provider can secure water for future growth without the necessity of immediately constructing diversion works and using the water. The quoted testimony of Vern Brewer and the applications and supporting data are consistent with this statute. The applications did not do an end run around I.C. 42-202. The permits were not intended to be held with no use until some point in the future. Just the contrary. As Mr. Brewer testified, the 8.91 cfs of Municipal rights would be used immediately within the five year time period allowed for development. The well system would be built with the full capacity for diverting the 8.91 cfs of Municipal rights within five years.

However, Mr. Brewer also testified that eventually establishing storage to provide for fire flow protection substantially reduced the likelihood the City would have to apply for additional water rights for its expansion area because portions of the water rights could then be used for other municipal uses within the context of a Municipal water right. This strategic approach by the City ensures that the applications are consistent with the conservation of water resources. Rather than

continually seeking appropriations of water, the City planned for use that would conserve water. In this respect, the Final Order is actually inconsistent with the conservation of water resources.

All of the above information evidences the fact that the City expressly identified the current need for the 8.91 cfs of Municipal rights and how the water rights would be used in providing services. In other words, the need was immediate, even though the City had also planned for accommodating development needs. However, the applications were not, as explained, applications for future need water rights because the development and use would be current and immediate.

Still additional documentation in the record reflective of the City's intent with regard to the applications is Exhibit 24. Exhibit 24 summarizes the known information on the wells belonging to the various protestants. Exhibit 24 includes three tables which model impacts which theoretically could occur through the City's use of its rights. Tables 1, 2 and 3 reflect the shallow, intermediate, and deep aquifers associated with the areas of the City's applications. Each of the tables includes a calculation of the modeled drawdown in the respective aquifer for pumping 8.9 cfs for 365 days. There is no analysis for pumping 2.23 cfs because the City did not file applications for a 2.23 cfs Municipal right.[4]

In order to justify the redesignation of the requested permits to only 2.23 cfs Municipal and 6.68 cfs Fire Protection, the Final Order (and the Amended Preliminary Order) comes up with the concept of a "de facto future needs water right." Where this concept or idea comes from is not explained. However, it does not exist in the provisions of Idaho Code § 42-202 et. seq. The "de facto right" concept also represents a complete reversal of the analysis set out in the Preliminary

[4] The City would note that the analysis set out in the Tables 1, 2, and 3 is consistent with that applied by the IDWR in the Matter of Application to Amend Permit to Appropriate Water No. 63-12448, a decision the Final Order reverses.

Order which approved the applications for 8.91 cfs of Municipal rights. No explanation of where this concept came from is in the Final Order or the Amended Preliminary Order and the City remains hard pressed to even address the matter.

The Department's processing of the City's applications is also directly contrary to the Department's previous practice for processing municipal applications. As pointed out in the City's Exceptions to the Amended Preliminary Order Issued October 4, 2007, the Department only one month before the City of Eagle filed its applications approved, without question and without any suggestion of "de facto future needs water rights", a permit for municipal purposes within a few miles of the City of Eagle. See IDWR file for Water Right Permit No. 63-31969. To suddenly change the Department's approach to its legal authority or its processing of applications for municipal rights within a space of two months without notice, without rulemaking, without even so much as a policy memorandum represents a clear abuse of discretion and, likewise, poor policy. The Department should either consistently apply the statutes for appropriation or consider engaging in rulemaking to provide some kind of notice to applicants. However, making up policy and post hoc rationalization as reflected in the Final Order constitutes a denial of due process. In fact, it represents no process at all.

II. ARTESIAN HEAD IS NOT AN ELEMENT OF A WATER RIGHT AND MOYLE IS NOT ENTITLED TO PROTECTION OF PRESSURE

Protestant Moyle's petition for reconsideration asserts that artesian pressure is entitled to protection and, because pressures will be allegedly affected, he should not have to test for any reduction in pressure or present evidence of a material injury to his water right. Moyle does not say he would not be able to get the full amount of his water right, but rather relies solely on the argument that pressure is protected from any reduction.

Actually, both of Moyle's assertions can be addressed with a single answer. That is because artesian pressure is not a protected element of a water right, and pressures associated with Moyle's rights are not entitled to protection. Therefore, there can be no injury. Moyle, like all other protestants, did not allege that he would not be able to obtain his water right. Rather, he argues that any reduction in pressure is an injury that presumably must be mitigated.[5] In other words, his ability to obtain his water without pumping must be protected.

First, even under a reasonable pumping level analysis, Moyle is not injured to the extent that he relies on artesian pressure to not have to pump at all. Indeed, the concept of "reasonable pumping levels" by its very definition incorporates a requirement for some pumping. An argument that a water right holder can continue forever to obtain his water flow without pumping at all effectively reads out of the phrase the word "pumping." Furthermore, a diversion system that relies solely on artesian pressure as a diversion system cannot even be argued to be reasonable diversion system. Moyle, like all protestants, alleged that there would be impact to pressure and therefore an injury must be presumed. This is incorrect.

The legislative history of the amendments to the Ground Water Act shows legislative consideration of whether pressure is an element of water right, a conclusion that it is not, and resulting legislation that reflects the legislature's decision on artesian pressure protection. The IDWR has long recognized that cold water artesian pressure is not protected. To the extent the Final Order concludes there is injury to any protestant's water right based on impacts to artesian head, the Final Order is in error.

[5] The Final Order does not provide protection to pre-1953 non-domestic rights. However, the Final Order errs in concluding that any of the protestants are entitled to mitigation because each protestant only argued that he or she would lose pressure.

In its Exceptions to the Amended Preliminary Order, the City cited to the Idaho Supreme Court case In the Matter of Application for Permit No. 47-7680 In the Name of Roger Crest, Inc., Collin Bros. Assignee, 114 Idaho 600, 759 P2d 891 (1998) as evidence that a reduction in pressure is not an injury. The Final Order seeks to ignore the evidence by arguing that the Supreme Court did not address the issue in Collins Bros. The Final Order misses the point. The City did not cite Collins Bros. for the reason that the Supreme Court has ruled on the issue. Rather what Collins Bros. evidences is that the IDWR held as a matter of law that a reduction in pressure is not an injury. Collins Bros. simply upheld the IDWR ruling. If the IDWR has changed its legal position, the Final Order should at least address when and under what circumstances that position has changed.

In 1986 the Senate passed Concurrent Resolution No. 119 establishing a Committee to examine the statutory framework addressing groundwater, "including the associated heat and artesian pressure values", and to gather information from a variety of sources including the Department of Water Resources. Concurrent Resolution No. 119, lines 23-39. A number of meetings were held throughout the state. Among the information provided to the Committee was a July 18, 1986 presentation by Phillip J. Rassier on Groundwater Administration. As the resolution directed, the Committee meetings thoroughly addressed artesian pressure.

In the August 25, 1986, Committee meeting attorney Roger Ling pointed out that he believed there was no "right" to artesian pressure. Mr. Don Campbell, Aquaculture Committee Chairman of the Idaho Farm Bureau, pointed out that water pressure was a resource unaddressed in Idaho. *Id. at 6.* Most importantly, IDWR Director Ken Dunn indicated that artesian pressure is not part of a water right. *Id at 10.* Supporting these statements was that by Mr. Keith Higgenson (also a former IDWR Director but at the time with Higginson–Barnett Consulting) who stated that

artesian pressures are not part of a water right. *Id at 11.* Finally, Jeff Fereday, a water attorney also noted that pressure is not part of a water right and that pressure cannot be condemned, transferred, or sold as could a water right. *Id at 11.*

The Committee meetings continued at least through November 17, 1986, when Mike Nugent, Committee staff, presented the Committee with RS13110 which was a compilation of a variety of legislation that had been considered by the Committee. The Committee discussed proposed provisions that would have protected both thermal values and artesian pressure. Senator Tominaga voiced his understanding that the only pressures that were supposed to be protected were thermal artesian pressures, and that he wanted to address only "thermal and geothermal pressures and not cold water artesian pressures." Committee Minutes, November 17, 1986. Mr. Tominaga's comments were supported by the Committee:

> The majority of the Committee Members felt the artesian pressure values on high and low geothermal waters should be maintained and the cold water aspects of artesian pressure values should be excluded.

Id at 2.

During the meeting Director Dunn also explained, in response to a concern that increasing artesian pressure would allow increased use of water, that:

> ["...whoever is using an artesian well has a water right for a certain amount of water. That water right holder may not be getting that full right from the flows of that well, so that if he repairs it he may get his total amount, but anything in excess of his water right would not be available to him unless he filed for a new water right for this excess.]

Id at 4.

All of these references demonstrate that cold water artesian pressure protection was considered and rejected. The amendments to I.C. § 42-226 contained in Senate Bill No. 1133 that year reflected this outcome by including the following change:

> In determining a reasonable ground water pumping level or levels, the director of the department of water resources shall consider and protect the thermal and/or artesian pressure values for low temperature geothermal resources to the extent that he determines such protection is in the public interest.
>
> S.B. No. 1133, p.2 L. 41-46.

Cold water artesian pressures were not protected as to reasonable pumping levels.

This legislative history clearly distinguishes Parker v. Wallentine's application in the present case because the only alleged injury by Moyle and the other protestants was an alleged loss of artesian head pressure, not the loss of the ability to obtain their water right as reflected in Parker. The Final Order is in error in suggesting that any protestant is entitled to mitigation for an injury to artesian pressure. The City of Eagle's reference to Collins Bros. was therefore not misplaced because the IDWR's legal conclusion referred to in Collins Bros. was consistent with the above noted legislative history and legislation.

CONCLUSION

The City filed its applications over three and a half years ago. After three and a half years of processing, the last minute redesignation of the City's applications to Municipal and Fire Protection is arbitrary and capricious and fails to reflect fair and reasoned consideration of the City's applications and the entire record. The Director is respectfully requested to correct the Final Order on this issue as reflected in the Preliminary Order and approve a Municipal water right for a total of 8.91 cfs.[6] The Final Order is incorrect in holding that any protestant is entitled to a finding of injury based solely on a reduction in artesian pressure.

[6] If the Director does not conclude that the City's applications should be designated as 8.91 cfs Municipal, the City requests that the Director order additional evidentiary proceedings sufficient to get a full and fair consideration of the City's intent with regard to its applications.

Respectfully submitted this 18 day of April 2008.

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BRUCE M. SMITH
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CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of April 2008, a true and correct copy of the foregoing document was served upon the following by the method indicated below:

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BRUCE M. SMITH