

**STARTING
LEFT
SIDE OF
FILE**

State of Idaho
Department of Water Resources
Permit to Appropriate Water

NO. 65-13912

Priority: August 2, 1999

Maximum Diversion Rate: 0.50 CFS

This is to certify, that CAROL LYNN MAC GREGOR
1109 WARM SPRINGS AVE
BOISE ID 83712

has applied for a permit to appropriate water from:

Source: SPRING**Tributary:** MOORES CREEK

and a permit is APPROVED for development of water as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>
HEATING	01/01 to 12/31	0.50 CFS
COMMERCIAL	01/01 to 12/31	0.50 CFS

LOCATION OF POINT(S) OF DIVERSION:SPRING NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 13, Twp 13N, Rge 03E, B M VALLEY County**PLACE OF USE:** COMMERCIAL

Twp Rge Sec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
13N 03E 13				X									X				
13N 04E 18							X	X	X	X							
							L 2				L 3						

CONDITIONS OF APPROVAL

1. Proof of application of water to beneficial use shall be submitted on or before **October 1, 2011**.
2. Subject to all prior water rights.
3. Use of water under this right shall be non-consumptive.
4. 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.
5. Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality permitting requirements administered by the Department of Environmental Quality.
6. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 65.

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7. 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
8. Any initial use of low-temperature geothermal water for commercial purposes must derive a benefit from the heat of the water prior to the water being used for a commercial purpose for which the heat of the water has no value.
9. Prior to construction of diversion works for the surface low-temperature geothermal water from Belvidere Hot Springs, the right holder must submit plans and specifications for the spring diversion to the Department, and the Department must approve the plans and specifications. The plans and specifications must provide for direct water delivery to water rights no 65-12891 and no 65-13332, at no cost to the holder of those rights, to replace reductions in the quantity or temperature of water historically diverted under water rights nos. 65-12891 and 65-13332 caused by diversions under permit no 65-13912
10. Prior to construction of the diversion works and delivery system and the diversion of water under this right, the right holder shall submit detailed designs to the Department for approval for use of low-temperature geothermal water in heating the spa buildings and associated hot water soaking pools or swimming pools. The designs must be based on computations using recognized engineering methodologies that determine the temperatures and quantities of water necessary to provide the low-temperature geothermal water for heating the spa buildings and to maintain sufficient temperature and pass through of hot water to the proposed pools

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code. Witness the signature of the Director, affixed at Boise, this 26th day of June, 20 07


for DAVID R. TUTHILL, JR., Director

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

IN THE MATTER OF APPLICATIONS TO)
APPROPRIATE WATER NOS. 65-13912,)
65-13913, AND 65-13986 IN THE NAME OF)
CAROL LYNN MACGREGOR)
_____)

FINAL ORDER

On April 21 and 22, 2005, and on May 4 and 5, 2005, Peter Anderson, a hearing officer appointed by the Director of the Idaho Department of Water Resources ("Director" or "Department" or "IDWR"), conducted a hearing in response to a protest filed against applications for permits to appropriate water nos. 65-13912, 65-13913, and 65-13986. On August 19, 2005, the hearing officer issued a *Recommended Decision and Order* ("Recommended Order"). Finding of Fact No. 33 stated the following:

Dr. MacGregor did not provide sufficient details of the proposed design, construction and operation of the hot water spa and irrigation project to allow the water resource impact of the Applications to be evaluated. The primary reason for this failure is her inability to drill and test a geothermal well to determine how much geothermal water she can obtain from the proposed wells and the temperature of that water.

Recommended Order at 20.

Conclusions of Law nos. 1 through 5 of the Recommended Order stated the following:

1. When considering a water right application Idaho Code § 42-203A(5) provides, in part, that:

The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied.

The Idaho Supreme Court has expanded on this, stating:

In all cases the plans should be sufficient to generally apprise the public of the efficacy of the proposed use in the planned facility, and of its potential impact.

Shokal v. Dunn, 109 Idaho 330, 340 (1985).

2. In the present case Dr. MacGregor has not submitted plans sufficient to generally apprise the public of the efficacy of the proposed use and of its potential impact. This failure, in large part, results from Dr. MacGregor's inability to drill and test the aquifer near Belvidere Hot Springs. Dr. MacGregor cannot be expected to design a project, which is completely dependent upon the amount and quality of the geothermal water available to her, when she is not allowed to determine that amount and quality.

IDWR did not allow Dr. MacGregor to make this determination, largely as a result of concerns raised by the Pancheris and rejected in Finding of Fact No. 47. By not allowing Dr. MacGregor to drill and test a geothermal test well, IDWR effectively made it impossible for Dr. MacGregor to satisfy her burden of proof in this matter.

3. This matter should be remanded to Dr. MacGregor to conduct further tests and studies to determine the availability of both geothermal and cold water at her proposed points of diversion pursuant to the Director's authority under Idaho Code § 42-1805. It is in the public interest to allow this testing to go forward without granting the Applications pursuant to IDAPA 37.03.09.045.01 d.

4. Water supplies are variable. A party applying for a permit is not required to show that the proposed use will never interfere with an existing water use. Occasional impacts on senior water rights are resolved by the application of the priority system. Constant unavoidable impacts, however, will prevent the issuance of a permit and/or subsequent license. IDWR determines whether there is a reasonable probability that the applicant will find sufficient water to complete the proposed water use without continuously interfering with senior water rights.

5. Upon completion of that testing an additional hearing should be held pursuant to IDAPA 37.01.01.720.02.c. in which Dr. MacGregor would submit plans detailing: 1) the precise quantity of water she intends to appropriate, the basis for that quantity, and the source; 2) the quantities to be withdrawn at each proposed point of diversion and the plans for construction of each point of diversion; 3) Dr. MacGregor's use of any overlapping or existing water rights in conjunction with the Applications; 4) actual and theoretical results from pump testing to demonstrate the impact, if any, on existing rights; and 5) Dr. MacGregor's plans for disposing of waste water from her proposed project and the impact of such disposal on the directly affected public water resource in the area.

Recommended Order at 28-30.

In his Recommended Order, the hearing officer recommended the following:

Based upon these Findings of Fact and Conclusions of Law the Applications are REMANDED to the Applicant, Dr. Carol MacGregor, for further investigation as described in Conclusion of Law Nos. 1-5. A further hearing shall be held in this matter to consider the results of such investigation.

Recommended Order at 30.

Duane and Darwin Pancheri ("Pancheris") filed exceptions to the Recommended Order.

ANALYSIS

On a case-specific basis, the Department disallows or approves an application for a drilling permit for a test well and a request to pump from the test well prior to approval of an application to appropriate water. When allowed, the Department approves the drilling permits.

and proposed testing pursuant to the Director's authority to explore and quantify the water resources of the State of Idaho pursuant to Idaho Code § 42-1805.

The Department denied the request of Carol MacGregor ("MacGregor") for a drilling permit for a test well on November 12, 2003. A person aggrieved by the Department's refusal to issue a drilling permit for a test well may request a hearing under Idaho Code § 42-1701A within fifteen (15) days of the refusal. MacGregor did not timely request a hearing.

In his Recommended Order, the hearing officer resurrected the issue of whether the Department should have approved the drilling permit for a test well. However, the hearing officer was charged with the responsibility of determining whether MacGregor's application satisfied the criteria contained in Idaho Code § 42-203A that the Director must analyze when considering an application to appropriate water. The hearing officer held that MacGregor did not submit sufficient evidence regarding reduction in the quantity of water available to other water rights, sufficiency of water supply, the local public interest, and perhaps whether the application to appropriate water was speculative. The hearing officer then determined that the reason for these deficiencies was that the Department did not grant the application for a drilling permit for a test well and remanded the applications for permits to appropriate water back to MacGregor for further investigation. The hearing officer erroneously held that the Department should issue the drilling permit for a test well to MacGregor so she can prospectively satisfy her burden of proof. In so ruling, the hearing officer exceeded his charge and authority, which was to consider, based on the evidence presented at the hearing, whether MacGregor's applications should be approved, approved with conditions, or denied. The hearing officer did not properly apply Idaho Code § 42-203A, and his decision remanding the applications for permits to appropriate water back to MacGregor for further investigation is vacated by this final order.

After reviewing the hearing evidence, the Director determines that the hearing officer failed to consider important evidence and did not give proper weight to evidence presented at the hearing. In addition, the Director determines that the hearing officer applied a standard of proof for the criteria required by Idaho Code § 42-203A that exceeded the requirements necessary. The following analysis examines the additional evidence and standard of proof that the hearing officer should have considered.

Pancheris' Water Rights

In order for the Department to analyze the sufficiency of the available water supply for appropriation and the potential for injury to existing water rights, the extent of the existing water rights must be examined.

Water Right No. 65-12891 (Laura and Duane Pancheri's Domicile)

Water right license no. 65-12891 authorizes diversion of low-temperature geothermal surface water from a spring complex known as Belvidere Hot Springs for heating and domestic use on property owned by Laura and Duane Pancheri at a rate of 0.44 cubic feet per second (cfs) up to an annual volume of 51.3 acre-feet. A gravity system diverts approximately 75 gallons per minute (gpm), equivalent to 0.17 cfs, for heating three homes and a shop, and also provides

water to a swimming pool. Low-temperature geothermal surface water is diverted year-round at the 75 gpm rate.

The continuous diversion of low-temperature geothermal surface water at the rate of 75 gpm equates to a volume of approximately one-third of an acre-foot per day. In approximately 155 days, or about five months of continuously diverting water at the rate of 75 gpm, diversion of low-temperature geothermal surface water to the Laura and Duane Pancheri domicile location exceeds the maximum annual volume of 51.3 acre-feet authorized by water right no. 65-12891.

Water right license no. 65-12891 contains the following condition:

The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under this right. The use of water confirmed by this right is limited to the amount which can actually be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.

The above condition was routinely included in water right licenses in the late 1980s and early 1990s in the event that more efficient systems would reduce the annual volume of water required to accomplish the beneficial use authorized. If a more restrictive efficiency standard than the standard in place at the time of licensing was implemented, the Department reserved the ability to reduce the upper limit on the annual diverted volume allowed based on the new efficiency standard. The Department could not have legally provided for increasing the limitation on annual diverted volume, since an increase would constitute an enlargement in use subsequent to the extent of the developed beneficial use on which the license was based. Therefore, the annual volume of water diverted under water right no. 65-12891 is limited to 51.3 acre-feet. Any volume of water diverted in excess of 51.3 acre-feet is not authorized and should be available for delivery to a junior appropriator.

Permit No. 65-13332 (Joan and Darwin Pancheri Domicile)

Joan and Darwin Pancheri hold water right permit no. 65-13332, which authorizes diversion of low-temperature geothermal surface water from the Belvidere Hot Springs to heat a home and a shop. Permit no. 65-13332 authorizes development and beneficial use of up to 0.10 cfs for heating purposes, although Joan and Darwin Pancheri divert low-temperature geothermal surface water under the permit from October to May at the rate of 17 gpm, which equates to approximately 0.04 cfs. Because the permit has not been licensed, the limitation on the annual volume of low-temperature geothermal surface water that can be diverted has not been determined.

Total Low-Temperature Geothermal Water Diverted by Pancheris

The combined total, equaling 92 gpm, of measured rate of flow diverted by Laura and Duane Pancheri (75 gpm) and Joan and Darwin Pancheri (17 gpm), or 0.21 cfs, is the maximum amount of low-temperature geothermal water that has historically been diverted.

Standard of Review

The preponderance of evidence is the standard for the burden of proof borne by an applicant. The applicant must prove it is more likely than not that the criteria of Idaho Code § 42-203A will be satisfied.

Sufficiency of Low-Temperature Geothermal Water Supply

Surface Water – Application to Appropriate Water No. 65-13912

Representatives for MacGregor and the Pancheris attempted to measure the total amount of surface water discharged through the Belvidere Hot Springs. Based on their measurements, the representatives for MacGregor and the Pancheris estimated that the springs discharge at least 150 gpm of low-temperature geothermal surface water. However, the diffuse nature of the spring flows, unmeasured underflow, and the fact that the total rate of surface water diverted by the Pancheris (92 gpm or 0.21 cfs) is significantly less than the available rate of supply, support approval for development of a flow rate of 224 gpm, or 0.50 cfs. The flow rate of 224 gpm is within the reasonable range of flow from the springs that could be fully available for appropriation after satisfying the existing water rights during at least some portions of an annual time period.

Ground Water – Application to Appropriate Water No. 65-13913

During the hearing, Jill Haizlip, an expert witness for MacGregor, testified, based on water chemistry and her experience, that Belvidere Hot Springs is a surface expression of a larger geothermal resource underlying the area of Cascade, Idaho to the north, and Cabarton, Idaho to the south. In contrast, Sherl Chapman, an expert witness for Pancheris, testified that Belvidere Hot Springs is a small, isolated, low-temperature geothermal resource. Chapman based his conclusions on his unsuccessful test wells drilled south and north of Belvidere Hot Springs. The wells drilled by Chapman did not exceed a depth of three hundred feet. Three hundred feet is a relatively shallow well depth when seeking to develop low-temperature geothermal ground water.

The Director determines in this order that there is sufficient likelihood of adequate low-temperature geothermal ground water available for appropriation underlying the well locations proposed by MacGregor in the quantities sought to be appropriated.

Sufficiency of Low-Temperature Geothermal Water Supply to Accomplish the Beneficial Use

Exhibit 30 is a Department administrator's memorandum pertaining to the "Rate of Flow for Heating Use." The memorandum is dated September 8, 1980. On September 28, 1992, the Department issued a more recent administrator's memorandum addressing the subject of "Rate of Flow for Heating Use." The most recent administrator's memorandum is identified as Administrator's Memorandum No. 23. The memorandum refers to attachments titled "Method for Estimating Residential Space Heating Load" and "Method for Estimating Rates of Flow for

Geothermal Heating Systems.” The attachments and the computational methods therein are “guidelines . . . intended to assist with computation of reasonable rates of flow of geothermal water for heating purposes.” The guidelines “are designed to provide straightforward initial estimates for evaluation of applications for permit and are not to be used for engineering design.”

Exhibit 19 is a conceptual design drawing of the spa at final build out. MacGregor testified that the spa would be built in phases. During the first phase, MacGregor would construct a 2,000 square foot lodge and soaking pool, fence and landscape the spa property, and obtain the necessary permits.

During the hearing, Terry Scanlan, an expert witness for MacGregor, testified there would be sufficient low-temperature geothermal surface water to supply the necessary water to the spa. The testimony of Terry Scanlan is interpreted as a statement that the low-temperature geothermal water is sufficient to satisfy the initial needs of the spa, at least for phase one.

MacGregor did not offer into the record any computational evidence about the exact quantities of low-temperature geothermal water needed for the first, second, or third and final phases of the project. There is evidence about the quantities of low-temperature geothermal water necessary to heat the Pancheris’ dwellings and shops, and to fill the Laura and Duane Pancheri pool with suitable water for swimming. The necessary rate of flow is somewhere between 17 gpm for the Joan and Darwin Pancheri home and shop to 75 gpm for Duane Pancheri’s three homes, shop, and swimming pool. The remainder of 58 gallons per minute of low-temperature geothermal water available year-round from Belvidere Hot Springs, based on measurements supporting an estimated availability of at least 150 gpm, is sufficient low-temperature geothermal water to heat a 2,000 square-foot lodge and fill a soaking pool.

At the hearing, MacGregor testified that, during phase two, she would construct an additional wing to the original lodge, a swimming pool, several individual soaking tubs, and two or three individual small buildings for overnight lodging. A comparison of the approximate size and use of water for these additional features is still within the range of flows demonstrated by the somewhat similar Pancheri use of low-temperature geothermal water.

The third phase would include another wing on the lodge, as well as up to ten more individual lodging buildings and associated amenities. The estimated size of the improvements in phase three may or may not result in use of low-temperature geothermal surface water exceeding the range of flows demonstrated by the somewhat similar Pancheri use of low-temperature geothermal water.

The ultimate design for use of low-temperature geothermal water in the buildings and associated hot water soaking pools or swimming pools must be justified by computations completed according to Administrator’s Memorandum No. 23, and other engineering methodologies, to determine the temperatures and quantities of low-temperature geothermal water necessary to provide for heating of the proposed buildings and to maintain sufficient temperature and pass through of hot water to the proposed pools. These computations must be submitted to the Department for approval following the testing of wells drilled under water right permit no. 65-13913.

Injury

Impacts of Well Construction

During the hearing, Jill Haizlip and Terry Scanlan both testified that well construction at the proposed locations would not impact the discharge of Belvidere Hot Springs. Jill Haizlip's testimony was particularly convincing. She has been employed in the exploitation of low-temperature geothermal resources for at least two decades. She has extensive experience in analyzing the production capacity of geothermal aquifers associated with geothermal springs. She has observed or participated in the drilling of wells into or near geothermal spring complexes and testified that the construction has not negatively impacted spring discharge. She also testified that the possibility of negative impacts resulting from drilling near Belvidere Hot Springs is extremely remote. The testimony of Terry Scanlan corroborated her testimony.

While Sherl Chapman also has extensive experience in the development of low-temperature geothermal resources, he could only give one example of possible negative impact resulting from well construction. The example was increased turbidity in a low-temperature geothermal spring located near Challis, Idaho, attributed to drilling in close proximity to the spring. There was no evidence that the drilling resulted in any permanent reduction in spring discharge.

The Director determines in this order that construction of the proposed wells will not reduce the quantity of low-temperature geothermal water available to Pancheris.

Impacts of Production

The expert witnesses disagreed about the extent of impact that production of low-temperature geothermal ground water from the proposed wells would have on Belvidere Hot Springs. The low-temperature geothermal aquifer is under hydrogeologic pressure. The hydrogeologic pressure forces water to the surface at the location of Belvidere Hot Springs. It is possible that any increased production from the ground water source supplying Belvidere Hot Springs may reduce the surface flow of the springs. The amount of impact, if any, cannot be determined without drilling a well and testing production. Production from the proposed wells cannot be allowed to injure Pancheris' water rights on an ongoing basis.

Ground Water Considerations to Prevent Injury

Prior to diversion of water pursuant to approval of application for permit to appropriate water no. 65-13913, the Department must approve a plan for well production and spring discharge testing. The Department and Pancheris must be able to participate in the testing. Based on the results of the tests, the Department will either: (1) disallow diversion and use of low-temperature geothermal ground water under the permit; or (2) limit the diversion rate and volume of low-temperature geothermal ground water diverted by MacGregor to prevent reductions in the temperature or amount of water Pancheris are authorized to divert; or (3) require direct delivery of water from MacGregor's wells to Pancheris, at no cost to Pancheris, to

replace reductions in the temperature or quantity of low-temperature geothermal surface water diverted by Pancheris.

Surface Water Considerations to Prevent Injury

Prior to diversion of water pursuant to approval of application for permit to appropriate water no. 65-13912, the Department must approve plans and specifications for spring diversion. The plans and specifications must provide for direct delivery, at no cost to Pancheris, of low-temperature geothermal water authorized by Pancheris' water rights to replace reductions in the temperature or quantity of low-temperature geothermal surface water, if any, diverted by Pancheris.

Speculation

At the hearing, the protestants established that a change in land zoning is not approved and that an application for a change in zoning is not actively pending. Pursuit of local zoning authorization is one factor in determining whether an application is speculatively filed. A disapproval by a local governing body could justify finding that the application is speculative. However, evidence of money expended, studies completed, and measurements conducted are all evidence of good faith intent to complete the development under the water right permits. The Director determines that MacGregor has not speculatively filed her water right applications.

Local Public Interest and Conservation of Water

Idaho Code § 42-202B defines the local public interest as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-233 requires that the heat value of low-temperature geothermal ground water be beneficially used prior to the water being used for other purposes. The Director is also charged with protecting artesian pressures for low-temperature geothermal aquifers. Idaho Code § 42-226. Over diversion or waste of low-temperature geothermal water is not in the local public interest and does not conserve the water resources of the State of Idaho.

The local public interest and the ethics of conservation demand that any use of low-temperature geothermal ground water satisfy minimum standards of efficiency in extracting the heat value of the water. As a result, after drilling of wells authorized by approval of application for permit to appropriate water no. 65-13913, MacGregor must provide detailed designs for use of low-temperature geothermal water in the buildings and associated hot water soaking pools or swimming pools. The designs must be based on computations using recognized engineering methodologies that determine the temperatures and quantities of low-temperature geothermal water necessary to provide for heating the spa buildings and to maintain sufficient temperature and pass through of hot water to the proposed pools.

The Director, having reviewed the exceptions filed by the Pancheris, and the record created at the hearing, determines that MacGregor satisfied her burden of proof for applications for permits to appropriate water nos. 65-13912, 65-13913, and 65-13986, and that the applications should be approved with conditions.

PROCEDURAL HISTORY

MacGregor filed three applications for permits to appropriate water, numbered by the Department as 65-13912, 65-13913, and 65-13986. MacGregor filed applications for permits to appropriate water no. 65-13912 and no. 65-13913 on August 2, 1999. Notice of the applications was published in The Long Valley Advocate on or about December 13 and 22, 1999. The Pancheris timely protested applications for permit no. 65-13912 and no. 65-13913. Pancheris protested the applications to protect their senior water rights.

MacGregor filed application for permit to appropriate water no. 65-13986 on October 25, 2000. Notice of the application was published in The Long Valley Advocate on or about December 6 and 13, 2000. Pancheris timely protested application for permit no. 65-13986 on the basis that the application, if approved, could cause injury to their existing water rights.

In January 2001, representatives for the parties began jointly measuring low-temperature geothermal water emitting and diverted from Belvidere Hot Springs. Representatives for the parties measured: (1) low-temperature geothermal water diverted by Duane and Darwin Pancheri; (2) water beneficially used at various locations by Duane and Darwin Pancheri; and (3) undiverted spring discharge collected in open channels from Belvidere Hot Springs. The measurements continued at least until February of 2005 (See Exhibit 37).

In January 2003, MacGregor submitted a proposal to the Department to construct a geothermal test well near Belvidere Hot Springs. Both MacGregor and Pancheris submitted information, respectively, in support of and in opposition to the geothermal test well proposal (see Applicant's Exhibit 40). On November 12, 2003, the Department denied the low-temperature geothermal test well proposal stating:

The Department will not consider approval of a drilling permit at the proposed location until the following has occurred:

Application for permit # 65-13913 is approved, and a drilling permit can be considered

OR

An agreement to compensate for possible damages is executed by the applicant and protestant.

Exhibit 200 (emphasis in original). No evidence was submitted indicating that MacGregor requested a hearing after the Department denied her application for permit to construct a test well.

On April 21 and 22, 2005, and on May 4 and 5, 2005, the hearing officer conducted a hearing for the contested case. Exhibits offered by MacGregor and admitted as part of the record are as follows:

Exhibit 2 - Notice of Protest to Application No. 65-13912, filed in the name of Duane and Darwin Pancheri;

Exhibit 6 - Notice of Protest to Application for Permit No. 65-13986;

Exhibit 7 - Application for Permit No. 65-13978;

Exhibit 8 - Notice of Protest to Application for Permit No. 65-13978;

Exhibit 9 - Partial Decree for Water Right No. 65-01973;

Exhibit 10 - Partial Decree for Water Right No. 65-01972;

Exhibit 11 - Idaho Department of Water Resources file for Water Right No. 65-12891, specifically including

- Water Right License No. 65-12891
- Application for Amendment (For Licensing Purposes)
- Assignment of Permit
- Permit for Water Right No. 65-12891
- Application for Permit No. 65-12891
- Topographic map showing the point of diversion and place of use
- Photocopy of public notice of application for permit
- Affidavit of publication
- Inter-Department Memo dated September 15, 1998
- Handwritten notes re: new address for Darwin and Joan Pancheri
- Correspondence from Steve Lester to Darwin Pancheri dated August 17, 1998
- Correspondence from Sharla Curtis to Duane and Darwin Pancheri dated January 12, 1992
- Correspondence from Sharla Curtis to Duane and Darwin Pancheri dated October 15, 1991
- License Review checklist
- Conversation Memorandum dated August 7, 1991, by Jan Shurte detailing conversation with Duane Pancheri
- Idaho Department of Water Resources Staff Analysis Sheet for Beneficial Use Report
- Beneficial Use Field Report
- Conversation Memorandum dated October 19, 1988
- Proof of Beneficial Use Analysis Sheet
- Proof of Beneficial Use
- Permit Approval Notice
- Idaho Department of Water Resources Appropriation Application Analysis Sheet
- Correspondence from "The Advocate" regarding publication

- Conversation Memorandum dated May 15, 1989
- Conversation Memorandum dated October 19, 1988;

Exhibit 12 - Idaho Department of Water Resources file for Application for Permit No. 65-13332, specifically including

- Permit No. 65-13332
- Application for Permit No. 65-13332 (including map)
- Affidavit of Publication
- Inter-Department Memo dated September 15, 1998
- Handwritten Notes dated September 8, 1998, re: Darwin and Joan Pancheri
- Correspondence from Steve Lester to Darwin Pancheri dated August 27, 1998
- Correspondence from Nina Shields to Darwin and Joan Pancheri dated October 29, 1991
- Proof of Beneficial Use
- Analysis Sheet for Proof of Beneficial Use
- Permit Approval Notice
- Application for Permit Review Sheet
- Appropriation Application Analysis Sheet
- Conversation Memorandum dated July 1, 1991
- Beneficial Use Field Report
- Conversation Memorandum dated October 18, 1988;

Exhibit 13 - Idaho Department of Water Resources File for Permit No. 65-13458, specifically including

- Water Right Permit No. 65-13458
- Application for Permit
- Comment dated June 22, 1993, Re: Overlap
- Map
- Inter-Department Memo dated September 15, 1998
- Handwritten note
- Handwritten note re: Darwin and Joan Pancheri mailing address
- August 17, 1998 correspondence from Steve Lester to Darwin Pancheri re: Licensing
- Proof of Beneficial Use
- Beneficial Use Field Report
- Maps

- Well Inspection Form
- Analysis Sheet for Proof of Beneficial Use
- Proof Acknowledgement Letter dated September 9, 1996
- Proof Due Notice dated July 31, 1996
- Permit Approval Notice dated October 19, 1993
- Application for Permit State Office Review
- Water Right Profile Report
- Appropriation Application Analysis Sheet
- Affidavit of Publication
- Application for Permit;

Exhibit 16 - Warranty Deed from Tom Nicholson to Carol Lynn MacGregor;

Exhibit 17A - Photographs, as follows

- (1) Belvidere Hot Springs and Darwin Pancheri home
- (2) Belvidere Hot Springs looking northeast
- (3) Belvidere Hot Springs looking east
- (4) Belvidere Hot Springs looking west
- (5) Outflow from Belvidere Hot Springs looking east
- (6) Hottest pool in Belvidere Hot Springs looking northeast
- (7) Belvidere Hot Springs looking northeast
- (8) Temporary fence east of Belvidere Hot Springs
- (9) Unused ditch south of Belvidere Hot Springs
- (10) Moore's Creek
- (11) Moore's Creek
- (12) Moore's Creek
- (13) Moore's Creek
- (14) Moore's Creek
- (15) Duane Pancheri structure
- (16) Duane Pancheri water drain
- (17) Duane Pancheri flow meter;

Exhibit 18 - Location Map of MacGregor Property;

Exhibit 19 - Drawing of MacGregor Project;

- Exhibit 20 - Correspondence from Terry M. Scanlan to Carol Lynn MacGregor dated June 6, 2000, re: Drilling Cost Estimate for Geothermal Exploration Well;
- Exhibit 21 - Financial Assurance Document;
- Exhibit 22 - Agreement for Specifications and Locations for Flow Meters;
- Exhibit 24 - Letter from Sherl Chapman to Scott Campbell dated May 20, 2003;
- Exhibit 25 - Letter from Sherl Chapman to Scott Campbell dated October 1, 2003;
- Exhibit 30 - Administrator's Memorandum dated September 8, 1980, re: Rate of Flow for Heating Use;
- Exhibit 33 - Geological Report dated February 14, 2005;
- Exhibit 34A - Illustrative Exhibit drawn by Jill Haizlip;
- Exhibit 34B - Illustrative Exhibit drawn by Jill Haizlip;
- Exhibit 37 - Correspondence from Terry M. Scanlan to Julie Klein Fischer re: Monitoring Update – Belvidere Hot Springs;
- Exhibit 38 - Correspondence from Terry M. Scanlan to Jo Beeman dated July 1, 1999, Re: MacGregor – Belvidere and Raspberry Ranches;
- Exhibit 40 - Correspondence from Terry M. Scanlan to Rob Whitney dated September 2, 2003, re: MacGregor Test Well Proposal;
- Exhibit 42 - Illustrative Exhibit drawn by Terry Scanlan;
- Exhibit 43 - St. Marie, et al., *Examination and Evaluation of Geothermal Sites in the State of Idaho with Emphasis Given to Potential for Electrical Generation or Direct Use*, Idaho Water Resources Research Institute, September 2002; and
- Exhibit 45 - Correspondence from John Westra to Josephine Beeman and Scott L. Campbell dated November 12, 2003.

Exhibits offered by the Pancheris and admitted as part of the record are as follows:

- Exhibit 101 - Merle W. Wells, *Heat from the Earth's Surface: Early Development of Western Geothermal Resources*, reprinted from *Journal of the West*, Vol. X, Number 1;
- Exhibit 102 - Arthur A. Hart, "Idaho Yesterdays: Indians Used Warm Springs," *The Idaho Statesman*, at 12;
- Exhibit 103 - N.S. Nokkentved, "Report: Water Pumping Reduces Bruneau Hot Springs," *The Times-News*;
- Exhibit 104 - Charles Berenbrock, *Effects of Well Discharges on Hydraulic Heads in Spring Discharges from the Geothermal Aquifer System in the Bruneau Area, Owyhee County, Southwestern Idaho*. USGS Water-Resources Investigations Report 93-4001, Boise, Idaho;
- Exhibit 105 - Will L. Burnham and Spencer H. Wood, *Field Guide: Boise Geothermal System, Idaho*, 38th Annual Meeting, Rocky Mountain Section, The Geological Society of America;

- Exhibit 106 - Kenneth W. Neely, *Production, Temperature and Water Level Data for the Four Heating Systems in the Boise Front Low Temperature Geothermal Resource Area, 1977-1997*, Idaho Department of Water Resources Planning and Policy Division, Technical Services Bureau, Ground Water Monitoring Section, Open File Report;
- Exhibit 107 - Kenneth W. Neely, *Production History for the State of Idaho Capitol Mall Geothermal System 1983-1994*, Idaho Department of Water Resources;
- Exhibit 109 - Christian R. Petrich, *Investigation of Hydrogeologic Conditions and Ground Water Flow in the Boise Front Geothermal Aquifer (Executive Summary)*, Idaho Water Resources Research Institute, Research Report IWRI 2003-07;
- Exhibit 110 - Well log notes from Clements well;
- Exhibit 111 - Notes from Larry Hellhake Well No. GEO-1, Well No. 2, and Spring, Roystone Hot Springs;
- Exhibit 112 - Lithologic log and temperature gradient, Well No. GEO-1, Roystone Hot Springs;
- Exhibit 113 - Ground Temperature Contours, Roystone Hot Springs;
- Exhibit 114 - Ken Neely, *Semi-Annual Review of the Monitoring Data for the Boise Front Geothermal System*, January – June 2003, Idaho Department of Water Resources;
- Exhibit 115 - *Geothermal Resources of Utah – An Overview*, Geo-Heat Center Quarterly Bulletin, Vol. 25, No. 4, at 2;
- Exhibit 116 - *Crystal Hot Springs – Salt Lake County*, Geo-Heat Center Quarterly Bulletin, Vol. 25, No. 4, at 26;
- Exhibit 125 - Photograph of Duane Pancheri's shop interior;
- Exhibit 126 - Photograph of back of Duane Pancheri's shop;
- Exhibit 127 - Photograph of back of Duane Pancheri's shop;
- Exhibit 128 - Photograph of back of Duane Pancheri's swimming pool;
- Exhibit 129 - Photograph of back of Duane Pancheri's home and guest house;
- Exhibit 130 - Photograph of back of Duane Pancheri's yard;
- Exhibit 131 - Photograph of back of Duane Pancheri's home and guest house;
- Exhibit 132 - Photograph of back of Duane Pancheri's yard;
- Exhibit 133 - Photograph of lane to Duane Pancheri's homes looking west;
- Exhibit 134 - Photograph of Duane Pancheri's shop;
- Exhibit 135 - Photograph of Duane Pancheri's laborer's house;
- Exhibit 137 - Photograph of Duane Pancheri's laborer's house;
- Exhibit 138 - Photograph of discharge from Duane Pancheri's pool into creek;
- Exhibit 143 - Photograph of Darwin Pancheri's shop;
- Exhibit 144 - Photograph of Darwin Pancheri's home and shop;
- Exhibit 145 - Photograph of Darwin Pancheri's pump sump and flow meter;

Exhibit 146 - Photograph of Darwin Pancheri's pump sump;
Exhibit 147 - Photograph of Belvidere Hot Springs on the Pancheris' Property;
Exhibit 148 - Photograph of Darwin Pancheri's pump sump;
Exhibit 149 - Photograph of sprinkler and Belvidere Hot Springs;
Exhibit 150 - Photograph of laying hot water lines under Darwin Pancheri's shop;
Exhibit 151 - Photograph of discharge from Darwin Pancheri's pump sump;
Exhibit 153 - Photograph of overflow discharge from Duane Pancheri's laborer's house;
Exhibit 154 - Photograph of discharge into Duane Pancheri's pool;
Exhibit 155 - Photograph of Belvidere Hot Springs;
Exhibit 157 - Photograph of Belvidere Hot Springs flowing east;
Exhibit 160 - Photograph of Belvidere Hot Springs discharge area near weir site; and
Exhibit 162 - Photograph of the Pancheris' and MacGregor's Property near Belvidere Hot Springs.

The Department, on its own initiative, admitted the following exhibits:

Exhibit 200 - IDWR Staff Memorandum dated January 27, 2005; and
Exhibit 201 - Applications for Extensions of Time to Avoid Forfeiture for Water Rights
Nos. 65-1972 and 65-1973.

MacGregor called the following witnesses:

Duane Pancheri;
Darwin Pancheri;
Carol Lynn MacGregor;
Terry Scanlan; and
Jill Haizlip.

Pancheris called the following witnesses:

Duane Pancheri;
Darwin Pancheri; and
Sherl Chapman.

John Westra, Manager of the Western Region of the Department, also testified at the hearing. The hearing officer called Westra as a witness to testify regarding a Department staff memorandum he authored about the applications.

On August 19, 2005, the hearing officer issued *Recommended Decision and Order*. On September 6, 2005, Pancheris filed *Petition for Reconsideration*. On September 16, 2005, the hearing officer denied the petition. On September 30, 2005, Pancheris filed *Exceptions to Recommended Decision and Order*.

The Director, having reviewed the files, the testimony, and the exhibits, finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application for permit no. 65-13912 seeks to appropriate low-temperature geothermal surface water as follows:

Source -	Belvidere Hot Springs
Point of Diversion -	NESENE ¹ , Section 13, T13N, R3E
Use -	Heating and Commercial
Quantity -	0.50 cfs
Period of Use -	1/1 to 12/31
Place of Use -	SENE and NESE, Section 13, T13N, R3E; Lot 2 (SWNW) SENW, NESW, and Lot 3 (NWSW), Section 18, T13N, R4E.

2. Application for permit no. 65-13913 seeks to appropriate low-temperature geothermal and cold ground water as follows:

Source -	Ground water
Points of Diversion -	SENE, Section 13, T13N, R3E (up to three wells)
Use -	Heating and Commercial
Quantity -	2.0 cfs
Period of Use -	1/1 to 12/31
Place of Use -	SENE and NESE, Section 13, T13N, R3E; Lot 2 (SWNW) SENW, NESW, and Lot 3 (NWSW), Section 18, T13N, R4E.

The “remarks” section of application no. 65-13913 states that “two low-temperature geothermal wells and one cold water well are currently anticipated.”

3. Application for permit no. 65-13986 seeks to appropriate ground water as follows:

Source -	Ground water
Point of Diversion -	NESE, Section 13, T13N, R3E
Use -	Irrigation of 132 acres
Quantity -	2.0 cfs
Period of Use -	4/15 to 10/31

¹ In this decision, the public land survey numeric descriptor “1/4” is assumed to follow each two alpha character public land survey locator when the numeric descriptor is missing. For instance, in this example, the full description would be the NE1/4 SE1/4 NE1/4, Section 13, Township 13 North, Range 3 East, Boise Meridian

Place of Use - SENE and NESW, Section 13, T13N, R3E; Lot 2 (SWNW),
SENW, NESW, and Lot 3 (NWSW), Section 18, T13N, R4E.

4. Application for permit no. 65-13986 states:

This water right will be supplemental to 65-1979. The application contemplates sharing one cold water well in the SENE Sec 13 with pending application for Permit No. 65-13913. Diversion rate in combination with 65-13913 will not exceed 2.00 cfs. This application also proposes using spent low-temperature geothermal fluids diverted under 65-13913 for irrigation, provided that the heat value is utilized prior to irrigation.

Water Uses Proposed by Application Nos. 65-13912, 65-13913, and 65-13986

Hot Water Spa

5. MacGregor owns approximately 1,100 acres of real property in Valley County, Idaho. The property, known as Raspberry Ranch, is a working cattle ranch managed by MacGregor.

6. A low-temperature geothermal water spring complex, known as Belvidere Hot Springs, is located partially on Raspberry Ranch and partially on property located north of Raspberry Ranch, which is owned by Joan and Darwin Pancheri. The MacGregor portion of Belvidere Hot Springs is located in the SENE, Section 13, T13N, R3E and will be referred to hereafter as the "MacGregor-Belvidere Hot Springs." The MacGregor-Belvidere Hot Springs flow to the northeast across MacGregor's north property boundary and onto property owned by Joan and Darwin Pancheri.

7. MacGregor proposes to develop a hot water spa on a portion of Raspberry Ranch using water from the MacGregor-Belvidere Hot Springs (application for permit no. 65-13912). In addition, MacGregor proposes to drill two wells seeking to appropriate additional low-temperature geothermal ground water and a third well to appropriate cold ground water for use in the spa (application for permit no. 65-13913).

8. After completion, the hot water spa would include a lodge, hot baths, and individual lodging units referred to as "casitas." Exhibit 19 depicts the general concept of the project.

9. The spa would be built in three phases. During the first phase, MacGregor would construct a 2,000 square-foot lodge with massage facilities, a large hot water soaking pool, a driveway, and one parking area. MacGregor would also landscape the property (bushes and trees). Approximately 30 acres of land would be fenced off. There would be no overnight guest accommodations in the first phase. MacGregor estimates the first phase of the spa project will cost \$300,000.

10. During the second phase, MacGregor would construct a swimming pool, several individual soaking tubs, two or three "casitas," and an additional wing to the original lodge, with more therapy rooms, showers, linen rooms, and cleaning supply spaces. After phase two, the spa

would include approximately five bathrooms and shower rooms, and each casita would have a bathroom with a shower. MacGregor estimates the second phase of her project will cost \$400,000.

11. During the third and final phase, MacGregor would construct another wing on the lodge and up to ten more “casitas,” for a total of twelve, with associated amenities. MacGregor estimates the third phase of her project will cost \$2.3 million. The total cost for the completed health spa is estimated to be \$3.0 million.

Proposed Appropriation of Low-Temperature Geothermal Water

Low-Temperature Geothermal Surface Water

12. Application for permit no. 65-13912 proposes the diversion of 0.50 cfs of low-temperature geothermal surface water directly from the MacGregor-Belvidere Hot Springs. MacGregor proposes to construct an infiltration gallery in a west-to-east direction through the MacGregor-Belvidere Hot Springs. The infiltration gallery would collect water from the hot springs, and the water would flow from the infiltration gallery to a pump sump. Water would then be lifted by the pumps and conveyed to the hot water spa where it would be used for heating and commercial purposes.

Low-Temperature Geothermal Ground Water

13. Application for permit no. 65-13913 proposes diversion of 2.0 cfs of low-temperature geothermal ground water from two wells. Two, redundant, low-temperature geothermal wells are proposed: one 200 feet to the south of the MacGregor-Belvidere Hot Springs, and one 450 feet southeast of the MacGregor-Belvidere Hot Springs.

14. The size of the facility MacGregor is able to construct is directly dependent upon the quantity, location, and temperature of low-temperature geothermal water she is able to obtain under applications for permit no. 65-13912 and no. 65-13913.

Proposed Appropriation of Cold Ground Water

Cold Ground Water for Spa

15. In addition to the two, low-temperature geothermal wells described in Finding 13, application for permit no. 65-13913 also proposes construction of a cold water well several hundred feet southeast of the MacGregor-Belvidere Hot Springs. The low-temperature geothermal and cold ground water would be conveyed in pipes of indeterminate size to the hot water spa, where it would be used for heating and mixed for commercial purposes such as bathing. The amount of cold ground water withdrawn would depend upon the temperature of the low-temperature geothermal water diverted.

Irrigation Project

16. Application for permit no. 65-13986 received very little attention during the hearing. Although there is some indication in the record that the proposed place of use is currently dry pasture, there is also evidence in the record that water right no. 65-1979 has the same place of use as that proposed by application for permit no. 65-13986. See Exhibit No. 38, Figure 2 and application for permit no. 65-13986, remarks ("This water right will be supplemental to 65-01979").

17. The remarks section of application for permit no. 65-13986 also contains the following statement:

The application contemplates sharing one cold water well in the SENE Sec 13 with pending application for permit 65-13913. Diversion rate in combination with 65-13913 will not exceed 2.0 cfs. This application also proposes using spent low-temperature geothermal fluids diverted under 65-13913 for irrigation, provided that the heat value is utilized prior to irrigation.

The configuration of the diversion works for water right permit no. 65-13986, if the associated application is approved, will be dependent upon the configuration of the diversion works proposed as part of application for permit no. 65-13913.

18. Application for permit no. 65-13986 proposes to divert 2.0 cfs of ground water from a well located approximately 2,000 feet south of the MacGregor-Belvidere Hot Springs for the irrigation of 132 acres of pasture. This quantity is within the maximum diversion rate limitation of 1.0 cfs for every 50 irrigated acres set forth in Idaho Code § 42-202(6).

Project Financing

19. MacGregor owns Raspberry Ranch without debt. In addition, she owns a ranch in Emmett Idaho, and a home in Boise, both of which are free of liens. Those properties, if mortgaged, could provide monies in excess of the total estimated cost to develop all phases of MacGregor's spa project. In addition, MacGregor derives income from other sources, primarily private investments. If needed, MacGregor could finance the full development of her spa and related water rights, at an estimated cost of \$3 million. MacGregor could complete the entire hot water spa project within five years.

Existing Water Rights from Belvidere Hot Springs

MacGregor Water Rights

20. MacGregor currently holds two water rights, decreed in the Snake River Basin Adjudication, authorizing beneficial use of water from Belvidere Hot Springs. Water right no. 65-1973 is described as follows:

Priority Date -	May 1, 1901
Source -	Spring

Point of Diversion - SENE, Section 13, T13N, R3E
Use - Domestic
Quantity - 0.01 cfs., 13,000 gallons per day, 1.20 acre-feet per year
Season of Use - 1/1 to 12/31
Place of Use - SENE, Section 13, T13N, R3E.

21. Water right no. 65-1972 is described as follows:

Priority Date - May 1, 1901
Source - Spring
Point of Diversion - SENE, Section 13, T13N, R3E
Use - Domestic
Quantity - 0.04 cfs., 13,000 gallons per day, 1.20 acre-feet per year
Season of Use - 1/1 to 12/31
Place of Use - SENE, Section 13, T13N, R3E.

22. These two water rights historically were used at hot baths built directly in the McGregor-Belvidere Hot Springs, but are currently unused and subject to extensions of time to avoid forfeiture pursuant to Idaho Code § 42-222(2). Ex. 201. MacGregor's testimony about these water rights implied that the water rights would be used in the new proposed hot water spa.

Pancheri Water Rights

23. Pancheri's developed water uses at two locations with water diverted from Belvidere Hot Springs. One location is a domicile owned by Joan and Darwin Pancheri. The other location is a domicile owned by Laura and Duane Pancheri.

24. Pancheri's divert water from Belvidere Hot Springs for use at both locations described in Finding 23 with a single, common, buried infiltration gallery. The infiltration gallery is approximately 40 to 50 feet long and situated 25 to 50 feet north of the MacGregor-Belvidere Hot Springs. The infiltration gallery is higher in elevation than MacGregor's property.

25. The beneficial use at each domicile location is represented by a separate water right. The use at the Laura and Duane Pancheri domicile location is authorized by water right no. 65-12891 licensed to Duane and Darwin Pancheri and is summarized as follows:

Priority Date - October 19, 1988
Source of Water - Spring
Point(s) of Diversion - NESENE and SENENE, Section 13, T13N, R3E
Use(s) - Heating 0.40 cfs, 47.7 acre-feet per year
Domestic 0.04 cfs, 3.6 acre-feet per year
Total Quantity - 0.44 cfs, 51.3 acre-feet per year
Period of Use - January 1 – December 31
Place of Use - SESW, NWSE, and SWSE, Section 18, T13N, R4E.

26. After collection in the common infiltration gallery, the water flows through pipes by gravity approximately 5,100 horizontal feet, where it heats three homes, a shop, and supplies water for a swimming pool. Water flows through this system year-round at an average rate of approximately 75 gpm (0.17 cfs).

27. Permit no. 65-13332 is held by Darwin and Joan Pancheri, and is summarized as follows:

Priority Date -	July 2, 1991
Source of Water -	Spring
Point(s) of Diversion -	NESENE and SENENE, Section 13, T13N, R3E
Use(s) -	Heating
Total Quantity -	0.10 cfs
Period of Use -	January 1 – December 31
Place of Use -	NENE, Section 13, T13N, R3E.

28. After collection in the common infiltration gallery, the water flows into a pump sump. From the pump sump, the water is pumped 600 to 800 horizontal feet to heat a home and a shop. Water flows through this system generally from mid-October to mid-May at a maximum rate of approximately 17 gpm (0.04 cfs).

29. From mid-October to mid-May, Pancheris jointly divert a maximum total flow rate of 92 gpm. During the remainder of the year, Duane Pancheri's diversion of 75 gpm is the sole diversion under the Pancheri water rights, subject to a volume limitation of 51.3 acre-feet. Subtracting the maximum water diverted by Pancheris from Belvidere Hot Springs (approximately 92 gpm) from the estimated discharge of at least 150 gpm provides an estimated undiverted discharge of at least 58 gpm (0.13 cfs) available for diversion on a continuous basis.

Water Supply

Belvidere Hot Springs and Associated Low-Temperature Geothermal Aquifer

30. Belvidere Hot Springs are located in the NESENE, Section 13, T13N, R3E. The springs discharge from multiple vents in an area of approximately one acre. Based upon measurements taken by representatives of both MacGregor and the Pancheris, the total instantaneous discharge from Belvidere Hot Springs is estimated to be at least 150 gpm. At a flow rate of 150 gpm, Belvidere Hot Springs will annually discharge 241 acre-feet of water. In addition, there are undoubtedly other unmeasured diffuse discharge locations and underflow associated with the Belvidere Hot Spring complex. The temperature of the discharged spring water ranges from 104 degrees to 121 degrees F.

31. The precise geologic structure underlying Belvidere Hot Springs and the total quantity of low-temperature geothermal water beyond the amount of water discharging from the springs is unknown. The best general description of the geology of Belvidere Hot Springs is contained in a 1976 investigation report by Monte D. Wilson, James K. Applegate, Sherl L. Chapman, and Paul R. Donaldson titled "Geothermal Investigation of the Cascade, Idaho Area."

Ex. 40 (Attachment B). This report, authored in part by Sherl Chapman, Pancheris' expert, was also used and cited by the experts for MacGregor. The following general conclusions regarding this area were reached by Wilson et al. in 1976, and continue to be generally accurate:

1. Water supplies in the valley are sufficient for all uses now being made. The river and stream system provides adequate water for irrigation of all agricultural land.
2. The major non-thermal aquifer is the valley fill and alluvium, and it is adequate to supply water for nearly all wells on the valley floor and future ground water development.
3. The valley fill aquifer contains a large number of artesian zones, most of which are untapped and are capable of supplying fair yields to wells.
4. The hydrologic parameters, such as the storage coefficient and transmissivity, have not been calculated because of a lack of adequate pumping well data.
5. Water quality in the cold water system is considered to be poor for domestic purposes because of the high iron and manganese content. Other constituents, however, are within acceptable limits.
6. Known thermal water occurrences in the valley are related to the geologic structure. Locations of existing hot springs are directly controlled by the presence of fault and fracture patterns.
7. Both the granitic rocks and valley fill offer potential as reservoirs for thermal water. A significant untapped thermal aquifer may exist at depth in the valley fill.
8. Quality of the present geothermal resource is good. Samples analyzed show that hot water issuing from springs and wells in the area can be utilized for nearly all uses, including irrigation of crops.
9. Recharge to both the non-thermal and thermal systems is probably meteoric in origin. Chemical differences in the water are the result of the longer time of travel and heat in the thermal reservoir.

Exhibit 40 (Attachment B at 41-42).

32. Belvidere Hot Springs are a surface expression of a larger geothermal resource underlying the area of Cascade, Idaho to the north, and Cabarton, Idaho to the south. The geothermal aquifer manifests itself with multiple, significant surface discharge points and multiple zones of discharge. The underlying, low-temperature geothermal aquifer is most likely a fault controlled lateral discharge system that discharges to the surface and also laterally into the sediments. Belvidere Hot Springs is not the sole point of discharge from this geothermal aquifer system.

33. The production capacity of the geothermal aquifer system is significantly larger than the surface manifestations of the aquifer at Belvidere Hot Springs. The "feed sources" for

low-temperature geothermal springs will nearly always produce several times more water than the quantity of water emitting from the springs at ground surface.

34. One well proposed by MacGregor would be located about 200 feet south of the nearest vent of the MacGregor-Belvidere Hot Springs. MacGregor intends to intercept a fault trending in a northeastly direction that is expected to yield low-temperature geothermal water.

35. The prior owner of the land where the MacGregor-Belvidere Hot Springs are located retained Boise State University to investigate the geophysical resistivity of lithology underlying areas surrounding the MacGregor-Belvidere Hot Springs. A report describing the resistivity test results is an attachment to Exhibit 40. Resistivity is a measure of the ability of electrical current to travel through the geologic formation. An area of low resistivity is an indicator that low-temperature geothermal water may be present. Measured low resistivity may also indicate other geologic anomalies, however.

36. The location of the second geothermal well proposed by MacGregor is approximately 450 feet from the MacGregor-Belvidere Hot Springs and is within an area of low resistivity.

37. MacGregor could conduct additional geophysical testing in an attempt to increase the probability of finding low-temperature geothermal water. However, the additional testing would be costly and would not significantly increase the probability of finding low-temperature geothermal ground water. The surest and most cost-effective method of determining the amount and temperature of the low-temperature geothermal ground water available for development by MacGregor is to drill and test a well.

Cold Ground Water

38. The parties agreed there is sufficient cold ground water underlying the proposed cold-water points of diversion to provide the cold ground water MacGregor seeks to appropriate.

Reduction of Water Under Existing Water Rights

Impact of Drilling Wells

39. MacGregor proposes to drill the low-temperature geothermal wells as depicted in Exhibit 40. In general, the wells would be bored with a mud rotary drill through the sediments and unconsolidated materials. The purpose of the mud, or "soap," is to increase the specific gravity of fluid in the drilling column to prevent collapse of the open drill hole.

40. Bentonite soil is a clay that acts as an aquatard or aquaclude to prevent the migration of water. Bentonite is often placed around the annular space of the casing of a well near the ground surface as a seal to prevent downward movements of contaminants or upward migration of artesian water around the well casing. If bentonite is diluted to the proper consistency, well drillers can also use bentonite as a drilling mud to increase the specific gravity of the drilling fluid.

41. Bentonite is not the only mud ingredient that can increase the specific gravity of the drilling fluid. There are other polymers that will increase the specific gravity of the drilling fluid that do not have the sealing property of bentonite.

42. When bentonite is used as a drilling fluid component, some of the bentonite can migrate into the water producing zones encountered while drilling. The migration of bentonite in the water bearing zones is usually minimal, however, and the bentonite fluid is largely recovered when ground water is pumped to develop the well.

43. The risk of plugging the vents and conduits conveying low-temperature geothermal water to Belvidere Hot Springs while drilling with mud, including bentonite, is minimal.

44. After the mud rotary drill bores through the surface overburden, the drill bit will strike granite. Because granite is rock, most often an open well can be drilled in granite without fluid to support the bore hole. As a result, to the extent possible, the proposed well in granite will be bored with an air rotary drill.

45. Many wells have been drilled at various locations in the United States and worldwide near or directly into geothermal spring complexes without causing damage to the vents and conduits that convey geothermal water to surface water springs.

46. The well proposed to be 200 feet away from the nearest MacGregor-Belvidere Hot Springs vent is also located 400 to 500 feet away from the portion of Belvidere Hot Springs providing water to Pancheris' common infiltration gallery.

47. Despite fears expressed by the protestants about the "violent" nature of well drilling, damage to the geologic structure allowing movement of water, referred to in the testimony as a "feed zone," will be very localized. Any damage will be further minimized because Belvidere Hot Springs most likely has multiple "feed zones."

Impacts of Production from Springs and Ground Water

48. Belvidere Hot Springs and any encountered low-temperature geothermal water will be hydraulically connected. Because the low-temperature geothermal aquifer is under pressure, any change in pressure could affect the flow of Belvidere Hot Springs.

49. Increased production from the low-temperature geothermal source may impact the quantity of water flowing at ground surface from Belvidere Hot Springs to satisfy Pancheris' water rights. The degree of impact, if any, will depend on the amount of artesian pressure in the low-temperature geothermal aquifer and whether pumping is required to produce water from the wells. If low-temperature geothermal water must be pumped from the wells, the likelihood of reducing the quantity of water flowing from Belvidere Hot Springs will increase.

Speculation

50. MacGregor dug monitoring holes equipped with standpipes in one of her pastures for purposes of determining the location and size of a septic field for the proposed spa. MacGregor, through her representative, also extensively monitored the production of and use of water from Belvidere Hot Springs to support seeking appropriations of low-temperature geothermal water. These activities demonstrate MacGregor's intent to develop the spa and the water rights required for the spa.

Local Public Interest and Conservation of Water

51. There is a public demand for use of low-temperature geothermal water for soaking and bathing. There is also a public good resulting from heating with low-temperature geothermal water.

52. Irrigation produces growing crops in the arid West. No uses conflicting with the proposed irrigation use of cold ground water were identified.

53. The local public interest is enhanced when water is used efficiently and, as a result, is conserved for other uses.

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. The Idaho Supreme Court stated in *Shokal v. Dunn*, 109 Idaho 330, 340 (1985):

In all cases the plans should be sufficient to generally apprise the public of the efficacy of the proposed use in the planned facility, and of its potential impact.

Injury

4. Rule 45.01 a of the Water Appropriation Rules defines reduction in “quantity of water available under an existing water right” as injury to the water right. Rule 45.01 i. states that a water right is not injured unless the “water available . . . will be reduced below the amount recorded . . . [by the water right] . . . or the historical amount beneficially used [or needed] by the water right holder under such recorded rights, whichever is less.” Rule 45.01 a.iv. states that “[a]n application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the director.”

5. Drilling of the two low-temperature geothermal wells proposed by application for permit to appropriate water no. 65-13913 will not reduce the quantity of water available to Pancheris’ existing water rights.

6. Testing the production of the low-temperature geothermal wells may temporarily reduce the quantity of water available under Pancheris’ water rights. The reduction, if any, will not be permanent. MacGregor must conduct the test based on a plan approved by the Department. Pancheris and the Department must have the opportunity to participate in the tests.

7. Following the production tests, the Department can prevent injury to Pancheris’ water rights by: (1) disallowing diversion and use of water under the permit; or (2) limiting the diversion rate and volume of water diverted by MacGregor to prevent reductions in the amount of water Pancheris divert; or (3) requiring direct delivery of water from MacGregor’s wells, at no cost to Pancheris, to replace reductions in the quantity or temperature of water diverted by Pancheris.

8. Prior to MacGregor’s diversion of the surface low-temperature geothermal water from Belvidere Hot Springs, the Department must approve plans and specifications for spring diversion. The plans and specifications must provide for direct water delivery, at no cost to Pancheris, should MacGregor’s surface water delivery impact the quantity or temperature of water diverted by Pancheris.

9. Diversion of cold water for irrigation proposed by application for permit no. 65-13986 and for mixing with low-temperature geothermal water by application no. 65-13913 will not injure other water rights.

Sufficiency of Water

10. There is a high likelihood of sufficient unappropriated low-temperature geothermal surface water flowing from Belvidere Hot Springs to provide approximately the 0.5 cfs of flow sought by application for permit no. 65-13912, at least when Pancheris are not diverting water. A comparison of the respective size of the developed Pancheri uses with the size of the uses proposed by MacGregor supports a conclusion that there is sufficient low-temperature geothermal surface water to supply at least two phases of the spa project.

11. Based on information presented at the hearing, sufficient unappropriated low-temperature geothermal ground water is expected to be available to complete the entire spa project at a diversion rate of 2.0 cfs as sought by application for permit no. 65-13913. Because the total use of low-temperature geothermal water must be limited by the purpose sought, the total water use at the time of licensing will be limited to the amount actually needed and beneficially used.

12. There is sufficient cold ground water for the purposes sought.

Financial Resources

13. MacGregor has sufficient financial resources to complete the project.

Speculation, Delay, and Bad Faith

14. The applications were not filed for speculation, delay, or in bad faith.

Location Public Interest and Conservation of Water

15. Idaho Code § 42-202B defines the local public interest as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.”

16. Idaho Code § 42-233 requires that the heat value of low-temperature geothermal ground water be beneficially used prior to the water being used for other purposes.

17. Idaho Code § 42-226 states, in pertinent part:

Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided. In determining a reasonable ground water pumping level or levels, the director of the department of water resources shall consider and protect the thermal and/or artesian pressure values for low temperature geothermal resources and for geothermal resource to the extent that he determines such protection is in the public interest

18. Over diversion or waste of low-temperature geothermal water is not in the local public interest and does not conserve the water resources of the State of Idaho.

19. The local public interest and the ethics of conservation demand that any use of low-temperature geothermal ground water satisfy minimum standards of efficiency from extraction of the heat value of the water. As a result, after drilling of wells authorized by water right permit no. 65-13913, MacGregor must provide detailed designs for use of low-temperature geothermal water in the buildings and associated hot water soaking pools or swimming pools. The designs must be based on computations using recognized engineering methodologies that determine the temperatures and quantities of low-temperature geothermal water necessary to

provide for heating the spa buildings and to maintain sufficient temperature and pass through of hot water to the proposed pools.

20. Irrigation of additional lands with cold water is in the local public interest.

21. The application is in the public interest and will conserve the waters of the State of Idaho provided that the water is used according to designs approved by the Department.

ORDER

IT IS HEREBY ORDERED that application to appropriate water no. 65-13912 is **APPROVED** with the following conditions:

1. Proof of application of water to beneficial use shall be submitted on or before **October 1, 2011**.

2. Subject to all prior water rights.

3. Use of water under this right shall be non-consumptive.

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

5. Any initial use of low-temperature geothermal water for commercial purposes must derive a benefit from the heat of the water prior to the water being used for a commercial purpose for which the heat of the water has no value.

6. Prior to construction of diversion works for the surface low-temperature geothermal water from Belvidere Hot Springs, the right holder must submit plans and specifications for the spring diversion to the Department, and the Department must approve the plans and specifications. The plans and specifications must provide for direct water delivery to water rights no. 65-12891 and no. 65-13332, at no cost to the holders of those rights, to replace reductions in the quantity or temperature of water historically diverted under water rights nos. 65-12891 and 65-13332 caused by diversions under permit no. 65-13912.

7. Prior to construction of the diversion works and delivery system and the diversion of water under this right, the right holder shall submit detailed designs to the Department for approval for use of low-temperature geothermal water in heating the spa buildings and associated hot water soaking pools or swimming pools. The designs must be based on computations using recognized engineering methodologies that determine the temperatures and quantities of water necessary to provide the low-temperature geothermal water for heating the spa buildings and to maintain sufficient temperature and pass through of hot water to the proposed pools.

8. Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality permitting requirements administered by the Department of Environmental Quality.

9. 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.

10. 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.

IT IS FURTHER ORDERED that application to appropriate water no. 65-13913 is **APPROVED** with the following conditions:

1. Proof of application of water to beneficial use shall be submitted on or before **October 1, 2011**.

2. Subject to all prior water rights.

3. 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.

4. Use of water under this right shall be non-consumptive.

5. Any initial use of low-temperature geothermal water for commercial purposes must derive a benefit from the heat of the water prior to the water being used for a commercial purpose for which the heat of the water has no value.

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

7. Prior to construction of the diversion works and delivery system and the diversion of water under this right, other than for conducting the tests described in the following paragraph, the right holder shall submit detailed designs to the Department for approval for use of low-temperature geothermal water in heating the spa buildings and associated hot water soaking pools or swimming pools. The designs must be based on computations using recognized engineering methodologies that determine the temperatures and quantities of water necessary to provide the low-temperature geothermal water for heating the spa buildings and to maintain sufficient temperature and pass through of hot water to the proposed pools.

8. Prior to beneficially using water as authorized by this water right, the right holder shall propose a test to divert water from wells constructed as points of diversion described by this water right. The proposal for the diversion test must be submitted to the Department and to the holders of water rights no. 65-12891 and no. 65-13332 prior to the test. The proposed test must be capable of determining the impact to surface water flow from Belvidere Hot Springs resulting from the diversion of low-temperature geothermal ground water authorized by this water right. The Department must approve the proposed test. The water right holder shall include the Department and the holders of water rights no. 65-12891 and no. 65-13332 as participants in the test to the extent participation is desired by the Department and the holders of water rights no. 65-12891 and no. 65-13332.

9. Following completion of the diversion tests and analysis of the test data, the Department will act on one of the following alternatives: (1) disallow diversion and use of water under the permit; or (2) limit the diversion rate and volume of water diverted by the right holder to prevent reductions in the amount of water historically diverted as authorized by water right nos. 65-12891 and 65-13332; or (3) require direct delivery of water from the right holder's wells, at no cost to the holders of water rights no. 65-12891 and no. 65-13332, to replace reductions in the quantity or temperature of water historically diverted by the holders of rights no. 65-12891 and no. 65-13332 caused by diversions under permit no. 65-13913.

10. Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality permitting requirements administered by the Department of Environmental Quality.

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

12. After specific notification by the Department, the right holder shall install one or more totalizing flow meters to record the amount of water diverted and shall annually report the amounts of water diverted to the Department as directed.

IT IS FURTHER ORDERED that application to appropriate water no. 65-13986 is **APPROVED** with the following conditions:

1. Proof of application of water to beneficial use shall be submitted on or before **October 1, 2011**.

2. 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.

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

4. Diversion and use of water with a temperature greater than 85 degrees Fahrenheit is not authorized under this right.

5. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.0 acre-feet annually per acre at the field headgate for irrigation of the lands authorized.

6. After specific notification by the Department, the right holder shall install a totalizing flow meter to measure the amount of water diverted and shall annually report the amount of water diverted to the Department as directed.

7. 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.

DATED this 4th day of October 2006.



KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2006, I mailed a true and correct copy of the foregoing **FINAL ORDER** on the following persons listed below by U.S. mail, postage prepaid and addressed as follows:

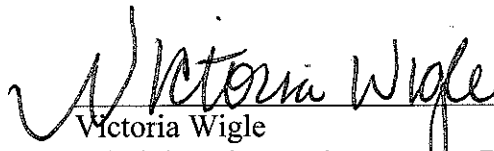
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(208) 373-7985

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(208) 383-4156

John Westra
Western Region Manager
Idaho Department of Water Resources
2735 Airport Way
Boise, Idaho 83705-5082


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

**EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER**

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) the petition for reconsideration is disposed of; or
 - (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days a) of the service date of the final order, b) of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

BEFORE THE DEPARTMENT OF WATER RESOURCES

FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR PERMIT NOS. 65-13912 and)
65-13913 IN THE NAME OF CAROL LYNN)
MACGREGOR)
_____)

**ORDER DENYING PETITION
FOR RECONSIDERATION**

The *Petition for Reconsideration* filed in this matter on September 6, 2005, by the
Pancheris, is DENIED.

Dated this 16th day of September, 2005.



Peter R. Anderson
Hearing Officer

SUPPORT DATA

FILE # 65-13912

CERTIFICATE OF SERVICE

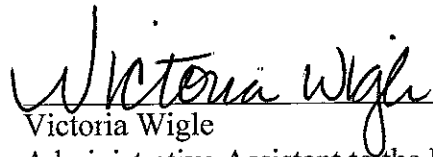
I HEREBY CERTIFY that on this 10th day of September, 2005, the above and foregoing document was served on the following via facsimile:

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(208) 385-5384

Julie Fischer
WHITE PETERSON
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Nampa, Idaho 83687
(208) 466-4405

Sherl Chapman
ERO Resources
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SPF Water Engineering
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Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

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

IN THE MATTER OF APPLICATION)
FOR PERMIT NOS. 65-13912, 65-13913 AND)
65-13986 IN THE NAME OF CAROL LYNN)
MACGREGOR)
_____)

**RECOMMENDED DECISION
AND ORDER**

STANDARD FOR DECISION

This matter comes before the Idaho Department of Water Resources ("IDWR") on three applications filed by Dr. Carol MacGregor ("Dr. MacGregor" or "Applicant") to appropriate ground water in the Payette River drainage. Water right applications are processed under Idaho Code § 42-203A, which provides, in part, that:

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

watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions. Provided however, that minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

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

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

FINDINGS OF FACT

I. Course of Proceedings.

1. Dr. Carol MacGregor filed three applications for permit that are the subject of this proceeding: 65-13912, 65-13913, and 65-13986 (together the "Applications").

2. Dr. MacGregor filed Application for Permit No. 65-13912 on August 2, 1999.

This application seeks to appropriate water as follows:

Source:	Belvidere Hot Springs
Point of Diversion:	NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 13, T13N, R3E, B.M., Valley County.
Use:	Heating and Commercial
Quantity:	0.50 c.f.s.
Period of Use:	1/1 to 12/31
Place of Use:	SE $\frac{1}{4}$ NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 13, T13N, R3E, B.M., Valley County Idaho. SW $\frac{1}{4}$ NW $\frac{1}{4}$ (Lot 2) and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and the

NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ SW $\frac{1}{4}$ (Lot 3), Sec. 18, T13N, R4E, B.M, Valley County, Idaho.

3. Dr. MacGregor filed Application for Permit No. 65-13913 on August 2, 1999.

This application seeks to appropriate water as follows:

Source: Groundwater
Point of Diversion: SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 13, T13N, R3E, B.M. Valley County, Idaho.
Use: Heating and Commercial
Quantity: 2.0 c.f.s.
Period of Use: 1/1 to 12/31
Place of Use: SE $\frac{1}{4}$ NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 13, T13N, R3E, B.M., Valley County Idaho. SW $\frac{1}{4}$ NW $\frac{1}{4}$ (Lot 2) and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ SW $\frac{1}{4}$ (Lot 3), Sec. 18, T13N, R4E, B.M, Valley County, Idaho.

The “remarks” section of the Application further provides that “two low-temperature geothermal wells and one cold water well are currently anticipated ”

4. Notice of Application Nos. 65-13912 and 65-13913 was published in The Long Valley Advocate, a weekly newspaper, on or about December 14 and 22, 1999. Duane and Darwin Pancheri (the “Pancheris”) timely protested Application Nos. 65-13912 and 65-13913, with the stated basis being “Protecting our Senior Water Rights.”

5. Dr. MacGregor filed Application for Permit No. 65-13986 on October 25, 2000.

This application seeks to appropriate water as follows:

Source: Groundwater
Point of Diversion: NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 13, T13N, R3E, B.M., Valley County, Idaho.
Use: Irrigation of 132 acres.
Quantity: 2.0 c.f.s.
Season of Use: 4/15 to 10/31
Place of Use: SE $\frac{1}{4}$ NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 13, T13N, R3E, B.M., Valley County, Idaho. SW $\frac{1}{4}$ NW $\frac{1}{4}$ (Lot 2) and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ SW $\frac{1}{4}$ (Lot 3), Sec. 18, T13N, R4E, B.M., Valley County, Idaho.

This application further provides:

This water right will be supplemental to 65-1979. The application contemplates sharing one cold water well in the SENE Sec 13 with pending application for Permit No. 65-13913. Diversion rate in combination with 65-13913 will not exceed 2.00 c.f.s. This application also proposed using spent low-temperature geothermal fluids diverted under 65-13913 for irrigation, provided that the heat value is utilized prior to irrigation.

Notice of Application No. 65-13986 was published in The Long Valley Advocate, a weekly newspaper, on or about December 6 and 13, 2000. The Pancheris timely protested Application No. 65-13986 on the basis that the application, if approved, could cause injury to their existing water rights.¹

6. An initial prehearing conference for Application Nos. 65-13912 and 65-13913 was scheduled for February 10, 2000. The conference was not held because Dr. MacGregor did not appear. In response to a *Notice of Failure to Appear at Prehearing Conference*, dated February 11, 2000, Dr. MacGregor noted in a letter received by IDWR on February 14, 2000:

I foresee no problems for these neighbors because I fully understand their right to receive their water right. On the other hand, I hope that they understand that I must ascertain the potential to develop the water right for which I bought my property, and for which (*sic*) have applied. I need to know that potential before I hire experts to draw up the plans that I envision.

A second prehearing conference regarding Application Nos. 65-13912 and 65-13913 was held on June 20, 2000. Following this prehearing conference a hearing was scheduled for November 14 and 15, 2000.

7. On November 3, 2000 IDWR issued an *Order Interrupting Processing of Application Suspending Hearing* as a result of a *Motion to Suspend Hearing* Dr. MacGregor filed

¹ In their *[PROPOSED] FINDING OF FACT AND CONCLUSIONS OF LAW*, at 40, the Pancheris indicate that Application for Permit No. 65-13986 should be granted so long as, among other things, the wells where ground water is withdrawn under this right are more than one quarter of a mile from Belvidere Hot Springs. Because one of Dr. MacGregor's proposed points of diversion under this Application is closer than one quarter of a mile to Belvidere Hot Springs, the Pancheris' concession did not fully resolve this protest.

on October 19, 2000. Processing of Application Nos. 65-13912 and 65-13913 was stayed until May 1, 2001, to allow for the parties to conduct discovery.

8. On January 3, 2001, IDWR issued an *Order Authorizing Discovery* and on January 25, 2001, an *Amended Order Authorizing Discovery*. The parties were authorized to engage in discovery for a period of one year, or until two weeks prior to the scheduled hearing, whichever was earlier. On June 6, 2001, IDWR issued a *Second Amended Order Authorizing Discovery* that again extended the discovery for a period of one year, or until two weeks prior to the scheduled hearing, and recognized an agreement between the parties for monitoring and inspection of the Belvidere Hot Springs area.

9. For approximately the next 3½ years little formal action was taken by IDWR. In January 2003, Dr. MacGregor submitted a proposal to IDWR to construct a geothermal test well at Belvidere Springs. Information was submitted by both Dr. MacGregor and the Pancheris in support of, and in opposition to, the geothermal test well proposal. Exs. 40, 122-124. On November 12, 2003, IDWR denied the geothermal test well proposal, stating:

The Department will not consider approval of a drilling permit at the proposed location until the following has occurred:

Application for permit #65-13913 is approved, and a drilling permit can be considered

OR

An agreement to compensate for possible damages is executed by the applicant and protestant.

Ex. 200 (emphasis in original). No evidence was submitted indicating that a hearing was requested by Dr. MacGregor on that test well denial. The language of the denial, however,

suggests that an issue to be determined when considering the Applications is whether drilling a low-temperature geothermal wells or wells is likely to harm the Pancheris.²

10. On November 11, 2004, Dr. MacGregor filed a *Motion and Request for Hearing*.

11. On November 24, 2004, Peter Anderson was appointed Hearing Officer regarding Application Nos. 65-13912 and 65-13913. A prehearing conference on those applications was held on January 3, 2005.

12. After this conference, a *Scheduling Order* issued on January 7, 2005, that established a time period for submission of any IDWR staff memorandum (February 11, 2005), provided for the exchange of information (February 18, 2005), provided for the exchange of witness and exhibit lists (April 8, 2005) and set tentative hearing dates (April 21 & 22, 2005).

13. On January 10, 2005, Peter Anderson was appointed Hearing Officer regarding Application No. 65-13986. With the agreement of the parties proceedings on Application Nos. 65-13912 and 65-13913 and Application No. 65-13986 were consolidated on January 14, 2005. Also on January 14, 2005, the Hearing Officer invited IDWR staff to file by February 11, 2005, a staff memorandum providing: (1) an analysis by IDWR staff of whether the Applications should be granted and, if so, any proposed conditions; (2) a listing of applicable IDWR memoranda; (3) an analysis of the availability of water at the proposed point of diversion, or analysis of any studies related to the availability of ground water at the proposed point of diversion; and (4) a GIS map showing the proposed place of use and point of diversion. A staff memorandum from John Westra, Western Region Manager for IDWR, was submitted on February 1, 2005 Ex. 200.

² This suggestion was borne out by the presentations of the parties at the hearing, which focused in large part on the risks of drilling low temperature geothermal wells near the Belvidere Hot Springs.

14. On April 22-23 and May 5-6, 2005, IDWR conducted a hearing on the Applications. Dr. MacGregor was present, represented by Julie K. Fischer and John R. Kormanik. The Pancheris were present, represented by Scott L. Campbell and Angela Schaer Kaufmann.

15. At the conclusion of the hearing the parties were given until May 16, 2005, to submit briefing regarding whether the Hearing Officer could recommend that Dr. MacGregor be allowed to drill and test a geothermal test well before a final decision is reached, and until June 3, 2005, to submit final briefing. Both Dr. MacGregor and the Pancheris filed extensive briefing and proposed findings and conclusions. This matter was fully submitted to IDWR on June 3, 2005.

II. Evidence Considered.

16. Exhibits offered by Dr. MacGregor and admitted as part of the record are as follows:

Exhibit 2: Notice of Protest to Application No. 65-13912, filed in the name of Duane and Darwin Pancheri.

Exhibit 6: Notice of Protest to Application for Permit No. 65-13986;

Exhibit 7: Application for Permit No. 65-13978;

Exhibit 8: Notice of Protest to Application for Permit No. 65-13978;

Exhibit 9: Partial Decree for Water Right No. 65-01973;

Exhibit 10: Partial Decree for Water Right No. 65-01972;

Exhibit 11: Idaho Department of Water Resources file for Water Right No. 65-12891. Specifically includes:

- Water Right License No. 65-12891;
- Application for Amendment (For Licensing Purposes);

- Assignment of Permit;
- Permit for Water Right No. 65-12891;
- Application for Permit No. 65-12891;
- Topographic map showing the point of diversion and place of use;
- Photocopy of public notice of application for permit;
- Affidavit of publication;
- Inter-Department Memo dated September 15, 1998;
- Handwritten notes re: new address for Darwin and Joan Pancheri;
- Correspondence from Steve Lester to Darwin Pancheri dated August 17, 1998;
- Correspondence from Sharla Curtis to Duane and Darwin Pancheri dated January 12, 1992;
- Correspondence from Sharla Curtis to Duane and Darwin Pancheri dated October 15, 1991;
- License Review checklist;
- Conversation Memorandum dated August 7, 1991, by Jan Shurte detailing conversation with Duane Pancheri;
- Idaho Department of Water Resources Staff Analysis Sheet for Beneficial Use Report;
- Beneficial Use Field Report;
- Conversation Memorandum dated October 19, 1988;
- Proof of Beneficial Use Analysis Sheet;
- Proof of Beneficial Use;
- Permit Approval Notice;
- Idaho Department of Water Resources Appropriation Application Analysis Sheet;

- Correspondence from “The Advocate” regarding publication;
- Conversation Memorandum dated May 15, 1989; and
- Conversation Memorandum dated October 19, 1988.

Exhibit 12: Idaho Department of Water Resources file for Application for Permit No. 65-13332. Specifically includes:

- Permit No. 65-13332;
- Application for Permit No. 65-13332 (including map);
- Affidavit of Publication;
- Inter-Department Memo dated September 15, 1998;
- Handwritten Notes dated September 8, 1998, re: Darwin and Joan Pancheri;
- Correspondence from Steve Lester to Darwin Pancheri dated August 27, 1998;
- Correspondence from Nina Shields to Darwin and Joan Pancheri dated October 29, 1991;
- Proof of Beneficial Use;
- Analysis Sheet for Proof of Beneficial Use;
- Permit Approval Notice;
- Application for Permit Review sheet;
- Appropriation Application Analysis Sheet;
- Conversation Memorandum dated July 1, 1991;
- Beneficial Use Field Report; and
- Conversation Memorandum dated October 18, 1988.

Exhibit 13: Idaho Department of Water Resources File for Permit No. 65-13458. Specifically includes:

- Water Right Permit No. 65-13458;
- Application for Permit;

- Comment dated June 22, 1993, Re: Overlap;
- Map;
- Inter-Department Memo dated September 15, 1998;
- Handwritten note;
- Handwritten note re: Darwin and Joan Pancheri mailing address;
- August 17, 1998 correspondence from Steve Lester to Darwin Pancheri re: Licensing;
- Proof of Beneficial Use;
- Beneficial Use Field Report;
- Maps;
- Well Inspection Form;
- Analysis Sheet for Proof of Beneficial Use;
- Proof Acknowledgement Letter dated September 9, 1996;
- Proof Due Notice dated July 31, 1996;
- Permit Approval Notice dated October 19, 1993;
- Application for Permit State Office Review;
- Water Right Profile Report;
- Appropriation Application Analysis Sheet;
- Affidavit of Publication; and
- Application for Permit.

Exhibit 16: Warranty Deed from Tom Nicholson to Carol Lynn MacGregor.

Exhibit 17A: Photographs, as follows:

1. Belvidere Hot Springs and Darwin Pancheri home.
2. Belvidere Hot Springs looking northeast.
3. Belvidere Hot Springs looking east.

4. Belvidere Hot Springs looking west.
 5. Outflow from Belvidere Hot Springs looking east.
 6. Hottest pool in Belvidere Hot Springs looking northeast.
 7. Belvidere Hot Springs looking northeast.
 8. Temporary fence east of Belvidere Hot Springs.
 9. Unused ditch south of Belvidere Hot Springs.
 10. Moore's Creek.
 11. Moore's Creek.
 12. Moore's Creek.
 13. Moore's Creek.
 14. Moore's Creek.
 15. Duane Pancheri structure.
 16. Duane Pancheri water drain.
 17. Duane Pancheri flow meter.
- Exhibit 18: Location Map of MacGregor Property.
- Exhibit 19: Drawing of MacGregor Project.
- Exhibit 20: Correspondence from Terry M. Scanlan to Carol Lynn MacGregor dated June 6, 2000, re: Drilling Cost Estimate for Geothermal Exploration Well.
- Exhibit 21: Financial Assurance Document.
- Exhibit 22: Agreement for Specifications and Locations for Flow Meters.
- Exhibit 24: Letter from Sherl Chapman to Scott Campbell dated May 20, 2003.
- Exhibit 25: Letter from Sherl Chapman to Scott Campbell dated October 1, 2003.
- Exhibit 30: Administrator's Memorandum dated September 8, 1980, re: Rate of Flow for Heating Use.

- Exhibit 33: Geologica Report dated February 14, 2005.
- Exhibit 34A: Illustrative Exhibit drawn by Jill Haizlip.
- Exhibit 34B: Illustrative Exhibit drawn by Jill Haizlip.
- Exhibit 37: Correspondence from Terry M. Scanlan to Julie Klein Fischer re: Monitoring Update – Belvidere Hot Springs.
- Exhibit 38: Correspondence from Terry M. Scanlan to Jo Beeman dated July 1, 1999, Re: MacGregor – Belvidere and Raspberry Ranches.
- Exhibit 40: Correspondence from Terry M. Scanlan to Rob Whitney dated September 2, 2003, re: MacGregor Test Well Proposal.
- Exhibit 42: I Illustrative Exhibit drawn by Terry Scanlan.
- Exhibit 43: St. Marie, et al., *Examination and Evaluation of Geothermal Sites in the State of Idaho with Emphasis Given to Potential for Electrical Generation or Direct Use*, Idaho Water Resources Research Institute, September 2002.
- Exhibit 45: Correspondence from John Westra to Josephine Beeman and Scott L. Campbell dated November 12, 2003.

17. Exhibits offered by the Pancheris and admitted as part of the record are as follows:

- Exhibit 101: Merle W. Wells, *Heat from the Earth's Surface: Early Development of Western Geothermal Resources*, reprinted from *Journal of the West*, Vol. X, Number 1.
- Exhibit 102: Arthur A. Hart, "Idaho Yesterdays: Indians Used Warm Springs," *The Idaho Statesman*, at 12.
- Exhibit 103: N.S. Nokkentved, "Report: Water Pumping Reduces Bruneau Hot Springs," *The Times-News*.
- Exhibit 104: Charles Berenbock, *Effects of Well Discharges on Hydraulic Heads in a Spring Discharges from the Geothermal Aquifer System in the Bruneau Area, Owhyee County, Southwestern Idaho*. USGS Water-Resources Investigations Report 93-4001, Boise, Idaho.
- Exhibit 105: Will L. Burnham and Spencer H. Wood, *Field Guide: Boise Geothermal System, Idaho*, 38th Annual Meeting, Rocky Mountain Section, The Geological Society of America.

- Exhibit 106: Kenneth W. Neely, *Production, Temperature and Water Level Data for the Four Heating Systems in the Boise Front Low Temperature Geothermal Resource Area, 1977-1997*, Idaho Department of Water Resources Planning and Policy Division, Technical Services Bureau, Ground Water Monitoring Section, Open File Report.
- Exhibit 107: Kenneth W. Neely, *Production History for the State of Idaho Capitol Mall Geothermal System 1983-1994*, Idaho Department of Water Resources.
- Exhibit 109: Christian R. Petrich, *Investigation of Hydrogeologic Conditions and Ground Water Flow in the Boise Front Geothermal Aquifer (Executive Summary)*, Idaho Water Resources Research Institute, Research Report IWRRI 2003-07.
- Exhibit 110: Well log notes from Clements well.
- Exhibit 111: Notes from Larry Hellnake Well No. GEO-1, Well No. 2, and Spring, Roystone Hot Springs.
- Exhibit 112: Lithologic log and temperature gradient, Well No. GEO-1, Roystone Hot Springs.
- Exhibit 113: Ground Temperature Contours, Roystone Hot Springs.
- Exhibit 114: Ken Neely, *Semi-Annual Review of the Monitoring Data for the Boise Front Geothermal System*, January – June 2003, Idaho Department of Water Resources.
- Exhibit 115: *Geothermal Resources of Utah – An Overview*, Geo-Heat Center Quarterly Bulletin, Vol. 25, No. 4, at 2.
- Exhibit 116: *Crystal Hot Springs – Salt Lake County*, Geo-Heat Center Quarterly Bulletin, Vol. 25, No. 4, at 26.
- Exhibit 125: Photograph of Duane Pancheri's shop interior.
- Exhibit 126: Photograph of back of Duane Pancheri's shop.
- Exhibit 127: Photograph of back of Duane Pancheri's shop.
- Exhibit 128: Photograph of back of Duane Pancheri's swimming pool.
- Exhibit 129: Photograph of back of Duane Pancheri's home and guest house.
- Exhibit 130: Photograph of back of Duane Pancheri's yard.

- Exhibit 131: Photograph of back of Duane Pancheri's home and guest house.
- Exhibit 132: Photograph of back of Duane Pancheri's yard.
- Exhibit 133: Photograph of lane to Duane Pancheri's homes looking west.
- Exhibit 134: Photograph of Duane Pancheri's shop.
- Exhibit 135: Photograph of Duane Pancheri's laborer's house.
- Exhibit 137: Photograph of Duane Pancheri's laborer's house.
- Exhibit 138: Photograph of discharge from Duane Pancheri's pool into creek.
- Exhibit 143: Photograph of Darwin Pancheri's shop.
- Exhibit 144: Photograph of Darwin Pancheri's home and shop.
- Exhibit 145: Photograph of Darwin Pancheri's pump sump and flow meter.
- Exhibit 146: Photograph of Darwin Pancheri's pump sump.
- Exhibit 147: Photograph of Belvidere Hot Springs on the Pancheris' Property.
- Exhibit 148: Photograph of Darwin Pancheri's pump sump.
- Exhibit 149: Photograph of sprinkler and Belvidere Hot Springs.
- Exhibit 150: Photograph of laying hot water lines under Darwin Pancheri's shop.
- Exhibit 151: Photograph of discharge from Darwin Pancheri's pump sump.
- Exhibit 153: Photograph of overflow discharge from Duane Pancheri's laborer's house.
- Exhibit 154: Photograph of discharge into Duane Pancheri's pool.
- Exhibit 155: Photograph of Belvidere Hot Springs.
- Exhibit 157: Photograph of Belvidere Hot Springs flowing east.
- Exhibit 160: Photograph of Belvidere Hot Springs discharge area near weir site.
- Exhibit 162: Photograph of the Pancheris' and MacGregor's Property near Belvidere Hot Springs.

18. IDWR, on its own initiative, admitted the following exhibits:

Exhibit 200: IDWR Staff Memorandum dated January 27, 2005.

Exhibit 201: Applications for Extensions of Time to Avoid Forfeiture for Water Rights Nos. 65-1972 and 65-1973.

19. Dr. MacGregor called the following witnesses:

Duane Pancheri,

Darwin Pancheri,

Carol Lynn MacGregor,

Terry Scanlan, and

Jill Haizlip.

20. The Pancheris called the following witnesses:

Duane Pancheri,

Darwin Pancheri, and

Sherl Chapman.

21. John Westra, Western Region Manager of the Idaho Department of Water Resources, also testified at the hearing. He was called by the Hearing Officer to testify regarding the Staff Memorandum.

22. All parties were afforded a reasonable opportunity to cross-examine the opposing side's witnesses and IDWR staff.

III. Applicant and Intended Water Use Under Application Nos. 65-13912, 65-13913 and 65-13986.

23. Dr. MacGregor is a professional historian, investor and rancher. She owns approximately 1,100 acres of real property in Valley County, Idaho. That property, known as Raspberry Ranch, is an operational cattle ranch managed by Dr. MacGregor. Although Dr. MacGregor owns a home in Boise, Idaho, Raspberry Ranch is her permanent home. Part of Raspberry Ranch was owned by Dr. MacGregor's father when she was growing up, and is now

owned by her. The portion of the ranch that includes the points of diversion and places of use under the Applications was acquired by Dr. MacGregor by warranty deed on January 15, 1998.

A. Hot Water Spa.

24. The SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 13, T13N, R3E, B.M., Valley County, Idaho contains a hot spring complex known as Belvidere Hot Springs. Dr. MacGregor testified that since she purchased this portion of Raspberry Ranch she has had the goal of developing a hot water spa using water from Belvidere Hot Springs and new low temperature geothermal wells. Development of the hot water spa is Dr. MacGregor's reason for submitting the Application Nos. 65-13912 and 65-13913.

25. Dr. MacGregor testified that the hot water spa on her property would include a lodge, hot baths and private "casitas". Exhibit 19, which was prepared by architect Chad Slichter depicts the general concept of the project. The spa would be built in three phases. The first phase consists of a 2,000 (two thousand) square foot lodge with massage facilities and landscaping (bushes and trees). It would include a driveway and one parking area, and a large hot water soaking pool. The exact size of the large pool was not provided. Approximately 30 acres of land would be fenced off. Dr. MacGregor testified that her husband would help her with the excavation. There would be no overnight guest accommodations in the first phase. The second phase of the project would include a swimming pool, several individual soaking tubs, two or three "casitas," and an additional wing to the original lodge, with more therapy rooms, showers, linen rooms, and cleaning supply spaces. After phase two, there would be approximately five bathrooms and shower rooms, and each casita will have a bathroom with a

shower. The third phase would include another wing on the lodge, as well as up to ten more “casitas,” for a total of twelve.

26. The 0.50 cfs of water to be used under Application for Permit No. 65-13912 would be collected directly from Belvidere Hot Springs. An infiltration gallery located across Belvidere Hot Springs running east to west, of unspecified size and elevation would be constructed to collect water from the hot springs and the water would be routed to a pump sump. Water would then be conveyed in pipes of indeterminate size to the hot water spa, where it would be used for heating and commercial purposes. The need for this amount of water was not established by Dr. MacGregor, although Terry Scanlan testified that this amount may be sufficient to operate a hot water spa of unspecified size. Dr. MacGregor did not present a cost estimate for the infiltration gallery, pumps, piping or other facilities she plans to install if Application for Permit No. 65-13912 is approved. It is not clear from the record whether Permit No. 65-13912 would be necessary if Permit No. 65-13913 is granted.

27. The 2.0 cfs of water used under Application for Permit No. 65-13913 would be collected from three wells. Two, redundant, low-temperature geothermal wells would likely be drilled: one 200 feet to the south of Belvidere Hot Springs and one 450 feet southeast of the spring vents. The conceptual plan and written description for one such well, initially drilled as a test well, are contained in Exhibit 40. The cold-water well would be located southeast of Belvidere Hot Springs. The depth and configurations of these wells can only be determined after actual exploration of the ground water underlying the proposed points of diversion.

28. The hot and cold ground water would be conveyed in pipes of indeterminate size to the hot water spa, where it would be used for heating and mixed for commercial purposes such

as bathing. The amount of cold ground water withdrawn would depend upon the temperature of the geothermal water. The theoretical basis for requesting this quantity of water was not established by Dr. MacGregor. Dr. MacGregor presented an estimate for the cost of drilling one geothermal well. That cost of the geothermal well was estimated at \$17,645.00. Dr. MacGregor presented no evidence regarding the cost of the cold water well she plans to drill if Application for Permit No. 65-13913 is approved.

29. The size of the facility Dr. MacGregor is able to construct is directly dependent upon the amount, location and temperature of geothermal water she is able to obtain under Application Nos. 65-13912 and 65-13913. It makes little sense to design the exact size and location of an infiltration gallery, pump sump, pumps, piping, the best mix of hot and cold water sources, the size of the hot water spa, and the precise use of spent hot water when the availability of hot water has not been precisely determined. Because of the uncertainty regarding the amount of geothermal water that will be available for the hot water spa³, Dr. MacGregor has not proceeded to develop detailed plans for her project or apply for all necessary permits and other governmental approvals.

30. As a result, as of the hearing dates, Dr. MacGregor had talked only briefly with a builder and does not have blueprints or a specific architectural design. Dr. MacGregor presented no testimony or evidence from any builder, architect, contractor, subcontractor, landscaper, or professional, other than Terry Scanlan, providing estimates for the construction of any part of her spa project. Dr. MacGregor has had only informal discussions with one Valley County Commissioner regarding her project, and has not begun the local permitting process.

³See Findings of Fact No. 43

Dr. MacGregor has dug monitoring holes with standpipes in one of her pastures for purposes of determining the location and size of her septic field. She testified that she will install the number of septic tanks required by Mr. Latham with the Valley County Health District. Her property is zoned agricultural and will need to be re-zoned in order for her to build her spa.

B. Irrigation Project.

31 Application for Permit No. 65-13986 received very little attention during the hearing. Dr. MacGregor's reasons for filing this application are unclear. Although there is some indication in the record that the proposed place of use is currently dry pasture, there is also evidence in the record that the same area is currently covered by Water Right No. 65-01979. *See* Ex. 38, Fig. 2 and Application for Permit No. 65-13986, Remarks ("This water right will be supplemental to 65-01979"). No evidence was provided regarding the use of Water Right No. 65-01979 and how the water use under Application for Permit No. 65-13986 relates to it. It may be that this application is intended to simply allow re-use of any ground water diverted pursuant to Application for Permit No. 65-13913:

The application contemplates sharing one cold water well in the SENE Sec 13 with pending application for permit 65-13913. Diversion rate in combination with 65-13913 will not exceed 2.0 cfs. This application also proposes using spent low-temperature geothermal fluids diverted under 65-13913 for irrigation, provided that the heat value is utilized prior to irrigation.

Application for Permit No. 65-13913, Remarks. If so, the configuration of this water right permit is dependent upon the configuration of proposed Permit No. 65-13913.

32. Under Application for Permit No. 65-13986 Dr. MacGregor proposes to divert 2.0 cfs of ground water for the irrigation of 132 acres of pasture. This quantity is within the restrictions of Idaho Code § 42-202(6). No annual volume of use was quantified in the Application. Dr. MacGregor intends to use two wells to divert this water. One well would be

located approximately 2000 feet south of Belvidere Hot Springs and the other well would also be that used by proposed Permit No. 65-13913.

C. Evaluation.

33. Dr. MacGregor did not provide sufficient details of the proposed design, construction and operation of the hot water spa and irrigation project to allow the water resource impact of the Applications to be evaluated. The primary reason for this failure is her inability to drill and test a geothermal well to determine how much geothermal water she can obtain from the proposed wells and the temperature of that water.

IV. Project Financing.

34. Dr. MacGregor testified that she thinks the first phase of her spa project will cost \$300,000. She stated that includes the lodge, excavation, fencing, landscaping, and permits. Dr. MacGregor estimates that the first and second phases of her project will cost \$700,000, with the third phase bringing the total cost (for all three phases) to \$3,000,000.

35. Dr. MacGregor testified at length about her assets. She testified she owns the 1,100 acre Raspberry Ranch in Long Valley, without debt. In addition, she owns a ranch in Emmett Idaho, and a home in Boise – all free of liens. Those properties, if mortgaged, could generate monies far in excess of the total cost to develop all phases of her spa project. Dr. MacGregor further testified about her income from teaching at Boise State University; publications; participating in a lecture tour; ranching; and private investments. Her uncontradicted testimony was that, if needed, she could access cash sufficient to finance full development of her spa and related water rights, at an estimated cost of three million dollars. Melina Sander, Senior Vice President and Financial Advisor with Morgan Stanley, provided a written statement that Dr. MacGregor has “the ability to cover in excess of \$700,000 to fund any

development she desires.” This is sufficient to cover the estimated cost of the first two phases of the hot water spa project. Dr. MacGregor also testified that she could complete the entire hot water spa project within five years.

36. Dr. MacGregor presented no evidence regarding the construction or cost of the southernmost cold water well she plans to drill if Application for Permit No. 65-13986 is approved. Dr. MacGregor presented no evidence regarding the cost of pipelines or other structures necessary to transport water from any of the points of diversion proposed under Applications for Permit Nos. 65-13986 to the proposed places of use. Dr. MacGregor did not testify or submit evidence regarding her ability to complete this irrigation water right.

V. Water Supply and Impact On Water Quantity Under Existing Water Rights.

37. The spring development and ground water wells contemplated by the Applications will withdraw water from the Payette River Drainage, which is designated hydrologic basin 65 in IDWR records.

A. Belvidere Hot Springs.

38. Belvidere Hot Springs are located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 13, T.13 N., R. 3 E, B.M., Valley County, Idaho. The Springs discharge from multiple vents in an area of approximately one acre. Based upon monitoring conducted by both Dr. MacGregor and the Pancheris, total instantaneous discharge from Belvidere Hot Springs is approximately 150 gpm, which translates to an annual discharge of 241 acre-feet. The temperature of the discharged ground water ranged from 104 degrees F. to 121 degrees F.

39. Dr. MacGregor currently owns two water rights using water from Belvidere Hot Springs that were decreed in the Snake River Basin Adjudication. Water right no. 65-01973 is described as follows:

Priority Date: May 1, 1901
Source: Spring
Point of Diversion: SE¼ NE¼, Sec. 13, T13N, R3E, Valley Co., Idaho.
Use: Domestic.
Quantity: 0.01 c.f.s., 13,000 gallons per day, 1.20 acre feet per year.
Season of Use: 1/1 to 12/31
Place of Use: SE¼ NE¼, Sec. 13, T13N, R3E, Valley Co., Idaho.

Water right no. 65-01972 is described as follows:

Priority Date: May 1, 1901
Source: Spring
Point of Diversion: SE¼ NE¼, Sec. 13, T13N, R3E, Valley Co., Idaho.
Use: Domestic.
Quantity: 0.04 c.f.s., 13,000 gallons per day, 1.20 acre feet per year.
Season of Use: 1/1 to 12/31
Place of Use: SE¼ NE¼, Sec. 13, T13N, R3E, Valley Co., Idaho.

These two rights historically were used at hot bathes built directly in the Belvidere Hot Springs, but are currently unused and subject to extensions of time to avoid forfeiture pursuant to Idaho Code § 42-222(2). Ex. 201. No evidence was submitted by Dr. MacGregor regarding how or if she intends to use these water rights in the proposed hot water spa.

40. The Pancheris have developed two water uses out of Belvidere Hot Springs. Water Right No. 65-12891 is licensed to Duane and Darwin Pancheri and is described as follows:

Priority Date: October 19, 1988.
Source of Water: Spring.
Point(s) of Diversion: NE¼, SE¼, NE¼ and SE¼, NE¼, NE¼, Sec. 13, T13N, R3E, B.M., Valley County, Idaho.
Use(s): Heating 0.40 c.f.s, 47.7 AFA
Domestic 0.04 c.f.s, 3.6 AFA.
Total Quantity: 0.44 cfs, 51.3 AFA.
Period of Use: January 1 – December 31.
Place of Use: SE¼ SW¼ and NW¼ SE¼ and SW¼ SE¼, Sec. 18, T13N, R4E, B.M., Valley County Idaho.

The hot water used under this water right is collected in a buried infiltration gallery which is approximately 40 to 50 feet long and situated 25 to 50 feet north of the hot spring vents located on

Dr. MacGregor's property. The water then flows by gravity approximately 5100 feet, where it is used to heat three homes, a shop and a swimming pool. Water flows through this system year round at an average rate of approximately 75 gpm (0.167 cfs, 121 afa). The infiltration gallery lies above Dr. MacGregor's property in elevation. Water Right Permit No. 65-13332 issued to Darwin and Joan Pancheri with a proposed water use as follows:

Priority Date:	July 2, 1993.
Source of Water:	Spring.
Point(s) of Diversion:	NE¼, SE¼, NE¼ and SE¼, NE¼, NE¼, Sec. 13, T13N, R3E, B.M., Valley County, Idaho.
Use(s):	Heating.
Total Quantity:	0.10 cfs.
Period of Use:	January 1 – December 31.
Place of Use:	NE¼, NE¼ Sec. 13, T13N, R3E, B.M., Valley County, Idaho.

This permitted water use also withdraws from the buried infiltration gallery, from which it flows into a pump sump. From the pump sump the water is pumped, using a ¾ hp pump, 600-800 feet to heat a home and a shop. Water flows through this system generally from mid-October to mid-May at an average rate of approximately 12.8 gpm (0.03 cfs)

41. Subtracting the water diverted by the Pancheris from Belvidere Hot Springs, approximately 87.8 gpm (75 gpm plus 12.8 gpm), from the measured flow--150 gpm--reveals that there is a maximum of approximately 62.2 gpm (0.13 cfs/100 afa) available for diversion on a continuous basis. Further evidence of Dr. MacGregor's plans and their precise impact on the Belvidere Hot Springs would be needed to determine the quantity of the excess water that could be diverted on an instantaneous basis without impacting the Pancheris' water uses. Although Mr. Scanlan testified that any impact on the Pancheris' water rights could be mitigated simply by ceasing the diversion to the hot water spa, if this impact is continuous the hot water spa could not be developed using Belvidere Hot Springs water.

B. Low Temperature Geothermal Aquifer.

42. The precise geologic structure underlying Belvidere Hot Springs and the availability of geothermal water in addition to that discharged from the Springs is unknown. The best general description of the geology of Belvidere Hot Springs is contained in a 1976 investigation report by Monte D. Wilson, James K. Applegate, Sherl L. Chapman and Paul R. Donaldson entitled "Geothermal Investigation of the Cascade, Idaho Area." Ex. 40 (Attachment B). This report, authored in part by the Pancheris' expert, was also cited by, used, and referred to by the experts for Dr. MacGregor. The following general conclusions regarding this area in 1976 were reached in Wilson et al., and continue to be generally accurate:

1. Water supplies in the valley are sufficient for all uses now being made. The river and stream system provides adequate water for irrigation of all agricultural land.
2. The major non-thermal aquifer is the valley fill and alluvium, and it is adequate to supply water for nearly all wells on the valley floor and future ground water development.
3. The valley fill aquifer contains a large number of artesian zones, most of which are untapped and are capable of supplying fair yields to wells.
4. The hydrologic parameters, such as the storage coefficient and transmissivity, have not been calculated because of a lack of adequate pumping well data.
5. Water quality in the cold water system is considered to be poor for domestic purposes because of the high iron and manganese content. Other constituents, however, are within acceptable limits.
6. Known thermal water occurrences in the valley are related to the geologic structure. Locations of existing hot springs are directly controlled by the presence of fault and fracture patterns.
7. Both the granitic rocks and valley fill offer potential as reservoirs for thermal water. A significant untapped thermal aquifer may exist at depth in the valley fill.

8. Quality of the present geothermal resource is good. Samples analyzed show that hot water issuing from springs and wells in the area can be utilized for nearly all uses, including irrigation of crops.

9. Recharge to both the non-thermal and thermal systems is probably meteoric in origin. Chemical differences in the water are the result of the longer time of travel and heat in the thermal reservoir.

Ex. 40 (Attachment B at 41-42).

43. Although Terry Scanlan testified that in his opinion there was sufficient ground water to develop the hot water spa, the only way to determine the amount and temperature of the geothermal ground water available for development by Dr. MacGregor is to drill and test an exploratory geothermal well. This was the stated conclusion of both of Dr. MacGregor's experts, Terry Scanlan and Jill Haizlip. The necessity for drilling and testing was also demonstrated by the testimony of the Pancheris' expert witness, Sherl Chapman. He described several test wells he had drilled in the general area of Belvidere Hot Springs that did not locate geothermal water. Two wells were drilled north of Belvidere Hot Springs and four to the south (between Belvidere Hot Springs and Cabarton Hot Springs), and none obtained warm water, much less geothermal water. The two northerly wells were located approximately one mile from Belvidere Hot Springs. One of the southerly wells was located three quarters of a mile to one mile from Belvidere Hot Springs, while the others were located within one mile of Cabarton Hot Springs (which is itself 2 1/2 to 3 miles from Belvidere Hot Springs). Although the wells drilled by Mr. Chapman were not drilled in as close a proximity to a hot springs or to the same depth as the wells proposed by Dr. MacGregor, Mr. Chapman's experience highlights the possibility that Dr. MacGregor will not locate geothermal water when drilling her wells. Drilling and testing is the only way to answer the question whether there is geothermal ground water near Belvidere Hot

Springs in sufficient quantity and quality to support Dr. MacGregor's proposed use, and is a method used by all of the experts who testified at the hearing.

44. Even if Dr. MacGregor does locate geothermal water, pumping the geothermal ground water may reduce the quantity of geothermal water flowing to Belvidere Hot Springs. Mr. Chapman testified regarding instances in Idaho of the drilling and pumping of geothermal wells adversely impacting nearby geothermal springs. In all of these instances, however, when pumping ceased the flow to the affected springs was restored. It is notable that in at least one instance, the impact described by Mr. Chapman occurred when a test well was drilled and pumped under his direction. In that case, when the pumping ceased, the impacted spring recovered within 24 hours. Although Mr. Scanlan testified that any such impact on the Pancheris' water rights by ground water pumping could be mitigated simply by ceasing the pumping, if this impact is continuous the hot water spa could not be developed using geothermal ground water. Drilling and pumping a geothermal test well will provide the best information regarding the quantity of water potentially available to Dr. MacGregor, without significant risk to the Pancheris' hot water supply.

C. Cold Water Aquifer.

45. Although productive cold water wells have been developed in the general area of Dr. MacGregor's proposed point of diversion under Application for Permit Nos. 65-13913 and 65-13986, no wells were shown to have produced quantities anywhere near the 2.0 cfs requested in those two applications. Although Mr. Scanlan testified that he believed the aquifer would be sufficient, no basis for this opinion, other than the general characteristics of the area, was provided. No theoretical analysis was presented to show the impact of the withdrawal of this

quantity of ground water on other ground water rights in the area and no test well with pump testing, or any other testing, was requested, approved or carried out.

VI. Local Public Interest.

46. Dr. MacGregor's proposed water use under the Applications is not well defined. The configuration of the diversion systems, distributions systems and actual water use under each of the individual applications appears to be dependent on the amount of water diverted under the other applications.⁴ This amount, and the subsequent design and development decisions, can only be made after a well or wells have been drilled and pump-tested to determine the properties of the aquifers underlying Dr. MacGregor's property. Drilling and testing is the best method for determining the water available to the Applications, and a method accepted by both the Applicant's and the Protestants' experts. There are no unusual or exceptional facts about the hydrologic characteristics of the area around Belvidere Hot Springs and the underlying aquifers that changes the applicability of drilling and testing exploration to this aquifer.

47. When Dr. MacGregor applied to IDWR to drill the test well Mr. Chapman raised the following concerns:

Additionally, drilling in and of itself is an invasive, violent procedure. If drilling is allowed to penetrate the "plumbing system" of the springs in the granitic rocks it could collapse some of the fractures that are providing water to the surface, provide a cross connection to other fractures that are presently dry and divert the water in the subsurface away from the surface discharge, or modify the entire vent system due to the drill activity. Additionally, if caving zones are found in the granitic rocks and the driller need to provide drilling mud to hold the hole open or put casing in the hole, fractures presently providing water to the surface discharge could be cut off or filled by drilling mud permanently.

⁴ For instance, there may be no need to drill a well under Application for Permit No 65-13986, if sufficient "spent" low temperature geothermal water is available from the wells drilled under Application for Permit No 65-13913. Similarly, the amount of water removed from Belvidere Hot Springs pursuant to Application for Permit No 65-13912 may depend upon the quantity and temperature of the water developed pursuant to Application for Permit No 65-13913.

Ex. 24. Although Mr. Chapman's concerns are a possibility, they are of very low probability. During the hearing Mr. Chapman, with his years of experience, cited no circumstances where the actions he described in Ex. 24 had ever occurred. Neither of Dr. MacGregor's experts, Ms. Haizlip and Mr. Scanlan, in their years of experience working with geothermal aquifers, knew of consequences similar to those described by Mr. Chapman. With no unique circumstances existing at Belvidere Hot Springs to heighten the risk, if IDWR were to determine that drilling and testing could not occur because of the concerns voiced by Dr. Chapman, virtually no geothermal exploration near hot spring vents where other water uses are located could occur in Idaho. This result would be contrary to both the work experience and advice of the experts in this matter, and the recommendations of many other experts. *See* Ex. 33, Ex. 40 (Attachment B at 42), Ex. 105 at 29-30, Ex. 109 at 8. Such a result would also be contrary to the Pancheris' own experience. Darwin Pancheri testified to having drilled a well within 135 – 140 feet of the hot springs to a depth of 99 feet (water right no. 65-13458). That well was intended to produce hot water for heating. *See* Ex. 13 (Idaho Department of Water Resources Well Inspection Form at 2). The Pancheris themselves drilled in closer proximity to Belvidere Hot Springs than Dr. MacGregor intends to drill, in the hopes of finding hot water and with no apparent concern for damaging the geothermal aquifer structure.

CONCLUSIONS OF LAW

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

I. Assessment of the Proposed Uses.

1. When considering a water right application Idaho Code § 42-203A(5) provides, in part, that:

The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied.

The Idaho Supreme Court has expanded on this, stating:

In all cases the plans should be sufficient to generally apprise the public of the efficacy of the proposed use in the planned facility, and of its potential impact.

Shokal v. Dunn, 109 Idaho 330, 340 (1985).

2. In the present case Dr. MacGregor has not submitted plans sufficient to generally apprise the public of the efficacy of the proposed use and of its potential impact. This failure, in large part, results from Dr. MacGregor's inability to drill and test the aquifer near Belvidere Hot Springs. Dr. MacGregor cannot be expected to design a project, which is completely dependent upon the amount and quality of the geothermal water available to her, when she is not allowed to determine that amount and quality. IDWR did not allow Dr. MacGregor to make this determination, largely as a result of concerns raised by the Pancheris and rejected in Finding of Fact No. 47. By not allowing Dr. MacGregor to drill and test a geothermal test well, IDWR effectively made it impossible for Dr. MacGregor to satisfy her burden of proof in this matter.

3. This matter should be remanded to Dr. MacGregor to conduct further tests and studies to determine the availability of both geothermal and cold water at her proposed points of diversion pursuant to the Director's authority under Idaho Code § 42-1805. It is in the public interest to allow this testing to go forward without granting the Applications pursuant to IDAPA 37.03.09.045.01.d.

4. Water supplies are variable. A party applying for a permit is not required to show that the proposed use will never interfere with an existing water use. Occasional impacts on senior water rights are resolved by the application of the priority system. Constant unavoidable

impacts, however, will prevent the issuance of a permit and/or subsequent license. IDWR determines whether there is a reasonable probability that the applicant will find sufficient water to complete the proposed water use without continuously interfering with senior water rights.

5. Upon completion of that testing an additional hearing should be held pursuant to IDAPA 37.01.01.720.02.c. in which Dr. MacGregor would submit plans detailing: 1) the precise quantity of water she intends to appropriate, the basis for that quantity, and the source; 2) the quantities to be withdrawn at each proposed point of diversion and the plans for construction of each point of diversion; 3) Dr. MacGregor's use of any overlapping or existing water rights in conjunction with the Applications; 4) actual and theoretical results from pump testing to demonstrate the impact, if any, on existing rights; and 5) Dr. MacGregor's plans for disposing of waste water from her proposed project and the impact of such disposal on the directly affected public water resource in the area.

RECOMMENDED ORDER

Based upon these Findings of Fact and Conclusions of Law the Applications are REMANDED to the Applicant, Dr. Carol MacGregor, for further investigation as described in Conclusion of Law Nos.1-5. A further hearing shall be held in this matter to consider the results of such investigation.

PROCEDURAL RIGHTS

This is the Recommended Decision and Order of the Hearing Officer. It will not become final without action of the Director of the Idaho Department of Water Resources. Any party may file a petition for reconsideration of this recommended order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any

petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Section 67-5243(3) Idaho Code.

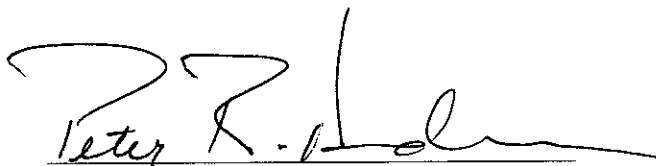
Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any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

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

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

hearings if further factual development of the record is necessary before issuing a final order.

DATED this 19th day of August 2005.

A handwritten signature in black ink, appearing to read "Peter R. Anderson", written over a horizontal line.

PETER R. ANDERSON
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of August 2005, I mailed a true and correct copy of the foregoing **RECOMMENDED DECISION AND ORDER** on the following persons listed below by U.S. mail, postage prepaid and addressed as follows:

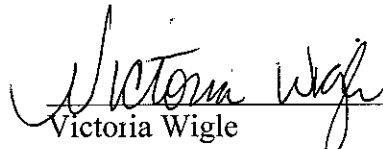
Scott L. Campbell
MOFFATT THOMAS
PO Box 829
Boise, Idaho 83701
(208) 385-5384

Julie Fischer
WHITE PETERSON
5700 E. Franklin Road, Suite 200
Nampa, Idaho 83687
(208) 466-4405

Sherl Chapman
ERO Resources
1106 N. Cole Road, Suite C
Boise, Idaho 83704-8661
(208) 373-7985

Terry Scanlan
SPF Water Engineering
600 E. River Park Lane, Suite 105
Boise, Idaho 83706
(208) 383-4156

Karl J. Dreher
Idaho Department of Resources
P.O. Box 83720
Boise, Idaho 83720-0098


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

**NOW
STARTING
RIGHT
SIDE OF
FILE**



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

June 27, 2007

C. L. "BUICH" OTTER
Governor

DAVID R. TUTHILL, JR.
Interim Director

CAROL LYNN MAC GREGOR
1109 WARM SPRINGS AVE
BOISE ID 83712

RE: Permit Nos. 65-13912, 65-13913 and 65-13986

Permit Approval Notice

Dear Permit Holder:

The Department of Water Resources has issued the enclosed permits in connection with the Preliminary Order issued October 4, 2006. Please be sure to thoroughly review the conditions of approval and remarks listed on your permit.

Please note that Section 42-248, Idaho Code, requires you or the owner of this water right to maintain current ownership and address records on file with the department. Forms to file a change of ownership of a water right and/or a change in the address of the water right owner are available from any department office, or at the department's website at: www.idwr.idaho.gov.

If you have any questions, please contact me at 208-287-4947.

Sincerely,

Shelley W. Keen

for Shelley W. Keen, Manager
Water Right Permits Section

Enclosure(s)

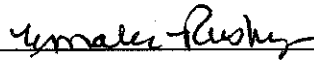
CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2007 I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER (Approved Permit) to the person listed below:

RE: WATER RIGHT NOS.

65-13912, 65-13913 & 65-13986

**CAROL LYNN MAC GREGOR
1109 WARM SPRINGS AVE
BOISE ID 83712**

A handwritten signature in cursive script, reading "Emalee Rushing", is positioned above a horizontal line.

**Emalee Rushing
Technical Records Specialist**

MEMORANDUM

Date: June 26, 2007
To: Water Right File 65-13912
From: cpadilla
Re: Permit Review

Protest resolved by order.
Entered in necessary conditions from orders and verifies POU, POD, uses, cfs, season, and source

IDAHO DEPARTMENT OF
WATER RESOURCES
322 EAST FRONT ST
P.O. BOX 83720
BOISE, ID 83720-0088

TO

Shel Chapman
ERO Resources
1409 N. Eagle Road, Suite 6
Boise, Idaho 83704-8585
UNABLE TO FORWARD

Delivered 05-13-99 (2) (Pace & Pace)

Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Eugene C. Thomas
John W. Barrett
R. B. Rock
Richard C. Fields
John S. Simko
John C. Ward
D. James Manning
Gary T. Dance
Larry C. Hunter
Randall A. Peterman
Mark S. Prusynski
Stephen R. Thomas
Glenna M. Christensen
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Michael W. McGreaham
Paul D. McFarlane
Kimberly D. Evans Ross

Jon A. Stenquist
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Tyler J. Henderson
Jason G. Murray
Mark C. Peterson
Andrew J. Waldera
Tyler J. Anderson
Joel A. Flake, Jr.
Russell G. Metcalf
Robert E. Bakes, *of counsel*
Morgan W. Richards, *of counsel*
Willis C. Moffatt, 1907-1980
Kirk R. Helvie, 1956-2003

RECEIVED

JAN 24 2006

DEPARTMENT OF
WATER RESOURCES

KARL

Boise
Idaho Falls
Pocatello
Twin Falls

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise, Idaho 83701 0829

208 345 2000
800 422 2889
208 385 5384 Fax
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January 23, 2006

Karl Dreher
Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720

Re: Applications for Permit Number 65-13912, 65-13913, and 65-13986
MTBR&F File No. 19-136.0

Dear Director Dreher:

This correspondence is in response to the January 18, 2006, correspondence sent to you by counsel for Carol Lynn MacGregor, the applicant in the above-referenced matter. Along with Scott Campbell, I represent the protestants Duane and Laura Pancheri and Darwin and Joan Pancheri ("Pancheris").

The Pancheris disagree with Dr. MacGregor that they raised "essentially the same" arguments in their *Exceptions to the Hearing Officer's Recommended Order*, particularly given their explanation of the Director's standard of review. While the issues raised by the Pancheris had properly been before the Hearing Officer for his consideration, the Pancheris' *Exceptions* were carefully crafted to take into consideration the record before the Director, as well as the Director's standard of review. Nevertheless, the Pancheris completely agree that it was Dr. MacGregor's choice whether to file a response to the *Exceptions*, and that Dr. MacGregor is not entitled to submit any further briefing to the Department regarding her applications, prior to the Director's issuance of a final order.

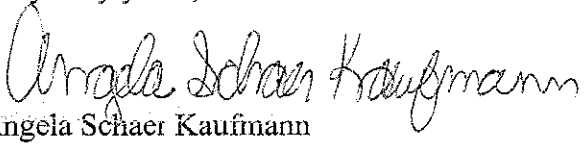
While Dr. MacGregor views time as being of the essence in this matter, the Pancheris are certain that most, if not all, applicants whose water appropriation or transfer applications remain pending feel the same way. In addition, while this matter is also quite important to the Pancheris, they also recognize that the Director's time has been consumed with a number of water delivery calls, matters which are of basin-wide importance in the Snake River Basin, if not state-wide importance.

The above-referenced permits involve matters which are not simple. Dr. MacGregor seeks to appropriate geothermal resources, resources for which the Pancheris have existing water rights.

Karl Dreher
January 23, 2006
Page 2

Evaluation of the Hearing Officer's Recommended Order, with its provision for the drilling of test wells, requires careful analysis of the full administrative record. Such matters should not be considered in haste.

Very truly yours,


Angela Schaer Kaufmann

ASK/mdr

cc: Darwin & Joan Pancheri
Duane & Laura Pancheri
Julie Klein Fischer

RECEIVED

JAN 19 2006

DEPARTMENT OF
WATER RESOURCES

WHITE PETERSON

ATTORNEYS AT LAW

SARAH H. ARNETT
KEVIN E. DINIUS
JULIE KLEIN FISCHER
CHRISTOPHER D. GABBERT
WM. F. GIGRAY, III
T. GUY HALLAM **
JILL S. HOLINKA
JOHN R. KORMANIK *
WILLIAM A. MORROW

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WILLIAM F. NICHOLS **
CHRISTOPHER S. NYE
PHILIP A. PETERSON
TODD A. ROSSMAN
JAMES M. VAVREK
TERRENCE R. WHITE ***

* Also admitted in CA
** Also admitted in OR
*** Also admitted in WA

January 18, 2006

Hand Delivery

Carl Dreher Director
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, Idaho 83720-0098

Re: *In the Matter of Application for Permit Nos. 65-13912; 65-13913 and 65-13986
Carol Lynn MacGregor*

Dear Mr. Dreher:

As you may know, we represent Dr. Carol MacGregor in connection with the above-referenced applications. Dr. MacGregor applied for three permits in 1999 and 2000, all of which were protested by a neighboring family.

After a series of unsuccessful negotiations with the Protestants, Peter Anderson was assigned to and heard the case over a five-day period in April and May, 2005. On August 22, 2005, Mr. Anderson issued a *Recommended Decision and Order*. Protestants, through their counsel Scott Campbell, filed a *Petition for Reconsideration* on September 2, 2005 which was denied on September 16, 2005. Thereafter, on September 30, 2005 Protestants filed *Exceptions to Hearing Officer's Recommended Order* ("Exceptions"). Dr. MacGregor chose not to respond to or comment on the Protestants *Exceptions* as the issues raised were essentially the same arguments that have been asserted throughout these proceedings. Instead, Dr. MacGregor maintains Mr. Anderson had sufficient information and authority to support his *Recommended Decision and Order* and additional briefing would add little, if anything, to the Department's analysis. By not filing any response to Protestants *Exceptions* within fourteen days of September 20, 2005 (or October 4, 2005), Dr. MacGregor, according to the Department's rules of procedure, is not entitled to submit further briefing on the *Exceptions*.

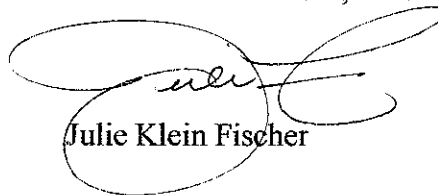
Although we understand the Department has some discretion with respect to extending deadlines, and has a significant number of issues before it on this and other matters, it was our expectation that a final order would be issued within fifty-six days of October 4, 2005, or by the second week of December (allowing some time for mailing). To our knowledge no order has been issued, nor has there been any notification to the parties that the Department seeks oral argument on any issue.

Time is of the essence for Dr. MacGregor in this matter. The *Recommended Order*, which should be adopted by the Department, allows Dr. MacGregor to conduct test well drilling to explore the geothermal resource on her land. Because the property upon which Dr. MacGregor will drill is located in Cascade there is a limited period of time during which drilling activities can occur. Accordingly, Dr. MacGregor respectfully requests issuance of the Department's decision, with all due haste, so she will know whether she can proceed during the 2006 drilling season.

Thank you for your kind attention to this matter.

Sincerely,

WHITE PETERSON, P.A.



Julie Klein Fischer

Cc: Scott Campbell
Peter Anderson
Dr. Carol Lynn MacGregor

JAN 18 2006

DEPARTMENT OF
WATER RESOURCES

WHITE PETERSON

ATTORNEYS AT LAW

SARAH H. ARNETT
KEVIN E. DENNIS
JULIE KLEIN FISCHER
CHRISTOPHER D. GABBERT
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T. GUY HALLAM **
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TODD A. ROSSMAN
JAMES M. VAVREK
TERRENCE R. WHITE ***

* Also admitted in CA
** Also admitted in OR
*** Also admitted in WA

January 18, 2006

Hand Delivery

Carl Dreher Director
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, Idaho 83720-0098

Re: *In the Matter of Application for Permit Nos. 65-13912; 65-13913 and 65-13986
Carol Lynn MacGregor*

Dear Mr. Dreher:

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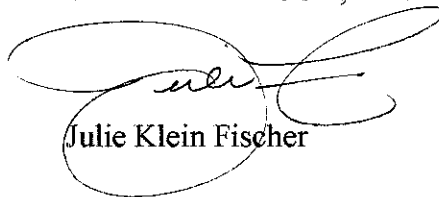
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Time is of the essence for Dr. MacGregor in this matter. The *Recommended Order*, which should be adopted by the Department, allows Dr. MacGregor to conduct test well drilling to explore the geothermal resource on her land. Because the property upon which Dr. MacGregor will drill is located in Cascade there is a limited period of time during which drilling activities can occur. Accordingly, Dr. MacGregor respectfully requests issuance of the Department's decision, with all due haste, so she will know whether she can proceed during the 2006 drilling season.

Thank you for your kind attention to this matter.

Sincerely,

WHITE PETERSON, P A.



Julie Klein Fischer

Cc: Scott Campbell
Peter Anderson
Dr. Carol Lynn MacGregor

Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Eugene C. Thomas
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Joel A. Flake, Jr.
Russell G. Mercalf
Robert E. Bakes, *of counsel*
Morgan W. Richards, *of counsel*
Willis C. Moffatt, 1907-1980
Kirk R. Helvie, 1956-2003

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SEP 30 2005

Department of Water Resources

Boise
Idaho Falls
Pocatello
Twin Falls

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise Idaho 83701 0829

208 345 2000
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September 30, 2005
via Hand Delivery

Idaho Department of Water Resources
Idaho Water Center
322 E. Front Street, 6th Floor
PO Box 83720
Boise, ID 83720-0098

**Re: In the Matter of Application for Permit Nos. 65-13912, 65-13913, and
65-13986 in the Name of Carol Lynn MacGregor**
MTBR&F File No. 19-136 0

Dear Clerk:

Enclosed for filing in the above-referenced matter are the following original documents:

1. Protestants' Exceptions to Hearing Officer's Recommended Order
2. Affidavit of Angela Schaefer Kaufmann

Please conform the copies of these documents and return them via the enclosed self-addressed, postage prepaid envelope.

Thank you for your assistance

Very truly yours,



Melonie D. Robinson
Administrative Assistant to
Angela Schaefer Kaufmann
mdr@moffatt.com

/mdr

Enclosures

cc: Julie Klein Fischer
Peter R. Anderson

RECEIVED

SEP 30 2005

Department of Water Resources

Attorneys for Duane and Laura Pancheri
and Darwin and Joan Pancheri

Scott L. Campbell, ISB No. 2251
Angela Schaer Kaufmann, ISB No. 5436
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
19-136 0

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

IN THE MATTER OF APPLICATION FOR
PERMIT NOS 65-13912, 65-13913, AND
65-13986 IN THE NAME OF CAROL LYNN
MACGREGOR

**PROTESTANTS' EXCEPTIONS TO
HEARING OFFICER'S RECOMMENDED
ORDER**

Protestants Duane and Laura Pancheri and Darwin and Joan Pancheri ("Pancheris"), by and through their counsel of record MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHID, hereby file their Exceptions to the hearing officer's Recommended Order in the above-captioned matter. The Exceptions are filed pursuant to Rule 720 of the Department's Rules of Procedure (IDAPA 37.01.01 720).

However, the heart of the hearing officer's ruling to which the Pancheris object is found in Conclusion of Law Number 3:

This matter should be remanded to Dr. MacGregor to conduct further tests and studies to determine the availability of both geothermal and cold water at her proposed points of diversion pursuant to the Director's authority under Idaho Code § 42-1805. It is in the public interest to allow this testing to go forward without granting the Applications pursuant to IDAPA 37.03.09.045.01.d

Recommended Decision and Order, p. 30. That decision, and many of the findings of fact and conclusions of law supporting it, are erroneous and fail to comport with Idaho law. Significantly, in issuing the Recommended Decision and Order, the hearing officer ignored the testimony of the Department's own employee, and further ignored the statutes and rules applicable to water appropriation in Idaho. Most critically, in the Recommended Decision and Order, the hearing officer effectively reversed the burdens allocated under Idaho law. Rather than placing the risk of injury and burden on the applicant Carol MacGregor ("MacGregor") as Idaho law requires, the hearing officer placed the burden and risk of injury squarely upon the Pancheris. In making the decision to allow MacGregor to drill a test well prior to approval of her pending applications for permit, the hearing officer acted outside the bounds of his limited legal authority and reversed a much earlier Department decision that was not before him for review.

Therefore, for the reasons set forth herein, the Pancheris respectfully request that the Director reverse the hearing officer's Recommended Decision and Order.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. The Applications for Permit and the Pancheris' Water Rights.

MacGregor filed three applications for permit, each of which is at issue in the above-captioned matter, and each of which the Pancheris protested. Application for Permit 65-13912 was filed on August 2, 1999, and seeks to appropriate 50 c.f.s. of water from Belvidere Hot Springs. Application for Permit 65-13913 was filed on the same date, and seeks

to appropriate 2.0 c.f.s. of groundwater. Both applications seek the appropriation of geothermal water for heating and commercial purposes. Finally, Application for Permit 65-13986 was filed in October 2000 and seeks to appropriate 2.0 c.f.s. of groundwater for irrigation purposes. However, the Application for Permit further provides that:

This water right will be supplemental to 65-1979. The application contemplates sharing one cold water well in the SENE Sect 13 with pending application for Permit No. 65-13913. Diversion rate in combination with 65-13913 will not exceed 2.00 c.f.s. This application also proposed using spent low-temperature geothermal fluids diverted under 65-13913 for irrigation, provided that the heat value is utilized prior to irrigation.

Applicant's Ex. 5. Therefore, Application for Permit No. 65-13986 can be considered only in the context of Application for Permit No. 65-13913.

The Pancheris' protest for Application for Permit 65-13912 provided that the basis was "Protecting our Senior Water Right," Applicant's Ex. 2, and throughout this proceeding, it became clear that the Pancheris were concerned that if Application for Permit 65-13912 was approved, it would reduce the quantity of water available to their existing water rights. The Pancheris also question whether there is sufficient water available to fulfill MacGregor's proposed appropriation.

The same is true of the Pancheris' protest to Application for Permit 65-13913. This Application for Permit causes the Pancheris particular concern because under that application, MacGregor seeks to appropriate low-temperature geothermal groundwater. In order to do that, she will obviously need to drill a production well, an action that carries a likelihood of permanently damaging the geothermal resource. Drilling a test well carries the same risk. *See, e.g.,* Exhibit 200 and Testimony of Sheri Chapman. The Pancheris protested Application for Permit No. 65-13986 on the basis that if the application were approved, it could cause injury

(i.e., reduce the quantity of water available to the Pancheris) under their existing water rights
Applicant's Ex. 6

The Pancheris own water rights which use Belvidere Hot Springs as their source:

1 Duane Pancheri and Darwin Pancheri hold Water Right No. 65-12891 in the amount of 0.44 c.f.s., with an October 19, 1988, priority date. This right has been licensed.

2 Darwin and Joan Pancheri hold Water Right No. 65-13332 in the amount of 0.10 c.f.s. with a July 2, 1991, priority date. This right is in the permit stage. However, the Pancheris have provided proof of beneficial use, a field examination has been conducted, and the right is simply awaiting licensing. Applicant's Ex. 12.

3 Darwin and Joan Pancheri also hold Water Right No. 65-13458 in the amount of .15 c.f.s. with a priority date of June 22, 1993. Like Water Right No. 65-13332, proof of beneficial use has been provided, the right has been field examined, and the right is simply awaiting licensing.¹

MacGregor also holds water rights which have Belvidere Hot Springs as their source. Water Right No. 65-1972 is for 0.04 c.f.s. with a May 5, 1901, priority date, and 65-1973 is for 0.01 c.f.s., also with a May 5, 1901, priority date. These rights have been decreed in the SRBA. They have not been used for some time, but Dr. MacGregor has filed an application for extension of time to avoid forfeiture for each right. Exhibit 201

¹ Applicant's Exhibits 12 and 13 contain correspondence from Steve Lester with IDWR explaining the delay in licensing, and that "the beneficial use developed under the permits has been verified. The rights remain fully protected by completion of that verification." Applicant's Ex. 12 and 13.

B. Procedural Background.

As noted above, MacGregor filed Applications for Permit 65-13912 and 65-13913 in 1999, and the Pancheris filed timely protests to each application. Initially, John Westra was the hearing officer, and he scheduled a prehearing conference after the protest period for Applications for Permit 65-13912 and 65-13913 had ended. MacGregor did not appear although the Pancheris did. Mr. Westra issued a Notice of Failure to Appear at Prehearing Conference on February 11, 2000, and scheduled another prehearing conference for April 4, 2000. A hearing was scheduled for November 14 and 15, 2000, but was delayed upon MacGregor's Motion to Suspend Hearing, dated October 19, 2000. On that date, MacGregor also filed a Motion for Order Authorizing Carol Lynn MacGregor's First Set of Interrogatories and Requests for Production of Documents, and a Motion for Order Authorized Inspection of Real Property.

Shortly thereafter, on November 2, 2000, Scott L. Campbell filed a Notice of Appearance, an Answer to the Motion Authorizing Inspection of Real Property, an Answer to Motion to Suspend Hearing, and an Answer to Motion Authorizing Carol Lynn MacGregor's First Set of Interrogatories and Requests for Production of Documents. The Pancheris opposed only the Motion Authorizing Inspection of Real Property. The next day, November 3, 2000, Gary Spackman of IDWR issued an Order Interrupting Processing of Application and Suspending Hearing. After briefing on the Motion for Order Authorizing Inspection of Real Property, and on January 3, 2001, Mr. Spackman (who was by then the hearing officer), issued an Order Authorizing Discovery. The Pancheris' counsel was not appropriately served, so the Order was re-issued as an Amended Order on January 25, 2001.

The Amended Order addressed one of the issues central to this matter: MacGregor's ability to obtain the information necessary to meet her burden of proof. The Amended Order provides, in pertinent part:

IT IS HEREBY ORDERED that all parties may engage in discovery for a period of one year or until two weeks prior to the scheduled hearing, whichever is earlier. When a hearing is scheduled, further orders for discovery may be necessary.

IT IS FURTHER ORDERED that the parties are granted until March 5, 2001, to negotiate an agreement for entry, inspection, and measurement, and submit the written agreement to IDWR.

IT IS FURTHER ORDERED that if the parties do not reach an agreement regarding entry, inspection, and measurement, IDWR will issue an order on or before March 15, 2001, requiring measurement and reporting as authorized by Idaho Code § 42-701. The order will generally require measurement that will satisfy IDWR standards, data gathering, and reporting needs.

IT IS FURTHER ORDERED that the parties may suggest the methods, frequency, and verification of measurement. Suggestions may be submitted from the date of this order until ten (10) days after issuance of a general order requiring measurement. Because MacGregor bears the burden of proof, she should describe, in detail, what information is sought, and how the information could best be gathered.

Amended Order dated January 25, 2001. Thus, from the earliest stages of this proceeding, IDWR offered suggestions to MacGregor as to how she might meet her burden of proof, upon providing the appropriate information and safeguards to the Pancheris. Notably, MacGregor and the Pancheris were able to negotiate an agreement for monitoring. *See* Order dated June 12, 2001.

Subsequently, MacGregor filed a test well proposal with IDWR in January 2003. In response, and after inquiry from the Pancheris' counsel, Gary Spackman from IDWR responded. That response is discussed in Section III A., below, but at this point the Pancheris

note that Mr. Spackman discussed the concerns of IDWR staff that drilling near Belvidere Hot Springs could alter artesian flows, cause commingling, reduce flows, or cause the sealing of water passages particularly at abandonment. Mr. Spackman noted that a bond in an amount that could be in excess of \$20,000 would be required before drilling.

If IDWR approves the drilling of a test well, IDWR will almost certainly require that MacGregor post a bond in an amount necessary to insure proper abandonment and to protect existing water right holders from injury. IDWR recently required a \$20,000 bond for drilling a cold water test well in Round Valley, Idaho. A bond for the drilling of a low temperature geothermal test well could be significantly larger than \$20,000.

Ex 200 (June 5, 2003 correspondence from Gary Spackman to Scott L. Campbell and Josephine Beeman). MacGregor's consultant Terry Scanlan subsequently provided additional information regarding the test well proposal, to which the Pancheris' consultant, Sherl Chapman, provided a response.

On November 12, 2003, John Westra issued IDWR's decision regarding MacGregor's test well proposal. That decision is discussed in more detail in Section III A., below. At its heart, however, was the requirement that MacGregor either obtain a water right permit or execute "[a]n agreement to compensate for possible damages" before drilling a test well. Ex. 200, correspondence dated November 12, 2003, from John Westra to Scott L. Campbell and Josephine Beeman.

MacGregor filed no pleadings seeking reconsideration of the Department's decision, and there was little action before the Department until November 11, 2004, when MacGregor's new (and current) counsel filed a Notice of Substitution of Counsel and Motion and Request for Hearing. Shortly thereafter, Peter Anderson was appointed the hearing officer, and he scheduled a prehearing conference for January 3, 2005. Subsequently, he issued a

scheduling order (dated January 7, 2005), a Request for IDWR Staff Memorandum, and an order consolidating Application for Permit Number 65-13986 with 65-13912 and 65-13913 (both on January 14, 2005). The requested staff memorandum was filed by John Westra, Western Region Manager for IDWR, on February 1, 2005. Ex. 200.

The matter proceeded to hearing, held on April 22-23 and May 5-6, 2005. After the parties had an opportunity to file proposed findings of fact and conclusions of law, Hearing Officer Anderson issued his Recommended Decision and Order. Although he signed the Recommended Decision and Order on August 19, 2005, it was not served until August 22, 2005. The Pancheris filed their Petition for Reconsideration pursuant to Idaho Code Section 67-5243(3) and IDAPA Sections 37.01 01.720.02a and b on September 2, 2005. Hearing Officer Anderson denied the Petition on September 16, 2005.

II. PERTINENT LEGAL AUTHORITY

A. The Law Regarding Appropriation of Water in Idaho.

The Idaho Code clearly sets forth the criteria a permit applicant must satisfy in order to obtain a water right permit:

In all applications whether protested or not protested, where the a 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 interests as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, . . . 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

IDAHO CODE § 42-203A(5).

A water right applicant bears the burden of proof for the factors that the Idaho Department of Water Resources must consider under Section 42-203A. *Cantlin v. Carter*, 88 Idaho 179, 187 (1964), *see also Shokal v. Dunn*, 109 Idaho 330, 339 (1985). The Department's Rules of Procedure further discuss the parties' relative burdens, and divides the burden of proof into, first, the burden of coming forward with evidence sufficient to present a prima facie case and second, the burden of persuasion. IDAPA 37.03.08 04.a

The burden of coming forward is slightly divided, although the majority of the burden falls upon the applicant. The applicant bears the burden of coming forward with evidence regarding whether the application will reduce the quantity of water available under existing rights; whether the water supply is sufficient; whether the application is made in good faith, and not for delay or speculation; and whether the applicant has sufficient financial resources. The burden regarding the local public interest criteria is more complex, but still remains largely upon the applicant:

ii The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criterion (e) of Section 42-203A(5), Idaho Code, as to any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall bear the initial burden of coming forward with evidence for those factors relevant to criterion (e) of Section 42-203A(5), Idaho Code, of which the protestant can reasonably be expected to be more cognizant than the applicant.

IDAPA 37.03.08 04 b.ii

Finally, the ultimate burden of persuasion remains squarely with the applicant for all of the criteria of Idaho Code Section 42-203A

B. The Law Regarding a Hearing Officer's Authority and Exceptions from a Recommended Order.

1. The Hearing Officer's Evaluation of the Evidence.

Certain aspects of the Department's Rules of Procedure regarding evaluation of evidence, the hearing officer's authority, and procedures for seeking change or reversal of a department order are also important for purposes of these exceptions. The importance stems from the fact that, as more fully discussed below, the hearing officer exceeded his authority when he improperly reversed an earlier decision of the Department and "remanded" the applications for permit to MacGregor for test well drilling.

The Department's Rules provide for wide latitude in the taking of evidence, but further specifically provide that the Department's expertise is important:

Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized by the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. *The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.*

IDAPA 37.01.01 600 (emphasis added). In this case the expertise of IDWR staff, as evidenced by the testimony of John Westra and the IDWR staff memorandum (Exhibit 200) (the latter which was specifically requested by the hearing officer) is particularly relevant and helps illustrate that the hearing officer erred in making his Recommended Decision and Order.

2. The Hearing Officer's Authority.

It is important to fully understand the hearing officer's authority, because although a hearing officer may enjoy relatively wide latitude in conducting a hearing, the actual scope of the hearing officer's authority is in fact quite limited.

As the Agency Head, the Director of the Department of Water Resources ("Department") is the individual with the ultimate legal authority, vested by provision of law. *See* Idaho Code Section 67-5201(4), and IDAPA Sections 37.01.01.005 04 and 37.01.01.005 10. The Idaho Code provides authority for the Director to delegate duties imposed upon him by law to employees of the Department, in order to promote the efficient administration of his duties. In addition, the Director may, in his discretion, appoint hearing officers to preside over contested cases. *See* Idaho Code Sections 42-1701(3) and 42-1701A(2), respectively. As a creature of statute, through Agency Head and/or Director appointment, hearing officers wield only those powers specifically granted to them through their appointment, consistent with the agency's rules. Put another way, hearing officers are subordinate to the agency head, and their authority is derivative. Further, hearing officers have only that authority delegated to them. IDAPA Section 37.01.01.411.²

In this matter, the Director appointed the hearing officer pursuant to Idaho Code Title 67, Chapter 52, and IDAPA Sections 37.01.01.410-413. *See* Order Appointing Hearing Officer, dated November 24, 2004. Rule 413 of the Department's Rules of Procedure

² This subordination concept is further illustrated by Idaho Code Section 67-5244 which provides that the head of the agency (the Director in this matter) shall exercise all the decision-making power on review of the recommended decision that he would have if he, himself, had presided over the hearing. In other words, the Hearing Officer's decision is advisory only, and the agency head is free to make his own determination. *See also Northern Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 440 (Ct. App. 1996).

specifically set forth the hearing officer's scope of authority: Rule 413 grants the following authority to hearing officers:

- a. Authority to schedule cases assigned to the hearing officer, including authority to issue notices of default, of prehearing conference and of hearing, or to provide for the use of informal procedure, as appropriate;
- b. Authority to schedule and compel discovery, when discovery is authorized before the agency, and to require advance filing of expert testimony, when authorized before the agency;
- c. Authority to preside at and conduct hearings, accept evidence into the record, rule upon objections to evidence, rule upon dispositive motions upon completion of the applicant's or the petitioner's case in chief, and otherwise oversee the orderly presentations of the parties at hearing; and
- d. Authority to issue a written decision of the hearing officer, including a narrative of the proceedings before the hearing officer and findings of fact, conclusions of law, and recommended and preliminary orders by the hearing officer, following the submission of evidence through stipulation of the parties, affidavits, exhibits, or hearing testimony.

Under the Director's November 24, 2004 appointment, the foregoing represents the full scope of the hearing officer's authority in this matter. As discussed below, the hearing officer's actions exceeded his authority in this matter.

3. IDWR Procedures Regarding Department Orders.

The hearing officer issued his Recommended Order and Decision on August 19, 2005, although it was not served until August 22, 2005. In accordance with Rule 720 of the Department's Rules of Procedure, the hearing officer set forth the procedural rights of the parties. In accordance with Rule 720 and the hearing officer's Recommended Order and Decision, the Pancheris filed a Petition for Reconsideration on September 2, 2005. *See* IDAPA

37.01.01.720.02 a. The hearing officer then entered his order denying the Petition on September 16, 2005. *See id* Therefore, the parties and the Department must proceed as follows:

b Within fourteen (14) days after . . . (b) the service date of a denial of a petition for reconsideration from this recommended order; . . . any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the agency head or designee on any issue in the proceeding. . . .

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

IDAPA 37.01.01.720

III. EXCEPTIONS AND ARGUMENT SUPPORTING THE EXCEPTIONS

The Pancheris' legal position is one that is straightforward, but amply supported by multiple sections of the Department's Rules of Procedure: As the applicant, Carol MacGregor bears the risk of harm, and the burden of proof that her applications, if approved, will not reduce the quantity of water available under existing water rights The Pancheris, as the owners of preexisting water rights, are protected in their existing uses under Idaho law, and the Idaho Constitution Under Idaho law, the Pancheris should not bear the risk that a future appropriation will reduce the quantity of water available to them under their existing rights

Despite the clearly-allocated burdens and risks under Idaho law, the hearing officer effectively placed the risk of harm squarely upon the Pancheris, and in so doing, reversed an earlier and well-reasoned decision of the Department By allowing MacGregor to drill a test

well or wells without first obtaining approval of her applications for water permits or otherwise providing protection to the Pancheris, the hearing officer has placed the Pancheris in the untenable position of being forced to stand by while MacGregor is allowed to take actions which could not only adversely but permanently damage the fragile geothermal resource upon which they rely.

A. Department Staff Repeatedly Recognized the Risk to Pancheris' Water Rights and to the Geothermal Resource if MacGregor Was Allowed to Drill a Test Well.

Throughout the remainder of this brief, the Pancheris will present legal arguments supporting their position that the Director should not adopt the Recommended Decision and Order, and should reverse the hearing officer's decision. However, certain facts regarding the potential impact to the geothermal resource, and thus to the Pancheris' senior water rights, are an important part of those legal analyses, and those facts are thus presented at the outset of the Pancheris' argument and analysis.

The Pancheris acknowledge that MacGregor presented the testimony of Jill Haizlip to counter the position of Department staff and the Pancheris that allowing MacGregor to drill a test well prior to permit approval or execution of a bond presented an unacceptable risk of harm to the geothermal resource. However, Ms. Haizlip demonstrated little particular familiarity with Belvidere Hot Springs and the geothermal region around Cascade, and in fact had visited the area for the first time the day before the hearing. *See* Testimony of Jill Haizlip. Therefore, her opinion is only entitled to limited weight.

Exhibit 200 to the record before the Director is the IDWR Staff Memorandum, requested by the hearing officer. The hearing officer had requested "analysis by IDWR whether

the applications at issue should be granted. . . .” In response, John Westra (who prepared the memorandum) stated:

The concern expressed by IDWR has been possible injury to the senior water rights (Pancheri). Geothermal resource systems are fragile; invasive actions could result in possible non-reversible injury to the resource and senior water rights. . . .

Ex. 200. The memorandum then referenced the June 5 and November 12, 2003, letters from IDWR.

Even prior to June 5, 2003, Department staff recognized the risk of drilling a test well into a geothermal resource and expressed significant concern. On March 25, 2003, Gary Spackman stated that:

The drilling of a test well, test pumping (or discharge if water flows from the well because of artesian pressure), and measurement of impacts to other related waters has not yet been approved. *Because of the proposed location of the test well and the possibility that the drilling of the well may negatively impact other water rights*, the proposal for construction of the test well is being reviewed internally within IDWR. After brief discussions with staff about the test well, I am confident that IDWR will expect significantly more detail about the proposed construction of the test well and the plan for testing.

Ex. 200, Correspondence from Gary Spackman to Beeman and Campbell, dated March 25, 2003 (emphasis added)

Subsequently, Department staff reiterated its concerns, and expanded upon the same:

IDWR staff has already voiced some of the same concerns expressed by Mr. Chapman in his letter. Drilling very near or in vents through which the geothermal water flows may alter the artesian flow of the water to the Pancheri’s point of diversion. There is also a possibility of temperature change caused by commingling or by flow reduction. If the test well must be abandoned after it is drilled and tested, the materials used to fill

and seal the well may also fill and seal the natural water passages, reducing flow and perhaps pressure.

Id., Correspondence from Gary Spackman to Beeman and Campbell, dated June 5, 2003. In that correspondence, Mr. Spackman also outlined specific information the Department staff would require before final consideration of a test well proposal.

MacGregor provided the additional information, but Department staff remained very (and justifiably) concerned about the effect of drilling a test well on the Pancheris' existing water rights. Staff discussed the various statutes and rules governing the Department staff's consideration of well drilling:

Pursuant to Idaho Code Sections 42-235 and 237a, the Director is charged with protecting the environment, preventing the mixture of water from different aquifers, and protecting the resource from damage and depletion. In addition, IDAPA 37, Chapter 9, Rule 45.01 d states that "[d]rilling permits will not be issued for construction of a well which requires another separate approval from the department, such as a water right permit . . . until the other separate approval has been given by the department." The Director may grant a waiver "if the public interest will be served by the expedited approval." Finally, Idaho Code § 42-1805 grants the Director the authority to "conduct surveys, tests, investigations, research, examinations, studies . . . relating to availability of unappropriated water. . . ." The need for additional information, the public interest in gathering the information, and the risk of injury to other water users should be considered in determining whether to approve a drilling permit.

The Department has reviewed the proposal submitted by Scanlan Engineering and analysis from Sherl Chapman of ERO Resources. In consideration of State Law, Administrative Rules, and information presented by the parties, the Department concludes the following:

Drilling into the low temperature geothermal system at Belvidere presents a substantial risk for permanent damage to the resource, and additionally subjects the Pancheri water right to possible injury. MacGregor can attempt to establish proof of water sufficiency at the location by other means. The Department will

not consider approval of a drilling permit at the proposed location until the following has occurred:

Application for permit #65-13913 is approved, and a drilling permit can be considered.

OR

An agreement to compensate for possible damages is executed by the applicant and protestant.

Id., Correspondence from John Westra to Beeman and Campbell, dated November 12, 2003

At the hearing in this matter, Mr. Westra further explained the basis for and serious nature of staff's concerns. First, Mr. Westra indicated that in preparing the IDWR Staff Memorandum, he "reviewed all the documents in the file, and the correspondence. I also reviewed the, the consultants' input and their, their correspondence, between them and the Department, and I reviewed our responsibilities that are given to us in the Idaho statutes" Westra Testimony, May 6, 2005 (Exhibit A to Affidavit of Angela Schaer Kaufmann, filed concurrently herewith; Day 4, Tape 15, p 31 of 32). He also had conversations with "well protection staff and administrators, the allocation staff and administration, and also the bureau chiefs at the state office." *Id.* He also reviewed the Department's statutory charges *Id.*, Day 4, Tape 16, p. 10 of 35

Then, upon questioning from MacGregor's counsel, Mr. Westra specifically outlined the Department's concerns, particularly with regard to Application for Permit 65-13913, which is the application for a geothermal groundwater right:

Kormanik: Sure. What possible injury to senior water rights does 13913 pose for IDWR staff?

Westra: It would be again the injury or loss to the Pancheris' water rights as far as their bene – heating beneficial use.

Kormanik: . . . What injury, and you use the work injury in that first line of the [inaudible], what injury are – is the staff concerned about?

Westra: That the senior right holder would lose their source

Kormanik: And by loss of source, you mean that the spring that naturally occurs would dry up?

Westra: Yes.

Id., p. 11-12 of 35.

Mr. Westra also expressed the related concern that drilling a geothermal well could damage the resource (i.e., the hot springs) itself. *Id.*, p. 13. He then discussed the type of irreversible injury about which IDWR staff was concerned:

Westra: What that would mean is that it can't be returned to where it existed or where it was initially. And—so, if something did happen with, with whatever has done, that's a possibility that it could not be changed back. It isn't the pumping groundwater where you have a well and you're using it for irrigation and there's an injury or something, you stop pumping. There is a solution. But in this case there may not be—you may not be able to reverse what has happened.

Kormanik: Why not?

Westra: It's because there's, there's issues here and unknown, and there's fragile things that you're dealing with. You don't know.

Id., p. 16 of 35.

Mr. Westra expressed IDWR staff's similar concerns regarding Application for Permit No. 65-13912 under which MacGregor seeks to appropriate water from Belvidere Hot Springs via an infiltration gallery. *Id.*, Day 4, Tape 16, p. 4. Finally, regarding Application for Permit No. 65-13986, Mr. Westra testified that even though the application seeks to appropriate cold water rather than geothermal water, "it's for ground water and it's in the vicinity of the

springs, [inaudible] concerns about it being a fragile area, even though it is for cold water, . . .”
Id., Day 4, Tape 16, p. 8

The hearing officer’s recommendations totally ignored these substantially un rebutted opinions. Such action, by itself, constitutes an adequate basis for rejecting his recommendations.

B. The Director Must Review the Entire Record When Considering Exceptions From a Recommended Order.

Idaho Code Section 67-5244 requires the Director to evaluate recommended orders after reviewing final briefs and oral argument if allowed, and to “issue a final order in writing within fifty-six (56) days of receipt of the final briefs or oral argument, whichever is later, unless the period is waived or extended with the written consent of all parties or for good cause shown ” *Id.* The Director may also “remand the matter for additional hearings; or hold additional hearings.” IDAHO CODE § 67-5244(2)(b)-(c).

Additionally, Idaho Code Section 67-5244(3) requires the Director to review the recommended decision, during which he is to “exercise all the decision-making power that he would have had if the agency head had presided over the hearing.” *Id.* Put another way, the hearing officer’s recommended decision is advisory only, and the Director is duty-bound to exercise free review of that recommendation by examining the entire agency record as well as any additional briefing and/or oral argument allowed. Such Director (agency head) review was directly discussed in *Northern Frontiers v State ex rel. Cade*, 129 Idaho 437, 926 P 2d 213 (Ct App. 1996), wherein the Idaho Court of Appeals stated:

Northern recognizes in its brief that the hearing officer’s decision is only a proposal, which may be rejected. Under I C § 67-5244, the head of the agency shall exercise all the decision-making power on review of the recommended decision that he or she would have had if the agency head had presided over the hearing.

The hearing officer's decision being only advisory, then, the director is free to affirm the decision or to reverse, reject or alter the findings of the hearing officer and make his own determination.

Id. at 440

Given the court's explanation of the applicable statutory standard, the Pancheris request that the Director carefully review all of the legal arguments presented, and that he independently examine the entire record of the proceeding, including the tapes of the hearing itself. This type of thorough and independent review of the agency record is the only manner in which the Director can possibly "exercise all the decision-making power on review of the recommended decision" as if he had "presided over the hearing." IDAHO CODE § 67-5244; *see also Northern Frontiers, supra*

C. The Hearing Officer Exceeded the Scope of His Authority by Recommending Remand of this Matter Back to the Applicant Permitting Her to Drill a Test Well.

In Section II B.2, above, the Pancheris set forth the pertinent Idaho statutes and rules pertaining to the authority of the hearing officer. This matter is before the Department in a specific procedural posture: MacGregor filed three applications for permit (two of which seek to appropriate geothermal water, with one of the two seeking to drill a geothermal well), and requested that the Department approve the same and issue water right permits. The hearing officer may have wide latitude in the conduct of a hearing, but the actual decision he was required or allowed to make was quite narrow: approve or disapprove the permits sought by MacGregor. MacGregor's own counsel reiterated that fact when he reminded Mr. Westra that "you understand that we're not here on a test well proposal, we're here to see if 13913, 13912 and 13986 [inaudible] approved, correct?" Ex. A to Affidavit of Angela Schaer Kaufmann, Day 4, Tape 16, p. 18 of 35. Whether MacGregor should be allowed to drill a test well in order

to meet her burden of proof was not a question before the hearing officer, and the hearing officer utterly lacked the authority to issue an order allowing MacGregor to drill a test well without first obtaining approval of the applications for water permits

Stated differently, this matter came before the hearing officer so that he could review the evidence put on by both parties (and IDWR's staff report), and based upon that evidence, decide whether MacGregor's applications for water permits should be approved. The hearing officer was not given the authority to grant the applicant additional opportunities to gather evidence; opportunities already ruled upon and denied by authorized Department employees over 17 months before the hearing. See discussion in Section III.A., above. The hearing officer has determined the evidence that was lacking, and rather than making the decision that was placed before him (to grant or deny the permit applications, whether in whole or in part), and based upon the evidence properly before him, the hearing officer instead made no decision on the question before him. Instead, he allowed the applicant *yet another* opportunity to provide evidence.

Allowing a party to drill a well of *any* type, including test wells, before the application for permit for the associated water right is granted is contrary to multiple statutes and Department rules. Idaho Code Section 42-202 pertains to applications for permit generally, and provides in pertinent part that

any person, association or corporation hereafter intending to acquire the right to the beneficial use of . . . ground water, . . . shall, ***before commencing of the construction***, enlargement or extension of the ditch, canal, *well* or other distributing works, or ***performing any work in connection with said construction or proposed appropriation*** or the diversion of any waters into a natural channel, make an application to the department of water resources. . . .

IDAHO CODE § 42-202(1) (emphasis added). Idaho Code Section 42-204 then clarifies that:

The department of water resources shall issue a permit for any approved application, make a record of the approval and provide a copy of the permit to the applicant, who shall be authorized ***on receipt thereof***, to proceed with the construction of the necessary works for the diversion of such water . . .

IDAHO CODE § 42-204 (emphasis added)

Those sections, combined, illustrate that the construction of diversion works (including wells) cannot commence until approval of a permit application. The Pancheris anticipate that the counterargument would be that a test well is not an actual diversion work, such as a production well. That argument is without merit, for two reasons.

First, requiring permit approval before the construction of diversion works ensures that senior water rights will be protected. The Pancheris will discuss that issue in Subsection E, below, but at this point it is critical to remember that MacGregor must prove that her applications, if approved, will not reduce the quantity of water under existing rights (including the Pancheris'). Allowing a test well to be drilled and pumped will circumvent the protection offered by the permit application and approval process, and places the risk of harm on the Pancheris.

Second, the Department's own rules, which the hearing officer lacks the authority to *defacto* amend, require that an application for permit be approved before drilling on wells other than those for domestic purposes can commence. Specifically, Rule 45.01 of the Department's Well Construction Standards Rules (IDAPA 37.03.09) provides, in pertinent part:

a. The owner of a well to be constructed . . . on or after July 1, 1987 shall obtain a drilling permit from the Director prior to construction or drilling of the well. . .

d. Drilling permits ***will not*** be issued for construction of a well which requires another separate approval from the Department, such as a water right permit . . ., ***until*** the other separate approval has been given by the Department. . .

Id. at 37.03.09.045 01.a and d (emphasis added).

Test wells are also included in those requirements. The Well Construction Standards Rules, by their terms “are applicable to *all water wells*, monitoring wells, low temperature geothermal wells, injection wells and other artificial openings and excavations in the ground which are more than eighteen (18) feet in vertical depth below land surface. . . .” IDAPA 37.03.09.001.02 (emphasis added). Further, the Rules continue by defining a well, including exceptions from the definition of “well.” Test wells are not included within those exceptions.

As Idaho Code and the Rules plainly state, receipt of a water right permit is a condition precedent to MacGregor’s ability to drill any test wells. To date no such water right permit has issued. The hearing officer was bound by the pertinent Idaho Code provisions in conjunction with the Department’s duly promulgated rules governing this matter, and he lacked the authority to take an action which amounts to a *de facto* amendment of the pertinent statutes and rules.

The hearing officer was called upon, after delegation from the Director, to conduct a hearing to determine whether MacGregor’s applications should be granted or denied. Perhaps the hearing officer thought that he was reaching an equitable decision in rendering the Recommended Decision and Order. However, Idaho Code sections 42-202 through 42-204, duly enacted by the Idaho Legislature, address the equities and as discussed below, allocate the burdens. The same is true of the Department’s rules. The hearing officer did not have the authority to rewrite the Idaho Code and the Department’s rules. His authority did not extend beyond that specifically delegated to him by the Director, acting pursuant to the appropriate legal authorities. The Recommended Decision and Order should be reversed on that basis.

D. The Issue of Whether MacGregor May Drill a Test Well Has Already Been Decided, and any Efforts to Resurrect It by MacGregor Are Barred.

Whether MacGregor should be allowed to drill a test well is not a new issue before the Department, and in fact was decided *years* ago. The Pancheris previously quoted extensively from John Westra's correspondence dated November 12, 2003. Ex 200. The critical aspects of that decision bear repeating:

Drilling into the low temperature geothermal system at Belvidere presents a substantial risk for permanent damage to the resource, and additionally subjects the Pancheri water right to possible injury. MacGregor can attempt to establish proof of water sufficiency at the location by other means. The Department will not consider approval of a drilling permit at the proposed location until the following has occurred:

Application for permit #65-13913 is approved, and a drilling permit can be considered.

OR

An agreement to compensate for possible damages is executed by the applicant and protestant

Ex. 200 Thus, as of November 12, 2003, the Department's decision was that MacGregor would not be allowed to drill a test well unless and until Application for Permit 65-13913 (the application by which MacGregor seeks to drill a geothermal well) was approved, or unless she reached an agreement with the Pancheris to compensate for potential damages.

The decision was not one reached in a vacuum -- MacGregor proposed a test well in early 2003, and was given ample opportunity (which she took), to provide additional information to the Department. On or about January 30, 2003, Dr MacGregor submitted a proposal to the Department seeking permission to drill a test well to investigate and/or further develop the geothermal resources at issue in this matter. This test well proposal received extensive internal Department scrutiny because of the proposed well location, and the

“possibility that the drilling of the well may negatively impact other water rights” See Exhibit 200 (March 25, 2003 correspondence from Gary Spackman of the Department to counsel for the applicant and protestants, included therein). A subsequent letter from Mr. Spackman to counsel for MacGregor and the Pancheris noted that Department staff had voiced numerous concerns regarding MacGregor’s proposal including, but not limited to, the following:

Drilling very near or in vents through which geothermal water flows may alter the artesian flow of the water to the Pancheri’s point of diversion. There is also a possibility of temperature change caused by commingling or by flow reduction.

Id. (June 5, 2003, correspondence from Gary Spackman to counsel for applicant and the protestants, included therein) As such, the Department devoted more time to technical data review of the matter

Ultimately, the Department denied the test well proposal, and the validity of the reasons for doing so will be discussed in Subsection E, below, pertaining to allocation of the relative burdens in this matter. At that point, however, MacGregor could have sought review of Mr. Westra’s decision, which was a decision of the Department, but did not do so. The decision has become binding, and for the reasons discussed in the next two subsections, the hearing officer lacked authority to reverse that decision.

1. The Department’s Rules Provide for Reconsideration and Review of Department Decisions, and MacGregor Did Not Avail Herself of Those Opportunities in a Timely Fashion.

MacGregor has never filed a petition contesting the Department’s decision regarding her test well proposal, let alone within the fifteen (15) days, as required by Idaho Code Section 42-1701A(3). That Section provides, in pertinent part, that:

any person aggrieved by any action of the director, including any decision, determination, order or other action, including any action upon any application for permit . . . shall file with the director,

within fifteen (15) days after receipt of written notice of the action
... a written petition stating the grounds for contesting the action
and requesting a hearing . . .

Id. By failing to file a timely written petition contesting the Department's prior denial of a test well, MacGregor waived her right to contest the Department's decision denying her test well proposal. It was completely outside the scope of the hearing officer's authority to act in an appellate capacity and reverse a Department decision that was not challenged by MacGregor in the manner contemplated by the Idaho Code.

Any argument that the November 13, 2003, correspondence authored by John Westra did not constitute "director action" for purposes of Idaho Code Section 42-1701A(3) lacks merit. Idaho Code Section 42-1701(3) authorizes the Director to delegate duties imposed upon him by law to Department employees in order to promote the efficient administration of the Director's duties. Thus, the November 12, 2003, Westra letter represented the position of the Department and constitutes "director action" for purposes of Idaho Code Section 42-1701A(3).

Because MacGregor did not seek review of the Department's decision in accordance with Idaho Code Section 42-1701A(3), the decision stands: MacGregor cannot drill a test well proposal absent approval of her applications for permit, or a bond or other self-executing mechanism agreed by the Pancheris as being sufficient to compensate them should the geothermal resource and their senior water rights be damaged.

2. The Department's November 12, 2003, Decision Regarding MacGregor's Test Well Proposal Is Entitled to Substantial Deference.

The Department's denial of MacGregor's test well proposal was based upon the agency staff's expertise. Therefore, the decision is entitled to substantial deference. In *Kopp v State*, 100 Idaho 160, 163 (1979), the Idaho Supreme Court held that agencies entrusted with the responsibility to administer particular statutes at issue are "impliedly clothed with power to

construe” the law. Stated differently, deference is given to decisions made within a particular agency’s expertise. *J.R. Simplot Co., Inc. v. Idaho State Tax Com’n*, 120 Idaho 849, 861 (1991), citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The hearing officer explicitly recognized the expertise of Department staff in the area of water rights and impacts to those rights: he sought that expertise in this matter by requesting that Department staff provide him with the staff memorandum discussed previously. The memorandum provided in response to that request included the Department’s November 2003 denial of MacGregor’s previous test well proposal.

During his testimony at the hearing in this matter, John Westra addressed the purpose of a staff memorandum. After identifying Exhibit 200, Mr. Westra testified as follows:

Kaufmann: Okay. And who asked you to write [inaudible]?

Westra: The request was given to us by Mr. Anderson.

Kaufmann: Okay. . . . is it part of your regular duties to prepare staff memorandum such as this?

Westra: Yes, it is.

Kaufmann: Okay. And, as you understand it, what is the purpose of a staff memorandum?

Westra: It’s – the purpose is to provide the hearing setting [sic] with the Department’s input as far as, as the application and what is, what is being protested and applied for?

Ex. A to Kaufmann Aff., Day 4, Tape 15, p. 30-31 of 32

Unfortunately, in his Recommended Decision and Order, the hearing officer inexplicably disregarded the very agency expertise that he sought in the first place. Not only did the hearing officer impermissibly jettison IDWR’s November 2003 opinion letter denying MacGregor’s ability to drill any geothermal test wells, but the hearing officer also appears to

impermissibly ignore all of the first hand testimony of John Westra, IDWR Western Region Manager. In short, the hearing officer's recommendation of remand of this matter for further applicant investigation not only violates the scope of his authority, but also impermissibly disregards the well settled rule of deference afforded to agency expertise as expressly reaffirmed by the Idaho Supreme Court in *J.R. Simplot Co., supra*.

E. The Hearing Officer's Remand Recommendation Violated the Burdens of Proof Under Idaho Code Section 42-203A(5), IDWR's Corresponding Rules, and Misconstrues the Nature of Injury to a Senior Water Right Holder.

In Section II, above, the Pancheris set forth the criteria which an applicant must satisfy in order to have an application for permit approved, and also set forth the relative burdens of proof and persuasion. For purposes of this brief, the most critical of the criteria is that an applicant must prove that his or her application, if approved, will not reduce the quantity of water available under existing water rights. Again, IDAPA 37.03.08.04 provides that the applicant has the burden of coming forward with evidence to satisfy that criteria. The hearing officer felt that by denying the test well proposal, the Department was effectively preventing MacGregor from meeting her burden of proof. That is not true, because as discussed above, MacGregor had the opportunity to seek review of the Department's decision dated November 13, 2003.

More important, however, is the fact that by remanding this matter to MacGregor to allow her to drill a test well, the hearing officer has impermissibly reallocated the pertinent burdens of proof and risk of loss. The relevant Idaho Code sections and Department rules evidence a pattern of protection for senior, existing water rights against those seeking a junior appropriation, a pattern which is a necessary and logical corollary to the prior appropriation doctrine. Unfortunately, under the hearing officer's decision and effective reallocation of the

burdens, the only risk that MacGregor faces is the loss of the money it costs to drill the test well, because she has not even been required to purchase a bond to protect the Pancheris.

In stark contrast, the Pancheris risk losing their primary (and much more cost-effective) heat source, their source of water for their swimming pool, and most importantly, their water rights. It is well established that water rights are akin to real property rights, and as further discussed herein, the risk to the Pancheris' water rights by the drilling of a test well or wells is substantial. At the hearing in this matter, Sherl Chapman testified about the risk to the Pancheris of drilling and pumping a test well. First, he testified about the challenges that drilling poses for granitic rock areas, such as that in and around Belvidere Hot Springs:

A. Well, they're, when you have a have a significant fault the, the area around the fault tends to be broken. Sometimes a few tens of feet in width; sometimes as much, in this area that I've found at least, is maybe 100 feet in width, and when you're drilling into that, that fractured zone, quite often the hole, the drill hole will not stay open, or you'll have spalling characteristics, which is where the formation tends to fall into the hole; it's not very, not very solid, I think is the best or easiest term to remember. But at any rate, the fractures pose some, some challenges for drillers. If the hole is sufficiently open to fractures then they have to either inject drilling mud to hold the hole open or different additives to; if you're air rotary drilling along with the water they'll add different chemicals, they refer to them as soap, to help lift the cuttings out and to, to help increase circulation so that they can get the drill cuttings out of the hole without plugging off the permeable zones.

Ex A to Kaufmann Aff., Day 3, Tape 12, p. 11 of 29. Later, he testified about Dr. MacGregor's test well proposal specifically:

Q And have you reviewed the proposal developed by Mr. Scanlan for the test wells?

A I have.

Q What about the proposal versus the Cabarton wells that you were involved with causes you concern?

A. Well, the, the, the issue is whether or not the wells are produced and whether or not production continues. Since, since geothermal systems are as sensitive as I believe they are, I think that there at least is a, a possibility of some irreversible damage to the springs upon pump testing. The holes that we drilled in the area of Cabarton Hot Springs, or between Cabarton Hot Springs and Belvidere Hot Springs, was a four-inch diameter, what we refer to as slim holes. And that was, they were not designed to be pump tested or have any water withdrawn out of the system at all.

Ex. A to Kaufmann Aff., Day 4, Tape 15, p 22 of 32.

Finally, Mr Chapman's concerns regarding the drilling of test wells are encapsulated in correspondence from him to Scott Campbell, dated May 20, 2003 (Applicant's Ex. 24). After explaining the general hydrogeologic characteristics of the area around Belvidere Hot Springs, and summarizing his experience regarding other geothermal systems, Mr. Chapman noted:

Ms. MacGregor suggests that test drilling will provide her an opportunity to determine the viability of development of the springs, while at the same time protecting the Pancheri's water rights. This assumption I believe to be incorrect. In order for Ms. MacGregor to determine the viability of development of her application for water right from the springs, test wells would have to be pumped to determine their potential yield. *This in itself could significantly alter the flow pattern in the springs and dry up the surface discharge from Belvidere Springs or decrease the temperature thus injuring the Pancheri's water rights.* Additionally, drilling in and of itself is an invasive, violent procedure. If drilling is allowed to penetrate the "plumbing system" of the springs in the granitic rocks it could collapse some of the fractures that are providing water to the surface, provide a cross connection to other fractures that are presently dry and divert the water in the subsurface away from the surface discharge, or modify the entire vent system due to the drilling activity. Additionally, if caving zones are found in the granitic rocks and the driller needed to provide drilling mud to hold the hole open or put casing in the hole, fractures presently providing water to the surface discharge could be cut off or filled by drilling mud permanently.

Applicant's Ex. 24 (emphasis added).

Department staff further repeatedly recognized the risk to the Pancheris, as described above in Section III A. Thus, there are significant risks to the Pancheris by the drilling and pumping of a test well. Under Idaho law the risks of an application for permit lie with MacGregor as the applicant, not the Pancheris. Unfortunately, the hearing officer impermissibly shifted those risks by allowing MacGregor to drill and pump test wells before her application for water permit was approved, or before she reached a satisfactory agreement with the Pancheris. The Recommended Decision and Order should be reversed on that basis.

F. The Hearing Officer Has Misconstrued and Misapplied Idaho Code Section 42-1805.

The Recommended Decision and Order provides, *inter alia*, that “[t]his matter should be remanded to Dr. MacGregor to conduct further tests and studies to determine the availability of both geothermal and cold water at her proposed points of diversion pursuant to the Director’s authority under Idaho Code Section 42-1805.” Recommended Decision and Order, p. 29. That statement is a misinterpretation and misapplication of Idaho Code Section 42-1805.

Idaho Code Section 42-1805 provides in pertinent part:

the director of the department of water resources shall have the following powers and duties: . . . (3) To conduct surveys, tests, investigations, research, examinations, studies, and estimates of cost relating to availability of unappropriated water, effective use of existing supply, conservation, storage, distribution and use of water. (4) To prepare and compile information and data obtained and to make the same available to interested individuals or agencies. . . .

Id. As the statute makes very clear, it is the province of the Director to perform the investigative activities and data compilation. Those activities cannot be delegated to an applicant. By suggesting/recommending that MacGregor be empowered to perform her proposed geothermal water investigations pursuant to Idaho Code Section 42-1805, the hearing officer completely

misconstrued and misapplied the express terms of the statute. The statute empowers the Director to undertake these activities, not non-Department personnel. There is no other tenable reading of the statute, and the hearing officer's recommended use of the statute is impermissibly expansive, wholly unsupported, and beyond his authority. He is not authorized to amend the plain language of the Idaho Code with a recommended decision in an administrative agency contested case procedure. The Idaho legislature has law-making authority, not the hearing officer. The Recommended Decision should be reversed on that basis.

G. The Hearing Officer Lacks the Authority to Allow or Order the Drilling of Test Wells Prior to Formal IDWR Approval of The Pending Applications For Permit.

As discussed in Section II A., *supra*, the scope of the Hearing Officer's authority is confined to that specifically granted to him. In this case, the scope of authority granted is limited to that provided by Rule 413. Therefore, it is not for the Hearing Officer to operate outside the bounds of applicable statutes and agency rules. Instead, his duty is to abide by, and to properly apply, those rules.

Idaho Code Section 42-202 pertains to applications for permit generally, and provides in pertinent part that

any person, association or corporation hereafter intending to acquire the right to the beneficial use of . . . ground water, . . . shall, before commencing of the construction, enlargement or extension of the ditch, canal, well or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources.

I.C. § 42-202(1). Idaho Code Section 42-204 then clarifies that:

The department of water resources shall issue a permit for any approved application, make a record of the approval and provide a copy of the permit to the applicant, who shall be

authorized *on receipt thereof*, to proceed with the construction of the necessary works for the diversion of such water, . .

I.C. § 42-204 (emphasis added).

Those sections, combined, illustrate that the construction of diversion works (including wells) cannot commence until approval of a permit application. One might argue that the Hearing Officer's proposed course of action is not to approve diversion works (i.e., a production well), but, rather, to approve only a test well. However, that argument is unavailing.

H. The Hearing Officer Has Incorrectly Applied the Public Interest Criterion as Set Forth in IDAPA 37.03.09.045.01.d.

In the Recommended Decision and Order, the hearing officer found that it was in the public interest to allow MacGregor's testing to go forward without first granting her applications pursuant to IDAPA Section 37.03.09.045.01.d. As discussed in the preceding subsection, the test well issue is simply not before the Hearing Officer in this matter. The test well issue is a dead issue as MacGregor failed to appeal the November 2003 denial, and because IDWR's decision is entitled to significant deference. Further, while the Director may waive the drilling permit requirement pursuant to IDAPA Section 37.03.09.045.01.d., such waiver must be in the public interest. There is no record evidence in this matter establishing how or why such a waiver would be in the public interest. A *sua sponte* statement by the Hearing Officer saying that test well drilling in this matter is in the public interest does not make it so.

As Idaho Code and the Rules plainly state, receipt of a water right permit is a condition precedent to MacGregor's ability to drill any test wells. To date no such water right permit has issued. The hearing officer acted outside his authority and incorrectly applied the pertinent Idaho Code provisions in conjunction with the Department's duly promulgated rules governing this matter. The Recommended Decision must be rejected as to all test well issues.

Moreover, the applications for water permits must be denied, as noted by the hearing officer, based upon the failure of the applicant to satisfy the evidentiary burdens imposed by Idaho law.

IV. CONCLUSION

The hearing officer exceeded his authority and misinterpreted and misapplied the pertinent provisions of the Idaho Code and Department rules. Therefore, for the reasons discussed previously, the Pancheris respectfully request that the Director not accept the hearing officer's Recommended Decision and Order, and reverse the same

DATED this 30th day of September, 2005.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Angela Schae Kaufmann for
Scott L. Campbell – Of the Firm

By Angela Schae Kaufmann
Angela Schae Kaufmann – Of the Firm
Attorneys for Duane and Laura Pancheri
and Darwin and Joan Pancheri

CERTIFICATE OF SERVICE

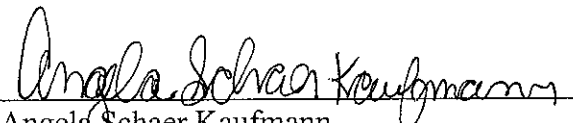
I HEREBY CERTIFY that on this 30th day of September, 2005, I caused a true and correct copy of the foregoing **PROTESTANTS' EXCEPTIONS TO HEARING OFFICER'S RECOMMENDED ORDER** to be served by the method indicated below, and addressed to the following:

Julie K. Fischer
WHITE PETERSON, P.A.
5700 East Franklin Road, Suite 200
Nampa, ID 83687
Fax: (208) 466-4405

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Peter R. Anderson
Hearing Officer
729 W. Braemere Road
Boise, ID 83702
Fax: (208) 395-0222

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile


Angela Schaer Kaufmann

RECEIVED
SEP 30 2005
Department of Water Resources

Attorneys for Duane and Laura Pancheri
and Darwin and Joan Pancheri

Scott L. Campbell, ISB No 2251
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101 S Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
19-136.0

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

IN THE MATTER OF APPLICATION FOR
PERMIT NOS. 65-13912, 65-13913, AND
65-13986 IN THE NAME OF CAROL LYNN
MACGREGOR

AFFIDAVIT OF ANGELA SCHAEER
KAUFMANN

STATE OF IDAHO)
) ss
County of Ada)

ANGELA SCHAEER KAUFMANN, being first duly sworn, deposes, and says as
follows:

1 I am an attorney employed by the law firm of MOFFATT, THOMAS,
BARRETT, ROCK & FIELDS, CHARTERED, as counsel of record for Duane and Laura Pancheri and
Darwin and Joan Pancheri, in this action, and I am making this affidavit on the basis of my
information and belief

2 During the hearing in this matter, my co-counsel Scott L. Campbell and I
provided a tape recorder and tapes, and taped the proceedings. When we returned from the

hearing, the tapes were transcribed at our direction by employees of MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD , the law firm in which we practice

3. At our direction, Debby Long organized transcription of the tapes from the hearing in the above-captioned matter.

4. Several members of our word processing department, as well as other administrative staff, listened to the hearing tapes and transcribed them to the best of their ability. After each tape was transcribed, Ms. Long listened to each tape as she read through the pertinent transcript and made corrections. She undertook that process because she is more familiar with water-related terminology than other people who assisted with the transcriptions.

5. The transcripts were done to the best of our staff's ability and represent the most accurate transcription of the tape recordings as was possible, given the quality of the tape recordings.

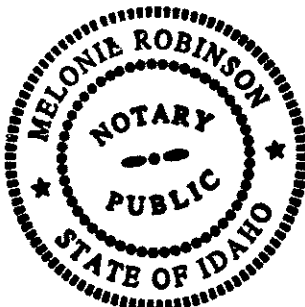
6. Appended hereto as Exhibit A is a true and correct copy of excerpts of the transcript of Day 3 and 4 of the hearing in the above-captioned matter.

DATED this 30th day of September, 2005.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Angela Schaer Kaufmann
Angela Schaer Kaufmann – Of the Firm
Attorneys for Duane and Laura Pancheri
and Darwin and Joan Pancheri

SUBSCRIBED AND SWORN to before me this 30th day of September, 2005



Melonie Robinson
NOTARY PUBLIC FOR IDAHO
Residing at _____ Kuna
My Commission Expires 10-17-06

CERTIFICATE OF SERVICE

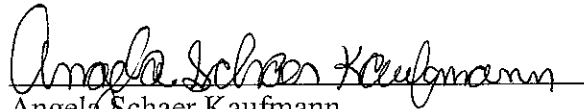
I HEREBY CERTIFY that on this 30th day of September, 2005, I caused a true and correct copy of the foregoing **AFFIDAVIT OF ANGELA SCHAER KAUFMANN** to be served by the method indicated below, and addressed to the following:

Julie K. Fischer
WHITE PETERSON, P.A.
5700 East Franklin Road, Suite 200
Nampa, ID 83687
Fax: (208) 466-4405

☒ U.S. Mail, Postage Prepaid
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☒ U.S. Mail, Postage Prepaid
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☐ Facsimile


Angela Schaer Kaufmann

1 Kaufmann At this time I would move again for admission of Exhibit No. 155.

2 Fischer [inaudible] objection [inaudible].

3 Kaufmann Well, he's identified the structures in the photograph. He'd already previously
4 identified [inaudible], the bath house; he's identified the, the fencing, the fences
5 placed around the spring area to keep the cows out. [inaudible] the actual, or a
6 direction the photograph [inaudible].

7 Anderson Well, under the standing for proper water resources, I'll admit Exhibit 155. The
8 foundation [inaudible] the position or the orientation of the photograph
9 [inaudible] much [inaudible].

10 Kaufmann Thank you. Mr. Chapman, can you, are you familiar with the geological system
11 underlying the Pancheri and MacGregor properties?

12 Chapman In general, yes.

13 Kaufmann And how did you obtain that familiarity?

14 Chapman From analyzing or reviewing the reports I've included as exhibits here; my own
15 geologic work in the valley; through review of well-driller reports in the area;
16 through construction of a number of wells that have been close by, or relatively
17 close by, in this area that I've either been involved with or designed or
18 supervised; and field reconnaissance of the surface characteristics as well.

19 Kaufmann And you mentioned projects that you worked on close by. How close were those
20 projects?

21 Chapman I've worked, with regard to the supervision or involvement of construction of
22 numerous wells on both sides of Belvidere Hot Springs, both north and south, and
23 several that have been to the west.

24 Kaufmann And did those projects include, as part of those projects did you review well-
25 drillers plans?

1 Chapman Yes.

2 Kaufmann And, based upon that experience and your research, can you describe the
3 geological system that underlies the Pancheri/MacGregor property?

4 Chapman Yes. It's, it's a portion of the [inaudible] of the [inaudible] at depth. The, the
5 granitic rocks underlie thin to very thick valley fill sediments. The granitic rocks
6 are exposed at the surface, surface routinely. There is some, some granitic
7 boulders on the property of Ms. MacGregor and to the, to the west, in particular
8 along that ridge that I spoke of that lies to the west of this entire valley.
9 Overlying the granitic rocks you have valley fill sediment, which are sand, silt,
10 clay, sometimes small gravel, that range in thickness from just a few inches to
11 several thousand feet out in the center of the valley. In this particular area it
12 appears that the valley fill sediments may be somewhere in the neighborhood of a,
13 of a hundred to several hundred feet in depth, depending on exactly how close
14 you are to the springs.

15 Kaufmann And you talked about granite, or the granitic rocks. Did you, could you talk a
16 little bit more about those?

17 Chapman Yes. They're a, they're a typical intrusive volcanic rock. They are eroded and
18 altered at the surface. They typically have a, a line on the surface that is in some
19 cases altered to the point of nearly being sand, but somewhat competent or firm
20 enough to stay open and drill them for a short period of time. It, the granitic rocks
21 are typically fractured in two ways one, by faulting, which occurs through
22 movement of the earth, and sometimes cooling, and then also through jointing,
23 which is an unloading characteristic and a cooling characteristic as well. Joints
24 tend to be at right angles to one another and sometimes fairly continuous, but in,
25 in granitic rocks in this area they're fairly discontinuous. The faults that traverse
26 this area tend to be longer and more severe in nature.

1 Kaufmann Now you mentioned the, the fractures of granitic rock, if I characterized that
2 correctly. Does that present any particular challenges with regard to drilling?

3 Chapman Well they're, when you have a, have a significant fault the, the area around the
4 fault tends to be broken. Sometimes a few tens of feet in width; sometimes as
5 much, in this area that I've found at least, is maybe 100 feet in width, and when
6 you're drilling into that, that fractured zone, quite often the hole, the drill hole
7 will not stay open, or you'll have spalling characteristics, which is where the
8 formation tends to fall into the hole; it's not very, not very solid, I think is the best
9 or easiest term to remember. But, at any rate, the fractures pose some, some
10 challenges for drillers. If the hole is sufficiently open to fractures then they have
11 to either inject drilling mud to hold the hole open or different additives to, if
12 you're air rotary drilling along with the water they'll add different chemicals, they
13 refer to them as soap, to help lift the cuttings out and to, to help increase
14 circulation so that they can get the drill cuttings out of the hole without plugging
15 off the permeable zones.

16 Kaufmann Are you personally aware of any circumstances where drilling has occurred in the
17 fractured granite in the Cascade Valley?

18 Chapman Yes, in most of the wells that I've been involved with, quite thankfully, we've
19 been in fractured zones. You, if you're not in the fractured zones you don't get
20 any water.

21 Kaufmann Did you encounter any problems?

22 Chapman There have been times when we, when our, we've run into drilling problems.
23 Typically it's been a problem with the hole caving in, and we've had to, to use
24 additives to hold the hole open while we got the well drilled in and then casing
25 installed.

26 Kaufmann So, can drilling then cause a collapse of the fractured granite?

1 Chapman It can, yes.

2 Kaufmann And I think you mentioned that you have had, actually, I don't want to put words
3 in your mouth, so let me ask a question of you. Have you had experiences in the
4 Cascade Valley where that has happened?

5 Chapman Yes.

6 Kaufmann And could describe those for me?

7 Chapman They were typically water-well drilling scenarios where we were trying to get
8 water for different homes and the, the driller would encounter fracture zones or
9 highly altered zones in the granitic rocks, which are associated with fractures, and
10 we had to add a significant amounts of soap to try to hold the hole open. And in
11 one case we had to actually use bentonitic mud and shift over a mud, over a
12 drilling in order to hold the hole.

13 Kaufmann And were any of those wells that we've been talking about geothermal?

14 Chapman None of those were, no.

15 Kaufmann In any of the geothermal wells that you've encountered in the Cascade Valley,
16 have you experienced problems just with the drilling?

17 Chapman No, we've been fortunate; we have not.

18 Kaufmann Now, Mr. Scanlan has proposed using air drilling instead of drilling with mud.
19 Can you, first of all, describe some of the problems that could occur if you're
20 drilling a geothermal well with bentonite or some sort of drilling mud?

21 Chapman Well in, in any case when you're drilling a fractured media with bentonitic mud,
22 the purpose of the mud is to increase the viscosity of the drilling fluid so that you
23 can let the cuttings out, prevent collapse of the hole, and allow you to continue
24 drilling without casing. If you're, depending on the size of the fractures an the
25 nature of the aquifer, and depending on how much bentonitic mud you use, you

1 will get some migration of the bentonitic mud back into the formation fractures.
2 Sometimes that can be removed, other times it's extremely difficult, and the
3 difficulty seems to increase with an increase of temperature. That's not a, not a
4 rule, but it, it is one of those things that does happen.

5 Kaufmann And when you say increase in temperatures, is that increase in temperature of the
6 water that's being encountered?

7 Chapman Yes, or increase in the temperature of the rock media you're drilling. In some
8 cases if you're drilling a very deep hole the temperature will just increase because
9 you're going deep under the earth's crust.

10 Kaufmann Now, would drilling just, drilling with air eliminate the risk to the geothermals?

11 Chapman It, it decreases the risk; I would say that. And, again, you may have to add
12 certain, certain chemicals, soaps or emulsifiers to try to get the cuttings out,
13 depending on the fractures and the size of the fractures and the intensity of those
14 or the complexity of them. If you have to add significant amounts of soap or
15 other additives it does increase the risk of plugging off, as we refer to it. But it is,
16 is significantly less than mud rotary drilling.

17 Kaufmann Have you used an air rotary system in the Cascade Valley?

18 Chapman Yes.

19 Kaufmann And were any of those projects geothermal projects?

20 Chapman Yes.

21 Kaufmann Did you have to use, in any of those projects did you have to use some sort of a
22 mud or drilling fluid [inaudible]?

23 Chapman We used soap, yes.

24 Kaufmann And did you have to use a great deal of soap, or--

1 Chapman No, not a lot.

2 Kaufmann We have also heard about drilling into the fractures and that the goal would be to
3 only drill into one or two of the fractures in the system Do you recall that
4 testimony?

5 Chapman I recall something being discussed about that, yeah.

6 Kaufmann In your experience drilling geothermal systems, what is generally the goal when
7 you're drilling a geothermal well?

8 Chapman Well I know--

9 Fischer [inaudible] I, I guess my point is [inaudible] process [inaudible].

10 Kaufmann [inaudible] the question, but let me ask the, ask the question this way. You
11 testified that you worked on geothermal projects in the Cascade Valley, is that
12 right?

13 Chapman That's correct.

14 Kaufmann And, and how many projects were there?

15 Chapman Seven or eight geothermal projects.

16 Kaufmann And, in each of those, was the goal to drill a geothermal well?

17 Chapman Yes.

18 Kaufmann Now, as part of that drilling process, what, and let me lay this foundation, what
19 was your role with regard to a driller, the drilling of the geothermal well in those
20 projects, and if it was different for each project, can tell me that too??

21 Chapman In, in--

1 Anderson One minute, I'm sorry. I'm having taping [inaudible] here. Can we stop to
2 change it.

3 Chapman Okay, with regard to my role in the geothermal projects in Valley County, the role
4 that I had were – do the preliminary investigation, locate a drilling site, and
5 supervise the construction of the well to its total depth.

6 Kaufmann And, as you were working on those projects, did you have a specific goal or
7 purpose?

8 Chapman Yes, I did.

9 Kaufmann And what was that?

10 Chapman To get as much geothermal water as we could.

11 Kaufmann And when you're drilling a well for geothermal water, how do you go about
12 accomplishing the most water possible?

13 Chapman If you're, if you're drilling sediments you collect samples of all of the formations;
14 conduct temperature surveys of the drilling fluid to make sure that you're
15 monitoring what's coming out of the hole correctly; maintain close coordination
16 with the driller to, so you understand what he's drilling through and monitor the
17 inflow and outflow of water as best you can in the well bore through the drilling
18 characteristics. In sediments the goal, or excuse me, in hard rock, such as granite,
19 the goal is to still collect samples and monitor the, the drilling progress and what
20 the driller's doing, but of course the idea in the fractured rock is to drill through as
21 many fractures that contain the geothermal fluid as possible.

22 Kaufmann And why, why do you want to drill through as many fractures as possible?

23 Chapman Well if, if each fracture is carrying some, some quantity of geothermal fluid, or
24 providing a passageway for that geothermal fluid to move from its source to the,
25 to the surface or toward the surface, then you want to intercept as many of those

1 as you can because your goal is to cumulative gather in as many of those as you
2 can, it will increase your production. And that's, you know, that's true of drilling
3 in fractured rock for cold water or surface water.

4 Kaufmann And then is that also true for drilling then for geothermal water?

5 Chapman Yes.

6 Kaufmann Mr. Chapman, I'd like you to take the binder that was provided by the applicant
7 and turn to ap-, turn to Exhibit and tab no. 33. Have you seen this document
8 before, Mr. Chapman?

9 Chapman Yes.

10 Kaufmann And have you read the document?

11 Chapman I have

12 Kaufmann And for the record, could you just state what the document is?

13 Chapman My Exhibit 33 is the Geologica Report provided to Ms. Fischer by Jill Haizlip and
14 Dean Sumnick [sp?], I guess it is.

15 Kaufmann And do you agree, or do you have an opinion regarding the conclusion –
16 conclusions reached in that report?

17 Chapman Conclusion number one I would not have any problem with. Conclusion number
18 two, additional discharge into valley fill sediment probably disperses the thermal
19 waters away from the range front, I think that's speculative; we don't know that.

20 Kaufmann Okay, let's talk about, about that for a moment. Why do you think that that's
21 speculative?

22 Chapman As, as I recall previous testimony regarding this, this particular report, my
23 recollection is that Ms. Haizlip testified that water in the, or the geothermal waters

1 Chapman Yes.

2 Kaufmann – of water? And you testified that he had not. Could he, does he have, does his
3 system have the capability of diverting that quantity of water, that amount of
4 water [inaudible]?

5 Chapman I, I think his pipeline system is. And, and I testified that, that I had not, I had not
6 witnessed him diverting .44 c.f.s. But there's a lot of time that, that I've not been
7 there and they used the water a long time before I arrived on the scene.

8 Kaufmann And jumping back for just a minute back again to the wells drilled between
9 Cabarton Hot Springs and Belvidere Hot Springs, you testified about the, the
10 diameter and depth of the wells.

11 Chapman Yes.

12 Kaufmann And have you reviewed the proposal developed by Mr. Scanlan for the test wells?

13 Chapman I have.

14 Kaufmann What about that proposal versus the Cabarton wells that you were involved with
15 causes you concern?

16 Chapman Well, the, the, the issue is whether or not the wells are produced and whether or
17 not production continues. Since, since geothermal systems are as sensitive as I
18 believe they are, I think that there at least is a, a possibility of some irreversible
19 damage to the springs upon pump testing. The holes that we drilled in the area of
20 Cabarton Hot Springs, or between Cabarton Hot Springs and Belvidere Springs
21 was a four-inch diameter, what we refer to as slim holes. And that was, they were
22 just designed to, to analyze or collect samples on the geology and determine
23 where water levels were and what water temperatures existed. They were never
24 designed to be pump tested or have any water withdrawn out of the system at all.

1 Kaufmann And just so we make sure the record is clear, we've talked extensively about these
2 four wells that you were involved with, specifically, Belvidere, Cabarton. And if
3 my recollection is correct you were also involved with the drilling of two more
4 wells at the Belvidere Hot Springs?

5 Chapman Yes, to the north, approximately half way between Belvidere Springs and the city
6 of Cascade.

7 Kaufmann When we were talking about the, the monitoring requirements, would it be your
8 view that if the Department requires monitoring that it would be [inaudible] or to
9 the permit?

10 Chapman Oh, certainly.

11 Kaufmann Have you been involved in the past, in your experience as a consultant, with
12 assisting people with the, with following and monitoring [inaudible]?

13 Chapman Yes.

14 Kaufmann What has been your experience when one of the conditions of the license is not
15 met? What [inaudible] takes place after that?

16 [inaudible]

17 Chapman It's been very difficult. Typically we would contact the Department of Water
18 Resources. They, they generally need to have something in writing and then
19 follow up by the Department occurs as the Department is available to, to follow
20 up, and sometimes it's relatively rapid, but typically it's, it's not extremely rapid
21 because they're busy people and they have other irons in the fire; but they do try
22 to respond at least reasonably soon. But once the Department becomes involved
23 and determined that a condition has been violated, typically they, they will notify
24 the permit-holder that there's a, give them a notice of violation and give them
25 some time to respond and, it's, it's a process that can take several weeks at best,

1 usually. It's, it's, you know, when you're in a situation where you need to
2 respond today, that's almost impossible

3 Kaufmann I have no further questions, Mr. Anderson

4 Anderson [inaudible] Mr. Chapman. Next witness, Ms. Kaufmann.

5 Kaufmann We call John Westra to the stand.

6 [inaudible]

7 Anderson If I could have you remain standing, Mr. Westra. Raise your right hand. Do you
8 swear or affirm that the testimony that you give before the Idaho Department of
9 Water Resources is the truth, the whole truth, and nothing but the truth?

10 Westra Yes, I do.

11 HO [inaudible] Thank you.

12 Kaufmann Mr. Anderson, I wonder--

13 Anderson [inaudible] excuse me -- I'm sorry/

14 Kaufmann I'm wondering if we have a, I, I actually, I guess we'd need to inquire if you were
15 maybe going to ask questions of him first and--

16 Anderson Well I, I'll [inaudible]. Mr. Westra, could I have you state your name and spell
17 it?

18 Westra My name is John Westra. J-O-H-N W-E-S-T-R-A.

19 Anderson Ms. Kaufmann.

20 Kaufmann I apologize. Actually, the question I was going to ask you also, Mr. Anderson, is
21 if there is a, a copy of the, of the Exhibit 200 that's marked as such that you
22 would like Mr. Westra to use?

1 Anderson I've handed Mr. Westra Exhibit 200.

2 Kaufmann Mr. Westra, my name is Angela Kaufmann and, along with Scott Campbell, I
3 represent the Pancheris, who are the protestants in this matter. I just want to start
4 out asking you a few background questions, to help us all get to know you a little
5 bit. You are employed by the Idaho Department of Water Resources, is that
6 correct?

7 Westra That's correct.

8 Kaufmann And how long have you been employed by them?

9 Westra Just about 18 years.

10 Kaufmann What's your position with the Department?

11 Westra I'm the Western Regional Manager at the regional office in Boise.

12 Kaufmann And how long have you had that particular position?

13 Westra Two years.

14 Kaufmann What did you do at the Department prior to that?

15 Westra I was in the dam safety section at the regional office, in the – for the region.

16 Kaufmann And then did you have any other positions with the Department prior to the dam
17 safety position?

18 Westra Yes, I worked in the energy section in pump testing and well efficiency for two
19 years.

20 Kaufmann And did that include any geothermal wells?

21 Westra No, it did not.

22 Kaufmann And can you tell me a little bit, Mr. Westra, about your educational background?

1 Westra I'm a professional engineer and registered in Idaho. I have a bachelor of science
2 in agricultural engineering.

3 Kaufmann And how long have you been a professional engineer?

4 [laughter]

5 Kaufmann Approximately.

6 Westra Probably about 15 years.

7 Kaufmann In your, what are your job responsibilities in your current position with the
8 Department as the Western Regional Manager?

9 Westra Basically it, it's managing the western regional area of the state of Idaho, and that
10 area encompasses east and west from the border to King Hill, and north and south
11 from the border to White Bird. That would be my delegated area.

12 [loud beeping]

13 Anderson Go ahead.

14 Kaufmann And as a manager, as the manager, could you just give me some idea of the
15 typical tasks that you are required to complete?

16 Westra I am in, in charge of the regional activities, which encompasses all of the
17 Department programs well protection, dam safety, water allocations,
18 adjudication.

19 Kaufmann Have you been involved with any well drilling regulations on behalf of the
20 Department?

21 Westra Yes.

22 Kaufmann And what has your involvement been?

1 Westra As far as well protection?

2 Kaufmann Yes.

3 Westra The wells that are drilled and regulated in the region, I, I, I oversee that.

4 Kaufmann Have you been involved in drafting any of the Department's well-drilling rules or
5 any other rules like that?

6 Westra Not at this point, no.

7 Kaufmann Okay

8 Westra We, we're going through some of those changes currently, but not at this point.

9 Kaufmann Have you ever been in the past?

10 Westra No.

11 Kaufmann I'm going to call your attention now specifically to the applications for permit that
12 we've all been talking about for quite some time now, I know you just joined us
13 for this proceeding. Are you familiar with the applications for permit
14 no. 65-13912, 13913 and 13986, filed by Carol MacGregor?

15 Westra Yes, I am.

16 Kaufmann And how did you become familiar with those applications?

17 Westra Two of the applications I held the first prehearing conference on, after they were
18 protested.

19 Kaufmann And which specific applications were those, if you can--

20 Westra Sure

21 Kaufmann If you want, if you want to describe them more in terms of what they seek, if
22 that's easier for you.

1 Westra I believe one of them was, one of them was, had to do with surface water from the
2 springs, diverting that, and then one of them was actually drilling a well for
3 heating.

4 Kaufmann Okay. And approximately when was that that you held the first hearing?

5 Westra Oh, gosh, it probably was over four years ago, roughly.

6 Kaufmann And after that first hearing, then what was your involvement regarding the
7 applications that we just mentioned?

8 Westra I was involved with the manager at that time, who was Gary Spackman, and, as
9 more of a side involvement. Gary was, was the lead in it. So I was involved in,
10 in some of the correspondence, but the correspondence and direction was then
11 Gary's [inaudible] manager.

12 Kaufmann And as a result of your involvement, even as the side, the side involvement that
13 you've just described, did you personally conduct any field examinations of either
14 Mrs. MacGregor's property or the Pancheris' property?

15 Westra No, I did not. That was done by the well protection person in our office.

16 Kaufmann And who is that?

17 Westra Rob Whitney.

18 Kaufmann Did you have any conversations with Rob Whitney about this [inaudible]?

19 Westra Not initially. Not at that time.

20 Kaufmann Subsequently then did you have any conversations with Rob about, Mr. Whitney,
21 about [inaudible]?

22 Westra I did when I became the manager.

1 Kaufmann And it sounds then from, from what you just said that your task with regard to
2 these application permits then changed when you became a manager

3 Westra That is correct, yes.

4 Kaufmann Okay. After you became the manager then what, what was your task with regard
5 these applications?

6 Westra If I recall, one of the first things that was presented was a proposal to drill an
7 exploratory or test-type program near the springs, and that proposal came to me
8 when I was, became the manager; shortly after that.

9 Kaufmann Okay. And what did you do with regard to this proposal?

10 Kormanik Objection. I'm sorry, sir. At this point I'm just going to object. I don't think that
11 Ms. Kaufmann's line of questioning deals with the development of IDWR Staff
12 Memorandum [inaudible]

13 Anderson Go ahead, Mr. Westra.

14 Westra Could you tell me, what was the question?

15 Kaufmann Sure. I may not get it exactly right, but I, I'll try to get close to what I just asked
16 you. After you became the western region manager, then what was your – no,
17 that was the question you had already actually answered – excuse me. The
18 proposal came, you said that the proposal for the test well came to you –?

19 Westra Yes.

20 Kaufmann After you became the manager.

21 Westra Yes.

22 Kaufmann What, what were you asked to do regarding that proposal?

23 Westra I was asked to, to review it and, and approve or disapprove, deny it.

1 Kaufmann Okay, and what did you do?

2 Westra We, we denied it.

3 Kaufmann Okay, and what was your basis for denying it?

4 Westra There's, there were several things that entered into it, and after reviewing the
5 proposal and, and the documents, and conferring with our administration, our
6 technical people, we denied it based on the, on the fact that we were concerned
7 about the risk involved and that the action might be proven irreversible, and we
8 had concerns about that. And we felt that making a decision on the conservative
9 side would, on the safe side I guess would be a similar thought, that would be
10 appropriate.

11 Kaufmann [inaudible] you had been, at the beginning of this line of questioning
12 Mr. Anderson handed you what's been marked as Exhibit No. 200. Do you have
13 that in front of you?

14 Westra I do.

15 Kaufmann Okay, and do you recognize what that document is?

16 Westra Yes.

17 Kaufmann And could you just, so our record is clear, can you just state what that document
18 is?

19 Westra It's the IDWR Staff Memorandum and [inaudible].

20 Kaufmann Okay. And who asked you to write [inaudible]?

21 Westra The request was given to us by Mr. Anderson.



1 [END OF TAPE]

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

Before Peter R. Anderson, Hearing Officer

IN THE MATTER OF APPLICATION FOR
PERMIT NOS. 65-13912, 65-13913, AND
65-13986 IN THE NAME OF CAROL LYNN
MACGREGOR

HEARING TRANSCRIPT

Date: May 6, 2005

Hearing Day 4 - Tape 16

- Westra Other than going back to the – to the Idaho Code or the statutes that dictate or tell us [inaudible], our responsibilities in evaluating an application, and there's basically six things. I call them the six magic things. And two of them are will the applications cause injury to senior rights, and the other one of the six is the water, or is the resource – is there enough quantity available. So those two things – jump out. The other thing is to – is the resource being protected. That's another charge given to us by the statutes.
- Kaufmann And then after you, you review your statutory charges then did you have any concerns about [inaudible]?
- Westra I stated in number one on the document that we did have concerns of those three things that I talked about.
- Kaufmann And with that then based on your [inaudible] review [inaudible]?
- Westra Yes. And that corresponds that have [inaudible].
- Kaufmann I don't have any additional questions [inaudible].

Anderson Cross-examination?

Kormanik Mr. Westra, my name is John Kormanik, we haven't met before. I think it was [inaudible] along with Ms. Fischer we represent Dr. MacGregor, the applicant. [inaudible] going to start off just so that I am clear. Does the Department have an opinion about whether application for water right 65-13912 should be granted?

Westra No.

Kormanik What's your understanding of what that 912 water right [inaudible]? And if you don't know, that's fine.

Westra I'd have to look at it.

Kormanik Okay. If you could turn to tab one in that black binder in front of you

Westra Okay. The question was what does it seek?

Kormanik Correct.

Westra Okay. It seeks heating and commercial beneficial use from the hot springs.

Kormanik I think for the purposes of my next question, that if you understand that -- that's sufficient.

Westra Okay.

Kormanik What possible injury to senior water rights could occur if the Department were to grant 13912, which seeks excess surface water from the hot springs?

[inaudible]

Kaufmann Actually, Mr. Anderson, I would [inaudible] an opposing objection to the extent that I -- I heard Mr. Westra [inaudible] the Department doesn't have an opinion as to whether this application for permit should be granted.

Anderson In the Department's staff memorandum [inaudible] analysis [inaudible] concerns [inaudible] by IDWR of possible injury to the senior water rights [inaudible] simply [inaudible] simply asking this witness because the staff memorandum supposedly deals with all three water rights, and what concerns the department has with 13912, specifically, as opposed to [inaudible].

[inaudible]

Kormanik You still have my question?

Westra I think so.

Kormanik Okay.

[laughter]

Kormanik Because I don't.

[laughter]

Westra So you're asking -- if I can repeat this -- you're asking: what would -- what are the Department's concerns related to this application specifically?

Kormanik That's correct.

Westra Okay. This application is, is, is for the Belvidere hot springs water specifically, the springs, and so our concern -- there is a senior right, water right here, which is the Pancheris' with similar beneficial use, and our concerns would be that they are not injured. This is not a regulated spring at this time. There is no regulation.

Kormanik When you say it's not a regulated spring. What you mean?

Westra The flow is -- the flows are not divided or regulated by any entity as far as a water district or the Department.

Kormanik Are you aware that there are, at the present time, flow meters in place to measure the Pancheris diversion?

Westra Yes.

Kormanik If 13912, which is for the surface water were granted, would those – the monitoring of those flow meters reveal whether or not there was any possible [inaudible] to the Pancheri water rights?

Westra I don't know that.

Kormanik Your concern that there is a senior water right from the spring for a similar beneficial use when that spring is not regulated. Is that – is that type of concern unique – specific to Belvidere, or would it be to any other naturally occurring spring, geothermal spring, whether its [inaudible] water right?

Westra That would be appurtenant to any application that we receive.

Kormanik Okay. The analysis, on Exhibit 200, goes on to state that geothermal resource systems are fragile and invasive actions could result in possible nonreversible injuries to resources and water rights. With regard to that statement, what are the Department's concerns, if any, with regard to 13912?

Westra Well, I think generally it would apply. We're still – even though this is surface water, we're still talking about the geothermal resource and it being fragile.

Kormanik Tell me what you mean by "fragile?"

Westra I knew you were going to ask that –

[laughter]

Kormanik Well – and, Mr. Westra, I mean – we've all been sitting here and we've had people talk about what fragile meant to them, so I just want to make sure that I

understand what fragile means to you in the context that you used in the staff memorandum.

Westra I guess I would say my thoughts would be in invading the resource artificially, and in some, some – by some action and that it is fragile and that damage could be irreversible. I guess irreversibility is the word.

Kormanik Okay. For 13912, if I were – let me back up for just a second – and let you know that it is anticipated that Dr. MacGregor would construct an infiltration gallery [inaudible] to obtain water under one [inaudible]. Okay. Do you have that in your mind?

Westra Um-hm

Kormanik What nonreversible injury could the construction of an infiltration gallery pose to [inaudible]?

Westra I don't know that. I would have to read – our staff would have to look at the proposal and what is being proposed.

Kormanik Okay. And the staff would utilize its expertise in assisting [inaudible] assisting Dr. MacGregor in constructing an infiltration gallery that was acceptable to IDWR? Is that fair?

Westra We would review the proposal, not necessarily assist her in getting it?

Kormanik But you couldn't it until IDWR was satisfied?

Westra That's correct.

Kormanik Do you know whether or not there is excess water coming out of that spring that is not subject to prior water rights?

Westra I do not know that.

Kormanik Would that affect your – concerns with application 13912?

Westra That would be a – one of the considerations as we finish processing it – a condition.

Kormanik You bring up a point, you stated conditioning. What type of conditions would the Department place on 13912 to alleviate [inaudible]?

Westra There's lots of conditions. The list is – the possibility is significant.

Kormanik Okay.

Westra We would have to review a – you know – what is the information, and what is the proposal, blah, blah, blah.

Kormanik Okay. Are you aware that the Pancheris have constructed an infiltration gallery on their side of the fence to develop their water rights [inaudible]?

Westra Yes, I am aware of that.

Kormanik Are you aware of – how that was constructed?

Westra Specifically, no I'm not. That's before my time, that application.

Kormanik Okay. If you turn to the third page of exhibit 200, which is the staff memorandum; this is a letter from Mr. Spackman to [inaudible] Mr. Campbell –

Westra Is that the March 25th letter?

Kormanik It is. March 25, 2003. If [inaudible]. Did you discuss this letter with Mr. Spackman?

Westra I did not discuss it at the time he had written it, but I did discuss it when I became the manager.

Kormanik Okay. Kind of a hand-off –

Westra Right.

Kormanik - procedure. If you turn to the second page of that letter. The last full paragraph, would you read that to yourself.

Westra Starting "when all the details?"

Kormanik No, "IDWR," the next paragraph down, if you would just read that to yourself.

Westra Okay.

Kormanik Do you know what type of proof Mr. Spackman is referring to?

Westra At that time, I don't think there was any data that would have – that would have convinced him otherwise. And I'm not sure on the timing. I know there was some testing that Mr. Scanlan and Mr. Chapman had done, and I don't know how that correlated with this letter. As far as date and time.

Kormanik Can you tell why you included this letter as an attachment to this [inaudible]?

Westra Just to give the hearing officer and the parties a background of correspondence from the Department.

Kormanik So other than the background the purpose of the March 25, '03 letter [inaudible] specific?

Westra No.

Kormanik If you could turn to tab number five in the black binder. Right there.

Westra Yes.

Kormanik Is that the application for 65-13986?

Westra That is correct.

Kormanik Keeping that application in mind – if you could just review that briefly so that you can get an idea of what is what

Westra Okay.

Kormanik Alright. 13986 applies for 2 cfs for irrigation, correct?

Westra That's correct.

Kormanik [inaudible] correct?

Westra Correct.

Kormanik How, for 13986, is the Department concerned about possible injury to the Pancheris' right?

Westra Well, here again, it's for ground water and it's in the vicinity of the springs, [inaudible] concerns about being in a fragile area, even though it is for cold water, classified as a cold water well under 85 degrees.

Kormanik When you say in the vicinity of the springs, what do you mean?

Westra Well, in the – local, in the area.

Kormanik Are you aware that Mr. Darwin Pancheri had a cold water well in a hundred to a hundred and fifty feet from the spring source?

Westra Yes, I am.

Kormanik How does that – the presence of that well factor in, if it does at all, to the Department's concern about possible injury for the irrigation water sought in 13986?

Westra Tell me that again. I'm not with you.

Kormanik You know what – that wasn't a very good question [inaudible] Sometimes I start talking [inaudible]. Does the fact that Mr. Darwin Pancheri's cold water well within a hundred to a hundred and fifty feet from the springs [inaudible] affect the Department's concern about possible injury to the Pancheri water rights [inaudible] cold water well on top of [inaudible]?

Westra Well, the specifics – this is an application for an allocation of water right. You have not seen the specifics as far as a well drilling proposal or have looked at any proposals for this ground water well. So, to say yea or nay, I don't know at this point. I don't know that it's being proposed.

Kormanik Okay.

Westra But it's a cold water well. That's all I know at this point.

Kormanik And if 13986 were approved by the Department –

Westra Um-hm.

Kormanik Then Dr. MacGregor would have to submit a well drilling proposal under the [inaudible], correct?

Westra That is correct.

Kormanik And the Department would then have the opportunity to review that report – proposal and either approve it or [inaudible]?

Westra That's correct.

Kormanik Does the Department have a position on whether 65-13986 should be granted?

Westra No, it does not.

Kormanik So the Department doesn't oppose the granting of the application 65-13986?

Westra It has no opinion on it.

Kormanik Okay.

Anderson I would note for the record that although counsel's timely [inaudible] the Department Director will make the decision [inaudible]. Mr. Westra is here as staff.

Kormanik I apologize. [inaudible]. I meant no disrespect to the Director. Mr. Westra, turning to the application [inaudible] 13913, [inaudible]. Are you there, sir?

Westra Yes.

Kormanik Okay. The top number is cut off, but rest assured that number three is for 13913. If you would briefly review that.

Westra Okay. [pause] Okay.

Kormanik Alright. And I hate to do this to you, but I'm going to ask you a question about 13986. You don't have to turn to it.

Westra Okay.

Kormanik You'll be fine, I think. The Department's concern is – I'm sorry – the staff's - [inaudible] as you've indicated with 13986 is that the Pancheri's need the water right [inaudible].

Westra That's correct.

Kormanik Is that concern different than an application for a cold water well – any other cold water well with their senior water rights in the vicinity?

Westra It would be no different.

Kormanik Turning to 13913, now, what's your understanding of what 13913 seeks?

Westra This one seeks ground water, but the beneficial use is for heating, which would confer – or says that it's, it's a geothermal [inaudible].

Kormanik Okay. So is it your understanding that this application is – proposes to tap into the geothermal resource via a well [inaudible]?

Westra That's correct.

Kormanik With that understanding in mind, what possible injury to the Pancheris' water rights does 13913 pose [inaudible]?

Westra Tell me that again. I didn't quite catch –

Kormanik Sure. What possible injury to senior water rights does 13913 pose for IDWR staff?

Westra It would be again the injury or loss to the Pancheris' water rights as far their bene – heating beneficial use.

Kormanik Okay. Is that concern different from any other geothermal application for geothermal water in the vicinity where their senior waters could [inaudible] resource [inaudible]?

Westra No.

Kormanik You used the term possible [inaudible]?

Westra Um-hum.

Kormanik [inaudible] IDWR hasn't been – the concern expressed by IDWR [inaudible] possible. Can you quantify possible, for us?

Westra I don't think I can. And that's the concern. What is possible? What does that mean?

Kormanik Let me ask you this way. If based on your review of the document [inaudible] spoke with Ms. Kaufmann about, again with the statutory responsibilities of the Department, if you had the staff could determine that it was probable – it was

probable that there would injury to the Pancheri water rights, would you have used probable in this staff memorandum?

Westra Oh, I – I can't go there on the use of the words.

Kormanik Okay.

Westra I just can't. No.

[laughter]

Westra Again, I don't know.

Kormanik It's, it's – and I apologize, it's my legal training.

[laughter]

Kormanik It's rearing it's – some would say – ugly head. Okay. What injury, and you use the word injury in that first line of the [inaudible], what injury are you – is the staff concerned about?

Westra That the senior right holder would lose their source.

Kormanik And by loss of source, you mean that the spring that naturally occurs would dry up?

Westra Yes.

Kormanik In your experience, in the energy [inaudible] that you talked about.

Westra Yes.

Kormanik [inaudible], you said that you dealt with pump testing and [inaudible]?

Westra Yes.

Kormanik What is that?

Westra Efficiency of, of a pump as far as irrigation systems, efficiency of delivery, [inaudible].

Kormanik [inaudible], I apologize – did you deal with geothermal resources when you were in the energy section?

Westra No, I did not.

Kormanik Based on your – let me back up. So the injury is that the Pancheris would lose their source?

Westra That's a concern.

Kormanik Any other injuries that the staff would [inaudible]?

Westra The injury to the resource itself.

Kormanik Is that identical? Or is it –

Westra It's related.

Kormanik And when you say the resource itself, again, are you referring to the natural hot spring?

Westra That is correct.

Kormanik Are you referring to the potential geothermal aquifer?

Westra I'm referring to the hot spring itself as it exists.

Kormanik Okay, so the surface manifestation?

Westra Yes.

Kormanik Any other injury that the staff [inaudible]?

Westra Those two are the key [inaudible].

Kormanik You stated that you reviewed some documentation concerning the Bruneau area, when developing the staff memorandum, correct?

Westra That is correct.

Kormanik What's your understanding of what occurred in the Bruneau area?

Westra Well, I don't have a great deal of understanding as far as specific details, but I went through our documents [inaudible]

Kormanik Okay. Do you recall whether or not the issue at Bruneau was overproduction?

Westra Overproduction of – ?

Kormanik Of the geothermal resource?

Westra Help me out here, over use or overproduction or what are you asking?

Kormanik I guess, do you have understanding that one of the issues in the Bruneau area was the fact that the [inaudible] hot springs dried up?

Westra That's correct.

Kormanik Okay. Do you have an understanding of whether or not that, it dried up simply because a well was drilled and closed up the source, or whether or not production of the geothermal resource resulted in the spring drying up?

Westra A little of everything. There's lots of issues and I'm not sure they're all clear.

Kormanik Okay. Are you aware of whether or not there was instance in Bruneau where somebody drilled in the vicinity of the [inaudible] the hot springs and the simple act of drilling damaged [inaudible]?

Westra I am not aware of that.

Kormanik Let's go back to Exhibit 200. The second sentence says "geothermal resources are fragile. Invasive actions could result in nonreversible injury to the resource and senior water rights." And I apologize in advance, when you say invasive actions could – what does the staff mean?

[laughter]

Westra I am just making a statement. It could –

Kormanik [inaudible]

Westra – happen.

Kormanik But you don't know?

Westra Well, nobody knows.

Kormanik Can you assign a percent to that?

Westra No.

Kormanik Isn't, isn't it fair to say that nobody ever knows until some – until the act occurs and then you can determine then?

Westra That's correct.

Kormanik So, the Department – or the staff is [inaudible] where they did not know, and [inaudible] who knows until something – what – something occurs?

Westra Well, but, you're leading me here.

[inaudible]

Westra Everyone has to – you look at what you have for information. You review it, look at, do your thing, and take the – make the best choice you can. So, there's no guarantees either way. So –

Kormanik Okay, and I appreciate that. And I – I, honestly, am not trying to put you on the spot.

Westra Yeah.

Kormanik I think it's important for all of us to understand that. In your estimation, as you use it in Exhibit 200, what is a nonreversible [inaudible]? What is that?

Westra Well, I, I – what that would mean is that it can't be returned to where it existed or where it was initially. And – so, if something did happen with, with whatever was done, there's possibility that it could not be changed back. It isn't like pumping groundwater where you have a well and you're using it for irrigation and there's an injury or something, you stop pumping. There is a solution. But in this case there may not be – you may not be able to reverse what has happened.

Kormanik Why not?

Westra It's because there's, there's issues here and unknowns, and there's fragile things that you're dealing with. You don't know.

Kormanik In your position as the Western Regional Manager –

Westra That's correct?

Kormanik You're aware that the Department [inaudible] for construction of geothermal wells?

Westra Yes, I am.

Kormanik And those rules – direct the consideration of the well driller [inaudible]?

Westra That is correct.

Kormanik Those rules assure that geothermal wells are drilled in a [inaudible], is that correct?

Westra That's correct.

Kormanik And if those rules are followed, isn't it true that the Department considers following those rules to result in diminishment of the risk to the resource to an acceptable limit?

Westra Well, there's always risk involved, and we have to look at things on a case by case basis, so to make a general statement in that regard may or may not be true. We do look at everything on a case by case --

Kormanik Sure. And under the rules the Director has the authority to impose additional conditions over and above those simply stated in the [inaudible]?

Westra That's correct.

Kormanik So, if Dr. MacGregor were to submit a proposal to drill a geothermal well on the property near -- by Belvidere springs, the Department could probably condition that well drilling [inaudible] to ensure that the resource [inaudible]?

Westra Well, we would consider it. I am not saying that we, we would condition it [inaudible] say we would consider it -- the proposal.

Kormanik Sure. But if you could [inaudible] requirement [inaudible] be imposed?

Westra That's correct. But I'm not saying we would approve or disapprove until we saw it

Kormanik Oh, sure. And, and I'm not - certainly not asking you to do anything like that. Does the Department -- I'm sorry. Does the staff have a position with regard to whether or not application 65-13913 [inaudible]?

Westra No [inaudible].

Kormanik Isn't it true that, that the Department would not consider a well drilling application in this case until Dr. MacGregor either went and had her water right application approved [inaudible] or [inaudible]?

Westra Ah, that it – that is generally correct.

Kormanik And when you say generally again, I'm going to be a lawyer, how is it not correct?

Westra Well, it is correct is – and those conditions were listed on the denial for the test well proposal. And that's why I am referring to –

Kormanik Sure. And if you could go ahead, and – Exhibit 200, if you could turn to the June 5th, 2003 letter –

Westra Okay.

Kormanik - from Mr. Spackman. Excuse me, Mr. Campbell. Have you [inaudible]?

Westra I have.

Kormanik Did you speak with Mr. Spackman about this letter in the same manner as you testified previous during the – I think the term I used was hand-off – when you took over [inaudible] job?

Westra Yes, that is correct.

Kormanik And this concerns test well drillings. Do you understand – well, I'm going to assume that you understand that we're not here on a test well proposal, we're here to see if 13913, 13912 and 13986 [inaudible] approved, correct?

Westra Correct.

Kormanik I just have a couple of questions with regard to this letter. Look at the third whole paragraph that begins "IDWR Staff."

Westra Yes.

Kormanik If you could read that paragraph to yourself.

Westra Okay.

Kormanik Alright. The second sentence starts “drilling very near or [inaudible] where the water flows [inaudible] artesian flow [inaudible].” Do you know what drilling very near [inaudible]?

Westra Well, I believe he’s referring to the test well proposal and the location of the test well. [inaudible]

Kormanik I’m sorry.

Westra - that was proposed.

Kormanik Do you know how close that initial test well proposal was?

Westra It was fairly close, but I don’t recall the footage or the details right off hand.

Kormanik Do you know whether or not after this letter was sent out, do you know whether or not [inaudible] test well proposal [inaudible]?

Westra I think there was, at one point, some, some changes made and I don’t recall what Mr. Scanlan and the applicant proposed right off my head, but I do remember that there was something proposed.

Kormanik Does the fact that Mr. Darwin Pancheri drilled within a hundred to a hundred and fifty feet of the spring, does that factor in to the concern expressed in this [inaudible]?

Westra I don’t know if Mr. Spackman considered that or not. I didn’t discuss it with him.

Kormanik When Mr. Spackman says – uses the term “[inaudible] water [inaudible],” do you know what he means by that?

Westra Yes, I do.

Kormanik What does he mean?

Westra The vents are the conduits that the water comes to the surface, [inaudible] water.

Kormanik Is this – the concern that Mr. Spackman addressed in this [inaudible], is that concern just a general concern with all applications for [inaudible] wells within this area of naturally occurring hot springs, or is it just specific to Belvidere?

Westra I think that would be a general concern. Anything [inaudible] geothermal resource

Kormanik Despite staff concerns – those types of general staff concerns, is it fair to say that the Department has issued permits and approved drilling plans [inaudible] geothermal resources in the general vicinity of hot springs?

Westra Um – specifi – generally, yes. We issue –

Kormanik Okay.

Westra [inaudible].

Kormanik Do you know if Mr. Spackman, when he wrote this letter, considered that Mr. – the field report, the beneficial field report for Mr. Darwin Pancheri's irrigation well we've talked about being a hundred to a hundred and fifty feet [inaudible], the field report indicates Mr. Pancheri was looking for a hot water [inaudible], do you know if Mr. Spackman took that [inaudible]?

Westra I don't know that.

Kormanik Further on in that paragraph, it states there is always a possibility of temperature change caused by commingling or by flow reduction. I'm not going to ask you to define possibility. Is that concern, again a general concern for geothermal drilling by any naturally [inaudible]?

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

IN THE MATTER OF APPLICATION FOR
PERMIT NOS. 65-13912, 65-13913, AND
65-13986 IN THE NAME OF CAROL LYNN
MACGREGOR

PETITION FOR RECONSIDERATION

COMES NOW Protestants/Petitioners Duane and Laura Pancheri and Darwin and Joan Pancheri (collectively "Pancheris"), by and through undersigned counsel of record and pursuant to Idaho Code Section 67-5243(3) and IDAPA Sections 37.01.01.720.02 a and b, and hereby petition the Hearing Officer for reconsideration of his Recommended Decision and Order issued in this matter on or about August 19, 2005.¹

¹ While Idaho Code Section 67-5243(3) and IDAPA Sections 37.01.01.720.02 a and b require that a Petition for Reconsideration be filed within 14 days of the issuance of the applicable order, this petition is timely because the applicable order was not served until August 22, 2005.

I. BACKGROUND

The Pancheris hold senior water rights (65-12891—priority date 1988, and 65-13332—priority date 1993) to geothermal water produced by Belvidere Hot Springs in Valley County, Idaho. The Pancheris use the geothermal water to heat their respective residences, shops and/or outbuildings, and a swimming pool.

In 1999 and 2000, neighboring property owner Dr. Carol MacGregor (“MacGregor”) filed three applications for permit, two of which (65-13912 and 65-13913) seek to appropriate water from the hot springs for the development of geothermal water supplied spa consisting of a lodge, pool, and upwards of 12 “casitas.” The Pancheris timely filed objections to each of MacGregor’s three appropriation applications.

Little formal action was taken by the Idaho Department of Water Resources (“Department” or “IDWR”) until MacGregor submitted a test well drilling proposal seeking to explore the sufficiency of the Belvidere Hot Springs resource for the future construction of her spa. The Pancheris opposed any such drilling for fears that it would adversely impact the resource and injure their senior water rights. Thus, IDWR received information from MacGregor and the Pancheris supporting and opposing the proposal, respectively.

On November 12, 2003 IDWR denied MacGregor’s geothermal test well proposal for fear that the drilling could upset the delicate nature of the hot springs, and possibly collapse the system altogether, thereby injuring the Pancheris’ senior water rights. In the denial letter, IDWR stated:

The Department will not consider approval of a drilling permit at the proposed location until the following has occurred:

Application for permit #65-13913 is approved, and a drilling permit can be considered

OR

An agreement to compensate for possible damages is executed by the applicant and the protestant.

Id. (emphasis in original). As the burden falls upon the applicant (MacGregor in this case) to sufficiently show that her proposed appropriation will not injure senior water right holders, IDWR was not going to allow her to drill and potentially upset the hot spring system, thereby injuring the Pancheris, unless and until she met her burden of proof through the permit approval process, or unless and until she posted a bond to mitigate properly presupposed damages to the springs in order to protect the Pancheris from MacGregor's drilling activities should they adversely impact the hot spring system. Despite her express right to do so, MacGregor never appealed IDWR's test well drilling denial.

Nearly one full year after IDWR's denial of her test well drilling proposal, MacGregor requested a hearing seeking approval of her applications for water right numbers 65-13912 and 65-13913, filing her request on or about November 11, 2004. IDWR responded by appointing Peter Anderson as Hearing Officer for the matter on November 24, 2004. Eventually, MacGregor's water right application number 65-13986 was consolidated with the others, and the hearing on the applications was set for late April 2005. In the meantime, Hearing Officer Anderson requested that IDWR provide him with a staff memorandum detailing: (1) an analysis by IDWR staff as to whether the applications should be approved and, what, if any, conditions should be imposed; (2) a listing of any applicable IDWR memoranda; (3) IDWR analysis of water availability at the proposed points of diversion and pertinent studies of the same, if any; and (4) a GIS map showing the points of diversion and proposed places of use. IDWR's Western Region Manager, John Westra, provided the requested memorandum and corresponding materials on February 1, 2005.

The hearing regarding this matter was held on April 22,-23, and May 5-6, 2005. At the conclusion of the hearing the parties were requested to submit briefing as to whether the Hearing Officer could recommend that MacGregor be allowed to drill the geothermal test well that IDWR had previously and expressly denied, as well as proposed findings and conclusions of law. After receiving the requested briefing, the Hearing Officer issued his Recommended Decision and Order on August 19, 2005 (served on August 22, 2005) remanding the applications back to MacGregor pending her further investigation (geothermal test well drilling) of the Belvidere Hot Springs resource. Put another way, the Hearing Officer has recommended to the Director that MacGregor be allowed to drill her geothermal test well despite the Department's prior denial of that request.

II. ARGUMENT

A. The Hearing Officer Has Exceeded the Scope of His Authority By Recommending Remand of This Matter Back to the Applicant Permitting Her To Drill A Test Well

While the Hearing Officer enjoys great latitude in the conduct of hearings, his or her ability to take specific actions regarding applications for permit is really quite limited.

As the Agency Head, the Director of IDWR is the individual in whom the ultimate legal authority of the agency is vested by provision of law. *See* Idaho Code Section 67-5201(4), and IDAPA Sections 37.01.01.005.04 and 37.01.01.005.10. The Idaho Code provides that the Director may delegate such duties imposed upon him by law to employees of the Department in order to promote the efficient administration of his duties, and, further, the Director may, in his discretion, appoint Hearing Officers to preside over contested cases. *See* Idaho Code Sections 42-1701(3) and 42-1701A(2), respectively. As a creature of statute, through Agency Head and/or Director appointment, Hearing Officers wield only those powers specifically granted to them through their appointment, consistent with the agency's rules. Put

another way, Hearing Officers are subordinate to the agency head. IDAPA Section

37.01.01.411²

In this matter, the Director appointed the Hearing Officer pursuant to Idaho Code Title 67, Chapter 52, and IDAPA Sections 37.01.01.410-413. *See* Order Appointing Hearing Officer, dated November 24, 2004. Therefore, the Hearing Officer's scope of authority is that which is granted to him by Rule 413 of IDWR's Rules of Procedure (IDAPA Section 37.01.01.413—Scope of Authority of Hearing Officers). Unless otherwise provided, Rule 413 grants the following authority to Hearing Officers:

- a. Authority to schedule cases assigned to the hearing officer, including authority to issue notices of default, of prehearing conference and of hearing, or to provide for the use of informal procedure, as appropriate;
- b. Authority to schedule and compel discovery, when discovery is authorized before the agency, and to require advance filing of expert testimony, when authorized before the agency;
- c. Authority to preside at and conduct hearings, accept evidence into the record, rule upon objections to evidence, rule upon dispositive motions upon completion of the applicant's or the petitioner's case in chief, and otherwise oversee the orderly presentations of the parties at hearing; and
- d. Authority to issue a written decision of the hearing officer, including a narrative of the proceedings before the hearing officer and findings of fact, conclusions of law, and recommended and preliminary orders by the hearing officer, following the submission of evidence through stipulation of the parties, affidavits, exhibits, or hearing testimony

² This subordination concept is further illustrated by Idaho Code Section 67-5244 which provides that the head of the agency (the Director in this matter) shall exercise all the decision-making power on review of the recommended decision that he would have if he, himself, had presided over the hearing. In other words, the Hearing Officer's decision is advisory only, and the agency head is free to make his own determination. *See also Northern Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 440 (Ct. App. 1996).

Under the Director's November 24, 2004 appointment, the foregoing represent the full scope of the Hearing Officer's authority in this matter.

MacGregor applied for three water right permits, and has requested approval of the same. When the Hearing Officer was appointed by the Director, it was to consider whether the applications for permit should be approved, not to consider whether MacGregor should be allowed to drill a test well. The test well issue was not before the Hearing Officer, having already been disposed of by IDWR in November 2003—a decision/denial that MacGregor never challenged or appealed. The Pancheris respectfully submit that the Hearing Officer may only approve or disapprove Applications for Permit Number 65-19312, 65-13913, and 65-13986, in whole or in part, or with such conditions as may be appropriate. To render any recommended decision concerning the drilling of test wells and “remanding” the matter to MacGregor for further resource investigation (geothermal test well drilling), blatantly exceeds the scope of the Hearing Officer's authority in this matter.

B. The Issue of Whether MacGregor May Drill a Test Well Has Already Been Decided, And Any Efforts To Resurrect It By MacGregor Are Barred By *Res Judicata*

As noted in Section II.A., *supra*, IDWR explicitly and expressly denied MacGregor's proposal seeking permission to drill a geothermal test well to further investigate the sufficiency of the Belvidere Hot Springs complex. This test well proposal received extensive internal Department scrutiny because of the proposed well location, and the “possibility that the drilling of the well may negatively impact other water rights.” *See* Exhibit 200 (March 25, 2003 correspondence from Gary Spackman of the Department to counsel for the applicant and protestants, included therein). A subsequent letter from Mr. Spackman to counsel for MacGregor and the Pancheris noted that Department staff had voiced numerous concerns regarding MacGregor's proposal including, but not limited to, the following:

Drilling very near or in vents through which geothermal water flows may alter the artesian flow of the water to the Pancheri's point of diversion. There is also a possibility of temperature change caused by commingling or by flow reduction.

Id. (June 5, 2003 correspondence from Gary Spackman to counsel for applicant and the protestants, included therein) As such, the Department devoted more time to technical data review of the matter.

Ultimately, in a letter dated November 12, 2003, the Department rejected MacGregor's test well proposal because (a) the test well proposal presented "a substantial risk for permanent damage to the resource . . . additionally subjecting the Pancheri water right to possible injury," and (b) because, pursuant to Rule 45 of the Department's Well Drilling Standards Rules, "the Department will not consider the approval of a drilling permit at the proposed location until . . . Application for permit #65-13913 is approved . . . **OR** an agreement to compensate for possible damages is executed . . ." *Id.* (November 12, 2003 correspondence from John Westra of the Department to counsel for the applicant and the protestants, included therein) No agreement to compensate the Pancheris for possible damages has been reached, and Application for Permit Number 65-13913 has not been approved.

The Hearing Officer in this matter is bound by the Department's decision rejecting the test well proposal for three primary reasons. First, the Department's November 2003 decision to reject MacGregor's test well proposal correctly applies the Department's Well Drilling Standards Rules in conjunction with its Water Appropriation Rules, the Idaho Code, and is a decision that is binding on the Hearing Officer. Contravening or questioning the Department's decision regarding the test well proposal falls outside the scope of the Hearing Officer's authority granted by the Director and Rule 413 in this matter, because as discussed

above, the Hearing Officer was appointed solely to determine whether to approve or reject MacGregor's applications for water right permits.

Second, MacGregor has never filed a petition contesting IDWR's decision regarding her test well proposal, let alone within the fifteen (15) days, as required by Idaho Code Section 42-1701A(3). That Section provides, in pertinent part, that:

any person aggrieved by any action of the director, including any decision, determination, order or other action, including any action upon any application for permit . . . shall file with the director, within fifteen (15) days after receipt of written notice of the action . . . a written petition stating the grounds for contesting the action and requesting a hearing . . .

Id. MacGregor effectively waived her right to contest the Department's decision denying her test well proposal, and it would be outside the scope of the Hearing Officer's authority to reverse a Department decision that was never even challenged by MacGregor in the manner contemplated by the Idaho Code³

Third, IDWR's denial of MacGregor's previous test well proposal was based upon agency expertise and statutory construction, and, therefore, is entitled to significant

³ MacGregor may attempt to argue that the Department's November 12, 2003 letter authored by John Westra does not constitute "director action" for purposes of Idaho Code Section 42-1701A(3). Such an argument lacks merit. As stated previously in Section I, *supra*, Idaho Code Section 42-1701(3) authorizes the director to delegate duties imposed upon him by law to Department employees in order to promote the efficient administration of his duties. Thus, the November 12, 2003 Westra letter represents the position of the Department and does constitute "director action" for purposes of Idaho Code Section 42-1701A(3).

Any subsequent attempts by MacGregor to resurrect the test well drilling issue are barred by the doctrine of *res judicata*. The doctrine of *res judicata* is well established, and provides that in an action between the same parties upon the same claim or demand, the former adjudication (IDWR's November 13, 2003 letter in this matter) concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim, but also every matter which might and should have been litigated in the first suit. *U.S. Bank National Ass'n v. Kuenzli*, 134 Idaho 222, 226 (2000). Under the doctrine of *res judicata*, a valid and final judgment rendered in an action extinguishes all claims arising out of the same transaction, or series of transactions out of which the cause of action arose. *Id.*

deference. *See Kopp v. State*, 100 Idaho 160, 163 (1979) (agencies entrusted with the responsibility to administer statutes at issue are “impliedly clothed with power to construe” the law). The rule of deference is premised on the rationale of agency expertise *J.R. Simplot Co., Inc. v. Idaho State Tax Com’n*, 120 Idaho 849, 861 (1991), *citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Hearing Officer, himself, sought IDWR’s expertise in this matter by requesting that IDWR provide him with the staff memorandum discussed in Section I., *supra*. That memorandum included IDWR’s November 2003 denial of MacGregor’s previous test well proposal. However, now, in his Recommended Decision and Order, the Hearing Officer is inexplicably disregarding the very agency expertise that he sought in the first place.⁴ The Hearing Officer’s recommendation of remand of this matter for further applicant investigation not only violates the scope of his authority, but also impermissibly disregards the well settled rule of deference afforded to agency expertise as expressly reaffirmed by the Idaho Supreme Court in *J.R. Simplot Co., supra*.

Review of the Department’s test well proposal decision is not before the Hearing Officer in this matter. Rather, the Hearing Officer’s sole purview in this matter is conducting the hearing regarding MacGregor’s applications for permit in accordance with the powers vested in him by the Director and Rule 413. Any decision by the Hearing Officer that contravenes the Department’s prohibition of test well drilling unless and until MacGregor’s application for permit is approved by the Department impermissibly exceeds the scope of the Hearing Officer’s

⁴ Not only does the Hearing Officer impermissibly jettison IDWR’s November 2003 opinion letter denying MacGregor’s ability to drill any geothermal test wells, but the Hearing Officer also appears to impermissibly ignore all of the first hand testimony of John Westra, IDWR Western Region Manager at the hearing of this matter explaining the agency’s denial decision and its rationale

authority in this matter, and impermissibly ignores the well settled doctrines of agency deference and *res judicata*.

C. The Hearing Officer's Remand Recommendation Violates The Burdens of Proof Under Idaho Code Section 42-203A(5), IDWR's Corresponding Rules, And Misconstrues The Nature Of Injury To A Senior Water Right Holder

In the August 19, 2005 Recommended Decision and Order, the Hearing Officer states that MacGregor has failed to meet her burden of submitting plans of her proposed project sufficient enough to "generally apprise the public of the efficacy of the proposed use and of its potential impact. *Id.* at 29. However, the Hearing Officer does not fault MacGregor for this failure, rather he blames the failure upon her inability to drill geothermal test wells to determine the sufficiency of the hot springs resource, which investigation would then lead to the development of sufficient plans with a scope reflecting the nature of the resource's carrying capacity. *Id.* Put another way, the Hearing Officer at least implicitly blames IDWR for MacGregor's application shortcomings

A water right applicant bears the burden of proof for the factors that the Idaho Department of Water Resources must consider under Section 42-203A. *Cantlin v. Carter*, 88 Idaho 179, 187 (1964), *see also Shokal v. Dunn*, 109 Idaho 330, 339 (1985). Regarding the criteria set forth in Idaho Code Section 42-203A, the Idaho Department of Water Resources has adopted rules (known as the Water Appropriation Rules) setting forth the criteria for evaluating some of the statutory factors set forth in Section 42-203A.

Pursuant to the Idaho Department of Water Resources Water Appropriation Rules, IDAPA Sections 37.03.08 *et seq.*, the burden of proof regarding the processing of applications for permit is divided into two (2) parts. The first part concerns the evidentiary burden, or, put another way, the burden of coming forward with evidence to present a *prima*

facie case, and the second part is known as the ultimate burden of persuasion. See IDAPA Section 37.03.08040.04(a).

1. Evidentiary Burden

The burden of coming forward with evidence is divided between both the applicant and the protestant, particularly when Idaho Code Section 42-203C (Hydropower water rights) is implicated. However, in this matter, because Idaho Code Section 42-203C is not implicated, the protestants bear only a very limited evidentiary burden as more fully described below.

As this matter only concerns evaluation of criteria set forth in Idaho Code Section 42-203A(5), the applicant bears the initial burden of coming forward with evidence for the evaluation of criteria (a) through (e) of said statutory section. See IDAPA Sections 37.03.08.040.04(b)(i-iii). In other words, the applicant bears the burden of coming forward with evidence to present a *prima facie* case that his or her proposed appropriation will not injure preexisting water rights; that there is sufficient water supply available to meet the proposed needs of the applicant; that the application was made in good faith; that the applicant has the financial resources necessary to construct/complete the diversion works and apply the water appropriated to beneficial use; and that the proposed appropriation does not conflict with the local public interest.⁵

⁵ As noted above, in matters such as these where Idaho Code Section 42-203C is not implicated, the protestant bears only a very limited evidentiary burden. The protestant's evidentiary burden is actually a split burden regarding criterion (e) of Idaho Code Section 42-203A(5) that the protestant shares with the applicant. Regarding criterion (e), the local public interest criterion, both the applicant and the protestant bear the burden of coming forward with evidence as to any factor affecting the local public interest of which he or she is knowledgeable, or can reasonably be expected to be knowledgeable, for purposes of evaluating the proposed appropriation's impacts upon the local public interest. With the exception of this criterion (e) /

2. Ultimate Burden of Persuasion

In addition to evidentiary burdens that the applicant bears regarding this matter, the applicant, and not the protestant, also bears the ultimate burden of persuasion for all of the criteria set forth in Idaho Code Section 42-203A(5). *See* IDAPA Section 37 03 08040.04(c). Thus, in addition to criteria (a) through (e) discussed above, the applicant also bears the ultimate burden of persuasion for criterion (f) (Conservation of Water Resources) as well. Put another way, the applicant bears the ultimate burden of persuasion that his or her proposed appropriation is not contrary to the conservation of water resources within the state of Idaho, in addition to bearing this same burden for each of criteria (a) through (e) discussed above.

These burdens placed upon water appropriation applicants are meant to protect the public and senior water right holders from injury by requiring that applicants meet their requisite burdens. IDWR did not allow MacGregor to drill any geothermal test wells because it properly presupposed possible injury, presupposed injury that MacGregor faces the burden of dispelling to the satisfaction of the Department in order for her to drill any test wells. In essence, MacGregor has two options: (1) obtain a water right permit by properly meeting her burdens under Idaho Code Section 42-203A, or (2) reach a settlement with the senior water right holders (the Pancheris) who stand to be injured by MacGregor's water right applications in order to mitigate for and/or protect them from any injury that may befall their senior water rights from MacGregor's proposed activities. It is not the Hearing Officer's province to alter these burdens, and doing so impermissibly exceeds the scope of his authority in this matter.

public interest evidentiary burden, the protestant bears no other evidentiary burden during the application evaluation process. *See* IDAPA Sections 37 03 08040.04(b)(i-iii).

3. Nature of Injury

Additionally, in the August 19, 2005 Recommended Decision and Order, the Hearing Officer states that “Water supplies are variable. A party applying for a permit is not required to show that the proposed use will never interfere with an existing water use.” *Id.* at 29. The Hearing Officer reasons that permits should be approved despite their injury to senior water right holders so long as the injury is occasional and not constant. *Id.* The Hearing Officer’s rationale regarding injury to senior water right holders misconstrues Idaho Code Section 42-203A(5)(a) as well as IDAPA Section 37.03.08.045.01a.

Idaho Code Section 42-203A(5)(a) directs the Director to reject an application for permit, and to refuse the issuance of a permit therefore, or condition a permit accordingly where the proposed use of water “will reduce the quantity of water under existing water rights.” *Id.* Further, the Department’s Water Appropriation Rules (IDAPA Section 37.03.08 *et seq.*) state

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if: (i) The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less. . . .

Id. Nothing in Idaho Code Section 42-203A(5)(a), or the pertinent, corresponding Department Water Appropriation Rules suggests that interference with a senior water right need be continuous and/or constant to constitute injury to a senior water right. Injury qualifies as a one time event, any point in time when a proposed use “will reduce the quantity of water under existing rights,” or any point in time when the amount of water available under an existing right “will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights.” Notwithstanding the Hearing Officer’s Recommended Decision and Order, occasional impacts

(i.e., injuries) are injuries regardless of their frequency, and the Director is statutorily required to reject or condition applications that will injure existing water rights by reducing the quantity of water available to them. Such is the case here, and the Hearing Officer's statements to the contrary are simply wrong.

D. The Hearing Officer Has Misconstrued and Misapplied Idaho Code Section 42-1805

In the August 19, 2005 Recommended Decision and Order, the Hearing Officer recommends the remand of these proceedings back to the applicant (MacGregor) for her "to conduct further tests and studies to determine the availability of both geothermal and cold water at her proposed points of diversion pursuant to the Director's authority under Idaho Code Section 42-1805." *Id.* at 29. Regarding his implication of Idaho Code Section 42-1805, the Hearing Officer is correct in noting the "Director's authority," as nothing in the statute contemplates that a private party may be, or is, empowered to conduct these investigations. Only the Director may perform or direct such investigations. By suggesting/recommending that MacGregor be empowered to perform her proposed geothermal water investigations pursuant to Idaho Code Section 42-1805 completely misconstrues and misapplies the express terms of the statute

Idaho Code Section 42-1805 provides in pertinent part:

the director of the department of water resources shall have the following powers and duties: . . . (3) To conduct surveys, tests, investigations, research, examinations, studies, and estimates of cost relating to availability of unappropriated water, effective use of existing supply, conservation, storage, distribution and use of water. (4) To prepare and compile information and data obtained and to make the same available to interested individuals or agencies. .

Id. As the statute makes very clear, it is the province of the Director to perform the investigative activities and data compilation that the Hearing Officer indicates can be delegated to the applicant in this matter. The statute empowers the Director to undertake these activities, not

non-Department personnel. There is no other tenable reading of the statute, and the Hearing Officer's recommended use of the statute is impermissibly expansive and wholly unsupported.

E. The Hearing Officer Lacks the Authority to Allow or Order the Drilling of Test Wells Prior to Formal IDWR Approval of The Pending Applications For Permit

As discussed in Section II.A., *supra*, the scope of the Hearing Officer's authority is confined to that specifically granted to him. In this case, the scope of authority granted is limited to that provided by Rule 413. Therefore, it is not for the Hearing Officer to operate outside the bounds of applicable agency rules, rather his duty is to abide by, and to properly apply, those rules.

Idaho Code Section 42-202 pertains to applications for permit generally, and provides in pertinent part that

any person, association or corporation hereafter intending to acquire the right to the beneficial use of . . . ground water, . . . shall, before commencing of the construction, enlargement or extension of the ditch, canal, well or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources.

I.C. § 42-202(1). Idaho Code Section 42-204 then clarifies that:

The department of water resources shall issue a permit for any approved application, make a record of the approval and provide a copy of the permit to the applicant, who shall be authorized *on receipt thereof*, to proceed with the construction of the necessary works for the diversion of such water, . . .

I.C. § 42-204 (emphasis added).

Those sections, combined, illustrate that the construction of diversion works (including wells) cannot commence until approval of a permit application. One might argue that the Hearing Officer's proposed course of action is not to approve diversion works (i.e., a

production well), but, rather, to approve only a test well. However, that argument is unavailing, for two reasons.

First, requiring permit approval before the construction of diversion works ensures that senior water rights will be protected. Allowing a test well to be drilled and pumped will circumvent the protection offered by the permit application and approval process.

Second, and even more directly, the Department's own rules require that an application for permit be approved before well drilling for those other than for domestic purposes. Specifically, Rule 45.01 of the Department's Well Construction Standards Rules (IDAPA 37.03.09) provides, in pertinent part:

a. The owner of a well to be constructed on or after July 1, 1987 shall obtain a drilling permit from the Director prior to construction or drilling of the well.

d. Drilling permits **will not** be issued for construction of a well which requires another separate approval from the Department, such as a water right permit, **until** the other separate approval has been given by the department. The Director may grant a waiver if he determines that the public interest will be served by an expedited approval.

Id. at 37.03.09.045.01.a and d (emphasis added).

In this matter, MacGregor seeks application for permit approval from the Department so that she may further develop subsurface geothermal resources which are already duly appropriated in whole or in part by senior right holders. Idaho Code and the Department's Water Appropriation Rules make clear that MacGregor may not proceed with construction of diversion works at all until the Director approves the application and issues a permit. *See, e.g.*, Idaho Code Sections 42-202 and 42-204 (Examination—Permit—Commencement of Work—Extensions—Appeal), and IDAPA 37.03.08.035.01.a (Application Requirements—General Provisions). When read in conjunction with Rule 45 of the Department's Well Construction

Standards Rules, it is clear that that MacGregor cannot drill a well without a permit, and that a permit for well drilling cannot issue unless and until she receives her “separate approval” from the Department in the form of a water right permit

Test wells are also included in those requirements. The Well Construction Standards Rules, by their terms “are applicable to *all water wells*, monitoring wells, low temperature geothermal wells, injection wells and other artificial openings and excavations in the ground which are more than eighteen (18) feet in vertical depth below land surface . . . ” IDAPA 37.03.09.001.02 (emphasis added). Further, the Rules continue by defining a well, including exceptions from the definition of “well.” Test wells are not included within those exceptions.

In the August 19, 2005 Recommended Decision and Order, the Hearing Officer states that it is in the public interest to allow MacGregor’s testing to go forward without first granting, *i.e.*, permitting her Applications pursuant to IDAPA Section 37.03.09.045 01.d. As discussed in Sections II A and B, *supra*, the test well issue is simply not before the Hearing Officer in this matter. The test well issue is a dead issue as MacGregor failed to appeal the November 2003 denial, and because IDWR’s decision is entitled to significant deference. Further, while the Director may waive the drilling permit requirement pursuant to IDAPA Section 37.03.09.04501.d., such waiver must be in the public interest. There is no record evidence in this matter establishing how or why such a waiver would be in the public interest. A *sua sponte* statement by the Hearing Officer saying that test well drilling in this matter is in the public interest does not make it so.

As Idaho Code and the Rules plainly state, receipt of a water right permit is a condition precedent to MacGregor’s ability to drill any test wells. To date no such water right

permit has issued. The Hearing Officer is bound to abide by, and apply, the pertinent Idaho Code provisions in conjunction with the Department's duly promulgated rules governing this matter. Any attempt to do otherwise, *i.e.*, permitting MacGregor to drill test wells prior to her receipt of a water right permit, exceeds the scope of the Hearing Officer's authority.

III. CONCLUSION

For the foregoing, the Pancheris respectfully request that the Hearing Officer reconsider his August 19, 2005 Recommended Decision and Order, and maintain IDWR's stated position denying MacGregor the ability to drill any geothermal test wells unless and until she meets her burdens of proof through the formal application approval process, or unless and until she reaches a settlement with the Pancheris capable of mitigating damages that will be suffered by them if MacGregor's proposed test well drilling adversely impacts the Belvidere Hot Springs.

DATED this 2nd day of September, 2005.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell – Of the Firm

By Andrew J. Waldera
Andrew J. Waldera – Of the Firm
Attorneys for Duane and Laura Pancheri
and Darwin and Joan Pancheri

CERTIFICATE OF SERVICE

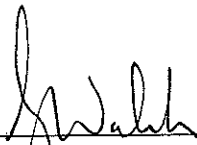
I HEREBY CERTIFY that on this 2nd day of September, 2005, I caused a true and correct copy of the foregoing **PETITION FOR RECONSIDERATION** to be served by the method indicated below, and addressed to the following:

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Andrew J. Waldera

Victoria

RECEIVED

JUN 06 2005

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

IN THE MATTER OF APPLICATION FOR	)	
PERMIT NOS. 65-13912 AND 65-13913 IN	)	
THE NAME OF CAROL LYNN	)	PETITIONER'S
MACGREGOR	)	POST HEARING BRIEF
	)	
	)	
	)	

INTRODUCTION AND BACKGROUND

Petitioner, Dr. Carol Lynn MacGregor is a native Idahoan who owns approximately 1,100 acres of real property in Valley County, Idaho. The property, known as Raspberry Ranch, is an operational cattle ranch managed by Dr. MacGregor. Part of Raspberry Ranch was owned by Dr. MacGregor's father when she was growing up; another portion was acquired by her 1998. See Petitioner's Exhibit 16. The portion of Raspberry Ranch acquired in 1998 contains a hot spring complex commonly known as Belvidere. There are two 1901 decreed water rights from Belvidere appurtenant to Raspberry Ranch: 65-01973 and 65-01972. See Petitioner's Exhibits 9 – 10. These two

rights historically were used as hot bathes on the MacGregor property, and Dr. MacGregor testified to having soaked in the bathes during her youth. Although Dr. MacGregor owns a home in Boise, Idaho, Raspberry Ranch is her permanent home and she feels a deep connection with the community in and around Cascade.¹

The Protestants, Duane, Laura, Darwin and Joan Pancheri own real property both north and south of Raspberry Ranch. See Map at Petitioner's Exhibit 18. The Pancheris' property also contains a hot spring which the Pancheris have developed for their own use.² Testimony of Darwin Pancheri, 4/21/05 Tape #1A; Testimony of Duane Pancheri, 4/21/05 Tape #1A, Side 2. The following chart represents the Pancheris' water rights currently being diverted from the spring that originates on Darwin Pancheri's property:

Right	Priority	Amount	Use
65-12891 Licensed to Duane and Darwin	1988	Rate 44 cfs Volume 51 3 afy	Heating Domestic
65-13332 Permit for Joan and Darwin	1991	Rate 10	Heating

On August 2, 1999, Dr. MacGregor, applied for two permits to divert additional geothermal water from Belvidere. Specifically, Application 65-13912 seeks to divert

¹ Interestingly, Dr. MacGregor's home in Boise – the C.W. Moore Mansion – was the first home on Warm Springs to be heated with geothermal heat. Her house is featured in Protestant's Exhibit 101 at p 61.

² Mr. Scanlan testified that the spring on the Darwin Pancheris' property may be a part of the Belvidere spring complex, which complex is likely vented to the surface on both the MacGregor and Pancheri properties. The map, attached to the IDWR Staff Memorandum (Exhibit 200) identifies the exact locations of the three surface manifestations. Dr. MacGregor's springs are labeled "lower spring vent" and "upper spring vent." The Pancheris' spring is labeled on the map as "infiltration gallery." The greatest discharge occurs on Dr. MacGregor's property. Petitioner's Exhibit 37.

excess water naturally flowing from the spring on her property for heating and commercial uses; Application 65-13913 contemplates drilling for hot water to be used in connection with a resort – day spa. *See* Petitioner’s Exhibits 1 and 3. In October 2000, Dr. MacGregor filed a third Application, No 65-13986, which sought to divert cold water for irrigation, also in Valley County. *See* Petitioner’s Exhibit 5

The Pancheris protested all three Applications,³ claiming “injury to our senior water rights” – that is: 65-12891 and 65-13332. *See* Petitioner’s Exhibits 2 and 4. After nearly six years of unsuccessful negotiations to resolve the protests (and having been denied the ability to drill test wells) Dr. MacGregor had no choice but to request a hearing on all three Applications. Thus, on April 21 - 22 and May 5 – 6, 2005, Peter Anderson conducted the hearing on Dr. MacGregor’s Applications.

At the conclusion of the hearing, Mr. Anderson invited briefing on the issue of whether the Director had the authority to issue an interlocutory order requiring test well drilling on Raspberry Ranch in order to further ascertain the extent of the geothermal aquifer available for development under Application 65-13913.⁴ On May 16, 2005, both parties submitted briefing on that issue. Mr. Anderson also provided an opportunity for the parties to submit briefing in support of their positions on approval of the Applications. This document constitutes Petitioner’s Post-Hearing Brief and summarizes why the Department should approve Dr. MacGregor’s Applications

³ Notably, the Pancheris’ have protested every application for water right Dr. MacGregor has sought on Raspberry Ranch, including her application for a domestic spring right for her residence located well over a mile from the Pancheri properties. *See* Petitioner’s Exhibit 8

⁴ The Hearing Officer acknowledged in his comments that, because the Department refused to allow test well drilling prior to the hearing on the Applications, Dr. MacGregor was placed in a “catch 22” situation where she was required to prove the elements of her case, but precluded from gathering certain data that would support that effort

ABOUT THE PANCHERIS' PROTESTS

The Pancheris' protests are in the record as Petitioner's Exhibits 2 and 4. The protests, which simply state they are being filed to "protect our senior water rights" fail to satisfy the requirements of IDAPA 37.01.01 250. That is, they do not set forth with particularity the basis of the protests. More specifically, how the approval of Dr. MacGregor's applications would impact their "senior water rights." Therefore, to better understand the Pancheris' protests, Dr. MacGregor called Duane and Darwin Pancheri as her first witnesses to explore their objections.

Darwin Pancheri testified first and was asked about his protest to each of Dr. MacGregor's applications. Regarding 65-13912, Darwin was asked what his objection is to Dr. MacGregor simply appropriating the excess water occurring from the hot water spring on her property – which is contemplated by 65-13912. Darwin Pancheri initially commented on his concerns about *drilling* for hot water, but upon understanding this application seeks to divert only the excess flowing from Dr. MacGregor's hot springs, answered: "If it's used as what's actually flowing out of her spring we'd have no problems with it." *See* 4/21/05, Tape # 1A. Similarly, Duane Pancheri testified, "Well our objection is we don't have any objection [inaudible] if we don't lose our water." Duane was reminded 65-13912 does not involve drilling, and asked again whether he had any concerns. He replied, "No, not really, only concern I have is we water livestock down behind the creek, where they drink in the summer." *See* 4/21/05, Tape #1A, Side 2. Duane admitted he has no stock water right for the use referenced. *Id.*

Next, Darwin and Duane were each asked about their protest to Dr. MacGregor's application for a cold water well for irrigation. Specifically, whether either had an

objection to application for permit 65-13986. Darwin responded, "Not if we knew the location she was going to drill." *See* 4/21/05, Tape # 1A. Duane echoed Darwin's response stating, "Not if she tells us where she'll drill it at. . ." *See* 4/21/05 Tape #1A, Side 2. Both comments were based on the apparent concern alleged by Mr. Chapman that drilling too close to the hot springs could affect that resource. However, when asked how close is "too close" Duane stated, "Well, I imagine within three hundred feet would be alright."⁵

Finally, upon inquiry about protest to application for permit 65-13913, which contemplates drilling for hot water, Darwin testified his objection was, "same as always been, protect our water rights." *See* 4/21/05, Tape # 1A. Upon further inquiry, however, Darwin admitted he had no personal knowledge or evidence that Dr. MacGregor's proposed development of 65-13913 would impact his water rights. The following testimony was given at the hearing:

John Kormanik: "Nothing in particular in your knowledge where you've seen facts or some evidence that would state the granting of this water right permit application [65-13913] would damage or impact the resource that you use?"

Answer: No.

See 4/21/05, Tape # 1A. Duane Pancheri's answer was slightly different in that Duane testified if Dr. MacGregor drilled near Belvidere for additional hot water, and bentonite was used in the process, that the spring would "seal up." Although Duane had no knowledge of such an event ever occurring, he insisted it would happen because bentonite is "just like cement." *See* 4/21/05 Tape #1A side 2

⁵ Duane maintained 300 feet was close enough, even when reminded his brother, Darwin testified to having drilled a well within 135 – 140 feet of the hot springs (water right no 65-13978). *See* 4/21/05 Tape #1A; Petitioner's Exhibit 7

In sum, after being given an opportunity to express the basis of their protests, the Pancheris made it quite clear they had no objection to: 1) Dr MacGregor diverting excess water from her spring under 65-13912 because no drilling would be required; 2) they had no protest to 65-13986 so long as they know the location of the well or provided it is more than 300 feet from the hot springs; and 3) they really don't understand or know the basis for objecting to 65-13913 other than an unfounded (and hypocritical) belief that drilling a well near Belvidere will somehow injure the spring and hence their water rights.

Thus, the only substantive evidence presented at the hearing regarding the Pancheris' protests was provided by Pancheris' consultant, Sherl Chapman. The weight that should be attributed to his testimony is explored in more detail below.

WEIGHING THE EVIDENCE

It is generally accepted that the weight given to an expert's testimony is left to the trier of fact – in this case, the hearing officer. *State v. Hopkins*, 113 Idaho 679, 681, 747 P.2d 88, 90 (Ct. App. 1987) (citing *IHC Hosp., Inc v. Board of Commissioners*, 108 Idaho 136, 697 P.2d 1150 (1985)). In determining the weight to be given an expert opinion, the trier of fact should consider the qualifications and credibility of the witness and the reasons given for his/her opinion.

Although this case consolidated three water right applications, the central issue at hearing involved application 65-13913 which contemplates *drilling* for hot water near Belvidere. Application 65-13913 was and has been the sole focus of written opinions

rendered by Mr. Chapman, regarding the likelihood of injury to the Pancheris' rights.⁶
See Petitioners Exhibits 24- 25 The Department initially accepted the concerns raised
by Mr. Chapman as noted in the IDWR Staff Memorandum which states:

The concern expressed by IDWR has been possible injury to the senior water rights (Pancheri). Geothermal resource systems are fragile, invasive actions could result in possible non-reversible injury to the resource and senior water rights....

See Exhibit 200.⁷

The result is that much of the evidence presented at the hearing was in the form of expert testimony regarding geothermal systems and the development of water rights there from. In the end, there was little disagreement between the parties' experts. However, as this matter is reviewed, the weight to be given expert testimony is important.

In this case, experts Terry Scanlan and Jill Haizlip offered the most credible, qualified, and scientifically sound testimony. In instances where technical or scientific facts were disputed, Mr. Scanlan and Ms. Haizlip offered consistent explanations for their opinions.

To the contrary, although Mr. Chapman is a qualified and respected geologist, the written opinions he rendered prior to the hearing (Petitioner's Exhibits 24 and 25) were not entirely consistent with his live testimony. The contradictions, between his written and verbal opinions are discussed in more detail below, and *must* be considered when attributing the weight of Mr. Chapman's testimony in this matter.

⁶ As is discussed above under the "Protest" section, the Pancheris did not ever (even through the hearing) express any basis for protesting 65-13912 or 65-13986. Instead, those applications have been "held hostage" pending resolution of 65-13913.

⁷ Significantly, this concept that geothermal systems are fragile and sensitive to invasive actions — as well as the possibility of irreversible injury from drilling — appears to come directly from claims made by Mr. Chapman. See Protestants Exhibits 24 and 25.

Additionally, it is significant that nearly all the flow and monitoring data relating to the Pancheris' water rights, and amount of unappropriated water available for diversion from Belvidere, was gathered by Terry Scanlan *See* Petitioner's Exhibit 37. Mr. Scanlan spent considerably more time "in the field" than did Mr. Chapman, and Mr. Chapman conceded at the hearing that Mr. Scanlan's data as summarized in Exhibit 37 is accurate. *See* Chapman Testimony 5/6/05. Mr. Scanlan's opinions were consistent and based not only from his vast experience with water rights in Valley County, but also from his field work and independent observations, thus rendering his testimony more credible and reliable than that of Mr. Chapman.

Finally, the opinions rendered by Jill Haizlip must be heavily weighted due to her level of expertise. Ms. Haizlip testified she is a partner in Geologica, a consulting firm that offers only senior level specialists that employ state-of-the-art data visualization, exploration, evaluation methods, and innovative applications of science and engineering. Ms. Haizlip has worked on geothermal projects world wide, including development of geothermal systems very similar to and much like the one from which Dr. MacGregor seeks to divert water under 65-13912 and 65-13913. Ms. Haizlip has over 25 years of experience in exploration, development, operations and closure of geothermal systems. Therefore, her opinions on the type and size of the geothermal system at issue, that the resource likely is "significant;" and that drilling near the spring can occur without impacting the Pancheris' senior water rights, must be recognized. *See* Petitioner's Exhibit 33.

EVALUATING THE APPLICATIONS

The Elements

There exists a constitutional right to divert the unappropriated waters of the state. *See* Idaho Const. Art. XV. That constitutional right is regulated, or monitored, by the Department, which is charged with overseeing the development of new water rights within the state.

When the Department receives an application for permit to appropriate water, whether protested or not, it must evaluate the application pursuant to Idaho Code 42-203A(5). That section requires the Department to consider various factors with respect to each application including:

- (a) Whether the proposed use will reduce the quantity of water under existing water rights;
- (b) Whether the water supply itself is sufficient for the purposes sought;
- (c) Whether the application is made in good faith or if it is speculative or for delay;
- (d) Whether the Applicant has sufficient financial resources with which to complete the work involved;
- (e) Whether the application conflicts with the local public interest;

The Department has established “evaluation criteria” to assist in reviewing each of the above elements, which is discussed in more detail below. *See* IDAPA 37.03.08.045.

If the Department finds that any of the above-factors are not satisfied, the Director has several options: (1) deny issuance of the permit, (2) partially approve and grant a permit for a smaller quantity of water than applied for, or (3) grant a permit upon conditions. *Id*. Additionally, the Director has broad authority to condition permits to

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ensure compliance with 42-203A, including the right to condition permits to retain jurisdiction to ensure compliance with the design, construction and operation provisions of the permit. *See* IDAPA 37 03.08.50

Under the facts and circumstances of this matter, Dr. MacGregor has provided sufficient evidence for the Department to evaluate her applications under these criteria and to issue the permits she seeks

The Unique Circumstances of this Matter

While Dr. MacGregor in no way concedes she has not met her burden of proof in this case, it must be recognized that she was backed into a hearing without the benefit of potentially valuable information that would support her case. That is, the Department refused to allow Dr. MacGregor to drill test wells to evaluate the largely undeveloped geothermal system underlying her property.⁸ This is true despite the fact she presented evidence at the hearing that the recommended course of action for geothermal resource development in the Cascade area is to drill, test, and develop the water from wells. This was the stated conclusion of both Dr. MacGregor's experts, Terry Scanlan and Jill Haizlip. In addition, this approach (drill-test-develop) was proposed in a 1976 study entitled "*Geothermal Investigation of the Cascade, Idaho Area*" which was co-authored by the Pancheris' expert, Sherl Chapman. (*See* Study at pps 38 – 42 attached to Petitioner's Exhibit 39). Finally, even the Department, itself, recommends this method of geothermal development as evidenced by its 2002 study entitled "*Examination and Evaluation of Geothermal Sites in the State of Idaho With Emphasis Given to Potential*

⁸ The fact and circumstances regarding the Department's denial are addressed in Petitioner's Post Hearing Memorandum filed with the Department on May 16, 2005. For efficiency, those facts will not be repeated here.

for Electrical Generation or Direct Use ” See Petitioners Exhibit 43. In that study (which was published just one year before Dr. MacGregor’s application for test-well drilling was denied) the Department concluded exploratory geophysical work “should be” performed using pump tests. *Id.* at pps 28-29, 36.

In sum, drilling and testing are the accepted, normal and recommended means of geothermal resource development, yet, Dr. MacGregor was not allowed to drill test wells to assist her in presenting her case. This fact must be considered when weighing the sufficiency of the evidence she has presented

The Proposed Use Will Not Reduce the Quantity of Water Under Existing
Water Rights

The Criteria for determining whether the proposed use(s) will reduce the quantity of water under existing water rights (that is, injure them) is found at IDAPA 37.03.08.045.01(a). That section provides there is “injury” if:

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license decree of valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less;
- ii. The holder of an existing water right will be forced to an unreasonable effort or expense to diver his existing water right.....
- iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user’s right, and the water cannot be restored to usable qualify without unreasonable effort or expense.

Id

The Department is authorized to approve a permit that might otherwise be denied because of injury, simply by imposing conditions to mitigate losses.

IDAPA 37.03.08.045.01(a)(iv).

In this case, Dr. MacGregor has proven she can develop water under her pending applications without any impact to the Pancheris. Further, if sustained production of any such diversion *did* impact spring flow – and hence the Pancheris – the evidence is clear that such impact can be mitigated by supplying water to the impacted water right. Testimony of Terry Scanlan, 4/22/05; Petitioner's Exhibit 33.

65-13912

Terry Scanlan's testimony, that there is unappropriated water flowing from the spring, in itself, establishes that 65-13912 can be diverted without injury to existing rights. Dr. MacGregor is doing nothing more than appropriating the excess. Additionally, Dr. MacGregor anticipates constructing an infiltration system to collect her decreed rights and 65-13912. According to Mr. Scanlan, the infiltration system likely will capture (and store) more water than is being measured at the surface. Any detected impact could be immediately remedied by simply reducing output.

65-13913

There was substantial evidence presented at the hearing regarding the potential impacts to the hot springs due to drilling. The case was focused on that issue largely due to the letters Sheri Chapman supplied to the Department. Petitioner's Exhibits 24 and 25. In Petitioner's Post-Hearing Memorandum, the reasons drilling will not injure or impact the spring are set forth in detail. Accordingly, Petitioner will not reargue those points here. Suffice it to say, there is a very clear record in this matter that drilling alone – even if near Belvidere, does not pose a threat to the natural resource or existing water rights. *See also* Petitioner's Exhibit 33.

Additionally, there was sound evidence presented that well production will not adversely impact the spring (and Pancheris' water rights). Nonetheless, any impact to spring flow caused by well production is not irreversible,⁹ and can easily be mitigated by supplying water to the impacted party.¹⁰

65-13986

Finally, there was evidence at the hearing that other irrigation wells have been drilled in the Cascade (even Belvidere) area without any impact to existing water rights. Darwin Pancheri Testimony, 4/21/05, Tape #1A. Water in Basin 65 continues to be developed for irrigation suggesting development can occur without injury. Again, however, to the extent Dr. MacGregor's irrigation diversion impacted senior water rights, the impact easily could be mitigated by requiring Dr. MacGregor to curtail production. There truly is no risk to any senior water rights should Dr. MacGregor be allowed to develop an irrigation right. The fact is, this right was protested as "part of the package".

In summary, Dr. MacGregor has established that she can develop 65-13912, 65-13913 and 65-13986 without impact or injury to the Pancheris. The Pancheris' senior water rights have been, and continue to be, monitored and measured. Totalizing flow meters have been in place since July 2004, and it is expected they will remain in tact if the applications are approved so that any impact could be observed. *See* Petitioners Exhibits 37 and 22. To the extent any impact is noted, Dr. MacGregor has demonstrated

⁹ While Mr. Chapman gave examples of springs that "dried up" due to over production, he could not cite a single instance where the spring did not recover if pumping ceased.

¹⁰ There was testimony by Ms. Haizlip that if Dr. MacGregor is successful in tapping thermal water, it is very possible the temperature of said water will exceed the temperatures of water occurring at the springs. In that event, pumping hotter water as mitigation would be a more efficient use of the resource.

through expert testimony, how mitigation can be accomplished. Accordingly, she has satisfied this element of proof with respect to all three applications.

There Exists Sufficient Water for the Proposed Uses

Pursuant to IDAPA 37.03.08045.01(b), “[T]he water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible . . . unless there are non-economic factors that justify application approval ”

65-13912

There is uncontested evidence in this case regarding the sufficiency of water for application 65-13912. Terry Scanlan’s monitoring and measuring data indicate there is undiverted flow from Belvidere in excess of fifty gallons per minute or approximately 160 acre feet per year.¹¹ These figures were agreed upon by Pancheris’ agent, Sherl Chapman. Mr. Scanlan further testified that, by constructing an infiltration gallery such as the Pancheris built, Dr. MacGregor likely would capture *additional* excess geothermal water (over and above the measured 160 acre feet) from the spring source. Mr. Scanlan testified the additional geothermal water naturally issuing from Belvidere Hot Spring is sufficient to construct “Phase 1” of Dr. MacGregor’s project.¹² Although Mr. Chapman questioned the impact to the Pancheris of diverting the unappropriated water from the spring (as discussed above) he joined in Mr. Scanlan’s conclusions regarding the availability of unappropriated water from Belvidere.

¹¹ These figures accept the Pancheris existing diversion rates, as measured, even though 65-13332 is not licensed and the diversion rate there under likely will be reduced in that process; as well as the fact that the Pancheris exceed their annual volume limitation each year under 65-12981.

¹² Note, while Dr. MacGregor testified she would use hot water for heat, domestic and commercial purposes at the spa, the project still can be successful even if, for example, heat was from a different source.

Alternatively, Dr. MacGregor can establish sufficient undiverted flow from the spring by measuring the total flow after the Pancheris reach their annual volume rate. License 65-12981 has an annual volume rate of 51.3 acre feet. Under the current diversion rates (See Petitioner's Exhibit 37) for this right, the Pancheris reach their annual volume by May of each year. Therefore, all water flowing from Belvidere after the annual volume of 65-12981 is reached (less 65-13332) is available for appropriation.

65-13913

As is discussed above, the preferred method for determining the size of the geothermal aquifer Dr. MacGregor intends to develop is through drilling and testing. Since that route of gathering information was not permitted, Dr. MacGregor hired Jill Haizlip to assist in understanding this geothermal system without drilling. Ms. Haizlip concluded that the geothermal system at issue is a fault controlled lateral discharge system. Petitioner's Exhibits 33 and 34. She testified it is the most commonly developed geothermal system and that based on her review of available data¹³ she believed the system was likely sufficient to sustain the diversion sought by Dr. MacGregor under 65-13913.¹⁴

Ms. Haizlip's conclusions are supported by the 1976 article "*Geothermal Investigation of the Cascade, Idaho Area*" (co-authored by Sherl Chapman), which concludes: "A significant untapped thermal aquifer may exist at depth in the valley fill "

¹³ The materials and information reviewed and relied upon by Ms. Haizlip are indexed in her Report which is Petitioner's Exhibit 33. In addition, Ms. Haizlip has visited the Belvidere site, and testified to having also considered Mr. Scanlan's monitoring data (Exhibit 37); Dr. MacGregor's Test Well Proposal (Exhibit 40); information about the Pancheris senior water rights; published geologic data on the area; the 1976 Study "Geothermal Investigations" co-authored by Sherl Chapman; and various Exhibits produced by Petitioners and Protestants in this case. Ms. Haizlip also consulted with numerous other experts regarding her work on this project before rendering her opinions.

¹⁴ Ms. Haizlip also testified it would be her recommendation to tap the resource and then, through testing and monitoring, develop a sustainable pumping level.

See attachment to Exhibit 39, p. 41. Additionally, the September 2002 IDWR report *“Examination and Evaluation of Geothermal Sites in the State of Idaho with Emphasis Given to Potential for Electrical Generation or Direct Use”* concludes:

The Cascade area has proven geothermal resources as evident by the existence of several wells with water temperatures in the 29 – 37 C range. However, the capacity of the reservoir system is unknown at this time. The Cascade area has the highest development potential for direct use at this time, and investigations should begin as soon as possible....

Petitioner’s Exhibit 43, p. 36

Even the Protestants offered evidence on the hearty nature of geothermal systems. In *“Heat from the Earth’s Surface,”* the author wrote, “Unlike fossil fuels, geothermal power... if developed wisely, won’t be exhausted too easily ” Protestant’s Exhibit 101, p.1.

The only evidence offered to controvert the sufficiency of the geothermal system as issue was testimony from Mr. Chapman. Specifically, Mr. Chapman stated he questioned the extent of the system after having drilled unsuccessful test wells between Belvidere and Cabarton springs.¹⁵ However, on cross examination, Mr. Chapman admitted it is possible his test wells were too shallow (or that he simply failed to intersect the fault zone which could explain why he did not locate thermal water). In fact, the 2002 IDWR study notes that successful thermal wells in the area have intersected thermal fluids at depths of about 800 feet. See Petitioner’s Exhibit 43, p. 28. The test wells referenced by Mr. Chapman were less than half that depth.

¹⁵ Notably, the concerns Mr. Chapman raised in Exhibit 24 and 25 about injuring hot springs through drilling were not considered during the test drilling he performed between Belvidere and Cabarton Hot Springs.

Finally, there is evidence that the aquifer in Cascade Valley easily can support Dr. MacGregor's application for irrigation water. This matter was given less attention than the other rights, but irrigation rights in the area recently have been and continue to be licensed by the Department.

Accordingly, and considering the tools available to Dr. MacGregor, she has established the sufficiency of the water supply for her proposed uses.

Dr. MacGregor's Applications are Made in Good Faith and are Not Speculative

The Department's Water Appropriation Rules provide:

The criteria requiring that the director evaluate whether an application is made in good faith or whether it is made for delay or speculative purpose requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence. . . . An application will be found to have been made in good faith if:

- i. The applicant shall have legal access to the property necessary to construct and operate the proposed project. . . .
- ii. The applicant is in the process of obtaining other permits needed to construct and operate the project;
- iii. There are no obvious impediments that prevent the successful completion of the project.

In this case, Dr. MacGregor has diligently – yet patiently –pursued approval of her applications. Specifically, pursuant to the evidence presented, Dr. MacGregor hired expert, Terry Scanlan, to assist in preparing and reviewing the applications before they were filed; she authorized Mr. Scanlan to monitor the spring temperature and output; she negotiated and paid for the installation and of totalizing flow meters to measure the

Pancheris' existing diversions (Petitioners Exhibit 22); she spent nearly one year preparing, modifying and presenting a test-well proposal to the Department; and met with the Pancheris on numerous occasions to attempt to resolve their protests. In addition, Dr. MacGregor testified she purchased the property on which Belvidere is located with the primary goal of developing a first rate spa using existing deeded rights, as well as newly developed hot water (65-13912 and 65-13913). Her application for irrigation water (65-13986) will be used to irrigate ranch property, currently being actively utilized for grazing.

Further, Dr. MacGregor established that she owns the land on which the water rights will be developed (Petitioner's Exhibit 16) and is seeking local permits for sewer approval. Testimony of Dr. MacGregor, 4/22/05. While she testified she has not yet sought a conditional use permit for the project, she explained doing so would be problematic until she could better identify the scope of the project, which is somewhat dependent on whether her wells (65-13913) successfully intersect the geothermal aquifer.¹⁶

Further, Dr. MacGregor testified that the location of the spa on her property would be landscaped to buffer neighbors, that it would include a lodge, hot baths and private casitas. In support of her testimony she offered Exhibit 18, which was prepared by architect Chad Slicther to depict the lay out of the project. Dr. MacGregor identified the number of bathrooms and showers in the lodge, the location of a proposed hot pool; and maximum number of casitas that would be constructed.

¹⁶ Dr. MacGregor and Terry Scanlan testified that the spa could be developed in phases. Phase one can be completed using the existing decreed rights as well as the amount sought under 65-13912. Additional phases will depend on establishing a sustainable pumping level for water diverted under 65-13913.

There are no obvious impediments to prevent the successful completion of the project. Dr. MacGregor's will to complete the project despite the delays and expense, are a testament to her ability to succeed.

Dr. MacGregor has Sufficient Financial Resources to Develop her Project

"An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction; or upon a financial commitment letter acceptable to the director." See IDAPA 37.03.08.045.01(d). In this case, Dr. MacGregor provided both. First, she testified at length about her assets, both liquid and non-liquid. She testified she owns the 1,100 acre Raspberry Ranch in Long Valley, without debt. In addition, she owns a ranch in Emmett Idaho, and a home in Boise – all free of liens, and which if mortgaged could generate monies far in excess of the total cost to develop all phases of her project. Dr. MacGregor further testified about her income from teaching at Boise State University; publications; participating in a lecture tour; ranching; and private investments. Her testimony was that, if needed, she could access cash sufficient to finance full development of her water rights and related spa, at an estimated an estimated cost of three million dollars.¹⁷

In addition, Dr. MacGregor produced a financial commitment letter from Morgan Stanley (Exhibit 21) which stated Dr. MacGregor "does without doubt have the ability to cover in excess of \$700,000 to fund any development she desires." That figure was presented as it represents the cost to develop phase 1 of the health spa as well as drilling hot and cold water wells. As mentioned above, Dr. MacGregor testified her development

¹⁷ Dr. MacGregor provided the Department with letter from Morgan Stanley stating she had access to the amount necessary to complete the full project. The letter was not offered as an exhibit at the hearing

was to be “phased” so that as it begins attracting clients, and will generate income for development of future phases (although not dependent on that income for completion). Dr. MacGregor also testified that she could complete the entire project within five years.¹⁸

Dr. MacGregor’s Proposed Development is in the Local Public Interest

Factors considered by the Director in evaluating the “public interest” element, include whether the project will have an effect on the local economy; the effect of the project on recreation, fish and wildlife resources; and environmental concerns. *See* IDAPA 37.03 08.045.01(d). There is no indication whatsoever that Dr. MacGregor’s project will conflict with the local public interest. To the contrary, evidence was presented that the applications – if approved, are *in* the local public interest. On that point, Dr. MacGregor offered the following:¹⁹

- Dr. MacGregor is a local resident and lives approximately one mile from where she would develop the water rights sought. She testified that with the mill closing, the local economy is dependent on tourism and needs new business. She believes her spa would support tourism, compliment development at nearby Tamarack, and provide a unique service to local and out-of-town clients. There is no other health spa facility in the Cascade area;

¹⁸ Again, the scope of the project will turn whether Dr. MacGregor’s hot water wells interest the geothermal system.

¹⁹ Both Duane and Darwin Pancheri testified they didn’t care what Dr. MacGregor did with her property. Additionally, the Protestants did not provide any evidence that the proposed applications conflict with the local public interest.

- Dr. MacGregor has visited with members of the community about her proposed spa, and the idea was well received with enthusiasm. In addition, Dr. MacGregor testified that she has visited with Nancy Boesfulg, of Tamarack Resort, and Phil Davis, Valley County Commissioner, about her proposal – both indicated support;
- Sherl Chapman, who resides near the proposed spa testified while he isn't crazy about development in general, he understands it is coming. He agreed with Dr. MacGregor that the spa would be good for the local economy and testified his wife wants to go Dr. MacGregor's spa;
- The Department has identified the City of Cascade as "a prime candidate for a district-heating program" utilizing low temperature geothermal wells. Dr. MacGregor's development of 65-13913 will involve drilling and testing which will provide significant data about geothermal resources in the area. This information will be valuable to Cascade City should it further explore development of low-cost, efficient, geothermal heating. The fact that Dr. MacGregor has and will fund the research and exploration of geothermal water in the Cascade Valley (related to her project) provides a huge benefit to that community;
- Protestants Exhibit 101, an article by Merle Wells entitled "*Heat from the Earth's Surface*" advertises the benefits and advantages of geothermal power and heat. The resource is clean, environmentally sound, and exceedingly efficient.

The above cited examples focus on development of 65-13912 and 65-13913. However, 65-13986 also is in the local public interest. Bringing otherwise dry land under irrigation will support and enhance Dr. MacGregor's ranching operation, and continue to make long valley a desirable area for summer grazing. Ranchers are a significant part of the areas culture, tradition and economy and maintaining ranch land should be supported, especially as development occurs.

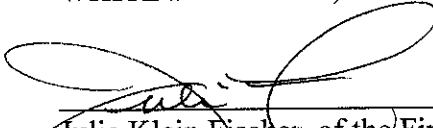
Clearly, the local public interest is served by all of Dr. MacGregor's proposed uses for her water applications.

CONCLUSION

For the reasons stated above, and based on the file and record herein, Dr. MacGregor respectfully requests the Department approve her applications.

Submitted this 3 day of June, 2005.

WHITE PETERSON, P.A.



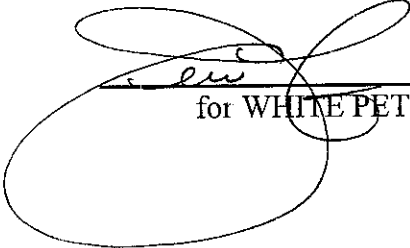
Julie Klein Fischer, of the Firm
Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that on this 3 day of June, 2005, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

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for WHITE PETERSON

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**Re: In the Matter of Application for Permit Nos. 65-13912, 65-13913, and 65-13986 in
the Name of Carol Lynn MacGregor**
MTBR&F File No. 19-136.0

Dear Clerk:

Enclosed for filing in the above-referenced matter are the following original documents:

- 1 [Proposed] Findings of Fact and Conclusions of Law
- 2 Pancheris' Memorandum in Support of Proposed Findings of Fact and Conclusions of Law

Please conform the copies of these documents and return them via our runner. Thank you for your assistance.

Very truly yours,



Melonie D. Robinson
Administrative Assistant to
Angela Schaer Kaufmann
mdr@moffatt.com

/mdr

Enclosures

cc: Julie Klein Fischer
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Department of Water Resources

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

IN THE MATTER OF APPLICATION FOR
PERMIT NOS. 65-13912, 65-13913, AND
65-13986 IN THE NAME OF CAROL LYNN
MACGREGOR

PANCHERIS' MEMORANDUM IN SUPPORT
OF PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Duane and Laura Pancheri and Darwin and Joan Pancheri, by and through their counsel of record MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD, hereby provide this Memorandum in Support of Proposed Findings of Fact and Conclusions of Law. As counsel for the Pancheris was drafting their Proposed Findings of Fact and Conclusions of Law, it became obvious that briefing would be needed to support some of the proposed Findings and Conclusions. In other words, some analysis is necessary to show why the Pancheris' Findings

and Conclusions should be adopted by the Hearing Officer. It did not seem appropriate to include argument in the Findings and Conclusions, so the argument is presented here.

It should be noted, however, that this memorandum is not intended to be a comprehensive analysis of the pertinent law, because the law is set forth in the Conclusions of Law. Instead, this memorandum is provided in order to set forth additional support for certain findings and conclusions. The Pancheris are mindful of the Hearing Officer's expressed preference for proposed Findings of Fact and Conclusions of Law over briefing, and therefore have limited this brief to specific points.

I. GENERAL INFORMATION

Throughout the Findings and Conclusions, the Pancheris cite to the specific exhibit or trial testimony which supports the particular finding or conclusion. This information might not be included in the final findings and conclusions issued by the Hearing Officer, but the Pancheris provide it so that the Hearing Officer may check the citations.

II. THE HEARING OFFICER'S EVALUATION OF THE EVIDENCE

As the Hearing Officer noted during the hearing, the admissibility of evidence in IDWR administrative proceedings is governed by Rule 600 of the Department's Rules of Procedure. That rule provides:

Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon

by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

IDAPA 37 01 01 600

At the close of the hearing, the parties and Hearing Officer clarified which exhibits had been admitted and which had not. The task now facing the Hearing Officer is evaluation of the evidence. The Department's Water Appropriation Rules (IDAPA 37 03 08) govern the evaluation of applications for permit. *See* IDAPA 37 03 08 045. The Rules are fairly specific and provide a tool for evaluating the evidence presented in this matter.

III. EVIDENCE REGARDING OTHER GEOTHERMAL SYSTEMS

A. Sherl Chapman's Testimony and Exhibits.

Sherl Chapman testified about his experience with geothermal systems. That experience includes working with several geothermal systems in Idaho in a variety of roles. In this subsection, the Pancheris will set forth Mr. Chapman's description of his role with several geothermal systems in Idaho, as well as his opinion regarding the usefulness of the information. This is being provided in order to show why his testimony and exhibits regarding those systems should be included in the Hearing Officer's findings.

Before doing so, however, the Pancheris emphasize that Mr. Chapman has extensive personal and professional knowledge of the geothermal system in and around the Cascade Valley. He testified that he supervised the drilling of four potentially geothermal wells between Cabarton Hot Springs and Belvidere Hot Springs, and two potentially geothermal wells north of Belvidere Hot Springs. Moreover, he is a resident of the Cascade Valley and has been for five (5) years.

1. Bruneau/Owyhee County

Mr. Chapman testified that his role regarding the Bruneau geothermal system was to provide a peer review of Exhibit 104, which is a report by Charles Berenbock entitled *Effects of Well Discharges on Hydraulic Heads in and Spring Discharges from the Geothermal Aquifer System in the Bruneau Area, Owyhee County, Southwestern Idaho* (USGS Water-Resources Investigations Report 93-4001, Boise, Idaho). A peer review is “essentially a reading of the document to provide an independent eye and a, and an independent opinion of the procedures, the data collected, the processes and, and formulas used in the conclusions drawn.” Chapman Testimony, Hearing Day 3.

Mr. Chapman also testified regarding the similarity of the Bruneau geothermal system to that from which Belvidere Hot Springs issues:

In my opinion the Bruneau/Grandview area, in this case this refers specifically to the Bruneau area, but the Bruneau area is similar in nature to Belvidere Springs, although on a much larger scope and areal extent. But the, the system is the same in that recharge to the system occurs by infiltration in the faults, the water, cold meteoric water is circulated at depth. It's heated, it comes back up and then flows laterally out into sediments and, in this case, volcanic rocks. But the overall mechanism is the same. And also in this case there were two large springs at one end of the valley that were impacted by ground water development in the thermal aquifer down gradient, and so the, the parallel exists even though, as I say, the areal extent of the Bruneau area is much larger than the Belvidere Spring area. The discharges and withdrawals involved are analogous.

Id.

2. Mt. Bennett Hills

The Mt. Bennett Hills system in Elmore County is also analogous and provides another example of the sensitivity of geothermal systems. Mr. Chapman testified:

When I, I first was, was hired by the Department of Water Resources, it was to collect information and data in an effort to try to aid the Director of the Department, who was then Keith Higginson, R. Keith Higginson, in resolving a dispute along the Mt. Bennett Hills Front over a geothermal system and geothermal interference. Two individuals had water rights and existing wells and hot springs along the Mt. Bennett Hills Front in Elmore County, which is in this case it's north and east of Mountain Home. The, the thermal system there is in volcanic rock. Water is, the water percolates down through a fault systems [sic] that run along the Mt. Bennett Hills, which are those mountains you can see to the east and northeast as you drive through Mountain Home along the freeway. Water percolates vertically downward, it's heated at depth, and it comes back up in the fault systems and then again discharges out into the sediments and there Mr. Hall and Mr. Lee had drilled wells as well as taken advantage of a hot spring that was at the site of an old stage stop. A Mr. Bill Walker, some six or seven miles to the southeast decided to drill a well into that same aquifer – did, immediately caused the, the water levels to drop and both Mr. Lee and Mr. Hall's wells and the springs to dry up. And all of these were under artesian pressure and flowed to the surface originally. Mr. Walker's continued to flow at the surface because he was a little bit lower in the system. So he was able to enjoy the artesian flow while the others were, had lost their artesian flow and actually lost the, the springs. The Director of the Department of Water Resources was petitioned to resolve the issue. He chose to do so by bringing me in, Dale Ralston was already here. We involved the University of Idaho. Mr. Higginson used that as a basis to resolve the water right dispute along the Mt. Bennett Hills Front. That again was another example of the, what I refer to as the sensitivity of, of geothermal systems. And in the case, it just took one well to, to cause significant problems some seven miles away.

Chapman Testimony, Day 3¹ He also testified that the Elmore Front system is analogous to Belvidere:

It's similar in that, that the water, meteoric water goes into a fault system that's heated at depth, that comes back up through a fault

¹ The Water Bulletin referenced by Mr. Chapman is actually Water Information Bulletin Number 4, "Ground-Water Resource of the Mountain Home Area, Elmore County, Idaho" by Dale Ralston and Sherl Chapman (IDWR July 1968). It can be found on the IDWR website at http://www.idwr.idaho.gov/hydrologic/info/pubs/wib/wib04-gw_res_mthome_id.pdf

system and discharges into sediments and, and in some cases volcanic rocks which are more or less horizontal in nature, but provide the ability for water to move laterally

Id.

3. Roystone Hot Springs

Roystone Hot Springs is similarly analogous. As Mr. Chapman testified, the Roystone Hot Springs experience

[I]s an example of what can happen when you, when you drill a well and try to produce it close to a spring. It's it was my first experience in developing a spring, or geothermal well adjacent to a spring. And obviously I thought we could do it. Because otherwise we wouldn't have proceeded to start with. The, the client invested a significant amount of money in drilling the, the production hole that we tested and the test well. But it would – it became very obvious very quick, 16 hours later, that we were going to be unsuccessful on the, the – even though the spring seemed to discharge from sediments. And that the well was drilled in sediments much as has been proposed by Ms. MacGregor, the reduction of the availability of water through pumping a production well, which in this case well less than two c.f.s. caused the cessation of the spring. We, we did shut the well down and the spring resumed flow within 24 hours

Chapman Testimony, Day 3. Mr. Chapman then testified about the similarity of Roystone Hot Springs to the Belvidere area:

The hot springs at Roystone Hot Springs are, are similar in nature in that they – the source of the water is a series of faults or a fault zone. It's deep in the subsurface. The water leaks out of the faults into the subsurface and ultimately appears at the surface and discharges and is being used by the residents of that area for heating and cooking and, and swimming pools and so forth. We drilled a well into the sediments close to the hot springs and pump tested that well. We produced it. And because of that production the hot springs ceased to flow. The Belvidere Hot Springs are fed by a fault zone. The water discharges into overlying sediments and appears at the surface. And in, are proposed at least to be used for a number of the same uses. And the proposal as I understand it is that a well will be drilled, or wells, and up to roughly 900 gallons per minute are proposed to be withdrawn from an area that is

essentially just about the same distance away as we, we attempted to do at Roystone Hot Springs. So I think when you add all of that up, they're relatively comparable. Both in geologic regimen and proposal for development.

Chapman Testimony, Day 3.

4. Ingram Hot Springs near Challis

Mr. Chapman's familiarity with the Ingram Hot Springs near Challis came as a subsequent consultant. Mr. Chapman testified:

I was involved a little bit as a consultant for a subsequent owner of, of the Ingram Hot Springs near Challis [which] are another example of, I think what, what can happen when you, when you drill close to a geothermal spring. IN the case of the Ingram Hot Springs there was, when we had the Challis earthquake the, the Ingram Springs which are, as I say, south of Challis dried up for somewhere of the some people say 24 hours others 48, but it dried up for a day or two. Just went from several c.f.s. to nothing. After a few days well the flow began to start again but the owner Mr. Ingram was a bit concerned about having a reliable water supply. And he petitioned the department to allow him to drill a well. And actually, rather than waiting for the approved permit, it's my understanding he went ahead and drilled the well. There's correspondence in the files of the Department from Mr. Spackman [inaudible] where Mr. Ingram reported that they, they drilled a well a few hundred feet away from the spring and as they drilled the, the water in the spring turned muddy and turbid and so they quit drilling for fear that they would injure the viability of the spring. And to my knowledge that well has never been produced, but it showed a very clear cut ability to, to drill into a spring vent and perhaps affect the spring.

Chapman Testimony, Day 3.

B. Jill Haizlip's Testimony.

The Pancheris concede that Ms. Haizlip has extensive experience with geothermal systems world-wide. What was lacking at the time she co-authored the "Geologica Report," however, was personal knowledge of the geothermal system in and around Belvidere Hot Springs. In fact, she admitted in her testimony that she did not visit that area until the day before

the hearing commenced in this matter. In addition, she admitted during cross-examination that there were several errors in the Geologica Report, and she demonstrated no particular familiarity with Idaho geothermal systems. Ms. Haizlip's lack of personal knowledge and experience regarding Belvidere Hot Springs must be contrasted with Mr. Chapman's extensive experience, and must also lead to the conclusion that while general knowledge regarding geothermal systems can sometimes be applied to specific geothermal systems, it is no substitute for specific personal experience.

The Pancheris further note that the Geologica Report and Ms. Haizlip's testimony were in support of drilling a test well. Neither the report nor her testimony address the feasibility of a geothermal production well, nor do they address the potential effects of a production well on the Pancheris' preexisting water rights.

IV. BURDENS OF PROOF

It is well-established that an applicant has the burden of coming forward with evidence regarding the Idaho Code Section 42-203A criteria, although protestants have the burden of coming forward with evidence regarding the local public interest for those factors "of which the protestant can reasonably be expected to be more cognizant than the applicant." IDAPA 37.03.08.04.b.ii. Further, the applicant bears the burden of proof for all of the 42-203A factors.

At the hearing, there was some hint that Dr. MacGregor might argue that the Pancheris' water rights are not as licensed and permitted. However, it is important to remember that the Pancheris' water rights are not at issue in this matter – what is at issue is Dr. MacGregor's ability to appropriate water. A protestant does not put his or her water rights at risk merely by filing a protest to an application. Moreover, a foundational tenet of the prior

appropriation doctrine is the protecting of existing (i e., senior) water rights, and it is Dr. MacGregor's burden to prove that her applications, if approved, will not reduce the quantity of water available to the Pancheris under their existing water rights.

Dr. MacGregor must prove that her applications comport with each of the Idaho Code Section 42-203A criteria before the respective applications can be approved. It is a significant burden, and one which has not been met.

V. CONCLUSION

The Pancheris respectfully request that the Hearing Officer adopt their proposed Findings of Fact and Conclusions of Law in their entirety

DATED this 3rd day of June, 2005

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Angela Schaer Kaufmann
Scott L. Campbell – Of the Firm

By Angela Schaer Kaufmann
Angela Schaer Kaufmann – Of the Firm
Attorneys for Duane and Laura Pancheri
and Darwin and Joan Pancheri

CERTIFICATE OF SERVICE

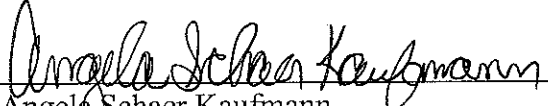
I HEREBY CERTIFY that on this 30th day of June, 2005, I caused a true and correct copy of the foregoing **PANCHERIS' MEMORANDUM IN SUPPORT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** to be served by the method indicated below, and addressed to the following:

Julie K. Fischer
WHITE PETERSON, P.A.
5700 East Franklin Road, Suite 200
Nampa, ID 83687
Fax: (208) 466-4405

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
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Peter R. Anderson
Hearing Officer
729 W Braemere Road
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☐ Hand Delivered
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Angela Schaer Kaufmann

RECEIVED
JUN 03 2005
Department of Water Resources

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

IN THE MATTER OF APPLICATION FOR
PERMIT NOS 65-13912, 65-13913, AND
65-13986 IN THE NAME OF CAROL LYNN
MACGREGOR

**[PROPOSED] FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

COMES NOW, Duane and Laura Pancheri and Darwin and Joan Pancheri
(collectively referred to herein as the "Pancheris"), by and through their counsel of record
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHID., and hereby submit their proposed
Findings of Fact and Conclusions of Law. These proposed Findings and Conclusions are
accompanied by a memorandum in support, filed concurrently herewith.

**I.
FINDINGS OF FACT**

Applications and Protests

1 Dr. Carol MacGregor ("Dr. MacGregor") filed three applications for permit that are the subject of this proceeding: 65-13986, 65-13913, and 65-13912

2 Dr. MacGregor filed Application for Permit No. 65-13912 on August 2, 1999. The application seeks to appropriate water as follows:

Source:	Belvidere Hot Springs
Point of Diversion:	Township 13N, Range 3E, Section 13, the NE 1/4 of the SE 1/4 of the Northeast 1/4
Use:	Heating and Commercial
Quantity:	0.50 c.f.s.
Period of Use:	1/1 to 12/31
Place of Use:	Township 13N, Range 3E, Section 13, SE 1/4 of the NE 1/4 and the NE 1/4 of the SE 1/4. Township 13N, Range 4E, Section 18, SW 1/4 of the NW 1/4, Lot 2; SE 1/4 of the NW 1/4; NE 1/4 of the SW 1/4; NW 1/4 of the SW 1/4, Lot 3.

3 The Pancheris protested Application for Permit No. 65-13912, with the stated basis being "Protecting our Senior Water Rights " Applicant's Ex 2. Throughout this proceeding, it became clear that the Pancheris are chiefly concerned about whether Application for Permit No. 65-13912, if granted, will reduce the quantity of water available to their existing water rights, and whether there is sufficient water to fulfill Dr. MacGregor's proposed appropriation. *See, e.g.*, Applicant's Exs 24 and 25.

4 Dr. MacGregor filed Application for Permit No. 65-13913 on August 2, 1999. The application seeks to appropriate water as follows:

Source:	Groundwater
Point of Diversion:	Township 13N, Range 3E, Section 13, SE 1/4 of the NE 1/4
Use:	Heating and Commercial
Quantity:	2.0 c.f.s.
Period of Use:	1/1 to 12/31

Place of Use: Township 13N, Range 3E, Section 13, SE 1/4 of the NE 1/4 and the NE 1/4 of the SE 1/4
Township 13N, Range 4E, Section 18, SW 1/4 of the NW 1/4, Lot 2; SE 1/4 of the NW 1/4; NE 1/4 of the SW 1/4; NW 1/4 of the SW 1/4, Lot 3.

The “remarks” section of the Application further provides that “two low-temperature geothermal wells and one cold water well are currently anticipated.” The application also provides that “Applicant agrees to mitigate consumptive use in the future as needed.”

5 The Pancheris protested Application for Permit No. 65-13913, with the basis being “Protecting Our Senior Water Rights ” Throughout this proceeding, it became clear that the Pancheris are concerned about whether Application for Permit No. 65-13913, if granted, will reduce the quantity of water available to existing water rights, and whether there is sufficient water to fulfill Dr MacGregor’s proposed appropriation *See, e g* , Applicant’s Exs 24 and 25.

6 Dr MacGregor filed Application for Permit No. 65-13986 on October 25, 2000. That application seeks to appropriate water as follows:

Source: Groundwater
Point of Diversion: Township 13N, Range 3E, Section 13, NE 1/4 of the SE 1/4.
Use: Irrigation
Quantity: 2.0 c.f.s.
Season of Use: 4/15 to 10/31
Place of Use: Township 13N, Range 3E, Section 13, SE 1/4 of the NE 1/4 and NE 1/4 of the SW 1/4;
Township 13N, Range 4E, Section 18, SW 1/4 of the NW 1/4 (Lot 2) and SE 1/4 of the NW 1/4; NE 1/4 of the SW 1/4 and the NW 1/4 of the SW 1/4 (Lot 3).

The Application for Permit further provides that:

This water right will be supplemental to 65-1979. The application contemplates sharing one cold water well in the SENE Sec 13 with pending application for Permit No. 65-13913. Diversion rate in combination with 65-13913 will not exceed 2.00 c.f.s. This application also proposed using spent low-temperature geothermal fluids diverted under 65-13913 for irrigation, provided that the heat value is utilized prior to irrigation

Applicant's Ex. 5.

7 The Pancheris protested Application for Permit No. 65-13986 on the basis that the application, if approved, could cause injury (*i.e.*, reduce the quantity of water available) to their existing water rights. Applicant's Ex. 6.

8 Belvidere Hot Springs are geothermal springs which the subject of several existing water rights.

a. Dr. MacGregor owns Water Right No. 65-1972 for 0.04 c.f.s. with a May 5, 1901, priority date, and 65-1973 for 0.01 c.f.s., also with a May 5, 1901, priority date. These rights have been decreed in the SRBA. They have not been used for some time, but

Dr. MacGregor has filed an application for extension of time to avoid forfeiture for each right. Exhibit 201.

b. Duane Pancheri and Darwin Pancheri hold Water Right No. 65-12891 in the amount of 0.44 c.f.s., with an October 19, 1988 priority date. This right has been licensed

c. Darwin and Joan Pancheri hold Water Right No. 65-13332 in the amount of 0.10 c.f.s. with a July 2, 1991, priority date. This right is in the permit stage. However, the Pancheris have provided proof of beneficial use, a field examination has been conducted, and the right is simply awaiting licensing. Applicant's Ex. 12.

d. Darwin and Joan Pancheri also hold Water Right No. 65-13458 in the amount of 15 c.f.s. with a priority date of June 22, 1993. Like Water Right No. 65-13332, proof of beneficial use has been

provided, the right has been field examined, and the right is simply awaiting licensing.

- e. On August 27, 1998, Steve Lester, who is a water rights supervisor for the Western Region Office of IDWR, sent correspondence to Darwin Pancheri providing:

After your call a few days ago, I checked the status of all your water rights in the Cabarton area. All of your permits for that site have been field examined in the last several years. The permits are now in the licensing process.

A perennial problem at this agency is not having the resources to complete everything in a timely manner. More often than not, completion of the licensing process is forced to take a backseat to more urgent work. This is regrettable but unavoidable given the present realities.

I hope that the licenses can be issued soon. The good news is that the beneficial use developed under the permits has been verified. The rights remain fully protected by completion of that verification.

Applicant's Exs. 12 and 13

Procedural Background

9. The initial hearing officer was John Westra.

10. After the time for filing protests for Applications for Permit No. 65-13912 and 65-13913 had ended, Mr. Westra scheduled a prehearing conference. The Pancheris appeared but Dr. MacGregor did not. Notice of Failure to Appear at Prehearing Conference, dated February 11, 2000, was issued and served on the Applicant.

11. Another prehearing conference regarding Applications for Permit No. 65-13912 and 65-13913 was scheduled for April 4, 2000. A hearing was scheduled for November 14 and 15, 2000, but Dr. MacGregor requested that it be postponed in order for discovery to be conducted. Motion to Suspend Hearing, dated October 19, 2000.

Dr. MacGregor also filed a Motion for Order Authorizing Carol Lynn MacGregor's First Set of Interrogatories and Requests for Production of Documents, and a Motion for Order Authorizing Inspection of Real Property, both filed on October 19, 2000

12. On November 2, 2000, Scott L. Campbell filed a Notice of Appearance on behalf of the Pancheris, as well as an Answer to Motion Authorizing Inspection of Real Property, an Answer to Motion to Suspend Hearing, and an Answer to Motion Authorizing Carol Lynn MacGregor's First Set of Interrogatories and Requests for Production of Documents. The Pancheris did not oppose the Motion Authorizing Discovery and Motion to Suspend Hearing (although they reserved certain arguments and rights), but did oppose the Motion Authorizing Inspection of Real Property

13. On November 3, 2000, Gary Spackman of IDWR issued an Order Interrupting Processing of Application and Suspending Hearing

14. On November 20, 2000, Dr. MacGregor filed a Brief in Support of her Motion for Order Authorizing Inspection of Real Property, followed by a responsive brief from the Pancheris on December 4, 2000

15. On December 21, 2000, the Pancheris filed their Notice of Protest for Applications for Permit Nos. 65-13986 and 65-13978

16. Application for Permit No. 65-13978 is not a part of this consolidated proceeding.

17. On January 3, 2001, Gary Spackman (who was then the Hearing Officer) issued an Order Authorizing Discovery. Because the Pancheris counsel was not served with that Order, it was re-issued as an Amended Order on January 25, 2001. The Amended Order provided as follows:

IT IS HEREBY ORDERED that all parties may engage in discovery for a period of one year or until two weeks prior to the scheduled hearing, whichever is earlier. When a hearing is scheduled, further orders for discovery may be necessary.

IT IS FURTHER ORDERED that the parties are granted until March 5, 2001, to negotiate an agreement for entry, inspection, and measurement, and submit the written agreement to IDWR.

IT IS FURTHER ORDERED that if the parties do not reach an agreement regarding entry, inspection, and measurement, IDWR will issue an order on or before March 15, 2001, requiring measurement and reporting as authorized by Idaho Code § 42-701. The order will generally require measurement that will satisfy IDWR standards, data gathering, and reporting needs.

IT IS FURTHER ORDERED that the parties may suggest the methods, frequency, and verification of measurement. Suggestions may be submitted from the date of this order until ten (10) days after issuance of a general order requiring measurement. Because MacGregor bears the burden of proof, she should describe, in detail, what information is sought, and how the information could best be gathered.

18 Dr. MacGregor and the Pancheris successfully negotiated an agreement for monitoring, as reflected in Hearing Officer Spackman's Order dated June 12, 2001.

19 Little action was taken involving the Department until November 11, 2004, when Dr. MacGregor's new counsel filed a Notice of Substitution of Counsel, as well as a Motion and Request for Hearing.

20 On November 24, 2004, Peter Anderson was appointed Hearing Officer, and he scheduled a prehearing conference for January 3, 2005.

21 On January 7, 2005, Hearing Officer Anderson issued a scheduling order, and on January 14, 2005, issued a Request for IDWR Staff Memorandum. That same day, he issued an order consolidating proceedings on Dr. MacGregor's Application for Permit No. 65-13986 with proceedings on Applications for Permit Nos. 65-13912 and 65-13913.

22 John Westra, Western Region Manager for IDWR, filed the requested Staff Memorandum on February 1, 2005 Ex. 200

23. Following pretrial disclosures and briefing, a hearing was held on April 22 and 23, 2005. Because the hearing was not completed on those two days, it was continued to May 5 and 6, 2005

Evidence Considered

24. Exhibits offered by MacGregor and admitted as part of the record are as follows:

- a. Exhibit 1: Excerpts of the Idaho Department of Water Resources File for Application for Permit No. 65-13912. The exhibit specifically includes:
 - i Application for Permit No. 65-13912;
 - ii Idaho Department of Water Resources Comment by D. Nelson dated November 24, 1999;
 - iii 7.5 minute series topographic quadrangle map showing the proposed place of use and point of diversion, as well as two additional maps;
 - iv Request to Process;
 - v Amended Application for Permit No. 65-13912, seeking to divert 0.10 c.f.s.; unsigned and apparently unfiled;
 - vi Enlarged topographic map showing place of use and point of diversion;
 - vii Belvidere Hot Spring Vicinity Map prepared by Scanlan Engineering and dated February 26, 2004;
 - viii Letter dated December 15, 1999, from Gary Spackman to Mark Limbaugh, Watermaster for Basin 65;
 - ix Letter dated November 15, 1999, from Gary Spackman to Scott Grunder, Idaho Department of Fish and Game;

- x Letter Dated December 15, 1999, from Gary Spackman to Darwin Pancheri;
 - xi Letter dated December 15, 1999, from Gary Spackman to Idaho Department of Health & Welfare, Division of Environmental Quality; and
 - xii Recommendation of Watermaster dated December 20, 1999, requesting that the application, if granted, include the condition that the water use will be under the control of the watermaster for Water District No. 65
- b Exhibit 2: Notice of Protest for Application No. 65-13912, filed in the name of Duane and Darwin Pancheri.
- c Exhibit 3: Application for Permit No. 65-13913. Excerpts of the Idaho Department of Water Resources' file for Application for Permit No. 65-13913. Specifically includes the following:
- i Application for Permit No. 65-13913;
 - ii IDWR Comment dated November 24, 1999, by D. Nelson;
 - iii Map;
 - iv Request to Process;
 - v Amended Application for Permit, unsigned and apparently unfiled; and
 - vi Topographic map showing points of diversion and place of use.
- d Exhibit 4: Notice of Protest for Application No. 65-13913, filed in the name of Duane and Darwin Pancheri.
- e Exhibit 5: Application for Permit No. 65-13986. Excerpts from the Idaho Department of Water Resources' file for Application for Permit No. 65-13986. Specifically includes the following:
- i Application for Permit No. 65-13986;

- ii. Topographic map showing the proposed place of use and point of diversion;
 - iii. Request to Process;
 - iv. Idaho Department of Water Resources Appropriation Application Analysis Sheet, dated November 15, 2000; and
 - v. IDWR Comment dated November 28, 2000, by L. Graves.
- f. Exhibit 6: Notice of Protest to Application for Permit No. 65-13986;
- g. Exhibit 7: Application for Permit No. 65-13978;
- h. Exhibit 8: Notice of Protest to Application for Permit No. 65-13978;
- i. Exhibit 9: Partial Decree for Water Right No. 65-01973;
- j. Exhibit 10: Partial Decree for Water Right No. 65-01972;
- k. Exhibit 11: Idaho Department of Water Resources file for Water Right No. 65-12891. Specifically includes:
- i. Water Right License No. 65-12891;
 - ii. Application for Amendment (For Licensing Purposes);
 - iii. Assignment of Permit;
 - iv. Permit for Water Right No. 65-12891;
 - v. Application for Permit No. 65-12891;
 - vi. Topographic map showing the point of diversion and place of use;
 - vii. Photocopy of public notice of application for permit;
 - viii. Affidavit of publication;
 - ix. Inter-Department Memo dated September 15, 1998;

- x Handwritten notes re: new address for Darwin and Joan Pancheri;
 - xi Correspondence from Steve Lester to Darwin Pancheri dated August 17, 1998;
 - xii Correspondence from Sharla Curtis to Duane and Darwin Pancheri dated January 12, 1992;
 - xiii Correspondence from Sharla Curtis to Duane and Darwin Pancheri dated October 15, 1991;
 - xiv License Review checklist;
 - xv Conversation Memorandum dated August 7, 1991, by Jan Shurte detailing conversation with Duane Pancheri;
 - xvi Idaho Department of Water Resources Staff Analysis Sheet for Beneficial Use Report;
 - xvii Beneficial Use Field Report;
 - xviii Conversation Memorandum dated October 19, 1988;
 - xix Proof of Beneficial Use Analysis Sheet;
 - xx Proof of Beneficial Use;
 - xxi Permit Approval Notice;
 - xxii Idaho Department of Water Resources Appropriation Application Analysis Sheet;
 - xxiii Correspondence from "The Advocate" regarding publication;
 - xxiv Conversation Memorandum dated May 15, 1989; and
 - xxv Conversation Memorandum dated October 19, 1988
1. Exhibit 12: Idaho Department of Water Resources file for Application for Permit No 65-13332. Specifically includes:
- i. Permit No. 65-13332;
 - ii. Application for Permit No. 65-13332 (including map);

- iii. Affidavit of Publication;
 - iv. Inter-Department Memo dated September 15, 1998;
 - v. Handwritten Notes dated September 8, 1998, re: Darwin and Joan Pancheri;
 - vi. Correspondence from Steve Lester to Darwin Pancheri dated August 27, 1998;
 - vii. Correspondence from Nina Shields to Darwin and Joan Pancheri dated October 29, 1991;
 - viii. Proof of Beneficial Use;
 - ix. Analysis Sheet for Proof of Beneficial Use;
 - x. Permit Approval Notice;
 - xi. Application for Permit Review sheet;
 - xii. Appropriation Application Analysis Sheet;
 - xiii. Conversation Memorandum dated July 1, 1991;
 - xiv. Beneficial Use Field Report; and
 - xv. Conversation Memorandum dated October 18, 1988
- m Exhibit 13: Idaho Department of Water Resources File for Permit No 65-13458. Specifically includes:
- i. Water Right Permit No 65-13458;
 - ii. Application for Permit;
 - iii. Comment dated June 22, 1993, Re: Overlap;
 - iv. Map;
 - v. Inter-Department Memo dated September 15, 1998;
 - vi. Handwritten note;
 - vii. Handwritten note re: Darwin and Joan Pancheri mailing address;

- viii. August 17, 1998 correspondence from Steve Lester to Darwin Pancheri re: Licensing;
 - ix. Proof of Beneficial Use;
 - x. Beneficial Use Field Report;
 - xi. Maps;
 - xii. Well Inspection Form;
 - xiii. Analysis Sheet for Proof of Beneficial Use;
 - xiv. Proof Acknowledgement Letter dated September 9, 1996;
 - xv. Proof Due Notice dated July 31, 1996;
 - xvi. Permit Approval Notice dated October 19, 1993;
 - xvii. Application for Permit State Office Review;
 - xviii. Water Right Profile Report;
 - xix. Appropriation Application Analysis Sheet;
 - xx. Affidavit of Publication; and
 - xxi. Application for Permit.
- n. Exhibit 16: Warranty Deed from Tom Nicholson to Carol Lynn MacGregor.
- o. Exhibit 17: Photographs.
- p. Exhibit 18: Location Map of MacGregor Property.
- q. Exhibit 19: Drawing of MacGregor Project.
- r. Exhibit 20: Correspondence from Terry M. Scanlan to Carol Lynn MacGregor dated Jun 6, 2000, re: Drilling Cost Estimate for Geothermal Exploration Well.
- s. Exhibit 21: Financial Assurance Document.

- t Exhibit 22: Agreement for Specifications and Locations for Flow Meters.
- u Exhibit 24: Letter from Sherl Chapman to Scott Campbell dated May 20, 2003.
- v Exhibit 25: Letter from Sherl Chapman to Scott Campbell dated October 1, 2003
- w Exhibit 30: Administrator's Memorandum dated September 8, 1980, re: Rate of Flow for Heating Use.
- x Exhibit 33: Geological Report dated February 14, 2005.
- y Exhibit 34 A & B: Illustrative Exhibits drawn by Jill Haizlip.
- z Exhibit 37: Correspondence from Terry M. Scanlan to Julie Klein Fischer re: Monitoring Update – Belvidere Hot Springs.
- aa Exhibit 38: Correspondence from Terry M. Scanlan to Jo Beeman dated July 1, 1999, Re: MacGregor – Belvidere and Raspberry Ranches
- bb Exhibit 40: Correspondence from Terry M. Scanlan to Rob Whitney dated September 2, 2003, re: MacGregor Test Well Proposal.
- cc Exhibit 42: Illustrative Exhibit drawn by Terry Scanlan.
- dd Exhibit 43: St Marie, et al , *Examination and Evaluation of Geothermal Sites in the State of Idaho with Emphasis Given to Potential for Electrical Generation or Direct Use*, Idaho Water Resources Research Institute, September 2002.

ee. Exhibit 45: Correspondence from John Westra to Josephine Beeman and Scott L. Campbell dated November 12, 2003.

25. Exhibits offered by the Pancheris and admitted as part of the record are as follows:

- a. Exhibit 101: Merle W. Wells, *Heat from the Earth's Surface: Early Development of Western Geothermal Resources*, reprinted from *Journal of the West*, Vol. X, Number 1.
- b. Exhibit 102: Arthur A. Hart, "Idaho Yesterdays: Indians Used Warm Springs," *The Idaho Statesman*, at 12.
- c. Exhibit 103: N. S. Nokkentved, "Report: Water Pumping Reduces Bruneau Hot Springs," *The Times-News*.
- d. Exhibit 104: Charles Berenbock, *Effects of Well Discharges on Hydraulic Heads in a Spring Discharges from the Geothermal Aquifer System in the Bruneau Area, Owyhee County, Southwestern Idaho*. USGS Water-Resources Investigations Report 93-4001, Boise, Idaho.
- e. Exhibit 105: Will L. Burnham and Spencer H. Wood, *Field Guide: Boise Geothermal System, Idaho*, 38th Annual Meeting, Rocky Mountain Section, The Geological Society of America.
- f. Exhibit 106: Kenneth W. Neely, *Production, Temperature and Water Level Data for the Four Heating Systems in the Boise Front Low Temperature Geothermal Resource Area, 1977-1997*, Idaho Department of Water Resources Planning and Policy Division,

Technical Services Bureau, Ground Water Monitoring Section,
Open File Report.

- g. Exhibit 107: Kenneth W. Neely, *Production History for the State of Idaho Capitol Mall Geothermal System 1983-1994*, Idaho Department of Water Resources.
- h. Exhibit 109: Christian R. Petrich, *Investigation of Hydrogeologic Conditions and Ground Water Flow in the Boise Front Geothermal Aquifer (Executive Summary)*, Idaho Water Resources Research Institute, Research Report IWRRI 2003-07.
- i. Exhibit 110: Well log notes from Clements well
- j. Exhibit 111: Notes from Larry Hellnake Well No. GEO-1, Well No. 2, and Spring, Roystone Hot Springs.
- k. Exhibit 112: Lithologic log and temperature gradient, Well No. GEO-1, Roystone Hot Springs.
- l. Exhibit 113: Ground Temperature Contours, Roystone Hot Springs
- m. Exhibit 114: Ken Neely, *Semi-Annual Review of the Monitoring Data for the Boise Front Geothermal System*, January – June 2003, Idaho Department of Water Resources.
- n. *Geothermal Resources of Utah – An Overview*, Geo-Heat Center Quarterly Bulletin, Vol. 25, No. 4, at 2.
- o. *Crystal Hot Springs – Salt Lake County*, Geo-Heat Center Quarterly Bulletin, Vol. 25, No. 4, at 26.

p. Exhibit 125 through 135, 137 and 138, and 143 through 164:

Photographs of the Pancheris' and MacGregor's Property.

26 The IDWR Staff Memorandum dated February 1, 2005, is Exhibit 200 in the record, and the Applications for Extensions of Time to Avoid Forfeiture for Water Rights Nos. 65-1972 and 65-1973.

27 The following individuals testified at the hearing on behalf of the Applicant:

- a. Carol Lynn MacGregor;
- b. Terry Scanlan; and
- c. Jill Haizlip

28 The following individuals testified at the hearing on behalf of the Pancheris:

- a. Duane Pancheri (also called by the Applicant);
- b. Darwin Pancheri (also called by the Applicant); and
- c. Sherl Chapman.

29 John Westra, Western Region Manager of the Idaho Department of Water Resources, also testified at the hearing. He was called by the Hearing Officer to testify regarding the Staff Report (Ex. 200)

Findings of Fact

30 Dr. MacGregor proposes to build a health spa on her property. The spa would be built in three phases.

- a. The first phase consists of a 2,000 (two thousand) square foot lodge with massage facilities and landscaping (bushes and trees)

It includes a driveway and one parking area, and a large hot water soaking pool. The exact size of the large pool was not provided.

Approximately 30 acres of land will be fenced off. Dr. MacGregor testified that her husband will help her with the excavation. There would be no overnight guest accommodations in the first phase.

(MacGregor Direct and Cross.)

- b The second phase of the project will include a swimming pool, several individual soaking tubs, two or three “casitas,” and an additional wing to the original lodge, with more therapy rooms, showers, linen rooms, and cleaning supply spaces. After phase two, there will be approximately five bathrooms and shower rooms, and each casita will have a bathroom with a shower.

(MacGregor Cross)

- c The third phase will include another wing on the lodge, as well as up to ten more casitas, for a total of twelve. (MacGregor Direct)

31. As of the hearing dates, Dr. MacGregor had talked only briefly with a builder and does not have blueprints or a specific architectural design.

32. Dr. MacGregor has had only informal discussions with one Valley County Commissioner regarding her project, and has not begun the local permitting process. Her property is zoned agricultural and will need to be re-zoned in order for her to build her spa. (Applicant’s Direct and Cross.)

33. Dr. MacGregor presented an estimate for the cost of drilling a geothermal well. That cost estimate was \$17,645 00. Applicant’s Ex. 20.

34 Dr. MacGregor did not present a cost estimate for the infiltration gallery she plans to install if Application for Permit No. 65-13912 is approved.

35 Dr. MacGregor presented no evidence regarding the cost of the cold water well she plans to drill if Application for Permit No. 65-13986 is approved.

36 Dr. MacGregor presented no evidence regarding the cost of pipelines or other structures necessary to transport water from any of the points of diversion proposed under Applications for Permit Nos. 65-13912, 65-13913, or 65-13986 to their respective proposed places of use.

37 Dr. MacGregor testified that she thinks the first phase of her spa project will cost \$300,000. She stated that includes the lodge, excavation, fencing, landscaping, and permits. (MacGregor Direct.)

38 Dr. MacGregor estimates that the first and second phases of her project will cost \$700,000 total, with the third phase bringing the total cost (for all three phases) to \$3,000,000. (MacGregor Direct and Cross.)

39 Dr. MacGregor presented no testimony or evidence from any builder, architect, contractor, subcontractor, landscaper, or professional, other than Terry Scanlan, providing estimates for the construction of any part of her spa project.

40 Melina Sander, Senior Vice President and Financial Advisor with Morgan Stanley, provided a written statement that Dr. MacGregor has “the ability to cover in excess of \$700,000 to fund any development she desires.” Applicant’s Ex. 21.

41 Dr. MacGregor testified that she may not build the third phase of the spa project, “depending on how the business goes.” (MacGregor Direct.)

42. Dr. MacGregor has dug monitoring holes with standpipes in one of her pastures for purposes of determining the location and size of her septic field. She testified that she will install the number of septic tanks required by Mr. Latham with the Valley County Health District (MacGregor Cross.)

43. The South Lake Sewer District has proposed bringing a sewer line to the MacGregor property that would be used for the second and third phases of the spa project, but it is not certain whether the expanded sewer line will be approved. It seems to be dependent, in part, on whether South Lake Sewer District obtains a grant. (MacGregor Direct and Cross.)

44. Dr. MacGregor has not submitted an application to the Valley County Health District for the second phase of the spa project. (MacGregor Direct and Cross.)

45. The size of the facility Dr. MacGregor is able to construct will be dependent upon the amount of geothermal water she is able to obtain. (Testimony of Dr. MacGregor.) Her own expert witness testified that he was unsure if there would be sufficient geothermal water for the planned outdoor pool and individual soaking pools. (Testimony of Terry Scanlan on Direct Examination).

46. There are several documented instances in Idaho of the drilling and pumping of geothermal wells adversely impacting, if not totally drying up, nearby geothermal springs

- a. In the Bruneau Area of Owyhee County in southwestern Idaho, discharge from springs decreased as more wells went online. Indian Hot Springs declined precipitously beginning in approximately 1965, when the number of wells also began to increase dramatically. Protestants' Ex. 104, p. 49, Figure 18. In

the several years preceding 1993 (when the report was published) “Indian Bathtub Spring has ceased to flow during the summer and early fall ” *Id.*, p. 50. *See also* Testimony of Sherl Chapman. The Bruneau experience is helpful because while the Bruneau area is larger in scope and areal extent, the mechanism of the geothermal system is the same. Testimony of Sherl Chapman. Therefore, a review of the experience of that system is helpful.

- b. Sherl Chapman also testified about his experience with the geothermal system along the Mt. Bennett Hills Front in Elmore County, Idaho. In that case, a Mr. Hall and a Mr. Lee drilled geothermal wells, but also took advantage of a hot springs. Mr. Bill Walker drilled a geothermal well six to seven miles away, which immediately caused the springs to dry up. Sherl Chapman Testimony, Day 3.
- c. Sherl Chapman testified that he was the consultant for clients who drilled a geothermal well near Roystone Hot Springs. His clients received permission to drill a test well, which was located approximately 300 feet from Roystone Hot Springs. The well was drilled in sediments, which is what Dr. MacGregor has also proposed. When the well (which was 543 feet deep) was pump tested for a period of approximately 16 hours, Roystone Hot Springs dried up. The well project was halted at that time, and the spring resumed flow within 24 hours.

- d Mr Chapman was also aware of a situation involving Ingram Hot Springs near Challis, and his familiarity came through his role as a subsequent consultant. A property owner had been using Ingram Hot Springs, and drilled a well in an attempt to obtain a more reliable source of geothermal water. When the well was drilled a few hundred feet from the spring, the spring became muddy and turbid.
- e. The Little Valley, located in Owyhee County, Idaho, also presents an example of a geothermal well interfering with a geothermal springs. In that instance, a well was drilled deep into the thermal aquifer, and could not be shut down because it was improperly drilled. As a result of the well flow of over 1,000 gallons per minute, the area surrounding the well turned into a wetland. In addition, the Bachman Springs, located approximately eight and one half miles away, dried up. (Chapman Direct.)

47 In 1999, before Dr MacGregor filed her applications for permit, her expert and consultant Terry Scanlan cautioned that if Dr MacGregor drills a geothermal well or wells, “there is a significant potential to impact the flow rate or temperature at the spring developed by the Pancheris.” Applicant’s Ex. 38, p 4.

48 The Pancheris have drilled a well in the general vicinity of Belvidere Hot Springs, and have two water rights, each of which uses one well as a point of diversion. Water Right No. 65-13458 uses a well drilled 100 to 150 feet from Belvidere Hot Springs, at a depth of 99 feet. Applicant’s Ex. 38, p 4.

49. Terry Scanlan, on behalf of Dr. MacGregor, and Sherl Chapman, on behalf of the Pancheris, measured the discharge of Belvidere Hot Springs, and found that it ranges from 110 to 180 gallons per minute. Protestants' Ex. 121, p. 2.

- a. Terry Scanlan is an engineer and geologist; and
- b. Sherl Chapman is a hydrogeologist. A hydrogeologist uses principles of hydrology and geology to analyze surface and subsurface occurrences of water. (Chapman Testimony on Direct.)

50. The Pancheri diversions from Belvidere Hot Springs were monitored for a six-month period. That period of time provides some information regarding spring flow, but does not capture seasonal fluctuations. (Scanlan Testimony on Cross-examination.) A full year of monitoring prior to development would be beneficial and very useful in order to document what is occurring in the geothermal system around Belvidere Hot Springs. *Id*

51. The last monitoring data in the record is dated February 2005. Dr. MacGregor filed her Motion and Request for Hearing in November 2004. In response, the Pancheris expressed their belief that monitoring should continue for one full year, and that the Agreement re: Monitoring provided for a full year of monitoring. Protestants' Response to Motion and Request for Hearing; Applicant's Ex. 22.

52. Under their existing Water Right No. 65-12891, the Pancheris are entitled to use 0.40 c.f.s. or 180 gallons per minute. Under Water Right No. 65-13332, the Pancheris are entitled use to 0.10 c.f.s. or 45 gallons per minute, for a total of 225 gallons per minute.

53. Dr. MacGregor has two existing water rights for Belvidere Hot Springs. The rights are not currently being used, and Dr. MacGregor has filed an application for extension of time to avoid forfeiture. Ex. 201. Under Water Right No. 65-1972, she is entitled to 0.04 c.f.s.

or 18 gallons per minute. Under water right 65-1973, she is entitled to use 0.01 c.f.s or 4.5 gallons per minute, for a total of 22.5 gallons per minute.

54. Based upon flow monitoring from 2001-2003, the combined surface discharge of Belvidere Hot Springs on the MacGregor property and the Pancheri property is 110 to 180 gallons per minute. Applicant's Ex. 40, p. 2.

55. Taking into account Dr. MacGregor's water rights, plus those of the Pancheris, the quantity in gallons per minute of existing water rights exceeds the average discharge of Belvidere Hot Springs by 67.5 to 137.5 gallons per minute. Even if Dr. MacGregor elects not to use her existing water rights, the amount of water to which the Pancheris are entitled under their existing water rights exceeds the flow of Belvidere Hot Springs by 45 to 115 gallons per minute.

56. Dr. MacGregor's expert suggested that she could pump from a proposed infiltration gallery at intermittent time periods, and thus allegedly not impact the Pancheris. Testimony of Terry Scanlan.

57. The Pancheris' expert testified that Dr. MacGregor's proposed infiltration gallery could reduce the quantity of water to the Pancheris under their existing water right in two ways:

- a. If Dr. MacGregor's infiltration gallery were placed lower (*i.e.*, deeper) into the ground than the depth of the Pancheris' infiltration gallery, it could induce flow away from the Pancheris' gallery, thus reducing the quantity of water available to the Pancheris.

b. Depending upon the size of Dr. MacGregor's infiltration gallery, the intermittent pumping from the gallery suggested by Dr. MacGregor's expert would be difficult to handle. For example, a six-inch pipe that was 400 feet in cumulative length would empty Dr. MacGregor's infiltration gallery in approximately three minutes, after which water flow would be induced into the gallery from elsewhere in the geothermal system

58. Dr. MacGregor provided no definitive plans regarding the pipe size or length of her proposed infiltration gallery.

59. Given the slope of the land and the ability of Dr. MacGregor's infiltration gallery to empty and begin pulling water from the Pancheris' infiltration gallery, there is a significant potential that Application for Permit No. 65-13912, will, if approved, reduce the quantity of water available to the Pancheris under their existing water rights

60. As to her Application for Permit No. 65-13913, Dr. MacGregor's expert also suggested that Dr. MacGregor could pump from the proposed geothermal well intermittently or at a constant low rate if her Application for Permit No. 65-13913 is approved. Testimony of Terry Scanlan.

61. The Pancheris' expert testified that if Application for Permit No. 65-13913 is developed as proposed, it will intercept the water now used by the Pancheris from Belvidere Hot Springs, and the water will no longer be available for the Pancheris' use. (Chapman Direct.)

62. Dr. MacGregor's proposed pumping intermittently or on a constant basis may move water away from the Pancheris' infiltration gallery.

63. Geothermal systems are sensitive to exploitation and withdrawal
Applicant's Ex. 24.

64. The Long Valley area, where the Pancheris' property is located, sometimes reaches wintertime temperatures of 25 to 30 degrees below Fahrenheit. If the Pancheris' infiltration gallery no longer received and diverted water, and therefore the heat system in their houses and buildings was lost, the consequences to the Pancheris' pipelines and plumbing could be disastrous. (Chapman Direct.)

65. The existence of a northeast trending fault in the area of Belvidere Hot Springs is speculative. The resistivity changes in that area could be explained by changes in overburden thickness, changes in the character or chemical composition of the rock, intrusion of a different type of rock, or a buried stream channel. (Chapman Direct.)

66. In addition to drilling, the potential existence of a fault can be potentially detected by conducting additional geophysical studies and/or more sophisticated resistivity analysis. (Chapman Direct.)

67. IDWR Staff expressed concern about possible injury to the Pancheris' senior water rights, stating that "[g]eothermal resource systems are fragile; invasive actions could result in possible non-reversible injury to the resource and senior water rights. The letters of November 12 and June 5, 2003, outline IDWR's responsibilities and concerns relating to the resource." Exhibit 200.

68. The June 5, 2003 correspondence referenced in and attached to the IDWR Staff Report provides, in part, that:

Drilling very near or in vents through which the geothermal water flows may alter the artesian flow of the water to the Pancheri's point of diversion. There is also a possibility of temperature change caused by commingling or by flow reduction. If the test

well must be abandoned after it is drilled and tested, the materials used to fill and seal the well may also fill and seal the natural water passages, reducing flow and perhaps pressure

Ex 200

69. The “Cascade Area” has been identified as a candidate for geothermal development Applicant’s Ex. 43, Neely, et al., “Examination and Evaluation of Geothermal Sites in the State of Idaho with Emphasis Given to Potential for Electrical Generation or Direct Use.” However, the specific geothermal area discussed in that report was in the City of Cascade itself. *Id.*; see also Chapman Testimony on Cross.

70. The “Neely Report” which is Applicant’s Exhibit 43 did not suggest that Belvidere, Cabarton, or any other hot springs were included in the recommendation for development. The report also did not take into account preexisting water rights (Chapman Direct Testimony.)

71. The report entitled “Geothermal Investigation of the Cascade, Idaho, Area” of which Sherl Chapman was a co-author, also did not take preexisting water rights into account. The purpose of the report was only to set forth the scope of the resource. (Chapman Direct Testimony.)

72. The potential sustainable development level of the geothermal resource near Belvidere Hot Springs by the pumping of wells is unknown. (Haizlip Testimony.)

73. Dr. MacGregor retained Jill Haizlip with Geologica to prepare a letter report and testify at an expert witness at the hearing in this matter. Dr. Haizlip’s report and testimony focused on the effects and impacts of drilling a test well or wells, not on the effects of pumping a production well.

74. Whether there is geothermal discharge into the valley fill sediment near Belvidere Hot Springs is speculative (Chapman Direct.) Two wells were drilled north of Belvidere Hot Springs and four to the South (between Belvidere Hot Springs and Cabarton Hot Springs), and none obtained warm water, much less geothermal water. The two northerly wells were located approximately one mile from Belvidere Hot Springs. One of the southerly wells was located three quarters of a mile to one mile from Belvidere Hot Springs, while the others were located within one mile of Cabarton Hot Springs (which is itself 2 1/2 to 3 miles from Belvidere Hot Springs). (Chapman Direct.)

75. It has not been shown that there is significant water leaking out of the fault zone, and thus potentially available for appropriation in the area between Cabarton Hot Springs and Belvidere Hot Springs, and between Belvidere Hot Springs and the City of Cascade.

76. The Pancheris' Water Right No. 65-12891 contains a remark providing, in pertinent part, that "[t]he use of water confirmed by this right is limited to the amount which can actually be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency." Applicant's Ex. 11.

77. The land in the vicinity of Belvidere Hot Springs slopes in a northwest to southeast direction, which means that the land rises in the direction of the Pancheris' property. (Scanlan Testimony, Hearing Officer Examination.)

78. Application for Permit No. 65-13986 seeks to appropriate 20 c.f.s. of cold water through the drilling of a well.

79. The potential for reducing the quantity of water available to the Pancheris under their existing water rights is less for Application for Permit No. 65-13986 than for

Applications for Permit Nos. 65-13912 or 65-13913. However, any wells drilled under Application for Permit No. 65-13986, if approved, must be located at least one quarter mile from Belvidere Hot Springs.

II. CONCLUSIONS OF LAW

A. Burdens of Proof

1. A water right applicant bears the burden of proof for the factors that the Idaho Department of Water Resources must consider under Section 42-203A. *Cantlin v. Carter*, 88 Idaho 179, 187 (1964), *see also Shokal v. Dunn*, 109 Idaho 330, 339 (1985)

2. As the applicant, Dr. MacGregor bears the initial burden of coming forward with evidence for the evaluation of criteria (a) through (e) of Idaho Code Section 42-203A. *See* IDAPA Sections 37.03.08040.04(b)(i-iii). Dr. MacGregor, therefore, bears the burden of coming forward with evidence to present a *prima facie* case that:

- a. the proposed use will not reduce the quantity of water under existing water rights;
- b. the water supply is sufficient for the purpose for which Dr. MacGregor seeks to appropriate it;
- c. the application is made in good faith and not for delay or speculative purposes;
- d. she has sufficient financial resources to complete the work involved in her project; and
- e. the proposed use will not conflict with the local public interest, as that term is defined in Idaho Code Section 42-202B.

3. As the Protestants, the Pancheris “bear the initial burden of coming forward with evidence for those factors relevant to criterion (e) of Section 42-203A(5), Idaho Code, of which the protestant can reasonably be expected to be more cognizant than the applicant ” IDAPA 37.03.08.04.b ii.

4. Dr. MacGregor also bears the ultimate burden of persuasion for all of the criteria set forth in Idaho Code Section 42-203A(5), including Subsection (f) therein. *See* IDAPA Section 37.03.08.04.04(c)

5. The evaluation of criteria (c) through (f) can be combined for all three Applications for Permit at issue in this consolidated matter. Evaluation of criteria (a) and (b) must be made individually for each Application.

Pertinent Rules of Procedure of the Idaho Department of Water Resources

6. Rule 600 of the Department’s Rules of Procedure provides:

Evidence should be taken by the agency to assist the parties’ development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized by the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency’s experience, technical competence and specialized knowledge may be used in evaluation of evidence.

IDAPA 37.01.01.600.

7. Rule 602 of the Department’s Rules of Procedure provides:

Official notice may be taken of any facts that could be judicially noticed in the courts of Idaho and of generally recognized technical or scientific facts within the agency’s specialized knowledge. Parties shall be notified of the specific facts or material noticed and

the source of the material noticed, including any agency staff memoranda and data. Notice that official notice will be taken should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed. Parties must be given an opportunity to contest or rebut the facts or material officially noticed. When the presiding officer proposes to notice agency staff memoranda or agency staff reports, responsible staff employees or agents shall be made available for cross-examination if any party timely requests their availability.

IDAPA 37.01 01.602

Pancheris' Water Rights

8. The nature, extent, and validity of the Pancheris water rights are not at issue in this proceeding.

9. Water Right No. 65-12891, owned by the Pancheris, is licensed. Idaho Code Section 42-220 provides that when water rights are licensed:

Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; . . . The right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure, on the part of the user or holder of such right, to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution of such water, . . .

10. Because Water Right No. 65-12891 is licensed, that license is binding upon the Department, and the Department will not reexamine that water right in this proceeding.

11. Water Right No. 65-13332 is a permit. It has long been the law in this state that "A permit merely expresses the consent of the state that the holder may acquire a water right, and if the holder of the permit substantially complies with all the requirements of the statute, to and including the actual application of the water to the beneficial use specified in the

application for the permit, he may become the owner of a water right, the priority of which will relate back to the date of the permit; . . . ” *Basinger v Taylor*, 30 Idaho 289, 164 P. 522 (1917).

12. The testimony of Darwin Pancheri, as well as Sherl Chapman, established that Water Right No. 65-13332 has been applied to beneficial use. Moreover, a proof of beneficial use form was filed with the Idaho Department of Water Resources on September 27, 1991, nearly 14 years ago Applicant’s Ex. 12. Finally, correspondence from Steve Lester with the Idaho Department of Water Resources dated August 27, 1998, and found in the file for Permit No. 65-13332 notes that the field examinations for all of the Pancheris’ permits in the Cabarton area had been conducted, and that the permits were in the licensing process. Applicant’s Ex. 12. The correspondence also provides that “[t]he good news is that the beneficial use developed under the permits has been verified. The rights remain fully protected by completion of that verification.” *Id.*

13. The Department will not reexamine the beneficial use of Permit No. 65-13332 in this proceeding.

Evaluation of Permits to Appropriate Water

14. The Water Appropriation Rules set forth the criteria to use in evaluating the factors set forth in Idaho Code Section 42-203A. IDAPA 37.03.08.045.

Whether the Application is Made in Good Faith and Not for Delay or Speculative Purposes

15. The Department must deny an application for permit if it determines that the applicant’s application was not made in good faith, but was instead made for delay and/or speculative purposes. Idaho Code Section 42-203A(5). The Department’s Water Appropriation Rules regarding this criterion provide:

- c. The criteria requiring that the director evaluate whether an application is made in good faith or whether it is made for delay or

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

- i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way; and
- ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and
- iii. There are no obvious impediments that prevent the successful completion of the project.

IDAPA Section 37.03 08045 01(c).

16. Dr. MacGregor is the owner of the property upon which she intends to build the spa, and is the owner of the property upon which her proposed points of diversion are located. Applicant's Ex. 16.

17. Dr. MacGregor is not in the process of obtaining other permits needed to construct and operate the project. According to her own testimony, she has not applied for any needed permits from the local zoning authorities. She has undertaken only informal discussions with the Valley Sewer District. She has not provided the Department with any other applications for any needed permits, licenses, or approvals.

18. Dr. MacGregor presented only a rough conceptual drawing of her planned spa.

19 There are no obvious impediments that prevent successful completion of this project if all governmental permits and approvals are acquired. However, Dr. MacGregor has not taken significant affirmative steps to obtain the necessary permits from other local and state agencies, and has not developed blueprints or formal plans.

20 While Dr. MacGregor may have filed her Applications for Permit (particularly for Permit Nos. 65-13912 and 65-13913) in good faith and not for delay, she has not met her burden of showing that her spa project, upon which Applications for Permit Nos. 65-13912 and 65-13913 would be used, is not speculative.

Sufficiency of Financial Resources

21 Idaho Code Section 42-203A(5) further requires that an applicant have sufficient financial resources to construct his or her diversion works and apply the water to beneficial use. The Department's Water Appropriation Rules regarding this criterion provide:

a Criteria for determining whether the applicant has sufficient financial resources to complete the project

i. An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the director.

IDAPA Section 37.03.08045.01(d)(i)

22 Dr. MacGregor presented evidence showing that it is reasonably probable that approximately \$700,000 in funds are or will be available

23 Dr. MacGregor has provided cost estimates for drilling a geothermal well, but not for drilling a cold water well nor for an infiltration gallery, nor for the conveyance system. Most significantly, she did not provide sufficiently detailed plans and specifications,

along with estimated construction costs from a contractor or builder, for the spa within which the water from Applications for Permit Nos. 65-13912 and 65-13913 will be used

24 Dr. MacGregor has financial resources. However, given the incomplete nature of the plans and projected costs, it is not entirely clear that sufficient funds will be available to complete the project.

25 Dr. MacGregor has not met her burden of showing that she has sufficient financial resources to complete the project

Public Interest

26 The Department must also deny an application for permit if it determines that the application, if approved, would conflict with the local public interest as defined in Idaho Code Section 42-202B. As of July 1, 2003, the “local public interest” is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code Section 42-202B(3).

27 Additionally, the Department’s Water Appropriation Rules, which predate the amended definition of “local public interest” further provide:

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

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

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

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

IDAPA Section 37.03.08.045 01(e)(i-iii).

28. In July 2003, the Idaho Legislature amended Idaho Code Section 42-202B(3), which is the statutory definition of “local public interest.” Therefore, to the extent the rule quoted in the previous paragraph conflicts with the new definition of “local public interest,” the rule may no longer be valid.

29. The Water Appropriation Rules also provide that:

The applicant shall seek comment and shall submit all letters of comment on the effects of the construction and operation of the proposed project from the governing body of the city and/or county and tribal reservation within which the point of diversion and place of use are located, the Idaho Department of Fish and Game, the Idaho Department of Environmental Quality, and any irrigation district or canal company within which the proposed project is located and from other entities as determined by the director.

IDAPA 37.03.08.045 g

30. The locale of Dr. MacGregor’s proposed upgradient septic sewer system is a significant matter of local public interest because of its potential to contaminate Belvidere Hot Springs via pathogen transport.

31. Dr. MacGregor’s Applications, if approved, will be contrary to the local public interest, because Dr. MacGregor failed to prove that the proposed return discharge of the diverted water through the upgradient septic sewer system will not contaminate Belvidere Hot Springs with pathogens. Because the Pancheris use geothermal water from Belvidere Hot Springs for a swimming pool, this is a serious concern with the statutory terms of “local public interest.”

Conservation of Water Resources

32. Idaho Code Section 42-203A(5) also requires that the proposed use of water not be contrary to the conservation of water resources in the state of Idaho. The Department's Water Appropriation Rules do not set forth specific criteria for determining whether a proposed use is contrary to the conservation of water resources, nor is there case law on the issue.

33. Based upon the information provided at hearing, Dr. MacGregor's proposed water use will not be contrary to the conservation of water resources in the state of Idaho.

Reduction in the Quantity of Water Under Existing Rights

34. The Idaho Department of Water Resources may deny an application for permit if it will reduce the quantity of water under existing water rights I.C. § 42-203A(5). The Department's Water Appropriation Rules provide further standards for determining whether a proposed use will reduce the quantity of water under existing water rights:

- a. Criteria for determining whether the proposed use will reduce the quantity of water under existing water rights. A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:
 - i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.
 - ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. Protection of existing groundwater rights are subject to reasonable pumping level provisions of Section 42-226, Idaho Code; or
 - iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the

existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.

IDAPA Sections 37.03 08045.01(a)(i-iii).

35 Application for Permit No. 65-13986: Dr. MacGregor has met her burden of showing that if this application for permit is approved, it will not reduce the quantity of water available to the Pancheris under the existing water rights, assuming that the proposed septic sewer system is located and constructed so that the water quantity of Belvidere Hot Springs is not adversely impacted. However, the point of diversion must be appropriately sited in order to avoid reducing the quantity of water available to the Pancheris under their existing water rights. Any well drilled as the point of diversion for this permit must be located at least a quarter of a mile from Belvidere Hot Springs

36 Application for Permit No. 65-13912: Dr. MacGregor has not met her burden of showing that if this application for permit is approved, it will not reduce the quantity of water available to existing water rights. Expert testimony established a significant likelihood that the amount of water available to the Pancheris under their existing license and permit will be reduced below the amount reflected in the license and permit, and below the amount historically beneficially used, if Dr. MacGregor is allowed to install her planned infiltration gallery and divert water from Belvidere Hot Springs. Dr. MacGregor has the affirmative burden of showing that those reductions will not occur, and she failed to meet that burden.

37. Application for Permit No. 65-13913. Dr. MacGregor has not met her burden of showing that Application for Permit No. 65-13913, if approved, will not reduce the quantity of water available to existing water rights. The proof put on by Dr. MacGregor showed only that a well must be drilled and pumped before the effect of pumping on the Pancheris' existing water rights could be determined. The Pancheris put on proof that, as illustrated by

other geothermal systems in Idaho, there is significant potential that pumping a geothermal well in the vicinity of Belvidere Hot Springs will reduce the flow of the springs, or dry them up completely. Dr. MacGregor has the affirmative burden of showing that reductions to the Pancheris' existing water rights will not occur, and she failed to meet that burden.

Sufficiency of Water Supply

38 The Department must also deny an application for permit if the water supply for the proposed appropriation is insufficient for the purposes for which it is sought to be appropriated Idaho Code Section 42-203A(5). The Department's Water Appropriation Rules provide:

b Criteria for determining whether the water supply is insufficient for the proposed use. The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant), unless there are noneconomic factors that justify application approval. In assessing such noneconomic factors, the director will also consider the impact on other water rights if the project is abandoned during construction or after completion, the impact on public resource values, and the cost to local, state and federal governments of such an abandonment

IDAPA Section 37.03.08045.01(b).

39. Application for Permit No. 65-13986: The Pancheris were able to drill a cold water well and obtain water, and there was no evidence that sufficient cold groundwater is available to fulfill the irrigation purposes for which Dr. MacGregor seeks to appropriate water under this Application for Permit.

40. Application for Permit No. 65-13912: The evidence shows that the total flows from Belvidere Hot Springs are less than the amount entitled to be diverted under existing water rights. Therefore, there would not be sufficient water available to fulfill Dr. MacGregor's

proposed uses of space heating and hot pools. Dr. MacGregor has failed to meet her burden of showing that there is sufficient water available to fulfill the proposed uses under this Application for Permit.

41 Application for Permit No. 65-13913: The evidence shows that in at least six other instances near Belvidere Hot Springs (four to the south of Belvidere Hot Springs and two to the north), attempts to obtain geothermal water by means of a well were unsuccessful. Further, the Pancheris drilled a well near Belvidere Hot Springs and did not obtain geothermal water. Dr. MacGregor has the affirmative burden of showing that there is sufficient water (2.0 c.f.s.) to fulfill the uses which she plans to make of the geothermal water sought under this Application for Permit, and she failed to meet that burden.

ORDER

Application for Permit No. 65-13912 is **denied**.

Application for Permit No. 65-13913 is **denied**.

Application for Permit No. 65-13986 is **granted**. However, the well site shall be at least one quarter of a mile from Belvidere Hot Springs and siting of the proposed septic sewer system shall preclude any potential for pathogens transport contamination of Belvidere Hot Springs.

DATED this 3rd day of June, 2005.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

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By Angela Schaefer Kaufmann
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and Darwin and Joan Pancheri

CERTIFICATE OF SERVICE

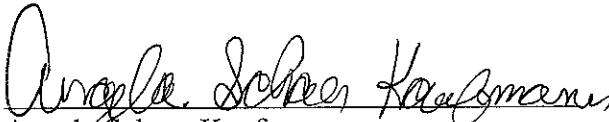
I HEREBY CERTIFY that on this 3rd day of June, 2005, I caused a true and correct copy of the foregoing [PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW to be served by the method indicated below, and addressed to the following:

Julie K. Fischer
WHITE PETERSON, P.A.
5700 East Franklin Road, Suite 200
Nampa, ID 83687
Fax: (208) 466-4405

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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

☒ U.S. Mail, Postage Prepaid
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Angela Schaer Kaufmann