

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS TO)
APPROPRIATE WATER NOS. 63-32089 AND)
63-32090 IN THE NAME OF THE CITY)
OF EAGLE)
_____)

**AMENDED PRELIMINARY
ORDER**

On January 19, 2005, the City of Eagle ("Eagle") filed two applications for permit to appropriate water, numbered in the files of the Idaho Department of Water Resources ("IDWR" or "Department") as 63-32089 and 63-32090. IDWR published notice of the applications in the Idaho Statesman on April 21 and 28, 2005. The applications were protested by the following individuals: Roy Barnett, Tim Cheney, City of Star, Dean and Jan Combe, Michael Dixon/Hoot Nanney Farms, Bill Flack, Bob and Elsie Hanson, Michael Heath, Charles Howarth, Corrin Hutton, Norma Mares, Michael McCollum, Charles Meissner, Jr., LeRoy and Billie Mellies, Robyn and Del Morton, Frank and Elaine Mosman, Joseph, Lynn, and Mike Moyle, Eugene Muller, Tony and Brenda O'Neil, Bryan and Marie Pecht, Dana and Viki Purdy, Sam and Kari Rosti, Ronald Schreiner, Star Sewer and Water District, Jerry and Mary Taylor, United Water Idaho, and Ralph and Barbara Wilder.

IDWR conducted a prehearing conference on July 28, 2005. At the prehearing conference, Scott Reeser hand-delivered a letter to IDWR. In the letter, Scott Reeser asked to intervene in the contested case.

On September 13, 2005, IDWR issued an order granting Scott Reeser's petition to intervene.

Several protestants failed to appear at the prehearing conference. IDWR mailed a notice of default to the non-appearing protestants. The following non-appearing protestants who failed to show good cause for non-appearance were dismissed as parties: Roy Barnett, Bryan and Marie Pecht, Del and Robin Morton, Tony and Brenda O'Neil, and Frank and Elaine Mosman.

The hearing officer conducted a second prehearing conference on October 18, 2005. At the prehearing conference, Eagle proposed to drill two wells for conducting a pump test. Eagle proposed to pump water from one of the wells and measure water levels in other wells in the vicinity of the pumped well to determine the impacts of pumping.

On December 22, 2005, IDWR approved two drilling permits to construct wells for the pump test.

On January 17, 2006, IDWR received a "notice of protest" from Bud R. Roundtree. IDWR interpreted the document as a petition to intervene.

On January 19, 2006, the hearing officer issued a *Notice of Hearing, Order Authorizing Discovery, and Prehearing Order*. The hearing officer scheduled the hearing for April 10 through April 14, 2006. On February 28, 2006, Eagle notified the hearing officer that the two test wells had not been constructed. The letter stated "the City of Eagle will not be able to get the pump test completed pursuant to the existing schedule." As a result of the notice, the hearing officer canceled and continued the hearing. In the *Order Continuing Hearing and Canceling Prehearing Deadlines*, the hearing officer ordered the following:

...[U]pon completion of construction of the test wells, the City of Eagle shall arrange a time for the anticipated pump tests with the other parties. When the date(s) for the pump tests have been arranged, the City of Eagle shall notify the Department of the test date(s). After receiving notice of the test date(s), the Department will inquire about available dates for a hearing. The hearing will be scheduled no earlier than ninety days following the date of the test to allow the exchange of information and discovery previously authorized.

On July 11, 2006, the City of Eagle notified the hearing officer that "the pump test conducted by the City of Eagle has been completed."

Sometime during late summer or the fall of 2006, Eagle submitted a report titled *City of Eagle – 7 Day Aquifer Test* to IDWR staff for review. The document is dated "June 2006," but the test was not completed until June 19, 2006.

On September 6, 2006, the hearing officer issued a second *Notice of Hearing, Order Authorizing Discovery, and Prehearing Order*. The Notice of Hearing scheduled the hearing for December 6 through 8, 2006 and December 11 and 12, 2006. At the time of service of notice of hearing, IDWR had not acted on the petition to intervene filed by Bud Roundtree. The record does not show that IDWR ever determined whether Roundtree should be allowed to intervene. Roundtree received notice of all the proceedings, however, and IDWR treated Roundtree as a full party to the contested case.

On November 7, 2006, Star Sewer & Water District withdrew its protest.

On November 13, 2006, protestants Joseph, Lynn, and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., and Charles Howarth filed a *Motion to Continue the Hearing*. On November 15, 2006, the above protestants filed an *Amended Motion to Continue Hearing*. The protestants filing the motion for continuance asserted: (1) various scheduling conflicts of the protestants; and (2) Eagle failed to "arrange a time for the anticipated pump test with the other parties" as required by the hearing officer's March 10, 2006 *Order Continuing Hearing and Canceling Prehearing Deadlines*.

On November 20, 2006, the hearing officer denied the *Amended Motion for Continuance*. This order will not discuss the grounds for refusing the continuance based on scheduling conflicts. A discussion of the prearrangement of the pump test is germane, however.

In denying the request for a continuance on the grounds of failure to jointly conduct a pump test, the hearing officer wrote:

...The hearing officer intended that all the parties interested in the pump test have an opportunity to participate in the test. If Eagle failed to arrange the timing of the test with the parties, the hearing officer is dismayed that Eagle did not follow the dictates of the order.

Nonetheless, even assuming Eagle did not arrange a time for the pump test with the protestants as required by the hearing officer's March 10, 2006 order, the protestants have known that the City of Eagle completed its pump test since receiving the July 11, 2006 letter. The hearing officer also notified the protestants of the completion of the pump test in his August 16, 2006 letter and alluded to the completion of the test in his September 6, 2006 order. Failure of the city to fully coordinate the pump test with the protestants should have been raised as an issue at the time the protestants were notified that the pump test had been completed. Instead, the protestants waited until less than a month before the scheduled hearing to complain. Despite Eagle's failure, the protestants' inaction after learning of the completion of the pump test for approximately four months leads the hearing officer to surmise that the protestants were disinterested in participating actively in the pump test. Consequently, failure to coordinate the pump test is not grounds for postponing the hearing at this late date.

On November 22, 2006, protestants Joseph, Lynn, and Michael Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., and Charles Howarth filed a *Motion in Limine*. The protestants participating in the *Motion in Limine* argued that the "...data and results collected from the seven-day pump test conducted by the City of Eagle in May and June, 2006" should be excluded from the evidence "...because the Protestants were not provided an opportunity to collect data from their wells while the pump test was conducted."

On November 30, 2006, the hearing officer issued an *Order Denying Motion in Limine, Notice of Staff Memorandum, and Amended Notice of Hearing*. In the order, the hearing officer stated:

...The protestants had an opportunity to complain about their inability to participate in the test long in advance of the hearing. The protestants did not avail themselves of the opportunity and should not be allowed to raise the issue just prior to the hearing as a means of preventing consideration of technical information.

The *Motion in Limine* should be denied.

On November 29, 2006, Sean Vincent and Shane Bendixsen submitted a Department staff memorandum to the hearing officer that evaluated the pump test conducted for the City of Eagle test wells. A copy of the staff memorandum is enclosed with this document. The staff memorandum raises several issues about the procedures of the pump test and the analysis of the pump test data. The

questions raised by Department staff could seriously affect the credibility of the pump test evidence presented at the hearing.

The hearing officer will consider the Department staff memorandum as part of the evidence in this contested case. Because the analysis of the pump test submitted to Department staff was incomplete, the hearing officer will forward any additional evidence about the pump test received into evidence at the hearing to Department staff for further review to determine possible deficiencies. After the staff review, the hearing officer will distribute the results of the Department's post hearing review to the parties who will have an opportunity to submit additional comments and possibly to request supplemental hearings about the document. This process **will delay** the ultimate consideration of the applications.

The November 30, 2006 order also delayed commencement of the hearing by one day.

A hearing for the contested case was conducted on December 7 and 8, 2006, and resumed on December 11 and 12, 2006. At the end of the day on December 12, 2006, the presentation of evidence was not complete. As a result, additional evidence was presented the morning of December 18, 2006.

Bruce Smith and Tammy Zokan, attorneys at law, appeared on behalf of Eagle. Charles Honsinger and Jon Gould, attorneys at law, appeared on behalf of Joseph, Lynn, and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanney Farms. Sam Rosti, Corrin & Terry Hutton, Mary Taylor, and Jan Combe appeared individually representing themselves.

On December 20, 2006, the hearing officer issued a request for staff memorandum to Hal Anderson, Rick Raymondi, Sean Vincent, and Shane Bendixsen. The request for staff memorandum stated the following:

Sean Vincent (Vincent) and Shane Bendixsen (Bendixsen) reviewed a technical document titled *City of Eagle, Idaho 7-Day Aquifer Test* prepared by Chris H. Duncan of Holladay Engineering Company. After the review, Vincent and Bendixsen issued a staff memorandum dated November 29, 2006. In the memorandum Vincent and Bendixsen stated that "the scope of the data collection was adequate, but the aquifer test analysis is incomplete."

The request for staff memorandum recited some of the procedural background, and further stated:

At a hearing conducted on December 7-8, 11-12, and 18, 2006, the City of Eagle presented additional analysis of the aquifer test data. In addition, the City of Eagle called Vincent to testify regarding the November 29, 2006 staff memorandum.

THEREFORE, the hearing officer invites department staff to augment the November 29, 2006 staff memorandum regarding the above captioned matter, which could include, without limitation:

1. A full scrutiny of the methods of gathering data, the data presented, and results of the aquifer test contained in the *City of Eagle, Idaho 7-Day Aquifer Test* report dated June 2006.
2. Presentation and analysis of additional data available to department staff to enhance the hearing officer's understanding of the hydrogeology and aquifers in the vicinity of the proposed appropriations of water, including, but not limited to data related to aquifer tests performed for the Lexington Hills well and the Floating Feather well.
3. An independent analysis of Eagle's 7-Day Aquifer Test data using commonly accepted scientific methods in the field of geology, hydrogeology, and engineering.
4. A technical review and critic (sic) of any information and analysis of data presented as evidence during the contested case hearing conducted on December 7-8, 11-12, and 18, 2006.

On February 27, 2007 (date on the document was February 27, 2006), Sean Vincent of IDWR submitted to the hearing officer a staff memorandum titled *Review of Addendum to City of Eagle, Idaho 7-Day Aquifer Test Report*. Attached to the staff memorandum was a document titled *Addendum to City of Eagle 7-Day Aquifer Test Report*.

In the staff memorandum, Vincent states that "the Addendum adequately addresses comments made in a previous memo to you dated November 29, 2006."

On March 13, 2007, Eagle mailed copies of the written addendum reviewed by IDWR staff to the parties who attended the December hearing.

On March 27, 2007, the hearing officer mailed a copy of the staff memorandum written by Vincent to the parties who attended the December hearing. The hearing officer also served a *Notice of Consideration of Additional Evidence and Post Hearing Order* on the parties. The document informed the parties that the hearing officer would consider the information in the addendum and the staff memorandum, and granted the parties until April 25, 2007 to review documents and to submit technical comments about the addendum to the hearing officer and/or request a supplemental hearing.

On March 27, 2007, the hearing officer issued an order dismissing the following parties from the contested case: Michael McCollum, Michael and Nancy Heath, Tim Cheney, Bob & Elsie Hanson, Bill Flack, Ronald Schreiner, City of Star, Scott and Nancy Reeser, Bud Roundtree, Ralph and Barbara Wilder, and Norma Mares.

On April 24, 2007, Mary Taylor submitted written comments to Eagle's addendum.

On April 25, 2007, protestants Joseph, Lynn, and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanny Farms, Inc., submitted comments to Eagle's addendum and the IDWR staff memorandum.

On July 17, 2007, the hearing officer issued a preliminary order approving applications nos. 63-32089 and 63-32090. On July 18, 2007, the preliminary order was served on the parties by mailing a copy of the preliminary order to each of the parties via the United States Postal Service.

The following parties filed timely petitions for reconsideration: United Water Idaho; Joseph, Lynn and Mike Moyle (Moyle), Eugene Muller, Dana and Viki Purdy, Charles W. Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanny Farms, Inc., all represented by Ringert Clark Chartered; Mary Taylor; and the City of Eagle. In addition, the hearing officer received individual comments from Mike Moyle, Eugene Muller, and Charles Howarth.

On August 2, 2007, United Water Idaho filed a *Withdrawal of Petition for Reconsideration*.

On August 14, 2007, Ringert Clark Chartered withdrew as counsel for Dana and Viki Purdy. Dana & Viki Purdy are parties now representing themselves.

On August 21, 2007, the hearing officer issued an order granting the petitions for reconsideration, stating that the merits of the petition would be addressed expeditiously.

PETITIONS FOR RECONSIDERATION

Statement of Issues

The following is a summary of the issues raised by the petitioners for reconsideration. Some of the issues will be resolved summarily in the response following statement of the issue. If the issue is stated without immediate written analysis, the issue will be analyzed in greater detail in the text following the statement of the issues. If the analysis of an issue is discussed in the text following full statement of the issues, the discussion will refer to one or more of the following numbered issues.

Issues Raised by Moyles, Eugene Muller, Charles W. Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanny Farms, Inc. by Ringert Clark Chartered

Ringert Clark Chartered raised the following issues for reconsideration:

1. The printed permit must be included with the preliminary order.
Response: This is not a requirement of the law. A printed permit document is issued as the final disposition of the application processes. If the provisions of the permit differ from those of the final order, the inconsistent provisions on the printed permit would be invalid.

2. A new and adequate pump test must be conducted by the City of Eagle before IDWR can adequately evaluate the factors of injury and the sufficiency of the water supply.

3. The preliminary order and written permit should limit the quantity appropriated to 2.23 cfs for municipal purposes and 6.68 for fire protection.

4. The preliminary order must establish a reasonable ground water pumping level before it can determine whether projected declines in ground water levels will fall below the reasonable pumping level.

Issues Raised by Michael Moyle

5. Eagle's failure/refusal to apprise the parties of the time and place of the aquifer test should have caused the hearing officer to delay the hearing/decision or to deny the application.

6. Eagle did not establish that there is sufficient ground water for the purposes sought by the applications, and did not prove that "the anticipated average rate of future natural recharge" will satisfy the proposed appropriation and existing water rights.

7. IDWR must establish a reasonable pumping level.

8. The hearing officer improperly excluded information about declines in the aquifer based on legal technicalities.

Response: The hearing officer is unaware of ground water data that was offered and excluded. Without additional information, the hearing officer cannot address this issue.

9. No evidence was submitted about the monitoring of the well construction.

Response: Staff at IDWR's Western Region oversaw well construction. Some information about Department oversight may be available, but it was not made a part of the record. Concern about method and adequacy of construction was not raised as an issue at the hearing. As a result, the adequacy of construction is not an issue presently before the hearing officer.

10. Eagle is "gunning for our aquifer," and intends to expand into the north foothills.

Response: Surface and ground water within the state of Idaho is owned by the state of Idaho. Water right holders have a property right to the use of the waters of the state of Idaho within the limitations of their water rights. The use of the word "our" must be interpreted as meaning the aquifer owned by the state and its collective citizens. IDWR is charged with analyzing the applications to appropriate water pending before it to determine whether there is water available for appropriation and whether the proposed diversion and use of water will injure other water rights.

11. United Water and Star Water have the physical facilities to provide municipal water to the Legacy and Eaglefield developments.

Response: This assertion of fact is not supported by facts in the record.

12. IDWR has approved new permits to appropriate water from ground water for municipal and domestic uses, but has not approved consumptive uses proposed by other applications to appropriate water.

Response: IDWR is not prevented from considering an application to appropriate water for municipal uses out of chronological sequence. An approved water right may be subject to curtailment if other earlier-in-time filed applications are approved and there is insufficient water to satisfy all water rights.

13. A study must be conducted to determine the direction of ground water flow prior to approving Eagle's applications.

14. Because of conjunctive management problems in the Eastern Snake Plain Aquifer, Eagle's applications should not be approved.

Response: The evidence at the hearing did not establish any factual relationship or similarities between ground water in the Treasure Valley and the Eastern Snake Plain Aquifer.

Issues Raised by Charles Howarth and Eugene Muller

15. The City of Eagle's failure/refusal to apprise the parties of the time and place of the aquifer test should have caused the hearing officer to delay the hearing/decision or to deny the application.

Charles Howarth and Eugene Muller also requested oral argument.

Issues Raised by Mary Taylor

16. The evidence establishes that the aquifer test conducted during 2006 resulted in water declines in a well owned by Taylor.

17. Taylor's well associated with water right no. 63-5040 is entitled to protection from ground water level declines under *Parker v. Wallentine*.

Response: The hearing officer recognizes water right no. 63-5040 is entitled to ground water level protection under *Parker v. Wallentine*. The well identified by water right no. 63-5040 is located in the City of Star, several miles from the proposed wells. Ground water levels in the Taylor well will not decline sufficiently as a result of the pumping as proposed by Eagle to require compensation.

18. Taylor compared the depth of her wells and the Parker well, and also compared the depth of the wells drilled by Eagle and the Wallentine well. Because there is some similarity in these depths comparisons, Taylor argues that she is entitled to the same water level protection given to Parker.

Response: The analysis of data for wells and aquifers is much more complex than a comparison of the depth of well construction. Aquifer composition and geologic separations of aquifers vary widely. The distance between wells that may be interfering with each other is also extremely important. In *Parker*, water was not available from the Parker domestic well when the new

Wallentine irrigation well was in operation. Taylor's factual allegations to establish injury are incomplete and do not justify further analysis.

19. Reference to "shallow aquifer" in discussion of the Muller well is incorrect.

Response: The hearing officer does not understand this argument by Taylor.

20. United Water and Star Sewer and Water have been assigned to provide municipal water to the Legacy and Eaglefield developments.

Response: As discussed, the record is devoid of facts related to this issue.

21. The hearing officer improperly determined that the proposed appropriation would not injure other water rights.

Response: This amended preliminary order reduces the flow rate and, by limiting the flow rate, also reduces the total volume of water that can be appropriated by Eagle. The analysis supports the conclusion that, with conditions to protect other right holders, the approval of the application will not injure other water rights.

22. Because of conjunctive management problems in the Eastern Snake Plain Aquifer, the City of Eagle's applications should not be approved.

Response: The evidence at the hearing did not establish any factual relationship or similarities between ground water in the Treasure Valley and the Eastern Snake Plain Aquifer.

Issue Raised by the City of Eagle

23. Mitigation should not be required prior to actual demonstration of injury to water rights.

Discussion of Issues for Reconsideration

The preliminary order and written permit should limit the quantity appropriated to 2.23 cfs for municipal purposes and 6.68 cfs for fire protection (Issue no. 3).

The preliminary order approved the total flow rate of 8.91 cfs for municipal purposes. The evidence at the hearing established that 2.23 cfs is the flow rate needed, within the next five years, to satisfy the regularly and continuously provided (at least seasonally provided) municipal uses expressly defined by Idaho Code § 42-202B(6) as "residential, commercial, industrial, irrigation of parks and open space . . ." Idaho Code § 42-202B(6) also authorizes use of water under a municipal water right for purposes related to "residential, commercial, industrial, [and] irrigation of parks and open space." The initial question is whether "related purposes" includes fire protection.

Codification of the words residential, commercial, and industrial might be construed to mean only use of water for those purposes. The broad mandate for a municipal provider, however, is to provide water for an umbrella of sub-uses within the service area that include all the water needs for the residential, commercial, industrial, and other activities within the municipal service area. The term "related purposes" includes fire protection.

The short-term water demand on a municipal system for fighting a fire is significantly greater than the water demand for the water uses that are regularly and continuously provided by the municipal provider. The significant additional water demand required for fighting a fire is reflected in the proportional parts of the total flow of 8.91 cfs sought by Eagle's applications dedicated to regular and continuous uses (2.23 cfs) and fire fighting (6.68 cfs). In addition, the spike in water demand for fighting a fire is both short in duration and infrequent.

When a permit to appropriate water is approved by IDWR, proof of completion of works and beneficial use of the water must be accomplished within five years, except in limited circumstances when the permit holder can obtain an extension of time for filing proof by showing good cause for non-completion, or where there are other specific factual circumstances that allow extensions for the filing of proof of beneficial use. Because of the unique obligations of municipal water providers, however, the law allows municipal providers to obtain water rights for "reasonably anticipated future needs" for which full completion of works and beneficial use is not required. To appropriate water for reasonably anticipated future needs, the municipal provider carries an extra evidentiary burden to establish the "planning horizon" for the municipality or municipalities served, and submit "population and other planning data" in support of the anticipated needs within the planning horizon. If a municipal provider seeks a water right for reasonably anticipated future needs, the planning horizon and supporting data cannot be inconsistent with the comprehensive land use plans. Furthermore, water rights for reasonably anticipated future needs cannot be granted to a municipal provider in areas "overlapped by conflicting comprehensive land use plans."

Eagle admitted at the hearing that the applications do not seek appropriation of water for "reasonably anticipated future needs." Eagle did not submit evidence about a planning horizon nor did Eagle submit any underlying data about planning and population within the planning horizon. 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.

The Department recognizes the need for the municipal provider to provide fire protection water flows. 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 where the applicant has not sought water for reasonably anticipated future needs and offered no evidence to support the appropriation of additional water.

The statutory identification of many sub-uses within the municipal use umbrella, including fire protection, does not prohibit the Department from limiting the uses, if necessary, to satisfy the criteria it must consider under Idaho Code § 42-203A or to insure that other statutory provisions are satisfied or are not violated. Recognizing the entire 6.68 cfs for fire protection within the broad municipal definition would create a de facto water right for reasonably anticipated future needs. The fire protection portion of the appropriation should be separately identified and limited as water that can only be used to fight a fire or prevent an existing fire from spreading.

Mitigation Prior to Demonstration of Injury (Issue no. 23)

Eagle argues that a senior water right holder must actually be injured by Eagle's diversion of water prior to Eagle having to provide mitigation for the injury. This argument assumes that Eagle would not be required to construct and install the necessary backup systems prior to demonstration of injury.

The degree to which Eagle must be prepared to immediately provide service depends both on the certainty of the possible injury and the severity of the injury that might occur. In the previous decision, Eagle's own modeling concluded that, at a continuous pumping rate of 8.9 cfs for a year, the measured pressure of 21 feet in the Moyle wells would decline by 17 feet to a pressure of four feet. A decline of 17 feet of pressure from 21 feet to four feet would cause water delivery shortages in the Moyle delivery systems. Short-term shortages could result in the death of large numbers of mink, loss of agricultural crops, and loss in domestic water supplies. The large drop in artesian pressures and the small residual pressure after the decline coupled with the immediate need for replacement water all dictated that Eagle be immediately ready and able to supply water to Moyles when the artesian pressure will no longer deliver water to Moyles for their beneficial uses.

This amended decision reduces the flow rate that can continuously be diverted by Eagle from 8.9 cfs to 2.23 cfs. The reduction in artesian pressure caused by continuously pumping 2.23 cfs is approximately four feet. A smaller pressure head reduction of four feet and a larger residual pressure head of approximately 17 feet are facts that do not compel the hearing officer to determine that the pressure declines will cause Moyles water rights to be undeliverable or will result in a significant decline in delivered flow, causing severe injury. As a result, this amended decision requires Moyles to test the effects of the smaller reduction in pressure head of four feet on the water delivered for Moyles' beneficial uses. The reduction in pressure can be simulated by causing a head loss through a valve or other fixture equal to the predicted four feet of artesian head loss resulting from Eagle's pumping. The difference between the flow rates delivered before and after the artificial reduction in pressure must be measured. If Moyles' test demonstrates a reduction in delivered flow for the beneficial uses of water resulting from the reduction in head of four feet, Eagle must be ready to supply to Moyles the loss of the flow rate caused by the reduction in pressure.

Moyle must complete the test by a date certain to insure that reductions in artesian pressure and corresponding flow rates are proximate in time to the approval of these permits for Eagle. Eagle must be informed and have an opportunity to participate in the test.

Failure of Eagle to Coordinate the Aquifer Test with the Protestants (Issues nos. 5 and 15)

The preliminary order issued on July 17, 2007 exhaustively explains the joint responsibilities neglected by both Eagle and the protestants related to the testing of the aquifer. Eagle did not properly apprise the protestants of the timing of the test. It is not clear whether this failure was due to faulty communication by Eagle and its consultants, or whether Eagle purposely determined not to communicate.

In contrast, the protestants received actual notice of completion of the test, and did not timely raise the lack of coordination as an issue until the eve of the hearing. Most legitimate legal causes of action are assigned time periods within which the cause of action must be brought. The hearing officer will not determine the legitimacy of a complaint about failure to coordinate, but only need hold that the protestants, with full knowledge that the test had been conducted, waited for months before asking, on the threshold of the hearing, for further testing, a continuance, and limitation of evidence. The facts imply that the protestants were raising the issue primarily for the purpose of delaying consideration of Eagle's applications. Equity dictates that the time for raising this issue had passed. The hearing officer will not amend his original determination.

Adequacy of the Aquifer Test (Issues nos. 2, 6, and 13)

Following the hearing, Eagle submitted additional evidence and analysis about the aquifer test, and Sean Vincent of the Department analyzed the additional information. Vincent concluded that, while the test could have been conducted in a way that would produce more meaningful data, the test was sufficient to define the characteristics of the aquifer and to estimate the impact of pumping on other wells in the area. Vincent also determined that there was adequate water residing in the production aquifer to satisfy the withdrawals sought by Eagle's applications. The conclusions by Vincent were incorporated by reference as findings of fact in the July 17, 2007 preliminary order. Vincent's conclusions are consistent with the testimony of Christian Petrich and Chris Duncan. Eagle satisfied its burden of proof regarding injury and sufficiency of the water supply. No additional pump test is necessary. (Issue no. 2).

The hearing officer did not expressly determine, nor is he required to determine, whether, after full development, the total withdrawals from the aquifer would exceed the average annual rate of recharge. Nonetheless, the hearing officer must make a similar determination of whether the water supply is sufficient for the purpose sought by the application. The hearing officer held, based on the evidence presented, that there is sufficient unappropriated water to supply the proposed use of water. While there may be some minor water level declines caused by this proposed use of water, the water level response to pumping will reach an equilibrium that is sustainable. (Issue no. 6).

Evidence to support an appropriation of ground water is never completely certain. There is always additional data that can be gathered through more extensive studies that can further assist the Department in determining the extent of a ground water aquifer. In contrast, the Department receives applications for the use of water and must make decisions about whether the proposed withdrawals and uses of water can be approved. It is more likely than not that there is sufficient water for the purpose sought, regardless of whether the ground water is flowing in the direction of the Payette River or the Boise River. (Issue no. 13).

Reasonable Pumping Level (Issues nos. 4 and 7).

Idaho Code § 42-230 states that the Department may establish reasonable pumping levels for the protection of existing water rights. The hearing officer recognizes that reasonable pumping levels have not been routinely established in the State of Idaho.

The non-establishment of a reasonable pumping level does not prohibit the Department from determining whether declines anticipated by a proposed appropriation will be sufficiently small and consequently holding that the pumping levels will remain within the reasonable range for existing right holders. Pumping the quantities of water sought by Eagle will not result in significant overall water declines in the production aquifer. The hearing officer need not establish a reasonable pumping level based on the evidence of sustainability of the aquifer presented into evidence.

Taylor Evidence of Interference During the Aquifer Test (Issue no. 16).

During its aquifer test, Eagle pumped from June 2 through June 9, 2006. Mary Taylor measured the water level in her irrigation well on June 25, 2006. The water level was measured at 75.82 feet. On August 8, the water level in the well was measured again, and the ground water level was 69.10 feet below ground surface. On October 11, 2006, the ground water level was measured at 62.12 feet below ground level.

The person who measured two of the ground water levels stated in a November 6, 2006 letter to Mary Taylor:

The difference in the two measurements is most likely due to the [Taylor] pump running at the time of the August measurement. At the time, I observed 35-40 sprinklers watering your yard and alfalfa field. During the October measurement, I did not observe any irrigation occurring.

The ground water level in Mary Taylor's irrigation well on June 25, 2006 was measured three weeks after Eagle's pumping ceased. It is unlikely the effects of pumping by Eagle predating the measurement by three weeks could be measured.

Furthermore, Taylor did not provide any background water level measurements for her irrigation well from 1999 to the June 25, 2006 measurement, but arbitrarily assumed water levels remained constant at approximately 58 feet below ground level for seven years until the test by Eagle. Finally, the production zone for Taylor's irrigation well is completed in the shallow aquifer. All of the evidence, both from the aquifer test and from the expert witnesses, concluded that pumping by Eagle would not significantly affect the shallow aquifer.

The hearing officer is reasonably certain that the declines in Taylor's irrigation well is a result of pumping by Taylor, perhaps combined with the effects of withdrawals of ground water pumped by other users from the shallow aquifer and not a result of pumping from the deep aquifer by Eagle during its aquifer test.

Having considered the evidence presented at the hearing, and the information subsequently submitted to the hearing officer, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On January 19, 2005, the City of Eagle submitted two applications to appropriate water to IDWR. IDWR assigned application numbers 63-32089 and 63-32090 to the applications.

2. Application to appropriate water no. 63-32089 seeks the following:

Source:		Groundwater
Flow Rate:		4.0 cfs
Purpose of Use:		Municipal
Proposed Priority:		January 19, 2005
Period of Use:		Jan. 1 through Dec. 31
Points of Diversion:		
Township 04 North, Range 01 West,	Section 10	NWNE ¹
	Section 11	SENE
	Section 10	NWNW
	Section 11	NWSE (two wells)
Place of Use:		The municipal service area for the City of Eagle.

3. Application no. 63-32090 proposes the following:

Source:		Groundwater
Flow Rate:		4.9 cfs
Purpose of Use:		Municipal
Proposed Priority:		January 19, 2005
Season of Use:		Jan. 1 through Dec. 31
Points of Diversion:		
Township 04 North, Range 01 West,	Section 10	NWNE
	Section 11	SENE
	Section 10	NWNW
Place of Use:		The municipal service area for the City of Eagle.

4. The two applications identify eight possible separate well locations. The three points of diversion listed in application no. 63-32090 duplicate locations described in application no. 63-32089. Eagle only intends to construct a maximum of five wells.

¹ Public land survey descriptions in this decision without a fraction following a two alpha character descriptor are presumed to be followed by the fraction "1/4." In addition, all public land survey descriptions are presumed to be based on the Boise Meridian. All locations are in Ada County.

5. Eagle owns and operates a municipal water system that serves a geographical area within the municipal boundaries of the City of Eagle. The certificated area of service for the Eagle municipal water system 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 in pink. Eagle Exhibit 6 also shows locations of the five wells proposed by the applications.

6. A portion of Eagle's service area is located west of Linder Road, east of Highway 16, and north of Highway 44 to the edge of the foothills bounded on the north by Homer Road. This area will be referred to in this decision hereinafter as the "western expansion area."

7. Two housing developments named Eaglefield and Legacy are currently proposed for construction in the western expansion area. The combined number of homes proposed for the development is approximately 2,000 homes. The homes will be constructed on approximately 800 to 900 acres in Sections 2, 3, 9, 10, and 11, Township 4 North, Range 1 West.

8. Eagle predicts that the development for the 2,000 homes will be complete within five years, although all of the homes may not be built by that time.

9. Developers proposing construction of residential housing within Eagle are required to dedicate sufficient ground water or surface water rights to the proposed developed lands to provide irrigation demands within the subdivision. When surface water is the traditional method of irrigating the lands prior to development, the developer is required to install a separate system from Eagle's municipal water system for delivery of surface water for irrigation.

10. The applications propose delivery of water primarily for in-house use in the 2,000 homes projected for construction. The peak one-hour demand for in-house use in 2,000 residential units is 2.23 cfs. In addition, Eagle is required to supply the development with 6.68 cfs for fire protection. The total projected instantaneous demand is 8.9 cfs, the combined flow rate sought by the two applications.

11. The developers of the proposed subdivisions must pay for the five proposed wells and internal delivery system within the development. In addition, Eagle has set aside monies in its budget for construction of main lines and trunk lines to connect with the existing Eagle municipal water system. Eagle also has the power to levy assessments against its water users for payment of additional improvements. Finally, Eagle has the authority to form a Local Improvement District (LID) and issue bonds to be repaid by future assessments.

12. Eagle does not presently intend to employ any water storage to meet peak demands. Storage to supply short-term peak demands and fire flow demands could be a component of future use, however. Eagle Exhibit 6 identifies the location of a future storage tank at the northern boundary of the western expansion area.

13. In May 2006, Eagle constructed two wells within the proposed development property. Both of the wells were constructed according to Idaho Department of Environmental Quality standards.

14. The first well was constructed in the SENW, Section 11, Township 4 North, Range 1 West. This well will be referred to hereafter as Well no. 1 or the "Legacy Well." The second well was constructed in the NWSE, Section 11, Township 4 North, Range 1 West. This well will be referred to hereafter as Well no. 2, or the "Eaglefield Well."

15. An aquifer pump test was conducted from approximately May 25 through June 19, 2006, by pumping the Eaglefield Well and monitoring water levels in other wells. The test was conducted in three separate phases. Background testing was conducted for seven days prior to the pump test. A seven-day constant rate pump test commenced on June 2 and ended on June 9 at a pumping rate of 1,580 gallons per minute ("gpm"). Following pumping, water levels were measured for seven days following the end of the pumping period to determine recoveries of ground water levels without pumping.

16. Eagle monitored the water levels in eight wells. One of the monitoring wells was the pumping well (Eaglefield Well). Water levels in the Legacy Well were monitored. Water levels in six other privately owned wells were also monitored. Other parties to this contested case were not given an opportunity to participate in the test and monitor their own wells during the test.

17. Eagle submitted to IDWR a report titled *City of Eagle, Idaho 7-Day Aquifer Test*. The report was received into evidence as Eagle Exhibit 14. Copies of the aquifer test were made available to the parties.

18. IDWR staff reviewed the report. In a staff memorandum dated November 29, 2006, staff found several deficiencies in the report. The staff memorandum stated, among other things, the following:

a. A higher pumping rate than was originally proposed for the lower yielding Monitoring Well # 1 (Legacy Well) could and should have been used to stress the system. If Eagle had done so, the effect on other nearby wells and possible boundary conditions would have been more clearly identified.

b. Site hydrogeology should have been consulted to determine whether the test data and conceptual models were reasonable.

c. Other factors such as water level trends, barometric pressure fluctuations, and fluctuations caused by nearby pumping wells should have been examined and used to correct and/or interpret the test data.

d. Tables should have been prepared to identify the various wells and their construction characteristics. Methods of analysis other than the Theis Equation should have been employed. This would have verified the results of the Theis estimates. Use of other methods would have better analyzed the water level recovery data.

e. Significant differences in the values estimated for storativity were not well explained.

f. Some water levels recovered to an elevation higher than the initial static water level.

19. The above deficiencies were discussed at the hearing. As a result of these concerns, the hearing officer allowed additional analysis of data and information following the conclusion of the presentation of evidence.

20. Ground water levels measured in a well owned by Ricks (referred to as Monitoring Well no. 6 in *City of Eagle, Idaho 7-Day Aquifer Test*) showed some signs of a boundary condition. The Ricks well began a steeper decline in water levels approximately four to five days into the pump test. Because the rate of pumping of the Eaglefield Well was not as high as it could have been, and because the pumping test was of somewhat short duration, this possibility of boundary conditions was never explored.

21. In an addendum to its original report submitted to the hearing officer after the hearing, Eagle addressed some of the concerns raised by IDWR staff. As a result, IDWR staff issued a supplemental staff memorandum dated February 27, 2007. The author of the supplemental memorandum, Sean Vincent, wrote the following:

1. The water level and aquifer test data presented in the Addendum generally support the authors' primary conclusion (i.e., the deep sand layers that are targeted for production have sufficient capacity for additional withdrawals). The fact that static water levels in the deep system near the area of proposed development are above land surface and appear to be relatively stable suggest that the deep aquifer system is not currently in a state of overdraft.
2. An exception to the relatively stable water level trend described above is the hydrograph for Well 04N01W-31AAA1, which is located approximately 5 miles southwest of the area of proposed development. The water level in this well has declined by approximately 10 to 15 feet since 1970. Because the aquifer strata are dipping, however, this 462-foot deep well may not be producing from the same aquifer system that is targeted for the development by the City of Eagle.
3. The inclusion of a conceptual hydrogeologic model, hydrographs for area wells, and additional analyses using the Cooper-Jacob (1946) and Theis (1935) residual drawdown methods, significantly improves the value of the aquifer test as a basis for evaluating the water supply.
4. As discussed in the Addendum, semilogarithmic plots of drawdown and residual drawdown suggest that both positive (recharge) and negative (finite aquifer) boundaries affected the test data. The observed behaviors are consistent with the conceptual model of a finite, confined aquifer that receives recharge from the surrounding uplands. Given the available data,

application of the Theis (1935) solution to estimate the aquifer properties is appropriate for this hydrologic setting.

5. The Addendum also includes calculations for estimating potential impacts to existing wells. The calculations, which also are based on the Theis (1935) solution, are conservative in that they neglect to account for aquifer recharge but non-conservative in that they are premised on the assumption of an infinite aquifer.
6. The 1-year timeframe for evaluating impacts to existing wells is appropriate, in my opinion, and is consistent with guidance for determining yield for public drinking water supply wells (IDEQ, 2007). The ranges of transmissivity and storativity values used to estimate drawdown also are appropriate based on available information.
7. I verified that the drawdown estimates presented in Table 4 of the Addendum were calculated correctly using the series approximation of the Theis (1935) solution and the assumed input values.
8. Although the data analysis provides the basis for estimating hydraulic properties for the target aquifer system, the aquifer test was not of sufficient duration to definitively evaluate aquifer boundary conditions and long-term impacts associated with pumping. As recommended in the Addendum (Recommendations 15 and 16), a long-term water level and discharge rate monitoring program should be implemented if the water right applications are approved in order to evaluate water level trends as affected by pumping. Dedicated upgradient and downgradient monitoring wells that are completed in the deep aquifer system within the zone of influence of the aquifer test are recommended.

22. The hearing officer adopts the Vincent analysis text quoted above as findings of fact. The hearing officer specifically finds that “static water levels in the deep system near the area of the proposed development are . . . relatively stable and suggest that the deep aquifer is not currently in a state of overdraft.” The hearing officer also specifically finds that the evaluation of draw downs in other wells from pumping by Eagle using the Theis analysis is reasonable.

23. Ground water underlying the location of the proposed wells resides in three aquifers separated by discontinuous clay aquatards. The discontinuity of the impervious clay strata allows some communication between the aquifers. This communicative relationship between the aquifers will be discussed in subsequent findings.

24. The shallow aquifer is a water table aquifer extending from land surface to approximately 100 feet below land surface. The intermediate aquifer is generally found from 100-200 feet below ground surface and is at least semi-confined. The deep aquifer is located at depths below approximately 200 feet and is under artesian pressure. There may also be deeper aquifers, including geothermal aquifers.

25. The production zones for two of the test wells are completed in the shallow aquifer. The production zones for three of the test wells are completed in the intermediate aquifer. The Eaglefield Well, the Legacy Well, and one of the United Water wells are completed in the deep aquifer. Evidence at the hearing established that a United Water intermediate aquifer well and a United Water deep aquifer well were completed within the same borehole. Upon construction, United Water nested strings of casing inside a single well. The casing for the monitoring well identified as having been constructed into the deep aquifer monitoring well commingled the intermediate and deep aquifers together, resulting in a mixing of water from the intermediate and deep aquifers, and also mixing the pressures of the two zones. This commingling probably skewed the data gathered from the United Water deep aquifer well. As a result, the only direct measurements of draw downs in the deep aquifer caused by pumping are the measurements of draw downs for the Legacy well.

26. Eagle Exhibit 8 is a summary of the potential effects on the protestants' wells of pumping the proposed Eagle wells at various flow rates.

27. Eagle Exhibit 24 contains information about the protestants' wells and tables estimating draw downs using the Theis equation at various radial distances from a producing well in the three different aquifers, the shallow aquifer, the intermediate aquifer, and the deep aquifer.

28. Table 1 of Eagle Exhibit 24 is an estimate of potential draw down in the shallow aquifer based on various pumping rates and distance from the pumping well. The estimates were calculated by multiplying Theis equation draw downs by a multiplier of 0.116. The 0.116 multiplier is an arbitrary number that has no basis in scientific or technical literature nor is it derived from actual data. Nonetheless, there is limited communication between the shallow, intermediate, and deep aquifers, and the separation between the shallow aquifer and the deep aquifer production zone significantly reduces the communication. The hearing officer determines there is little effect on the shallow aquifer by pumping from the deep aquifer.

29. Table 2 of Eagle Exhibit 24 is an estimate of potential draw downs in the intermediate aquifer resulting from continuous pumping at various flow rates and distances from the deep aquifer. The draw downs were calculated by multiplying the Theis equation draw down values by 0.5. The 0.5 multiplier has no basis in technical literature or data analysis. The hearing officer determines there is a direct hydraulic relationship between the intermediate aquifer and the deep aquifer from which Eagle proposes to produce water. Although the direct relationship may be limited by the separation from the deep aquifer, the degree of the limitation was not established. As a result, the hearing officer assumes the full Theis equation draw downs will occur in the intermediate aquifer without applying a fractional multiplier, and will use a modification of Table 3 of Eagle Exhibit 24 to determine the impacts of pumping the proposed wells on wells constructed in the intermediate aquifer.

30. Table 3 of Eagle Exhibit 24 contains results of a direct Theis equation calculation of draw downs at various flow rates and distances from the pumping well for continuous pumping over a period of 365 days. Pumping from the deep aquifer will directly and adversely affect other nearby water users diverting from the deep aquifer.

31. Water residing in the intermediate and deep aquifers in the area of proposed well construction is under artesian pressure. Artesian pressure in the deep aquifer causes water to rise above land surface in wells constructed with a production zone in the deep aquifer. These artesian pressures have been used by some of the protestants to supply water to their beneficial uses.

32. The following is a table of the active protestants' names, water right priorities/date of construction, and the depth of their wells. Some of this information is taken from Eagle Exhibit 24.

Protestant	Water Right	Priority - Construction	Distance from Nearest Proposed Eagle Well	Comments
Dean & Jan Combe	63-2858A	8/5/1956	5,900 ft	Well is 65 feet deep
Mike Dixon	63-2957 63-2958 63-31988	8/28/1953 8/28/1953 3/1/1976		No information about the depth or number of wells was presented at the hearing
Charles Howarth	Domestic (not recorded)	2002	1,399 ft	Well is 333 feet deep
Corrin & Terry Hutton	Domestic		11,992 ft	Well is 115 feet deep
Charles W. Meissner	Three wells. Well logs for two of the wells. No recorded water rights.	July 1981 July 1970	4,800 ft	Well is 90 feet deep Well is 103 feet deep
Mike Moyle	63-2546 63-2609	12/12/1959 2/15/1944	5,643 ft to 7,200 ft	Six wells, all completed in the deep aquifer
Eugene Muller	63-22650	7/25/1887	3,286 ft	Well was initially completed in the shallow aquifer. The well was redrilled in 1979, and now the production zone is in the deep aquifer
Dana & Viki Purdy	63-2920 63-15680 63-22652	1/2/1953 6/1/1900 6/1/1967	3,390 ft 2,700 ft approx. 2,640 ft	Well is 90 feet deep Well is 250 feet deep Well is 120 feet deep
Sam & Kari Rosti	Domestic (not recorded) 63-11715	1980 1992	3,444 ft	Well is 255 feet deep Well is 445 feet deep

Jerry & Mary Taylor	63-5040	3/1/1941	5,997 ft.	Wells completed in the shallow aquifer
	63-2858B	6/10/1951		
	63-17523	6/1/1960		
	63-3296	6/5/1962		
	63-32189	3/31/1976		

33. Given Eagle's projected growth, 2.23 cfs is the flow rate needed for the near continuous water demand for Eagle's anticipated expansion. The residual flow of 6.68 cfs is for the occasional and sporadic fire protection use.

34. Pumping of Eagle's proposed wells at a rate of 2.23 cfs will reduce the artesian pressure in wells constructed in the deep aquifer. Pumping will also reduce artesian pressures in wells constructed in the intermediate zone.

35. The relationship between the rate of pumping and the draw downs is linear. In other words, a change in the pumping rate will result in a proportional change in the draw down.

36. The draw downs at various distances in Table 3 of Eagle Exhibit 24 can be extrapolated to determine draw downs at various distances if Eagle continuously pumped 2.23 cfs for 365 days. The proportional draw downs are as follows:

Distance from Pumping Well (ft)	Calculated Water Level Draw Down from Pumping 2.23 cfs for 365 Days (ft)	Distance from Pumping Well (ft)	Calculated Water Level Draw Down from Pumping 2.23 cfs for 365 Days (ft)
1,200	6.19	4,500	4.03
1,400	5.93	5,000	3.87
1,600	5.70	6,000	3.87
1,800	5.52	7,000	3.32
2,000	5.35	8,000	3.11
2,500	5.00	9,000	2.92
3,000	4.69	10,000	2.75
3,500	4.43	15,000	1.36
4,000	4.23		

Moyles

37. Joseph, Lynn, and Mike Moyle own six wells constructed in the deep aquifer that flow under artesian pressure. Four of the wells are described as points of diversion by water rights nos. 63-2546 and 63-2609, bearing priority dates of 1939 and 1943, respectively. A fifth well is the point of diversion for an unrecorded domestic use for a home built by Joseph and Lynn Moyle

in approximately 1970. The sixth well was constructed in 1997 to supply water to Mike Moyle's home.

38. Moyles have measured the closed-in pressure in the wells at 10 pounds per square inch ("psi"). Ten psi correlates to a water level or pressure head of approximately 21 feet. The flowing artesian wells have supplied stock water for as many as 43,000 mink on the Moyle property. In addition, the Moyle wells have provided, by artesian pressure, irrigation water and water for commercial refrigeration and cooling. Finally, the flowing artesian wells provide domestic water for several homes. In some locations, small, relift pumps increase the pressure for commercial and domestic uses.

39. The four Moyle wells described by decreed or claimed water rights are remote from an electrical supply. As a result, pumping the wells would be difficult if the artesian pressure is lost.

40. As artesian pressure declines, the flow from the artesian wells will decrease. During the end of June 2006 or the first part of July 2006, the pressure dropped in some of the artesian wells. Moyles discovered that artesian water was not flowing to the end of the water lines providing drinking water for the mink. As a result, some of the mink died from lack of water.

41. If Moyles' nearest well is approximately 5,643 feet away from a new well pumping continuously at a flow rate of 2.23 cfs, the table in Finding of Fact no. 36 predicts a decline in artesian pressure of approximately 3.9 feet. A reduction from an artesian pressure head of 21 feet down to 17.1 feet may reduce the flow needed to supply the domestic, commercial, stockwater, and irrigation needs for Moyles.

42. The flow rate discharging from an artesian well will generally change as a function of the square root of the changed pressure head reading divided by the original pressure head reading. Because the relationship between change in head and flow is not linear, the reduction in flow at the well head will be smaller than the corresponding reduction in pressure head.

43. Other factors may be more important than the actual change in flow at the well head, however. For instance, (1) a delivery system could be long enough that friction losses and other minor losses within the system could significantly reduce the flow discharging at a point of delivery, or (2) the elevation from the well head to the point of delivery might increase enough that a small change in pressure head at the well could cause water to cease flowing at the point of delivery.

Muller

44. Eugene Muller holds water right no. 63-22650. The original well was constructed to a depth of 70 feet, and the production zone was in the shallow aquifer. In 1979, the well could no longer provide water for Muller's beneficial use, and Muller dug a new well in the deep aquifer. The new well is a flowing artesian well.

45. Muller testified that water flowed from the original well. His testimony is inconsistent with the described characteristics of the shallow aquifer. Nonetheless, any loss of pressure or water level in the original well occurred prior to 1979 when the original well failed, requiring construction of a new well in the deep aquifer.

Howarth

46. In approximately 2001 or 2002, Charles Howarth constructed a domestic well in the deep aquifer. The domestic well is under artesian pressure, maintaining 3 to 7 psi of pressure.

Meissner

47. Charles Meissner, Jr. owns three wells. One of the wells is completed in the shallow aquifer at a depth of 90 feet.

48. A second well was constructed to a depth in excess of 103 feet (See Protestants Exhibit 404, second page) in 1970, and is used for domestic and stockwater purposes. This well will be referred to as the "Double R Cattle Well." The well casing is not perforated, and the water in the well is derived from the bottom of the casing. The casing passes through a significant layer of clay from 70 to 85 feet in depth that probably acts as an aquatard. The water underlying the aquatard is under artesian pressure, but the water does not flow above land surface. The production zone for the well is completed in the intermediate aquifer.

49. The table contained in Finding of Fact no. 36 establishes that, at a distance of 4,800 feet from the nearest proposed Eagle well and at a continuous pumping rate of 2.23 cfs, water levels in the Double R Cattle Well will decline approximately four feet.

50. The depth and other information about Meissner's third well was not presented, except Meissner speculated that the well has collapsed.

Purdy

51. Dana and Viki Purdy hold water right no. 63-2920 authorizing irrigation from ground water. The point of diversion is a well approximately 90 feet deep. Purdys pump supplemental ground water for irrigation when surface water is not available for irrigation. The water right for the irrigation well bears a priority date of 1953, but is constructed in the shallow aquifer.

52. Water right no. 63-15680 authorizes use of water for domestic and stockwater purposes and bears a priority date of June 1, 1900. The well is constructed to a depth of 250 feet. Viki Purdy testified that the well has been in place during several decades she has lived on the Purdy farm and that the well had not been worked on or replaced. Water in the well is under artesian pressure but does not free flow. The production zone for this well is most likely completed in the deep aquifer.

53. The table contained in Finding of Fact no. 36 establishes that, at a distance of 2,700 feet from the nearest proposed Eagle well and at a continuous pumping rate of 2.23 cfs, water levels in the well for water right no. 63-15680 will decline approximately five feet.

54. Water right no. 63-22652 authorizes a stockwater use, and bears a priority date of June 1, 1967. The point of diversion for water right no. 63-22652 is a well drilled to a depth of 120 feet. The well is constructed in the intermediate aquifer. Water in the well is under artesian pressure, but water does not free flow at ground surface. The well was constructed in 1966.

55. The table contained in Finding of Fact no. 36 establishes that, at an approximate distance of 2,640 feet from the nearest proposed Eagle well and at a continuous pumping rate of 2.23 cfs, water levels in the well for water right no. 63-22652 will decline approximately five feet.

56. A well log for another well associated with a home owned by Dana Purdy's mother was received into evidence. The well was drilled in 1991.

Taylor

57. Jerry and Mary Taylor own several water rights. Three of the water rights authorize a total irrigation of 17 to 18 acres. Another water right authorizes domestic use. The Taylor wells described by these four water rights are completed in the shallow aquifer.

58. Claim no. 63-5040 is for a domestic/commercial use in the City of Star. The point of diversion described by claim no. 63-5040 is in excess of two miles (between 10,000 and 15,000 feet) away from the nearest well proposed for construction by Eagle. The well is sufficiently distant from the proposed Eagle wells that water levels in the well identified by claim no. 63-5040 would decline by, at most, one to two feet.

Combe

59. Dean and Jan Combe hold a water right for a domestic use from a well with a priority date of August 5, 1956. The well is 65 feet deep, and is completed in the shallow aquifer.

Rosti

60. Sam and Kari Rosti own a domestic well drilled in 1980. In addition, they own a 445 foot deep irrigation well completed in the deep aquifer drilled in 1992.

Boise River

61. Diversion of water from the deep aquifer would have little or no effect on the Boise River in the reach from Lucky Peak to just below Star Bridge. The flows of the Boise River in this zone are affected primarily by water residing in the shallow aquifer. Water in the deeper zones is separated by an aquatard or several aquatards. Water in the deep aquifer migrates westerly toward the Snake River.

CONCLUSIONS OF LAW

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

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

2. The applicant bears the ultimate burden of proof regarding all the factors set forth in Idaho Code § 42-203A.

3. Idaho Code § 42-111 defines the phrase “domestic purposes.” Stockwater use of up to 13,000 gallons a day is recognized as use of water for domestic purposes.

4. In 1951, the Idaho Legislature enacted legislation known as the Ground Water Act. In 1953, the Idaho Legislature amended the Ground Water Act. The 1953 amendment recognized that ground water rights would be administered according to the prior appropriation doctrine, but that prior water rights should not prevent the full economic development of the ground water resources of the State of Idaho, and that ground water appropriators would be required to pump from a “reasonable pumping level” established by the Department. In 1978, the Idaho Legislature amended the Ground Water Act again. The 1978 amendment expressly stated that domestic water rights are subject to the reasonable economic pumping level standard.

5. In *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), the Idaho Supreme Court determined that a later in time appropriator should be enjoined from pumping ground water for irrigation that almost immediately dried up a domestic well located nearby. The court held that the water right for the domestic well was perfected prior to the irrigation water right and before the reasonable pumping level standard was applied to domestic beneficial uses, and that the domestic water right holder was entitled to the protection of the ground water pumping level existing prior to pumping by the junior appropriator. The court held that the injunction was not permanent, and could be absolved upon full compensation by the junior appropriator for the cost of deepening the senior appropriator’s well and payment of the costs of additional equipment and energy.

6. The Idaho Supreme Court stated in *Parker v. Wallentine*:

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

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

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

103 Idaho at 514.

7. Under *Parker*, if (1) pumping of ground water by junior ground water appropriators causes declines in pumping water levels in wells of the senior water right holders because of local well interference, and (2) the water rights held by the senior water right holders bear priority dates earlier than 1953, or 1978 for domestic water rights, the holders of the senior water rights are, at a minimum, entitled to compensation for the increased costs of diverting ground water caused by the declines in ground water levels.

8. The extent to which *Parker* provides protection to the protestants' water rights depends on proof of injury and similarities to the facts of the *Parker* case.

9. In *Parker*, the owner of the domestic well was unable to divert water from the domestic well within minutes of when the junior priority right holder began pumping ground water. The proof of the lowered water table caused by pumping from the irrigation well that resulted in inability to pump water from the domestic well was established through testimony about the effects of the initial pumping from the Wallentine well and by a pump test conducted by the parties and the Department.

10. In an administrative hearing for an application to appropriate water, the applicant bears the burden of proving that the proposed use of water will not injure other water rights. If a protestant seeks the protection of *Parker* that would insulate the protestant from the reasonable pumping level standard of the Ground Water Act, however, the protestant must come forward

with evidence that: (1) the protestant is the holder of a water right that is not subject to the reasonable pumping standard of the Ground Water Act, and (2) the protestant's diversion equipment and facilities are capable of diverting the protestant's water right at the ground water levels at or about the time the application is being considered. Once the protestant comes forward with the information, the applicant ultimately bears the burden of proving that the proposed use of water will not injure the protestant under the *Parker* standard. If there are additional facts necessary to establish the extent of injury that can most equitably be provided by the party seeking *Parker* protection, the party seeking *Parker* protection may be required to provide the factual information.

11. Pumping of 2.23 cfs will not cause water level declines in area wells below a level that is reasonable.

12. The following describes how *Parker* applies to each of the active protestants.

Moyles

13. The priority dates of water rights held by Moyle predate the 1953 amendment of the Ground Water Act subjecting subsequent appropriations of water to the reasonable pumping level standard. Moyles are entitled to protection of their historical water levels in the four wells recorded by their water rights and in one other domestic well associated with a home owned by Joseph and Lynn Moyle. Evidence presented established that Moyles were receiving water under artesian pressure at the time Eagle filed its applications and during the summer preceding the hearing.

14. In order to avail themselves of *Parker* protection, on or before August 1, 2008, Moyles must test each of their wells to determine the actual reduction in delivered flow for their beneficial uses resulting from a pressure head reduction of four feet, or a direct pressure reduction of approximately 1.7 pounds per square inch. Moyles must notify Eagle when the tests will be conducted, must submit a plan for conducting the test to Eagle and the Department, and Moyles must allow Eagle to participate in the tests.

15. Following the results of the tests, Eagle must (a) be ready and able to supply the tested loss of water flow in the Moyle wells for uses of ground water from the five Moyle wells entitled to *Parker* protection at no cost to Moyles except the cost for incidental electricity that adds pressure to the water supply for domestic and commercial uses; or (b) acquire all or a portion of the water rights from Moyles corresponding to the tested loss of flow, possibly through condemnation. Following a determination of the loss of water flow resulting from a reduction in pressure, if Eagle decides not to acquire all or a portion of Moyle's water rights, Eagle must complete one of the following: (a) physically connect Moyle's water delivery system to Eagle's municipal water system; or (b) with Moyles' consent, place the necessary pumps in the Moyle wells and/or delivery system, supply the power for the pumps, construct or install any other physical features, including running power to the wells, and at the same time, insure the water supply to Moyles' beneficial uses is not interrupted; or (c) drill new wells that will supply the water to Moyles' beneficial uses and construct and install all necessary features. Eagle must

pay all construction and equipment costs, maintenance, and power costs, except for the electricity costs described above to add additional pressure for domestic and commercial uses.

Muller

16. The priority date for water right no. 63-22650 (1887), owned by Eugene Muller, predates the 1953 amendment to the Ground Water Act that subjects water rights to the reasonable pumping level standard. The original well for water right no. 63-22650 was constructed in the shallow aquifer. In 1979 Muller constructed a new well in the deep aquifer. *Parker* would only protect Muller's water right from injury to water levels in the shallow aquifer. The hearing officer determines that pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. Any water levels (or pressures) in a new well constructed in 1979 are subject to the reasonable pumping level standard established by the 1978 amendment to the Ground Water Act as it relates to domestic water rights.

Howarth

17. Charles Howarth constructed a domestic well in the deep aquifer in approximately 2001 or 2002. The domestic well is under artesian pressure, maintaining 3 to 7 psi of pressure. Howarth's well is subject to the reasonable pumping level standard established by the 1978 amendment to the Ground Water Act as it relates to domestic water rights.

Meissner

18. One of Meissner's three wells derives water from the shallow aquifer. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer.

19. The Double R Cattle Well is a domestic well and is entitled to *Parker* protection because its use predates the recognition of reasonable ground water pumping levels under the 1978 amendment to the Ground Water Act.

20. The Double R Cattle Well is completed in the intermediate aquifer. Because Eagle did not satisfy its burden of proving the relationship between the intermediate and the deep aquifer, the hearing officer will assume that the Theis equation draw downs apply directly to the intermediate aquifer. Under *Parker*, Eagle must compensate Meissner for the additional costs of pumping resulting from declines in water levels caused by Eagle's pumping. To avail himself of the benefits of *Parker*, on or before August 1, 2008, Meissner must semiannually measure static water levels in the Double R Cattle Well. Meissner must allow Eagle the opportunity to observe or independently measure water levels in the Meissner well. If Meissner monitors static water levels in his well and can show that water levels decline in the well after Eagle begins pumping water, Eagle must compensate Meissner for the additional cost of pumping from up to four feet of water level declines, including costs of lowering a pump, if necessary. If the well dries up within the four feet of water level declines, Eagle must either: (a) provide water service to Meissner through its municipal water system; or (b) redrill a well for Meissner and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire

Meissner's water right, perhaps through condemnation. The depth of the third Meissner well is unknown.

21. Meissner had the burden to show that he holds a water right for a third well bearing a priority date that would qualify for *Parker* protection. Meissner did not satisfy his burden of proof for the third well.

Purdy

22. Dana and Viki Purdy own an irrigation well that is approximately 90 feet deep and is pumped to supply supplemental ground water for irrigation when surface water is not available. The water right for the irrigation well bears a priority date of 1953. Pumping from the deep aquifer will not injure water right no. 63-2920 because Purdys divert ground water from the shallow aquifer. The water level in the Purdy irrigation well is not entitled to *Parker* protection.

23. The well for water right no. 63-15680 is a domestic well entitled to *Parker* protection of ground water levels.

24. The point of diversion for water right no. 63-15680 is a well drilled to a depth of 250 feet. The well is probably completed in the deep aquifer, although the well does not free flow at land surface. Under *Parker*, Eagle must compensate Purdys for the additional costs of pumping resulting from declines in water levels caused by Eagle's pumping. In order to avail themselves of the benefits of *Parker*, on or before August 1, 2008, Purdys must begin semiannual measurements of the static water levels in the well for water right no. 63-15680. Purdys must allow Eagle the opportunity to observe or independently measure water levels in the well. If Purdys monitor static water levels in the well and can show that water levels decline in the well after Eagle begins pumping water, Eagle must compensate Purdys for the additional cost of pumping from up to five feet of ground water declines, including costs of lowering a pump, if necessary. If the well dries up within the predicted five feet of ground water declines, Eagle must either: (a) provide free municipal water service to Purdys; or (b) redrill a well for Purdys and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire water right no. 63-15680, perhaps through condemnation.

25. Water right no. 63-22652 authorizes domestic and stockwater use, and bears a priority date of June 1, 1967. The well for water right no. 63-22652 is a domestic well entitled to *Parker* protection of ground water levels.

26. The point of diversion for water right no. 63-22652 is a well drilled to a depth of 120 feet. The well is constructed in the intermediate aquifer. Water in the well is under artesian pressure, but water does not free flow at ground surface. The well was constructed in 1966. Under *Parker*, Eagle must compensate Purdys for the additional costs of pumping resulting from declines in water levels caused by Eagle's pumping. To avail themselves of the benefits of *Parker*, on or before August 1, 2008, Purdys must begin semiannual measurements of the static water levels in the well for water right no. 63-22652. Purdys must allow Eagle the opportunity to observe or independently measure the water levels in their well. If Purdys monitor static water levels in their well and can show that water levels decline in the well after Eagle begins pumping

water, Eagle must compensate Purdys for the additional cost of pumping from up to five feet of ground water declines, including costs of lowering a pump, if necessary. If the well dries up within the predicted five feet of ground water declines, Eagle must either: (a) provide free municipal water service to Purdys; or (b) redrill a well for Purdys and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire water right no. 63-22652, perhaps through condemnation.

27. Purdys also presented evidence about a well supplying water to Dana Purdy's mother's home. This well was drilled after domestic wells were subjected to the reasonable pumping level standard.

Taylor

28. All but one of the Taylor wells are completed in the shallow aquifer. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. The water levels in the shallow Taylor wells are not entitled to *Parker* protection.

29. The well described as a point of diversion by water right no. 63-5040 is entitled to *Parker* protection. The well is located in excess of two miles away from the nearest proposed Eagle well. Ground water levels in the well described by water right no. 63-5040 will not decline sufficiently as a result of pumping as proposed by Eagle to require compensation.

Combe

30. The Combe well is 65 feet deep, and within the shallow aquifer. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. The water level in the Combe well is not entitled to *Parker* protection.

Rosti

31. Rostis own a domestic well drilled in 1980. The Rosti domestic well was drilled after the 1978 amendment to the Ground Water Act that subjected domestic wells to the reasonable pumping level. The Rosti domestic well is not entitled to *Parker* protection of ground water levels.

32. The Rosti irrigation well completed in the deep aquifer was drilled in 1992. The Rosti irrigation well was constructed after the 1953 amendment to the Ground Water Act. The Rosti irrigation well is not entitled to *Parker* protection of ground water levels.

33. Water levels and pressures are not declining significantly in the area where water is sought for appropriation. Nonetheless, IDWR staff raised concerns about limitations of the pump test. Furthermore, in its addendum to the pump test report, Eagle recognized some of the uncertainties about sufficiency of the water supply and injury and recommended further ground water monitoring. IDWR staff recommended the construction/identification by Eagle of two observation wells, one up-gradient and one down-gradient of the proposed wells. In addition, Eagle must develop a monitoring, recording, and reporting plan for the observation wells.

34. By compensating the protestants entitled to protection of water levels/pressures under *Parker*, and by monitoring ground water levels during pumping, the proposed appropriation by Eagle will not injure other water users.

35. There is sufficient water for the purposes sought by Eagle's applications. The additional monitoring of the two dedicated observation wells will insure that the deep aquifer in the area is not overappropriated.

36. The application is not filed in bad faith or for purposes of speculation or delay.

37. Eagle has sufficient monetary resources to complete the project.

38. The proposed project is in the local public interest.

39. The proposal conserves the water resources of the state of Idaho because irrigation and other outside uses of water will be provided primarily by other water rights.

ORDER

IT IS HEREBY ORDERED that applications to appropriate water nos. 63-32089 and 63-32090 are **Approved** subject to the limitations and conditions set forth below.

IT IS FURTHER ORDERED that the beneficial uses and flows rates authorized are as follows:

Municipal	2.23 cfs
Fire Protection	6.68 cfs
Total	8.91 cfs

IT IS FURTHER ORDERED that the approved applications to appropriate water nos. 63-32089 and 63-32090 are subject to the following conditions:

Proof of application of water to beneficial use shall be submitted on or before **October 1, 2012**.

In connection with the proof of beneficial use submitted for this permit, the permit holder shall also submit a report showing the total annual volume, the maximum daily volume, and the maximum instantaneous rate of flow diverted from the point of diversion authorized for this permit during the development period. The report shall also show the maximum instantaneous rate of diversion, either measured or reasonably estimated by a qualified professional engineer, geologist, or certified water rights examiner, for the entire City of Eagle municipal water system. The report shall also describe and explain how water diverted under this permit provides an additional increment of beneficial use of water for the City of Eagle municipal water system as opposed to an alternative point of diversion for prior water rights already held and used by the City of Eagle for its municipal water system.

Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

Subject to all prior water rights.

Place of use is within the service area of the City of Eagle municipal water supply system as provided for under Idaho Law.

Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department as part of the diverting works.

Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.

The water right holder shall compensate Moyles for reductions in artesian flow rates delivered for Moyles' beneficial uses caused by reductions in pressure (water levels) in the four flowing artesian wells identified as points of diversion for water right nos. 63-2546 and 63-2609, and for the flowing artesian well for domestic use of water in the home presently owned by Joseph and Lynn Moyle. In order to avail themselves of *Parker* protection, however, on or before August 1, 2008, Moyles must test each of their wells to determine the actual reduction in delivered flow for their beneficial uses resulting from a pressure head reduction of four feet, or a direct pressure reduction of approximately 1.7 pounds per square inch. Moyles must prepare a written proposal of how the test will be conducted and submit the proposal to the Department and the water right holder. The Department must approve the test proposal. Moyle must notify the Department and the water right holder of the date and time of the tests, and Moyles must allow the water right holder and the Department to participate in the tests.

Following the determination of the reduction in flow caused by a reduction in pressure head, the water right holder shall (a) be ready and able to supply the tested loss of water flow for uses of ground water from the five Moyle wells entitled to *Parker* protection at no cost to Moyles except the cost for incidental electricity that adds pressure to the water supply for domestic and commercial uses; or (b) acquire all or a portion of the water rights from Moyles corresponding to the tested loss of flow, possibly through condemnation. Following a determination of the loss of water flow resulting from a reduction in pressure, if the right holder decides not to acquire all or a portion of Moyles' water rights, the right holder shall complete one of the following: (a) physically connect Moyles' water delivery system to the right holder's municipal water system; or (b) with Moyles' consent, place the necessary pumps in the Moyle wells and/or delivery system, supply the power for the pumps, construct or install any other physical features, including running power to the wells, and at the same time, insure the water supply to Moyles' beneficial uses is not interrupted; or (c) drill new wells that will supply the water to Moyles' beneficial uses and construct and install all necessary features. The right holder shall pay all construction and

equipment costs, maintenance, and power costs, except for the electricity costs described above to add additional pressure for domestic and commercial uses.

The right holder shall compensate Meissner for additional costs of pumping from the Double R Cattle Well because of declines in water levels caused by pumping from the authorized points of diversion. To avail himself of the benefits of *Parker*, on or before August 1, 2008, Meissner must semiannually measure static water levels in the Double R Cattle Well. Meissner must allow the right holder the opportunity to observe or independently measure water levels in the Meissner well. If Meissner monitors static water levels in his well and can show that water levels continue to decline in the well after the right holder begins pumping water, the right holder must compensate Meissner for the additional cost of pumping from up to four feet of water level declines, including costs of lowering a pump, if necessary. If the well dries up within the four feet of water level declines, the right holder must either: (a) provide water service to Meissner through its municipal water system; or (b) redrill a well for Meissner and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire Meissner's water right, perhaps through condemnation.

The right holder must compensate Purdys for the additional costs of pumping from the well described as a point of diversion by water right no. 63-15680. To avail themselves of the benefits of *Parker*, on or before August 1, 2008, Purdys must semiannually measure the static water levels in the well for water right no. 63-15680. Purdys must allow the right holder the opportunity to observe or independently measure water levels in the well. If Purdys monitor static water levels in the well and can show that water levels decline in the well after the right holder begins pumping water, the right holder must compensate Purdys for the additional cost of pumping from up to five feet of ground water declines, including costs of lowering a pump, if necessary. If the well dries up within the five feet of ground water declines, the right holder must either: (a) provide free municipal water service to Purdys; or (b) redrill a well for Purdys and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire water right no. 63-15680, perhaps through condemnation.

The right holder must compensate Purdys for the additional costs of pumping from the well described as a point of diversion by water right no. 63-22652. To avail themselves of the benefits of *Parker*, on or before August 1, 2008, Purdys must semiannually measure the static water levels in the well for water right no. 63-22652. Purdys must allow the right holder the opportunity to observe or independently measure water levels in the well. If Purdys monitor static water levels in the well and can show that water levels decline in the well after the right holder begins pumping water, the right holder must compensate Purdys for the additional cost of pumping from up to five feet of ground water declines, including costs of lowering a pump, if necessary. If the well dries up within the five feet of ground water declines, the right holder must either: (a) provide free municipal water service to Purdys; or (b) redrill a well for Purdys and pay for the equipment, construction, installation, and additional energy costs to pump the well; or (c) acquire water right no. 63-22652, perhaps through condemnation.

Prior to diversion of water under this right, the right holder shall construct/identify two observation wells, one up-gradient and one down-gradient of the production wells under this right. The location and construction must be approved by the Department. Each observation

well must be constructed so that water levels in each of the three aquifers can be independently measured.

Prior to diversion of water under this right, the right holder shall develop and the Department must approve, a monitoring, recording, and reporting plan for the observation wells.

The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.

The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

The wells constructed at the points of diversion shall be constructed in accordance with the rules of the Idaho Department of Water Resources regarding well construction standards and measurement of diversions and the rules of the Department of Environmental Quality for Public Drinking Water Systems, IDAPA 58.01.08.

IT IS FURTHER ORDERED that the request for oral argument filed by Muller and Howarth is **Denied**.

Dated this 3rd day of October, 2007.



Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4/24 day of October, 2007, a true and correct copy of the foregoing document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Amended Preliminary Order and Explanatory Sheet for
"Responding to Preliminary Orders..." when a hearing was held.

JERRY & MARY TAYLOR
3410 HARTLEY
EAGLE ID 83616

CORRIN & TERRY HUTTON
10820 NEW HOPE RD
STAR ID 83669

SAM & KARI ROSTI
1460 N POLLARD LN
STAR ID 83669

LEEROY & BILLIE MELLIES
6860 W STATE ST
EAGLE ID 83616

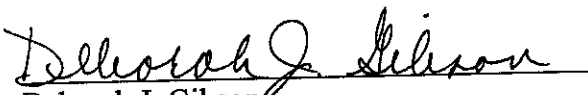
DEAN & JAN COMBE
6440 W BEACON LIGHT
EAGLE ID 83616

BRUCE M SMITH
MOORE SMITH BUXTON TURKE
225 N 9TH STE 420
BOISE ID 83702

JOHN M MARSHALL
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720

CHARLES L HONSINGER
DANIEL V STEENSON
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773

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


Deborah J. Gibson
Administrative Assistant

SECOND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2007, a true and correct copy of the foregoing document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Amended Preliminary Order and Explanatory Sheet for
"Responding to Preliminary Orders..." when a hearing was held.

DANA & VICKI PURDY
5926 FLOATING FEATHER
EAGLE ID 83616


Deborah J. Gibson
Administrative Assistant