

**STARTING
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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)
_____)

NOTICE OF HEARING

PLEASE TAKE NOTICE that the hearing in this matter is set for **April 21 and 22, 2005 starting at 9:00 a.m.**, at the **Idaho Department of Water Resources, 322 E. Front Street, Boise, Idaho**. The hearing will be held in accordance with the provisions of Chapters 2 and 17, Title 42 and Chapter 52, Title 67, Idaho Code, and the adopted Rules of Procedure of the department. IDAPA 37.01.01. A copy of the rules may be obtained from the department upon request. The presiding officer at the hearing will be the Peter R. Anderson.

The hearing will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please advise the department within ten (10) days prior to the hearing. Inquires about scheduling, hearing facilities, etc., should be directed to Victoria Wigle, Administrative Assistant to the Director, Idaho Department of Water Resources, 322 E. Front Street, P.O. Box 83720, Boise, Idaho 83720-0098, telephone: (208) 287-4803, fax: (208) 287-6700.

Dated this 7th day of April, 2005.



Peter R. Anderson
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of April, 2005, the above and foregoing document was served on the following via facsimile:

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SPF Water Engineering
600 E. River Park Lane, Suite 105
Boise, Idaho 83706
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Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

* * * Memory TX Result Report (Apr. 7. 2005 2:52PM) * * *

1) Idaho Dept. of Water Resources
2)

Date/Time: Apr. 7. 2005 2:51PM

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FOR THE STATE OF IDAHO

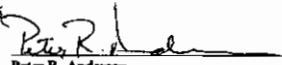
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Peter R. Anderson
Hearing Officer

**NOW
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**PLEASE REFER TO FILE
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**FOR THE
CONTINUATION OF THIS
WATER RIGHT FILE**

No. 65-13912

Julie K. Fischer
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Filed by FAX
6-3-05 VW

Attorneys for Petitioner, Carol Lynn MacGregor

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

IN THE MATTER OF APPLICATION FOR)
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THE NAME OF CAROL LYNN) **POST HEARING BRIEF**
MACGREGOR)
)
)

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

PETITIONER’S POST HEARING BRIEF - 9

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 Sherl 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 an 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 years¹⁸

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.

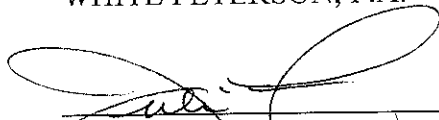
Clearly, the local public interest is served by all of Dr. MacGregor's proposed uses for her water applications

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.



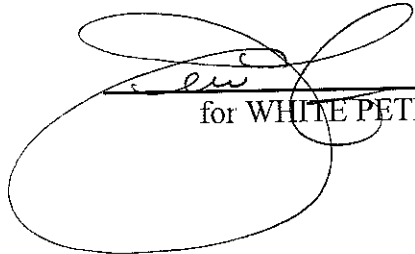
Julie Klein Fischer, of the Firm
Attorneys for Applicant

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:

<u> </u> X	US Mail	Scott L. Campbell
<u> </u>	Overnight Mail	Moffatt Thomas
<u> </u>	Hand Delivery	101 S. Capitol Blvd. 10 th Floor
<u> </u>	Facsimile No. 385-5384	Boise, Idaho 83701

<u> </u> X	US Mail	Peter R Anderson
<u> </u>	Overnight Mail	Idaho Department of Water Resources
<u> </u>	Hand Delivery	322 E Front Street
<u> </u> X	Facsimile No 395-0222	Boise, ID 83720


for WHITE PETERSON

RECEIVED
MAY 16 2005
Department of Water Resources

Attorneys for Duane and Laura Pancheri
and Darwin and Joan Pancheri

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19136 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 upon oath, deposes
and says:

1. I am one of the attorneys of record providing legal representation to Duane
and Laura Pancheri and Darwin and Joan Pancheri in the above-captioned matter. I have

knowledge of the files pertinent to this matter, and I make this affidavit based upon personal knowledge.

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.

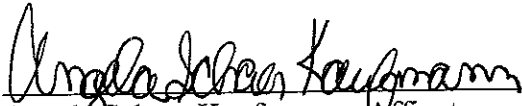
4. Several members of our word processing department as well as other administrative staff listened to the hearing tapes and transcribed them to the best of their ability. After each tape was transcribed, Ms. Long listened to each tape as she read through the pertinent transcript and made corrections. 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.

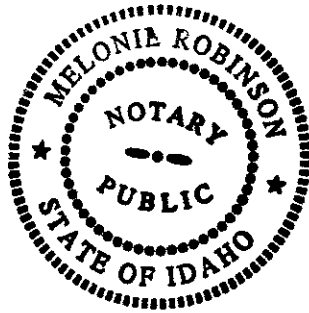
6. Appended hereto as Exhibit A is a true and correct copy of excerpts of the transcript of Day 3 and 4 of the hearing in the above-captioned matter.

DATED this 16th day of May, 2005

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED


Angela Schaer Kaufmann – Affiant

SUBSCRIBED AND SWORN to before me this 16 day of May, 2005



Melonie Robinson

NOTARY PUBLIC FOR IDAHO

Residing at Kuna

My Commission Expires 10/17/06

CERTIFICATE OF SERVICE

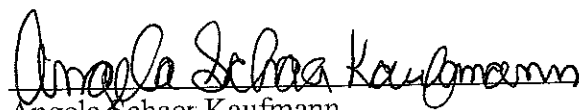
I HEREBY CERTIFY that on this 16th day of May, 2005, I caused a true and correct copy of the foregoing **AFFIDAVIT OF ANGELA SCHAER KAUFMANN** to be served by the method indicated below, and addressed to the following:

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
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

Peter R. Anderson
Hearing Officer
729 W. Braemere Road
Boise, ID 83702

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


Angela Schaer Kaufmann

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

9 Before Peter R. Anderson, Hearing Officer
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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 5, 2005

Hearing Day 3 – Tape 12

11
12 Chapman metal sump or culvert. It's pumped through PVC pipe up the hill to Darwin
13 and Joan Pancheris' home, circulates through their, their heating system and their,
14 their home and their shop, and then the spent geothermal water returns back
15 through a small pipeline and discharges, comes through the sump and discharges
16 back out and ultimately passes into a creek and travels off their property.

17 Kaufmann And does Duane Pancheri also take water from the infiltration gallery?

18 Chapman Uh-huh, yes. Yes.

19 Kaufmann Would you explain to us how [inaudible]?

20 Chapman His pipeline travels to the east, down adjacent to the railroad tracks. Again, as
21 shown, in part, at least on the diagram.

22 Kaufmann That's Exhibit 42.

23 Chapman Exhibit, yeah, Exhibit 42, yes. Travels to the east, makes a turn to the south,
24 travels to, his property crosses a creek and just north of the creek is where the
25 flow meter is installed that Mr. Scanlan referred to and we've seen earlier. The

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?

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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 No. 4 – Tape 15

11
12 Chapman I don't recall what the ultimate outcome was of the – of the Walker-Lee-Hall
13 issue was. At that time I was – I was a ground water geologist and my job was to
14 look at the resource and make the connections between geology and hydrology,
15 and then it went into a whole different world as far as I was concerned at that
16 point. I was happy to be in the field and pounding rocks.

17 [laughter]

18 Fischer There are plenty of those in Mountain Home. Ingram Hot Springs was another
19 example of [inaudible].

20 Chapman Yes.

21 Fischer That, the surface manifestation, I think said – there was impacted initially after
22 the Challis earthquake?

23 Chapman Yes.

24 Fischer So did the owner attempted to drill a well and tap into the geothermal water – to
25 make sure that didn't happen again?

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.

EXHIBIT A

RECEIVED
MAY 16 2005
Department of Water Resources

Attorneys for Duane and Laura Pancheri
and Darwin and Joan Pancheri

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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

PROTESTANTS' BRIEF REGARDING TEST
WELLS

Protestants Duane and Laura Pancheri and Darwin and Joan Pancheri (collectively
"Pancheris") by and through their counsel of record MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHTD, and in accordance with the Hearing Officer's oral order given on the record on
Friday, May 6, 2005, hereby providing briefing regarding the Hearing Officer's proposal to
allow Carol MacGregor ("Dr. MacGregor") to drill test wells. Specifically, the Hearing Officer
has suggested that he might allow applicant Dr. MacGregor to drill a test well or test wells prior

to determining whether he should approve the applications for permit which are the subject of this consolidated administrative proceeding

The Pancheris oppose the Hearing Officer's plan or suggestion. First, the Hearing Officer lacks the authority to allow the drilling of test wells absent an approved application for permit or agreement of the parties. Second, the Hearing Officer lacks the authority to overturn the Idaho Department of Water Resources' decision denying Dr MacGregor's test well proposal. As further discussed herein, under the Idaho Code and IDAPA, Dr MacGregor could have appealed that decision, but did not. Third, allowing Dr. MacGregor to proceed with test wells effectively reverses the burdens allocated by the Idaho Constitution, the Idaho Code and IDAPA, and impermissibly places virtually all of the risk of harm on the Pancheris

I.

WHILE THE HEARING OFFICER WIELDS RATHER BROAD ADJUDICATORY POWERS, HIS ULTIMATE POWER IS ONE OF RECOMMENDATION RATHER THAN OF FINAL DECISION MAKING, AND HIS POWER IS SUBORDINATE TO THAT OF THE AGENCY

At the outset, it is important to develop a clear understanding of the genesis of the Hearing Officer's authority. 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 the Department of Water Resources ("Department") 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 37.01.01.411 ¹

In this matter, the Director of the Department 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 the Department'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

¹ 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).

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 represent the full scope of the Hearing Officer's authority in this matter.

Dr. MacGregor has 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 Dr. MacGregor should be allowed to drill a test well. The Pancheris respectfully submit that the Hearing Officer may only approve or disapprove Applications for Permit Number 65-19312, -13913, and -13986, in whole or in part, or with such conditions as may be appropriate.

II.

THE HEARING OFFICER LACKS AUTHORITY TO ALLOW OR ORDER THE DRILLING OF TEST WELLS PRIOR TO FORMAL DEPARTMENT APPROVAL OF THE PENDING APPLICATIONS FOR PERMIT

As discussed in Section I, *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. As discussed later in this brief, one of the criteria Dr. MacGregor must prove is 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.

Second, and even more directly, the Department's own rules require that an application for permit be approved before well 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).

In this matter, Dr. 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. The Idaho Code and the Department's Water Appropriation Rules make clear that Dr. 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 Dr. 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.

As Idaho Code and the Rules plainly state, receipt of a water right permit is a condition precedent to Dr. 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 Dr. MacGregor to drill test wells prior to her receipt of a water right permit, exceeds the scope of the Hearing Officer's authority in this matter. Therefore, with all due respect to the Hearing Officer, he cannot allow Dr. MacGregor to drill a test well unless and until her application for permit is approved, or Dr. MacGregor reaches an acceptable agreement with the Pancheris.

III. THE HEARING OFFICER LACKS THE AUTHORITY OR JURISDICTION TO CONTRAVENTE THE DEPARTMENT'S DECISION DENYING DR. MACGREGOR'S TEST WELL PROPOSAL

Due to the Hearing Officer's subordinate and limited role, he is not free to contravene prior decisions of the Department. The Hearing Officer's duties and authority are confined to those/that granted by Rule 413. For many of the same reasons discussed in Sections I and II, *supra*, the Hearing Officer lacks any legal footing to contravene the Department's prior denial of Dr. MacGregor's test well drilling proposal.

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 the Dr. MacGregor and the Pancheris noted that Department staff had voiced numerous concerns regarding Dr. 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 Dr. 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 two primary reasons. First, the Department's November 2003 decision to reject Dr. 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 to determine whether to approve or reject Dr. MacGregor's applications for permit.

Second, Dr. 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. Dr. 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 Dr. MacGregor in the manner contemplated by the Idaho Code.²

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 Dr. 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 Dr. MacGregor's application for

² Dr. 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).

permit is approved by the Department impermissibly exceeds the scope of the Hearing Officer's authority in this matter.

**IV.
THE HEARING OFFICER'S PROPOSAL IMPERMISSIBLY
PLACES THE RISK AND BURDEN ON THE PANCHERIS
RATHER THAN ON THE APPLICANT, DR. MacGREGOR**

A. Protection Of Existing Water Rights Is Paramount, and the Burdens are Placed on Those Applying For A Permit.

The most basic tenet of Idaho water law is that "first in time is first in right "

While that principle, found at Article XV, Section 3 of the Idaho Constitution and Idaho Code Section 42-106, is used to determine which water rights must be fulfilled first, it also codifies and gives constitutional protection to existing water rights. In fact, in 1908, the Idaho Supreme Court held that "[t]he state engineer has no authority to deprive a prior appropriator of water from any streams in this state, and give it to any other person. Vested rights cannot thus be taken away" *Lakewood v. Freeman*, 15 Idaho 395, 98 P 295, 296 (1908).

The guiding principle of protection of senior water rights is also found in the allocation of the burdens of going forward and persuasion when considering a water right permit application. In order for her water right permit applications to be granted, Dr. MacGregor must satisfy the various criteria set forth in Idaho Code Section 42-203A. Not only must she meet the criteria, but she also 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 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. IDAPA Sections 37.03.08 *et seq.* Pursuant to those rules, 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 37.03.08.040.04(a)

As this matter only concerns evaluation of criteria set forth in Idaho Code Section 42-203A(5), and not Idaho Code Section 42-203C (pertaining to hydropower rights), Dr. MacGregor bears the initial burden of coming forward with evidence for the evaluation of criteria (a) through (e) of said statutory section.³ See IDAPA Sections 37.03.08040.04(b)(i-iii). In other words, she bears the burden of coming forward with evidence to present a *prima facie* case that 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 interest⁴

³ Criteria (a) through (e) of Idaho Code Section 42-203A(5) are as follows:

- (a) Injury to Preexisting Water Rights;
- (b) Sufficiency of Water Supply;
- (c) Good Faith Application;
- (d) Necessary Financial Resources; and
- (e) Public Interest.

⁴ 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 the local public interest criterion (e), the protestant bears no other evidentiary burden during the application evaluation process. See IDAPA Sections 37.03.08040.04(b)(i-iii).

In addition to evidentiary burdens that Dr. MacGregor bears regarding this matter, she 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, she also bears the ultimate burden of persuasion for criterion (f) (Conservation of Water Resources) as well. Put another way, Dr. MacGregor bears the ultimate burden of persuasion that 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.

At this point in time, the Hearing Officer has not indicated whether he intends to approve Dr. MacGregor's applications for permit. However, the Hearing Officer is considering allowing Dr. MacGregor to drill a test well or wells, presumably in order to gather information regarding the availability of geothermal water and the potential for harm to the Pancheris. With all due respect to the Hearing Officer, that course of action would not only be contrary to the authorities given to the Hearing Officer, but would effectively shift the risk of harm from Dr. MacGregor as the applicant to the Pancheris.

If the Hearing Officer allows Dr. MacGregor to drill a test well or wells without first approving her application for permit, the only risks that Dr. MacGregor will face is the loss of the money it costs to drill the test well, and the potential forfeiture of the bond which she must be required to purchase before any drilling occurs. On the other hand, 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.

B. The Risk Of Harm To The Pancheris Is Substantial

The protections given to the Pancheris' existing water rights and the fact that the burdens are placed upon Dr. MacGregor as the applicant shows that extreme care must be taken to ensure that any processes that are allowed to occur, including drilling, will not adversely impact the Pancheris. In other words, the actions cannot reduce the quantity of water available to the Pancheris under their existing water rights.

However, allowing Dr. MacGregor to drill a test well or wells without first obtaining a permit removes the risk and burden from her and places it squarely upon the Pancheris. 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.

Exhibit A to Affidavit of Deborah L. Long, Day No. 3, Tape 12, page 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.

Exhibit A to Affidavit of Angela Schaer Kaufmann, Day No. 4, Tape 15, page 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). Thus, there are significant risks to the Pancheris by the drilling and pumping of a test well. The risks of an application for permit under Idaho law lie with the applicant, not the protestants, and the Hearing Officer should not shift those risks by allowing Dr. MacGregor to drill and pump test wells unless and until her application for permit is approved, or until she reaches a satisfactory agreement with the Pancheris.

Dr. MacGregor may cite the report and testimony of Jill Haizlip in support of an argument that the drilling and pumping of a test well will not harm the Pancheris. However, Ms. Haizlip had not visited the MacGregor/Pancheri property until April 20, 2005, the day before the hearing in this matter commenced. Moreover, she demonstrated no particularly familiarity with the hydrogeology and the geothermal resources of Idaho, and of the Cascade Valley. In addition, many of the statements she made in the "Geologica Report" (Applicant's Ex. 33) were erroneous, as established at the hearing in this matter during cross-examination.

In contrast, Mr. Chapman testified extensively regarding his familiarity with the hydrogeologic system in the Cascade Valley and in the area of Belvidere Hot Springs in particular, including drilling for geothermal resources. Thus, Mr. Chapman's testimony regarding the risk of harm to the Pancheris should carry more weight than that of Ms. Haizlip. While Ms. Haizlip may have extensive generalized knowledge regarding geothermal systems, she lacks the particularized knowledge which is critical to matters such as these.

V. CONCLUSION

When discussing with the parties the possibility of allowing Dr. MacGregor to drill a test well or wells, the Hearing Officer mentioned what he perceived to be a "chicken and egg" problem regarding the timing of the drilling of test wells relative to the approval of permits. It may be that requiring water right permit applicants to prove that sufficient water is available

and that their proposed diversion will not reduce the quantity of water under existing rights before being allowed to drill test wells does present a timing issue. However, it is important to remember that it is the Idaho Legislature, as the policy and law making body of this State, which enacted the laws requiring that a permit application be approved before construction of diversion systems (including wells) can occur. Similarly, the Department duly promulgated regulations requiring permit approval before a well drilling permit can issue. With all due respect to the Hearing Officer, he does not have the authority to order or allow the drilling of test wells unless and until he finds that Dr. MacGregor has met her burdens of going forward and of persuasion, and approves her applications for permit.

Therefore, for the reasons set forth herein, the Pancheris respectfully request that the Hearing Officer refrain from allowing Dr. MacGregor to drill test wells at this time, and instead move to consideration of whether Dr. MacGregor has met her burdens and satisfied the Idaho Code Section 42-203A criteria.

DATED this 16th day of May, 2005.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell – Of the Firm

By Angela Schaer Kaufmann
Angela Schaer Kaufmann – 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

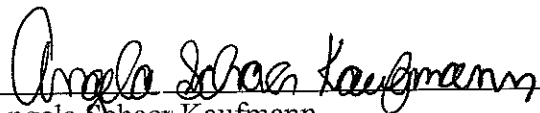
I HEREBY CERTIFY that on this 10th day of May, 2005, I caused a true and correct copy of the foregoing **PROTESTANTIS' BRIEF REGARDING TEST WELLS** to be served by the method indicated below, and addressed to the following:

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WHITE PETERSON, P.A.
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(☒) U S Mail, Postage Prepaid
() Hand Delivered
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() Hand Delivered
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Angela Schaer Kaufmann

Faxed may 15, 05
VW

Attorneys for Petitioner, Carol Lynn MacGregor

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
MACGREGOR

POST HEARING MEMORANDUM

INTRODUCTION

At the close of evidence in the hearing on Applications 65-19312, 65-13913, and 65-13986 (collectively “Applications”), the Hearing Officer invited briefing on the issue of whether the Director had the authority to issue an interlocutory order requiring test well drilling on the MacGregor property in order to further ascertain the extent of the geothermal aquifer available for development under Application 65-13913.

As demonstrated below, the Hearing Officer has the authority to issue a recommended order, and the Director has the authority to order test well drilling on the MacGregor property so that the best information available may be obtained regarding the

extent of the geothermal aquifer. Such information will assist the Department in considering the Applications and ensure that approval of the same will not impact senior water rights being diverted from a nearby geothermal spring ("Belvidere Hot Springs").

CASE SUMMARY

On August 2, 1999, nearly six years ago, Dr. MacGregor applied for two permits to divert geothermal water from her property in Valley County, Idaho—specifically, Application 65-13912 and 65-13913. In October 2000, Dr. MacGregor filed a third Application, No. 65-13986, which sought to divert cold water for irrigation, also in Valley County. The Pancheris protested all three Applications,¹ and after years of unsuccessful negotiations to resolve the protests, the matter went to hearing in April and May of 2005.

Although Dr. MacGregor presented evidence at hearing that the geothermal aquifer she seeks to develop is significant, the fact remains this resource (like many geothermal systems) is largely unexplored. Knowing that to be the case, and also in an attempt to address the Pancheris' protests before hearing, Dr. MacGregor sought permission from the Department in 2003 to drill test wells on her property. Dr. MacGregor's request to drill test wells was not unprecedented as the Department has clear authority to authorize test well drilling in contested cases, and has done so in the past.²

¹ It must be noted that the "Protests" filed by the Pancheris do not satisfy the requirements of IDAPA 37.01.01.250 as they do not set forth any particularities with regard to the protests.

² In 2001, IDWR exercised its authority pursuant to 42-1805(3) and authorized test-well drilling in a contested case pursuant to a proposal submitted by West Rock, LLC (Case No. 65-22357). In a letter to the applicant's counsel dated May 29, 2001, the Department acknowledged that test well drilling was appropriate because "the applicant carries the burden of proving that the proposed use of water will not injure other water rights and that the water supply is sufficient for the purpose sought." *See also* Department file 65-22650 in the name of Dave and Gloria Ringel wherein test drilling also was allowed in a contested case.

Again, however, the Pancheris objected to Dr. MacGregor's request to drill test wells predicting that the act of drilling alone would impact Belvidere Hot Springs. As a result, between January and November 2003 the parties and the Department negotiated drilling test wells on the MacGregor property.³ Unfortunately for Dr. MacGregor, those communications ended in November 2003 when the Department denied Dr. MacGregor's proposal for a drilling permit. In a letter dated November 12, 2003 from John Westra to Josephine Beeman and Scott Campbell Mr. Westra 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 protestant.

See Applicant's Exhibit 42. The Department's decision left Dr. MacGregor in a difficult spot. She either had to make a deal with the Pancheris (something she had been unable to do in the past) or go to hearing for approval of Application 65-13913 -- but without the benefit of test drilling data to assist in establishing the amount and sufficiency of the resource she sought to develop.⁴

³ The IDWR Staff Memo, Exhibit 200 in this matter, provides a history of the correspondence regarding Dr. MacGregor's request to drill test wells on her property. Because the letters, emails and proposals referenced in Exhibit 200 exist in file 65-13913, the full history of negotiations for test well drilling will not be repeated in this Memorandum.

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.

Accordingly, and because she had no other options, Dr. MacGregor requested a hearing to bring this matter to a conclusion.⁵

ARGUMENTS AND AUTHORITY

In order to prove her *prima facie* case under the Applications, Dr. MacGregor is required to, *inter alia*, submit a project design “definite enough to reflect its impacts and implications to the local public interest. *Shokal v Dunn*, 109 Idaho, 330, 330, 707 P 2d 441, 450 (1985). These 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.” *Id* at 340, 707 P 2d at 451. Dr. MacGregor believes the Hearing Officer’s proposal to issue an interlocutory order requiring test well drilling on the property containing Belvidere Hot Springs is not only proper, but is the a reasonable course of action given the testimony elucidated during the four-day hearing on her water right applications.⁶

The following analysis sets forth the Director’s authority, based on the Idaho Constitution, Idaho Code as well as Idaho Department of Water Resources Rules (“Rules”) to issue an interlocutory order to allow test well drilling. The analysis continues with an examination of the function of administrative hearings of the type held on Dr. MacGregor’s applications and how that function supports the issuance of an interlocutory order to permit test well drilling.

⁵ Between November 2003 when Dr. MacGregor’s request to drill test wells was denied, and November 2004 when Dr. MacGregor requested a hearing in this matter, she negotiated the installation of totalizing flow meters to monitor the water utilized by the Pancheris under their existing water rights.

⁶ Dr. MacGregor maintains, under the facts and circumstances of this matter, the plans submitted during the contested case hearing, Applicant’s Exhibit 19, and supporting testimony, sufficiently satisfied her burden under *Shokal*. However, Dr. MacGregor also recognizes test drilling could provide additional and important data which may affect the manner in which she develops her project. Accordingly, she agrees with an approach that allows for test drilling.

A. THE DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES HAS THE AUTHORITY TO ISSUE AN ORDER ALLOWING TEST WELL DRILLING ON THE MACGREGOR PROPERTY AT ANY PHASE OF THE PROCEEDINGS

1. Origin of Authority

It is well settled—an administrative agency such as the Idaho Department of Water Resources has only such powers as granted it by statutes and ordinances. *Beker Indus. Inc. v. Georgetown Irr. Dist.*, 101 Idaho 187, 191, 610 P.2d 546, 550 (1980). The powers of the Department are set forth in Idaho Const. Art. XV, title 42, Idaho Code, and the administrative rules adopted pursuant thereto. Accordingly, the question of whether the Director has the authority to issue the proposed interlocutory order to allow test well drilling on the MacGregor property, must be answered by reviewing the statutes and ordinances. As that question is considered, however, the Department must not lose sight of the fact that Dr. MacGregor is seeking to appropriate “private waters,” and, thus, her ownership, and the potential for the use, of these waters cannot be taken from her without her consent without compensation and in the manner as provided by law. *See Public Utilities Comm’n v. Natatorium Co.*, 36 Idaho 287, 211 P. 533 (1922).

2. Scope of Hearing Officer’s Authority in Contested Case Proceedings

Idaho Code § 42-201 through –250 govern the application for, and issuance of, a permit, certificate, or license to divert water. Specifically applicable to the issue at hand is Idaho Code § 42-203A(5) which requires hearings on applications such as Dr. MacGregor’s to be held in accordance with the provisions of Section 42-1701A (1) and (2). Section 1701A, in turn, requires hearings to be conducted pursuant to the Idaho Administrative Procedure Act, chapter 52, title 67, Idaho Code (“APA”).

At the commencement of the contested case hearing on Dr. MacGregor's Applications, the Hearing officer indicated he would issue a "recommended order" for the Director's consideration. A "recommended order" is one which does not become final until the agency head, in this case the Director, reviews and acts on it.

Under the Idaho APA, the Hearing Officer, as a presiding officer, has the authority to **"regulate the course of the proceedings to assure that there is a full disclosure of all relevant facts and issues."** Idaho Code § 67-5242(3)(a) (emphasis added). Further, the Hearing Officer is statutorily obligated to "afford all parties the opportunity to respond and present evidence and argument on all issues involved" in the matter. Idaho Code § 67-5242(3)(b). Thus, under the plain language of the Idaho APA, the Hearing Officer has the inherent authority to issue the proposed interlocutory order. An interlocutory order allowing test well drilling on Dr. MacGregor's property to assist in the development of her *prima facie* case for the Applications will, no doubt, afford her the opportunity to "present evidence ... on all issues involved" in the contested case hearing.

In addition, the Rules of Procedure of the Idaho Department of Water Resources, IDAPA 37.01.01 ("Rules of Procedure") grant the Hearing Officer (or presiding officer) the authority to use informal procedures, as appropriate. Rule of Procedure 413.01(a). Further, the Hearing Officer is vested with the general authority to oversee the orderly presentation of the case, and to issue recommendations or preliminary orders following submission of the evidence. IDAPA 413.01(c) – (d).

Accordingly, under the statutes and rules governing contested case hearings before the Department, the Hearing Officer not only has the authority to recommend an

interlocutory order allowing test well drilling on the MacGregor property, but likely has a duty to do so under the facts and circumstances of the matter at hand

3. Scope of Authority of the Director of the Idaho Department of Water Resources

In addition to the Hearing Officer's ability and authority to issue a recommended order requiring test well drilling on the MacGregor property, the Director has the authority to issue such an interlocutory order. For example, pursuant to Idaho Code 42-1085(3), the Director has the power and duty: "To conduct surveys, tests, investigations, research, examinations, studies, and estimates of cost relating to the availability of unappropriated water, effective use of existing supply, conservation, storage, distribution and use of water." Idaho Code § 42-231 states, in relevant part: "In addition to other duties prescribed by law, it shall be the duty of the director of the department of water resources to conduct investigations, surveys, and studies relative to the extent, nature and location of the ground water resources of this state; and to that end, the director of the department of water resources may, on behalf of the state of Idaho enter into cooperative investigations, researches, and studies with any . . . individuals."

As shown in Applicant's Exhibit 43, which contains the "Examination and Evaluation of Geothermal Sites in the State of Idaho with Emphasis Given to Potential for Electrical Generation or Direct Use," dated September 2002, the Department itself recognized: "The Cascade, Idaho area overlies a low temperature geothermal resource of unknown size." Applicant's Exhibit 43, p. 26. To date, however, the Department has refused to allow Dr. MacGregor to conduct test well drilling; an effort that would, no doubt, assist the Department in determining the extent of the geothermal resource.

Further, the Department's Rules of Procedure contain various provisions that, either expressly or impliedly grant the Director the authority to issue an interlocutory order allowing test well drilling and pumping in this matter.

For instance, Rule of Procedure 710 states:

Interlocutory orders are orders that do not decide all previously undecided issues presented in a proceeding, except the agency may by order decide some of the issues presented in the proceeding and provide in that order that its decision on these issues is final and subject to review by reconsideration or appeal, but it is not final on other issues.

Accordingly, it is clear that the Director has express authority to issue just the type of order as is contemplated by the Hearing Officer in this case.

4. The Purpose of the Contested Case Hearing Process Supports the Issuance of an Interlocutory Order Allowing Test Well Drilling

A contested case hearing is a more formal mechanism to resolve a protest to an application for a water right than the informal mechanisms for alternative dispute resolution recognized in Rule of Procedure 500. A contested case, however, is much less formal than a proceeding in district court and the goals of a contested case hearing are distinctly different. For example, Rule of Procedure 600 states, *inter alia*:

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.

As expressed in Rule of Procedure 600, the goal of a contested case is to enable the parties to develop the evidence necessary for the Director to make the most informed decision possible on Dr. MacGregor's Applications. It cannot seriously be argued that the parties, the Hearing Officer and, ultimately, the Director, would not be served in this matter by the further development of evidence regarding the extent of the geothermal

aquifer underlying Dr. MacGregor's. Thus, an interlocutory order requiring test well drilling and pumping, if issued, will be consistent with the underlying purposes of the contested case hearing process

B. THE ACT OF DRILLING POSES NO THREAT TO THE SPRING OR EXISTING WATER RIGHTS DEVELOPED THEREFROM

It is important to note that at the hearing in this matter, the fears and concerns raised by the Pancheris regarding test wells, and which the Department accepted, were diffused. That is, there is a very clear record in this matter that drilling alone – even if near the Belvidere Hot Springs, does not pose a threat to the natural resource or existing water rights.

For example, in 2003 when the Department was considering Dr. MacGregor's request to drill test wells, the Pancheris' agent, Mr. Chapman, submitted a letter to the Department outlining his concerns with test-drilling. In that letter, dated May 20, 2003, Mr. Chapman referred to geothermal systems as being "sensitive," and stated that test drilling could result in fractures being filled with cement, mud, bentonite or other materials thereby "permanently altering the vent complex." Applicant's Exhibit 24. The Department took note of Mr. Chapman's "concerns" as evidenced Mr. Spackman's June 5, 2003 letter to Mr. Campbell and Ms. Beeman (Exhibit 200), which states:

IDWR staff has already voiced some of the same concerns expressed by Mr. Chapman in his letter. Drilling very near or in the 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.

However, as stated above, the evidence at the hearing overwhelmingly proved these concerns to be unfounded. First, Dr. MacGregor's experts, Jill Haizlip and Terry Scanlan both testified drilling materials would not "fill" the natural fractures of the geothermal system, nor would drilling near Belvidere Hot Springs permanently alter the vent complex. Rather, any adverse impact from drilling materials would only exist at the borehole itself. Mr. Chapman conceded on cross examination that he knew of no instance where drilling materials had actually damaged a spring system or vent complex and instead agreed with Mr. Scanlan and Ms. Haizlip that any "collapse" or "filling" would relate only to *the bore hole itself*. Damage to the actual fault zone from drilling materials is not a realistic possibility in this geothermal system and that evidence was sound and uncontested.

Further, Mr. Chapman also conceded he knew of no instance where the act of drilling irreversibly impacted a geothermal surface manifestation. Instead, the testimony given by Mr. Chapman largely focused on spring impacts due to over production or withdrawal of geothermal water – precisely the type of impact that test-drilling and pumping are designed to address. Again, this testimony was consistent with that offered by Dr. MacGregor's experts who opined that because of the nature and make up of this particular system, drilling near the spring did not pose risk of irreversible injury.

Finally, even though the "drilling" concerns raised by the Pancheris' were shown to be groundless, perhaps the best evidence that drilling near the Belvidere Hot Springs can occur without "injury" was provided by the Pancheris themselves. Specifically, evidence was presented at hearing that in 1991, Darwin and Joan Pancheri drilled a well within approximately 100 feet of Belvidere Hot Springs, looking for hot water. *See*

Applicant's Exhibit 13 (narrative remarks contained in the beneficial use report for Pancheri's water right no. 65-13458 state, "the owner drilled the well in June 1991 near a developed hot springs with the intent to have a hot well for heating purposes"). In drilling their well, the Pancheris took no special precautions to protect the same spring they later claimed would be irreversibly damaged simply by allowing Dr. MacGregor to drill test wells.⁷

In sum, the Department now has had the benefit of hearing evidence from all the experts in this case regarding the possibility of drilling impacts. With that, the Department can proceed and allow drilling on Dr. MacGregor's property with knowledge that test wells can be drilled without impact to the existing spring or water rights.

C. RIGHT NOS. 65-13912 and 65-13986 SHOULD BE APPROVED PENDING TEST WELL DRILLING

As noted above, even in the face of an interlocutory order requiring test well drilling and pumping, the Hearing Officer has the ability to propose, and the Director the authority to adopt, a proposed order settling some aspects of the Applications and leaving other's open. Dr. MacGregor urges the Hearing Officer to approve Applications 65-13912 and 65-13986 and order test well drilling for Application 65-13913 only.

Dr. MacGregor has applied to the Department for the approval of three distinct, yet somewhat interrelated water rights. Application 65-13896 requests 2.0 cfs for irrigation of the lands Dr. MacGregor owns. As testified to during the hearing on this matter, the land is, at present, dry and is utilized for cattle grazing. The drilling and utilization of a cold water well for irrigation purposes does not, in any way, hinge on Dr. MacGregor's proposed development of a spa (using geothermal water) on her property

⁷ Notably, Dr. MacGregor's test well proposal from September 2003 does not contemplate drilling as close to Belvidere Hot Springs as did Pancheris in 1991

In fact, Mr. Scanlan testified that Application 65-13986 was independent of the Applications to divert geothermal water. Dr. MacGregor satisfied her burden of putting forth a *prima facie* case with regard to this Application; thus, Application 65-13896 should be approved at this juncture.⁸

With regard to Application 65-13912, Dr. MacGregor contends the evidence produced at the hearing on the Applications is sufficient for approval. The totalizing flow meters and other monitoring data indicate there is an excess of naturally occurring geothermal spring water not currently subject to appropriation; Mr. Scanlan testified the excess was approximately 160 acre feet per year, which figures were agreed upon by Pancheri's 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, and as a result, there is no reason to delay approval Application 65-13912. If, however, the "catch-22" referenced by the Hearing Officer applies to Application 65-13912, an interlocutory order requiring test well drilling and pumping should provide information necessary for the further development of the record for this Application as well as that for Application 65-13913.

⁸ Although 65-13896 proposes to utilize spent geothermal water from Dr. MacGregor's development as an additional source of water to fulfill the 20 cfs requested in the Application, this proposal was made to ensure the spent geothermal water from Applications 65-13912 and 65-13913 was put to its best and highest use. Such spent geothermal water, however, is not essential to the Application for a cold water well for irrigation purposes.

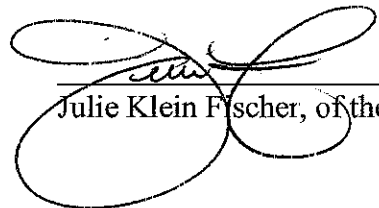
CONCLUSION

As discussed above, the Hearing Officer and Department are vested with the authority to process contested cases. The tools provided to them to do so are not rigid, but instead offer certain flexibility so that it is possible to balance the interests of those entitled to appropriate water, with the protection of existing rights. There is clear authority in this case for the Department to order test drilling on the MacGregor Property, and it is logical to do so.

Accordingly, Dr. MacGregor requests that the Department issue and order allowing her to drill test wells under Application No. 65-13913. The Department can be assured that if such an order is issued, Dr. MacGregor will work with the Department and her own consultants to develop a drilling, testing and monitoring plan that is acceptable to and can be approved by the Department.

Respectfully submitted this 16 day of May, 2005.

WHITE PETERSON, P.A.



Julie Klein Fischer, of the Firm

CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of May, 2005, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

X

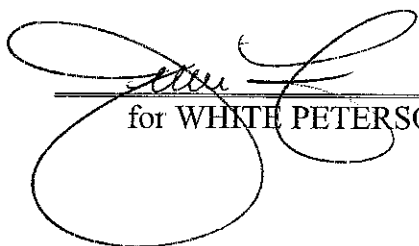
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Peter R Anderson
Idaho Department of Water Resources
322 E. Front Street
Boise, ID 83720


for WHITE PETERSON

W:\Work\M\MacGregor, Carol\Pleadings\Post hrg memo JRK.doc

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

FACSIMILE TRANSMISSION

Date: May 9, 2005
To: Ms. Victoria Wigle
Idaho Department of Water Resources
Fax No.: 208-287-6700
From: Ruth Hyde, Legal Assistant to
Julie Klein Fischer and John R. Kormanik
Phone: 208-466-9272
No. of Pages: 2 (including coversheet)
RE: Carol Lynn MacGregor, Permit Application Nos. 65-13912 and 65-13913
COMMENTS: Attached:

1. Letter dated May 9, 2005.

Please call if you have any questions.

This facsimile transmission (and/or the documents accompanying it) may contain confidential information belonging to the sender which is protected by the ATTORNEY-CLIENT PRIVILEGE. This information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this information is strictly prohibited. If you have received this transmission in error, please immediately notify us by telephone to arrange for return of the documents.

If you do not receive all pages, please call Ruth as soon as possible at (208) 466-9272

The original of this faxed document will not be sent unless requested by the recipient.

WHITE PETERSON

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

May 9, 2005

Via Facsimile 208-287-6700

Ms. Victoria Wigel
Idaho Department of Water Resources
322 E. Front Street
Boise, ID 83720

Re: Permit Application Nos. 65-13912 and 65-13913

Dear Ms. Wigel:

As per your instructions, this is a formal written request for audio copies of the MacGregor Hearing, Permit Application Nos. 65-13912 and 65-13913, that took place on April 21-22, and May 5-6, 2005. Please let us know an estimated cost before duplication begins. If you should have any questions, please give us a call. Thank you.

Sincerely,

WHITE PETERSON, P.A.



Ruth Hyde, Legal Assistant to
Julie Klein Fischer and John R. Kormanik

cc: Client

- ROSTER OF ATTENDANCE -

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

IDWR HEARING

May 5 - 6, 2005

NAME	ADDRESS	REPRESENTING
Angela Schen Kaufman	Moffatt Thomas PO Box 82, Boise 83713	Pancheri
Laura Pancheri	Duane Pancheri	
Terry Scanlan	600 E. River Park Ln #105 Boise 06	MacGregor
Carol MacGregor	60 Raspberry Rd. Cascade, ID 83611	self
Julie Gosche		DR. MIKE CONEY
JOHN R. ROSSMAN	5700 E. FRANKLIN RD, NAVA ID	DR. MACGREGOR
Darwin Pancheri	9325 Missouri Ave Nampa, ID 83686	
Joan Pancheri	"	
Sheri Chapman	Cascade ID	Pancheri
Scott Campbell	Moffatt Thomas P.O. Box 829 Boise ID 83701	"
Terry Scanlan	600 E. River Park Ln Boise 06	MacGregor

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MAY 03 2005
DEPARTMENT OF
WATER RESOURCES

Julie K. Fischer
Idaho State Bar No. 4601
John R. Kormanik
Idaho State Bar No. 5850
WHITE PETERSON, P.A.
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687
Telephone: (208) 466-9272
Facsimile: (208) 466-4405
jkf@whitepeterson.com

Attorneys for Petitioner, Carol Lynn MacGregor

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	)	APPLICANT'S SUPPLEMENTAL
MACGREGOR	)	DISCLOSURE
	)	

COMES NOW, the Applicant, Carol Lynn MacGregor ("MacGregor"), by and through her attorneys WHITE PETERSON, P.A., makes the following disclosure.

DOCUMENTS AND EXHIBITS

Attached hereto as Exhibit Number 46, correspondence from Morgan Stanley dated Thursday, April 28, 2005, that may be introduced into evidence at the May 5-6, 2005, hearing.

DATED this 3rd day of May, 2005.

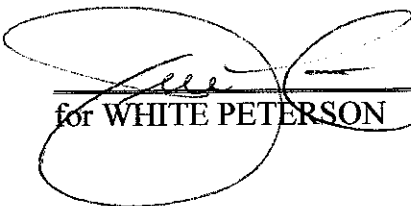
WHITE PETERSON, P.A.


Julie Klein Fischer, of the Firm

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2005, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

☐	US Mail	Scott L. Campbell
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☐	Hand Delivery	101 S. Capitol Blvd. 10 th Floor
☒	Facsimile No. 385-5384	Boise, Idaho 83701
☐	US Mail	Peter Anderson
☐	Overnight Mail	c/o Victoria Wigel
☒	Hand Delivery	Department of Water Resources
☒	Facsimile No. 395-0222	322 E. Front Sreet
		Boise, ID 83720


for WHITE PETERSON

W:\Work\M\MacGregor, Carol\Pleadings\Disclosure4.doc

Melinda Sander, CFP®
Senior Vice President
Financial Advisor
Retirement Planning Specialist

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P.O. Box 3
Boise, ID 83707

toll-free 800 733 5231
tel 208 338 6900
direct 208 338 6973
fax 208 338 6933

Morgan Stanley

Thursday, April 28, 2005

Julie Cline Fischer

FAX# 466-4405

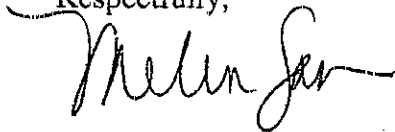
Re: *Statement of Financial Ability*

Dear Julie:

This letter is to validate the my client Carol Lyn MacGregor, PhD does have the ability to readily access her own funds here at Morgan Stanley of over \$3,000,000.00 of liquid investments to draw out or use for any purpose she sees fit.

Should you have any questions please don't hesitate to call my Associate Veronica Mira or me at the phone number listed above.

Respectfully,



Melinda Sander, CFP®certificant
Senior Vice President,
Financial Advisor

Investments and services are offered through Morgan Stanley DW Inc., member SIPC.

Morgan Stanley

Melinda Sander, CFP®
Senior Vice President
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Thursday, April 28, 2005

Julie Cline Fischer

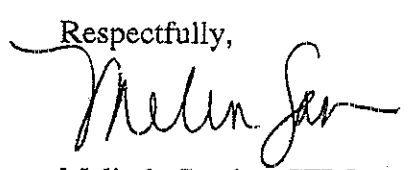
FAX# 466-4405

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Should you have any questions please don't hesitate to call my Associate Veronica Mira or me at the phone number listed above

Respectfully,


Melinda Sander, CFP®certificant
Senior Vice President,
Financial Advisor

Investments and services are offered through Morgan Stanley DW Inc., member SIPC

- ROSTER OF ATTENDANCE -

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

IDWR HEARING

APRIL 21 - 22, 2005

NAME	ADDRESS	REPRESENTING
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Joan Pancheri	"	
Duane Pancheri	19010 SW Can. Rd. Melb	
Laura Pancheri		
Shel Chapman	4441 Hilltop rd Cascade	Jel-Pancheri
Angela Schaar Kaufmann	P.O. Box 829, Boise Moffatt Thomas	Pancheris
Carol MacGregor	60 Raspberry Pl Cascade	MacGregor
Julie Klein Fischer	5700 E Franklin Nampa, Idaho 83687	Carol MacGregor
John R. Hornum III	5700 E Franklin Nampa, Idaho 83687	DR MacGregor
Jill Robinson Harzlip	594 Howard St Suite 400 San Francisco, CA 94103	Carol MacGregor
Terry Scanlan	600 E. River Park Lane #105 Boise, ID 83706	" "

Heating Exhibits housed
seperately (See Boxes)

Moffatt Thomas

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Kirk R. Helvic, 1956-2003

April 20, 2005

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Director
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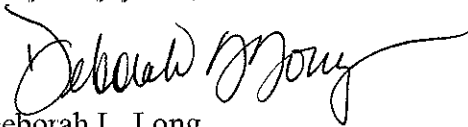
**Re: In the Matter of Application for Permit Nos. 65-13912, 65-13913, and 65-13986 in
the Name of Carol Lynn MacGregor**
MTBR&F File No. 19136.0

Dear Clerk:

I am enclosing two documents which were filed by facsimile on Wednesday, April 20, 2005.
Please conform these copies and return them in the envelope provided.

Thank you for your attention. Please call me if you have any questions.

Very truly yours,


Deborah L. Long
Administrative Assistant to
Angela Schaer Kaufmann

/dl
Enclosures

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APR 21 2005

DEPARTMENT OF
WATER RESOURCES

Attorneys for Duane and Laura Pancheri
and Darwin and Joan Pancheri

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Angela Schaer Kaufmann, ISB No. 5436
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Facsimile (208) 385-5384
19136.0

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
MACGREGOR

AFFIDAVIT OF ANGELA SCHAEER
KAUFMANN IN REPLY TO OPPOSITION OF
PROTESTANTS' MOTION IN LIMINE RE
EXHIBITS, OR, ALTERNATIVELY, MOTION
TO CONTINUE HEARING

State of Idaho)
) ss
County of Ada)

ANGELA SCHAEER KAUFMANN, being first duly sworn upon oath, deposes

and says:

1. I am one of the attorneys of record providing legal representation to Duane
and Laura Pancheri and Darwin and Joan Pancheri (collectively, the "Pancheris") in the

AFFIDAVIT OF ANGELA SCHAEER KAUFMANN IN REPLY TO
OPPOSITION OF PROTESTANTS' MOTION IN LIMINE RE EXHIBITS,
OR, ALTERNATIVELY, MOTION TO CONTINUE HEARING - 1

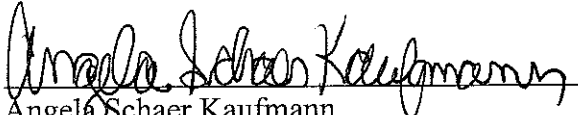
BOI_MT2:578831 2

above-captioned matter. I have knowledge of the files pertinent to this matter, and I make this affidavit based upon personal knowledge.

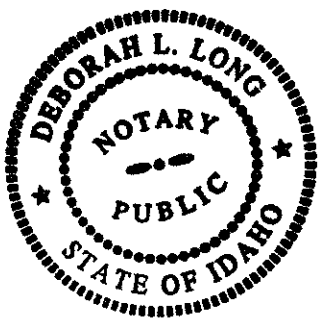
2. I practice law at the firm of Moffatt, Thomas, Barrett, Rock & Fields, Chtd. It is this firm's practice that when documents are received via hand-delivery, they are date stamped and marked with time received. The date stamp for Applicant's proposed Exhibits 19 and 21 shows that they were received at the front desk of Moffatt Thomas on Tuesday April 19, 2005 at 2:42 p.m.

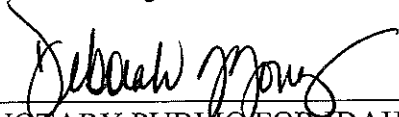
3. I have yet to receive Applicant's proposed Exhibits 34 and 42, which Applicant labels as "Illustrative Exhibits" in the exhibit binder produced to me on April 8, 2005

DATED this 20th day of April, 2005.


Angela Schaer Kaufmann

SUBSCRIBED AND SWORN to before me this 20th day of April, 2005.




NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires 10/10/07

CERTIFICATE OF SERVICE

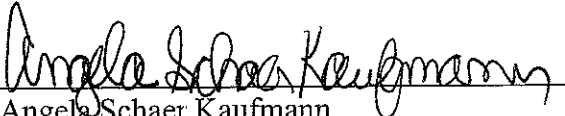
I HEREBY CERTIFY that on this 20th day of April, 2005, I caused a true and correct copy of the foregoing **AFFIDAVIT OF ANGELA SCHAER KAUFMANN IN REPLY TO OPPOSITION OF PROTESTANTS' MOTION IN LIMINE RE EXHIBITS, OR, ALTERNATIVELY, MOTION TO CONTINUE HEARING** to be served by the method indicated below, 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
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Angela Schaer Kaufmann

RECEIVED

APR 21 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
Andrew J. Waldera, ISB No. 6608
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARIERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
19136 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' REPLY TO APPLICANT'S
OPPOSITION TO PROTESTANTS' MOTION
IN LIMINE REGARDING EXHIBITS, OR,
ALTERNATIVELY, MOTION TO CONTINUE
HEARING

I.
INTRODUCTION

On April 18, Protestants (the Pancheris) submitted a Motion in Limine Regarding Exhibits, Or, Alternatively, Motion to Continue Hearing in this matter on the basis that the Applicant (MacGregor) had violated the Hearing Officer's January 7, 2005 Scheduling Order mandating that exhibit lists, witness lists, and pre-marked exhibits be exchanged by the parties on or before April 8, 2005. Applicant responded to, and opposed, said motion on April 19, 2005

PROTESTANTS' REPLY TO APPLICANT'S OPPOSITION TO
PROTESTANTS' MOTION IN LIMINE REGARDING EXHIBITS,
OR, ALTERNATIVELY, MOTION TO CONTINUE HEARING - 1

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for various reasons. The Pancheris now submit this reply to Applicant's opposition for the simple fact that Applicant readily acknowledges her tardiness in exchanging certain exhibits in violation of the Scheduling Order, though she attempts to diminish the prejudicial effects of that tardiness. It is for the Protestants to decide how to frame rebuttal, if necessary, and Applicant's tardy exchange of certain exhibits has prejudiced the Protestants. Further, regarding those exhibits identified by applicant as being "illustrative" only, those exhibits may be permissible, but only for the very limited purpose of illustration of testimony, and nothing more.

II. ARGUMENT

A. Exhibit 21

Applicant readily admits that her Exhibit 21 ("Financial Assurance Document") was not provided to the Protestants until April 19, 2005. More precisely, said exhibit was produced to the Protestants 11 days after the deadline mandated by the Hearing Officer's January 7, 2005 Scheduling Order, as it was received at 2:42 p.m. See Affidavit of Angela Schaer Kaufmann ("Kaufmann Aff.") at ¶ 2. Applicant offers no explanation for her tardy production. Instead, Applicant attempts to minimize any prejudicial effect of her tardy production by stating that "the letter simply states that the Applicant is financially able to proceed with her proposed project. The letter does not require lengthy review or time to prepare cross-examination." See Opposition to Protestants' Motion in Limine Re Exhibits, Or, Alternatively, Motion to Continue Hearing ("Opposition") at 3. Applicant further states, "There is no basis on which to challenge the Applicant's financial ability to proceed with her project, so the Protestants need no 'develop a strategy for responding' to this exhibit." *Id.*

With all do respect to Applicant's opinions regarding the import, or seeming lack thereof, of this exhibit, it is the Protestants' right to rebut any and all evidence introduced by Applicant in this matter, and it is for the Protestants to decide what strategy, if any, to develop in rebuttal. There is no dispute that proof of financial assurance is one of the criteria considered during application evaluation pursuant to Idaho Code Section 42-203A and the Department's corresponding Water Appropriation Rules. Should an applicant fail to produce sufficient financial assurance evidence, such failure, in and of itself, and independent of consideration of the other evaluation criteria, is sufficient grounds for application denial. Thus, Applicant's financial assurance documentation is an essential element of her application, upon which she bears significant and specific burdens of proof (both evidentiary and persuasion). As such, Applicant's downplaying of Exhibit 21's importance is misguided at best.

Because Applicant's Exhibit 21 has disclosed that she has financial capabilities in the neighborhood of \$700,000, Protestant's have been left scrambling, at the eleventh hour, to develop rebuttal testimony as to the potential construction costs of her substantial Lodge and Spa complex. Protestants have been unable to verify that applicant's plans will require roughly only \$700,000 to complete. It is entirely possible that Applicant's project would, in fact, cost more than \$700,000 to complete. However, efforts to develop such rebuttal testimony have been, and continue to be, hampered due to Applicant's tardy disclosure of this exhibit. While Applicant may downplay any potential prejudice suffered by the Protestants due to her tardy disclosures, the Protestants beg to differ.

Therefore, the Protestants continue to request that this hearing be vacated, or that Applicant be barred from using Exhibit 21 at the hearing in this matter.

B. Exhibit 19

Applicant's proposed Exhibit 19 is a drawing, apparently of Applicant's proposed project. Applicant tries to diminish the prejudicial effect of her late disclosure of this document by arguing that "[i]t is unlikely the Protestants will be required to 'develop a strategy for responding' to this exhibit; the exhibit is nothing more than a picture." Opposition to Protestants' Motion in Limine, p. 3. Again, it is the Protestants' right to determine whether and how to respond to each and every proposed exhibit, and they have been prejudiced in their ability to do so by the Applicant's tardy disclosure.

Therefore, the Protestants continue to request that this hearing be vacated, or that Applicant be barred from using Exhibit 19 at the hearing in this matter.

C. Exhibits 34 and 42

Protestants do not dispute the admissibility of "illustrative" exhibits as a general proposition. However, exhibits admitted for illustrative purposes may only serve that narrow and specific purpose, and cannot be admitted as substantive evidence.

Photographs, maps, and other drawings, are recognized as proper evidence to supplement the testimony of witnesses where the subject matter of the testimony is difficult to portray without such aids. *McKee v Chase*, 73 Idaho 491, 501 (1953). Put another way:

a witness may be unable, by means of words or gestures alone, to convey to the jury an accurate understanding or picture of the relative position of the physical objects or their physical characteristics, without the assistance of photographs or drawings. So, he may make a drawing or a photograph, or identify and adopt such drawing or photograph, made by another, as means of portraying to the jury facts which are within his knowledge, and which he is not as well able to portray without such help.

Id. at 501-02. However, such illustrative photographs, maps, or other drawings made either prior to, or contemporaneous with a witness's testimony, may only give facts within the personal knowledge of the witness, and may not note the witness's ultimate conclusions from such facts *Id.* at 502. In other words, exhibits offered merely for illustrative purposes may only be used by a witness to relate his testimony to the court; such an exhibit may not be used for substantive purposes, or to portray to the court facts not within the personal knowledge of the witness. *Hook v. Horner*, 95 Idaho 657, 660 (1973); *see also Dawson v. Olson*, 97 Idaho 274, 280 (1975) (it was error for the trial court to refuse to admit a simplified map used for illustrative purposes, however, if the map was also offered as substantive evidence, *e.g.*, to prove facts and details shown therein, then the map would be admissible only if the requirements of the hearsay rule were met).

To the extent that Applicant has identified Exhibits 34 and 42 as "illustrative" exhibits only (see Opposition at 3-4), then the purposes and evidentiary value of said exhibits must be limited accordingly. Furthermore, while Protestants concede that illustrative exhibits may be created contemporaneously during the testimony of a witness, to the extent that Applicant's illustrative exhibits have been pre-prepared, those exhibits should have been produced to the Protestants by the Scheduling Order's April 8, 2005 deadline for the Protestants' prehearing review

III. CONCLUSION

Applicant has offered no compelling excuses for her self-admittedly tardy disclosure of certain exhibits. While Applicant may attempt to downplay any potential prejudice suffered by the Protestants given her tardy disclosures, Applicant can not argue that she has not,

at the least, inhibited the Protestants' ability to prepare rebuttal evidence/strategy regarding some of her exhibits. As such, Applicant cannot argue that the Protestants have not been prejudiced by her tardy disclosures. Therefore, Protestants continue to seek the exclusion of those exhibits that Applicant failed to timely disclose pursuant to the January 7, 2005 Scheduling Order in this matter, or, in the alternative, that the hearing of this matter be vacated and reset after Applicant has fully disclosed each and every one of the exhibits that she intends to use at the hearing of this matter

DATED this 20th day of April, 2005.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Angela Schaer Kaufmann
Angela Schaer Kaufmann – 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

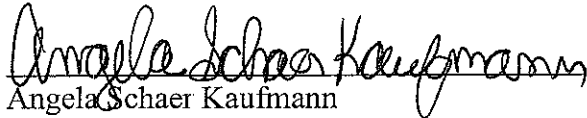
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Julie K. Fischer
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19136.0

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
MACGREGOR

AFFIDAVIT OF ANGELA SCHAER
KAUFMANN IN REPLY TO OPPOSITION OF
PROTESTANTS' MOTION IN LIMINE RE
EXHIBITS, OR, ALTERNATIVELY, MOTION
TO CONTINUE HEARING

State of Idaho)
) ss.
County of Ada)

ANGELA SCHAER KAUFMANN, being first duly sworn upon oath, deposes

and says:

1. I am one of the attorneys of record providing legal representation to Duane
and Laura Pancheri and Darwin and Joan Pancheri (collectively, the "Pancheris") in the

AFFIDAVIT OF ANGELA SCHAER KAUFMANN IN REPLY TO
OPPOSITION OF PROTESTANTS' MOTION IN LIMINE RE EXHIBITS,
OR, ALTERNATIVELY, MOTION TO CONTINUE HEARING - 1

BOI_MT2-578831.2

above-captioned matter. I have knowledge of the files pertinent to this matter, and I make this affidavit based upon personal knowledge.

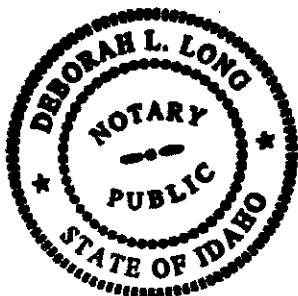
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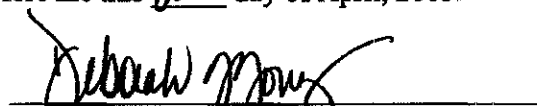
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NOTARY PUBLIC FOR IDAHO
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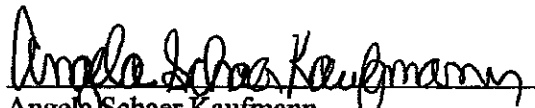
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PROTESTANTS' REPLY TO APPLICANT'S
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BOI_MT2-578815.2

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II. ARGUMENT

A. Exhibit 21

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With all do respect to Applicant's opinions regarding the import, or seeming lack thereof, of this exhibit, it is the Protestants' right to rebut any and all evidence introduced by Applicant in this matter, and it is for the Protestants to decide what strategy, if any, to develop in rebuttal. There is no dispute that proof of financial assurance is one of the criteria considered during application evaluation pursuant to Idaho Code Section 42-203A and the Department's corresponding Water Appropriation Rules. Should an applicant fail to produce sufficient financial assurance evidence, such failure, in and of itself, and independent of consideration of the other evaluation criteria, is sufficient grounds for application denial. Thus, Applicant's financial assurance documentation is an essential element of her application, upon which she bears significant and specific burdens of proof (both evidentiary and persuasion). As such, Applicant's downplaying of Exhibit 21's importance is misguided at best.

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Therefore, the Protestants continue to request that this hearing be vacated, or that Applicant be barred from using Exhibit 21 at the hearing in this matter.

B. Exhibit 19

Applicant's proposed Exhibit 19 is a drawing, apparently of Applicant's proposed project. Applicant tries to diminish the prejudicial effect of her late disclosure of this document by arguing that "[i]t is unlikely the Protestants will be required to 'develop a strategy for responding' to this exhibit; the exhibit is nothing more than a picture." Opposition to Protestants' Motion in Limine, p. 3. Again, it is the Protestants' right to determine whether and how to respond to each and every proposed exhibit, and they have been prejudiced in their ability to do so by the Applicant's tardy disclosure.

Therefore, the Protestants continue to request that this hearing be vacated, or that Applicant be barred from using Exhibit 19 at the hearing in this matter.

C. Exhibits 34 and 42

Protestants do not dispute the admissibility of "illustrative" exhibits as a general proposition. However, exhibits admitted for illustrative purposes may only serve that narrow and specific purpose, and cannot be admitted as substantive evidence.

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III. CONCLUSION

Applicant has offered no compelling excuses for her self-admittedly tardy disclosure of certain exhibits. While Applicant may attempt to downplay any potential prejudice suffered by the Protestants given her tardy disclosures, Applicant can not argue that she has not,

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DATED this 20th day of April, 2005.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Angela Schaer Kaufmann
Angela Schaer Kaufmann – 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 20th day of April, 2005, I caused a true and correct copy of the foregoing **PROTESTANTS' REPLY TO APPLICANT'S OPPOSITION TO PROTESTANTS' MOTION IN LIMINE RE EXHIBITS, OR, ALTERNATIVELY, MOTION TO CONTINUE HEARING** to be served by the method indicated below, and addressed to the following:

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Angela Schaer Kaufmann

RECEIVED

APR 20 2005

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

WHITE PETERSON, P.A.
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TEL (208) 466-9272
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Email rhyde@whitepeterson.com

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

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

April 20, 2005

Hand Delivery

Peter Anderson
c/o Victoria Wigel
Department of Water Resources
322 E. Front Street
Boise, ID 83720

Re: *Permit Application Nos. 65-13912 and 65-13913*

Dear Peter:

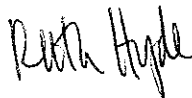
Enclosed are Exhibits 19 and 21 which were indexed but not included in the previous exhibit package. Also attached are the originals of the following:

1. Opposition to Protestants' Motion in Limine re Exhibits, or, Alternatively, Motion to Continue Hearing
2. Motion in Limine to Exclude Expert Testimony by John Westra, Rob Whitney, and Ron Shurtleff
3. Affidavit of Julie Klein Fischer in Support of Motion in Limine to Exclude Expert Testimony by John Westra, Rob Whitney, and Ron Shurtleff

If you should have any questions please don't hesitate to call.

Sincerely,

WHITE PETERSON, P.A.



Ruth Hyde, Legal Assistant to
Julie Klein Fischer

Cc: client

Morgan Stanley

Melinda Sander, CFP®
Senior Vice President
Financial Advisor
Retirement Planning Specialist

1087 West River Street
Suite 300
P.O. Box 3
Boise, ID 83707
toll-free 800 733 5231
tel 208 338 6900
direct 208 338 6973
fax 208 338 6933

Monday, April 18, 2005

Julie Cline Fischer
FAX# 466-4405

RECEIVED

APR 20 2005

Department of Water Resources

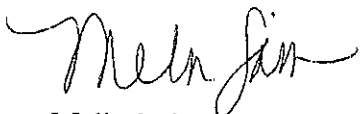
Re: *Statement of Financial Ability*

Dear Julie:

This letter is to validate that my client Carol Lyn MacGregor, PhD does without doubt have the ability to cover in excess of \$700,000 to fund any development she desires.

Should you have any questions please don't hesitate to call my Associate Veronica Mira or me at the phone number listed above.

Respectfully,



Melinda Sander, CFP®certificant
Senior Vice President,
Financial Advisor

Investments and services are offered through Morgan Stanley DW Inc., member SIPC.

RECEIVED
APR 20 2005
Department of Water Resources

forth below, the Applicant opposes the Protestant's alternative motions

II. ARGUMENT

A. There Are No Grounds Either To Exclude Exhibit Numbers 18, 19, 21, 34, and 42 Or To Continue The Hearing To Permit The Protestants To Review The Same

The Protestants assert the Applicant has violated the *Scheduling Order* in this matter by failing to disclose Exhibit Nos. 18, 19, 21, 34, and 42 by April 8, 2005, and, that the Protestants have been prejudiced by the failure to disclose those exhibits. These assertions are without merit.

i. Exhibit 18 Was Timely Exchanged

In her April 18, 2005, disclosures, the Applicant identified as Exhibit No. 18 "Maps." A map was submitted with the disclosures. The map was placed under tab number 18, but due to a clerical error, the map was mislabeled as "Exhibit 19." In their *Motion*, the Protestants admit they became aware of the map labeled as "Exhibit 19" during their review of the Applicant's disclosures. The subject matter of the map is self-explanatory. The Protestants have had sufficient time to examine the map thoroughly. The Protestants are in no way prejudiced by the mislabeling of Exhibit 18. There is no reason to exclude Exhibit 18 or to continue the hearing in this matter to permit the Protestants to conduct further examination of Exhibit 18.

ii. Exhibit 19 Should Not Be Excluded

In her April 18, 2005, disclosures, the Applicant identified as Exhibit 19 "Drawings of Project." A drawing of the Applicant's proposed project, which is marked as "Exhibit 19," was delivered to the Protestants on April 19, 2005. The Applicant has been unable to provide the Protestants with the drawing due to a delay in obtaining a reproduction of the drawing. The

drawing is a simple sketch of the Applicant's proposed project. The subject matter of the drawing is self-explanatory, and will be used by the applicant to describe her proposed project for which the protested water rights are sought-nothing more. It is unlikely the Protestants will be required to "develop a strategy for responding" to this exhibit; the exhibit is nothing more than a picture. The Protestants are in no way prejudiced by the submission of Exhibit 19 on April 19, 2005, and there is no reason to exclude Exhibit 19 or to continue the hearing in this matter to permit the Protestants to conduct further examination of Exhibit 19.

iii. Exhibit 21 Should Not Be Excluded

In her April 8, 2005, disclosures, the Applicant identified as Exhibit 12, "Financial Assurance Document." That document, which is a letter from the Applicant's financial advisor, Melinda Sander, at Morgan Stanley, was delivered to the Protestants on April 19, 2005. The letter simply states that the Applicant is financially able to proceed with her proposed project. The letter does not require lengthy review or time to prepare cross examination. Rather it simply serves to affirm the Applicant's position that she is financially able to proceed with her proposed project. There is no basis on which to challenge the Applicant's financial ability to proceed with her project, so the Protestants need not "develop a strategy for responding" to this exhibit. The Protestants are in no way prejudiced by submission of Exhibit 21 on April 19, 2005, and there is no reason to exclude Exhibit 21 or to continue the hearing in this matter to permit the Protestants to conduct further examination of Exhibit 21.

iv. Exhibit Nos. 34 and 42 Should Not Be Excluded

In her April 8, 2005, disclosures the Applicant identified as Exhibit 34 "Illustrative Exhibits For Geologica" and as Exhibit 42 "Illustrative Exhibits For SPF." The Applicant has identified these exhibits to give notice that her expert witnesses, Terry Scanlan of SPF and Jill

Haizlip of Geologica, may use illustrative exhibits in order to aid the trier of fact in understanding their testimony. The exhibits will be illustrative only. They will not contain any facts or data supporting the experts' opinions which has not previously been disclosed to the Protestants, so the Protestants will not be prejudiced if the illustrative exhibits are produced at trial.

B. There Are No Grounds Either To Exclude Exhibit Numbers 14, 15, 31, 32, 35, and 36 Or To Continue The Hearing To Permit The Protestants To Review The Same

The Protestants assert the Applicant has violated the *Scheduling Order* in this matter by failing to disclose Exhibit Nos. 14, 15, 31, 32, 35, and 36 by April 8, 2005, and, that the Protestants have been prejudiced by the failure to disclose those exhibits.

In her April 8, 2005, disclosures, the Applicant identified as Exhibits Nos. 14, 15, 31, 32, 35, and 36, "Reserved." Those numbers were reserved in case there were additional exhibits to be disclosed on April 8, 2005. In other words, reservation of the numbers was simply housekeeping. The Applicant will not be submitting additional exhibits labeled with those numbers. Therefore, there are no exhibits to exclude, and there is no reason to vacate and continue the hearing in this matter to permit the Protestants to review non-existent exhibits.

III. CONCLUSION

For the foregoing reasons, the Protestant's alternative motions should be denied.

DATED this 17 day of April, 2005

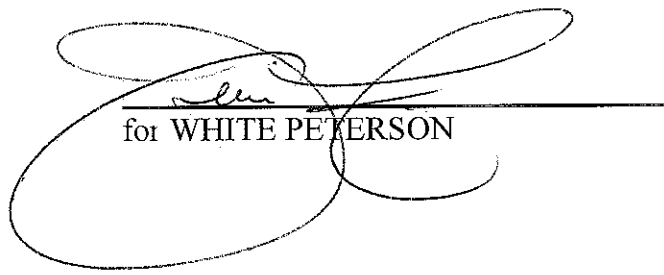
WHITE PETERSON, P.A.


Julie Klein Fischer, of the Firm

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of April, 2005, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

<u> </u>	US Mail	Scott L. Campbell
<u> </u>	Overnight Mail	Moffatt Thomas
<u> </u>	Hand Delivery	US Bank Plaza Building
<u> X </u>	Facsimile No. 385-5384	101 S. Capitol Blvd, 10 th Floor
		Boise, ID 83701
<u> </u>	US Mail	Peter R. Anderson
<u> </u>	Overnight Mail	Hearing Officer
<u> </u>	Hand Delivery	729 W. Braermere Road
<u> x </u>	Facsimile 395-0222	Boise, ID 83702


for WHITE PETERSON

Julie K. Fischer
Idaho State Bar No. 4601
John R. Kormanik
Idaho State Bar No. 5850
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RECEIVED
APR 20 2005
Department of Water Resources

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

**MOTION IN LIMINE TO
EXCLUDE EXPERT TESTIMONY
BY JOHN WESTRA, ROB
WHITNEY, AND RON
SHURTLEFF**

On January 7, 2005, a *Scheduling Order* (“*Order*”) was entered in this matter. The *Order* required that by February 18, 2005, the parties were to exchange the names of expert witnesses that may be called at the hearing, brief narrative summaries of the experts’ possible testimony, and identifications of any expert reports and prepared testimony.

Applicant's Motion In Limine - 1

the Protestants disclosed John Westra and Rob Whitney as witnesses who may be called to testify at the hearing in this matter. *Affidavit of Julie Klein Fisher*, ¶ 2, Exhibit A. On March 2, 2005, the Protestants made an untimely supplemental witness disclosure disclosing Ron Shurtleff, Watermaster of Water District 65, as a potential witness. *Fischer Aff*, ¶ 5, Exhibit B. The Protestants provided the following summaries of possible testimony by Mr. Westra, Mr. Whitney, and Mr. Shurtleff:

Mr. Westra may be called to testify regarding the IDWR Staff Memorandum, dated January 27, 2005, and regarding his knowledge of Dr. MacGregor's applications, their potential affect on the Panchers' water rights, and whether Dr. MacGregor's applications are approvable under Idaho law, as applied by the Idaho Department of Water Resources. [Emphasis added].

Mr Whitney may be called to testify regarding his knowledge of Dr. MacGregor's Applications, their potential effect on the Pancheris' water rights, and whether Dr. MacGregor's applications are approvable under Idaho law, as applied by the Idaho Department of Water Resources. [Emphasis added].

Mr. Shurtleff is expected to testify regarding the water system inherent in Water District 65, as well as the delivery systems in that District. He may also testify regarding his personal observations regarding water resources in Water District 65, including geothermal and cold water wells.

Fischer Aff, ¶¶ 2, 3, 5, 6, Exhibits A, B.

Although the Protestants did not distinguish between expert and fact witnesses in their disclosures, and the Applicant presumes that Mr. Westra and Mr. Whitney, who are IDWR employees, will not provide expert testimony for one party, the summaries above suggest that the Protestants may attempt to elicit expert testimony from Mr. Westra and Mr. Whitney.

Expert testimony from Mr. Westra, Mr. Whitney, and Mr. Shurtleff, should be excluded because, as IDWR employees, Mr. Westra and Mr. Whitney are not appropriate experts for one

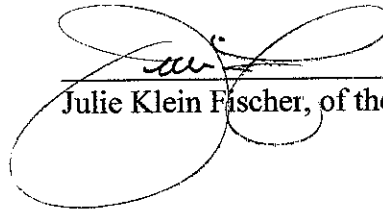
party, and because disclosure of Mr. Shurtleff was untimely. Furthermore, the Protestants did not timely disclose facts, reports, and other materials providing the basis for any expert opinions by Mr. Whitney, Mr. Westra or Mr. Shurtleff as was required by the Scheduling Order. *Fisher Aff.*, ¶¶ 4,7. Therefore, if the Protestants are permitted to elicit expert testimony from witnesses, other than Sherl Chapman, the Applicant will be severely prejudiced. Any testimony given by Mr. Westra, Mr. Whitney, and Mr. Shurtleff must be restricted to facts within their personal knowledge. Idaho Rules of Evidence Rules 602, 701.

WHEREFORE, the Applicant requests the hearing officer enter an order:

1. Limiting testimony of Mr. Westra, Mr. Whitney, and Mr. Shurtleff to facts within their personal knowledge; and
2. Prohibiting the Protestants from eliciting any expert opinion testimony from Mr. Westra, Mr. Whitney, and Mr. Shurtleff.

DATED this 20th day of April, 2005.

WHITE PETERSON, P A.

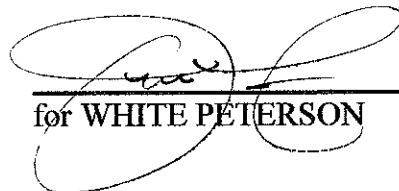


Julie Klein Fischer, of the Firm

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2005, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

_____	US Mail	Scott L. Campbell
_____	Overnight Mail	Moffatt Thomas
_____	Hand Delivery	101 S. Capitol Blvd. 10 th Floor
<u> x </u>	Facsimile No. 385-5384	Boise, Idaho 83701
_____	US Mail	Peter R Anderson
_____	Overnight Mail	Idaho Department of Water Resources
<u> x </u>	Hand Delivery	322 E. Front Street
<u> x </u>	Facsimile No. 395-0222	Boise, ID 83720



for WHITE PETERSON

RECEIVED
APR 20 2005
Department of Water Resources

Attorneys for Petitioner, Carol Lynn MacGregor

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

**AFFIDAVIT OF JULIE KLEIN
FISCHER IN SUPPORT OF
MOTION IN LIMINE TO
EXCLUDE EXPERT TESTIMONY
BY JOHN WESTRA, ROB
WHITNEY, AND RON
SHURTLEFF**

Julie Klein Fischer, Being first duly sworn upon oath, deposes and says:

Affidavit of Julie Klein Fischer in Support of Motion in Limine - 1

2. On February 17, 2005, the Protestants in this matter served *Disclosure Pursuant to Scheduling Order* ("Disclosure"), which is attached hereto as Exhibit A and incorporated herein by reference.

3. In their February 17, 2005, *Disclosure*, the Protestants disclosed John Westra and Rob Whitney as witnesses who may be called to testify at the hearing in this matter.

4. The Protestants did not disclose an identification of expert reports and testimony prepared by either John Westra or Rob Whitney.

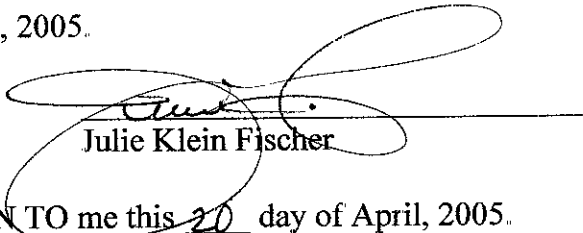
5. On March 2, 2005, the Protestants served *Pancheris' Supplemental Witness Disclosure* ("Supplemental Disclosure"), which is attached hereto as Exhibit B and incorporated herein by reference.

6. In their March 2, 2005, *Supplemental Disclosure*, the Protestants untimely disclosed Ron Shurtleff as a witness who may be called to testify at the hearing in this matter.

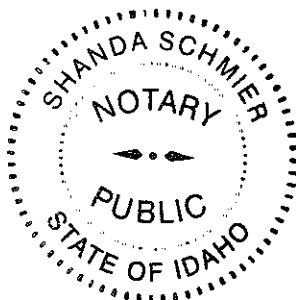
7. The Protestants did not disclose an identification of expert reports and testimony prepared by Ron Shurtleff.

FURTHER YOU AFFIANT SAYETH NAUGHT.

DATED this 20 day of April, 2005.


Julie Klein Fischer

SUBSCRIBED AND SWORN TO me this 20 day of April, 2005.



Shanda Schmier
NOTARY FOR THE STATE OF IDAHO
My commission expires 9/14/07

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2005, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

<u> </u>	US Mail	Scott L. Campbell
<u> </u>	Overnight Mail	Moffatt Thomas
<u> </u>	Hand Delivery	101 S. Capitol Blvd. 10 th Floor
<u> X </u>	Facsimile No. 385-5384	Boise, Idaho 83701
<u> </u>	US Mail	Peter R. Anderson
<u> </u>	Overnight Mail	Idaho Department of Water Resources
<u> </u>	Hand Delivery	322 E. Front Street
<u> X </u>	Facsimile No. 395-0222	Boise, ID 83720

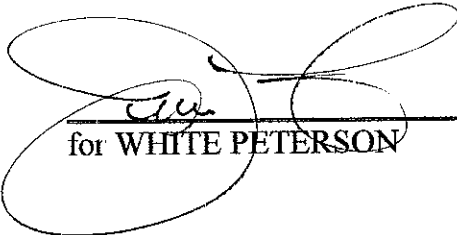

for WHITE PETERSON

EXHIBIT A

Attorneys for Duane and Laura Pancheri
and Darwin and Joan Pancheri

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19136.0

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
MACGREGOR

DISCLOSURE PURSUANT TO SCHEDULING
ORDER

In accordance with the Hearing Officer's February 18, 2005, Scheduling Order,
the Pancheris hereby provide you with the following information:

1. **The names of any experts or other witnesses that may be called at the hearing, together with a brief narrative summary of their possible testimony.**

The Pancheris may call the following witnesses at the hearing in this matter:

Sherl Chapman: Mr. Chapman is expected to testify regarding the hydrogeology in the area of the Pancheris property and Dr. MacGregor's property. He is also expected to testify about the potential and/or probable impacts of Dr. MacGregor's proposed diversions on the Pancheris' pre-existing water rights.

Duane Pancheri: Mr. Pancheri may be called to testify regarding his water rights, use of water under those rights, and the concerns he has regarding Dr. MacGregor's proposed water rights.

Darwin Pancheri: Mr. Pancheri may be called to testify regarding his water rights, use of water under those rights, and the concerns he has regarding Dr. MacGregor's proposed water rights.

John Westra: Mr. Westra may be called to testify regarding the IDWR Staff Memorandum, dated January 27, 2005, and regarding his knowledge of Dr. MacGregor's applications, their potential affect on the Pancheris' water rights, and whether Dr. MacGregor's applications are approvable under Idaho law, as applied by the Idaho Department of Water Resources.

Rob Whitney: Mr. Whitney may be called to testify regarding his knowledge of Dr. MacGregor's applications, their potential affect on the Pancheris' water rights, and whether Dr. MacGregor's applications are approvable under Idaho law, as applied by the Idaho Department of Water Resources.

Other Witnesses: The Pancheris reserve the right to examine any witnesses called by Ms. MacGregor.

2. **A description of all documents and exhibits that may be introduced into evidence at the hearing.**

The Pancheris may introduce any or all of the following documents and exhibits into evidence at the hearing in this matter:

1. Photographs showing the Pancheris' water diversion and use under their rights, as well as the location of their water user relative to the MacGregor property
2. Maps showing the location of the Pancheris' point of diversion and place of use, as well as Dr. MacGregor's proposed point of diversion and place of use.
3. Orthophotoquads showing the location of the Pancheri's point of diversion and place of use, as well as Dr. MacGregor's proposed point of diversion and place of use.
4. The IDWR staff memorandum, dated January 27, 2005, authored by J. Westra, Western Region, IDWR, and materials attached thereto and/or cited therein.
5. 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, January 1971.
6. Arthur A. Hart, "Idaho Yesterdays: Indians Used Warm Springs," The Idaho Statesman, October 30, 1972, at 12.
7. Charles Berenbock, 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 1993.
8. Will L. Burnham and Spencer H. Wood, Field Guide: Boise Geothermal System, Idaho, 38th Annual Meeting, Rocky Mountain Section, The Geological Society of America, April 22-24, 1985.

9. November 10, 2001 correspondence from Terry M. Scanlan to Carol MacGregor, Subject: Belvidere Spring Monitoring – September 26, 2001 and November 2, 2001
10. June 30, 2002 correspondence from Terry M. Scanlan to Carol MacGregor, Subject: Belvidere Spring Monitoring – June 1, 2002, and attachments thereto.
11. October 12, 2002 correspondence from Terry M. Scanlan to Carol MacGregor, Subject: Belvidere Spring Monitoring – October 9, 2002 and attachments thereto.
12. 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 June 1998.
13. Kenneth W. Neely, Production History for the State of Idaho Capitol Mall Geothermal System 1983-1994, Idaho Department of Water Resources, December 1995.
14. 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, October 2003, and August 10, 2003, Draft.
15. Well log notes from Clements well.
16. July 14, 1983, notes from Larry Hellnake Well No. GEO-1, Well No. 2, and Spring, Roystone Hot Springs.
17. Ken Neely, Semi-Annual Review of the Monitoring Data for the Boise Front Geothermal System, January-June 2003, Idaho Department of Water Resources, September 26, 2003.

18. Map showing ground temperature contours in the area of Roystone Hot Springs, October 22, 1980.

19. Test Data obtained from monitoring Pancheri diversions in 2004 & 2005. This information is not available at this time, but will be provided upon receipt.

3. **An identification of any expert reports and prepared testimony.**

Sherl Chapman is the Pancheris' expert witness. He will not be preparing an expert report, nor prepared testimony. It is anticipated that Mr. Chapman will testify at the trial in this matter, and may utilize the documents and exhibits described in Item 2, above, and Item 4, below.

4. **Reports, studies and data compilations in the Pancheris' possession containing information directly applicable to the Applications.**

The responsive documents in the Pancheris' possession at this time are attached hereto. If the Pancheris become aware of any additional responsive documents, they will provide them, but at this time and to the best of the Pancheris' knowledge, these are the responsive documents. The documents attached are as follows:

1. Correspondence from Terry Scanlan, Scanlan Engineering, to Rob Whitney, Idaho Department of Water Resources, dated September 2, 2003 (and materials attached thereto).

2. IDWR Staff Memorandum, dated January 27, 2005, prepared by J. Westra, Western Region, IDWR, and materials attached thereto and/or cited therein.

3. 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, January 1971.

4. Arthur A. Hart, "Idaho Yesterdays: Indians Used Warm Springs," The Idaho Statesman, October 30, 1972, at 12.
5. Charles Berenbock, 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 1993.
6. Will L. Burnham and Spencer H. Wood, Field Guide: Boise Geothermal System, Idaho, 38th Annual Meeting, Rocky Mountain Section, The Geological Society of America, April 22-24, 1985.
7. November 10, 2001 correspondence from Terry M. Scanlan to Carol MacGregor, Subject: Belvidere Spring Monitoring – September 26, 2001 and November 2, 2001
8. June 30, 2002 correspondence from Terry M. Scanlan to Carol MacGregor, Subject: Belvidere Spring Monitoring – June 1, 2002, and attachments thereto.
9. October 12, 2002 correspondence from Terry M. Scanlan to Carol MacGregor, Subject: Belvidere Spring Monitoring – October 9, 2002 and attachments thereto.
10. 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 June 1998.
11. Kenneth W. Neely, Production History for the State of Idaho Capitol Mall Geothermal System 1983-1994, Idaho Department of Water Resources, December 1995.
12. 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, October 2003, and August 10, 2003, Draft.

13. Well log notes from Clements well.
14. July 14, 1983, notes from Larry Hellnake Well No. GEO-1, Well No. 2, and Spring, Roystone Hot Springs
15. Ken Neely, Semi-Annual Review of the Monitoring Data for the Boise Front Geothermal System, January-June 2003, Idaho Department of Water Resources, September 26, 2003.
16. Map showing ground temperature contours in the area of Roystone Hot Springs, October 22, 1980.
17. Test Data obtained from monitoring Pancheri diversions in 2004 & 2005. This information is not available at this time, but will be provided upon receipt.

5. Persons With Knowledge

The following people may have knowledge regarding the facts in this matter:

1. Darwin Pancheri
2. Joan Pancheri
3. Duane Pancheri
4. Laura Pancheri
5. Dr. Carol MacGregor
6. Sherl Chapman
7. Terry Scanlan
8. Norm Young
9. John Westra
10. Rob Whitney

11. Gary Spackman

DATED this 17th day of February, 2005.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
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 17th day of February, 2004, I caused a true and correct copy of the foregoing **DISCLOSURE PURSUANT TO SCHEDULING 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
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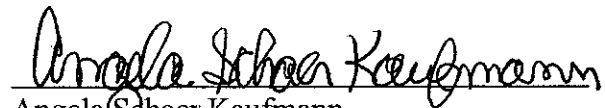

Angela Schaer Kaufmann

EXHIBIT B

Attorneys for Duane and Laura Pancheri
and Darwin and Joan Pancheri

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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
MACGREGOR

PANCHERIS' SUPPLEMENTAL WITNESS
DISCLOSURE

Duane and Laura Pancheri and Darwin and Joan Pancheri, by and through their counsel of record MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHID., hereby provide this supplemental witness disclosure. The Pancheris may call Ron Shurtleff, Watermaster of Water District 65. Mr. Shurtleff is expected to testify regarding the water system inherent in Water District 65, as well as the delivery systems in that District. He may also testify regarding his personal observations regarding water resources in Water District 65, including geothermal and cold water wells.

DATED this 2nd day of March, 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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March, 2005, I caused a true and correct copy of the foregoing **PANCHERIS' SUPPLEMENTAL WITNESS DISCLOSURE** 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

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☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Peter R. Anderson
Hearing Officer
729 W. Braemere Road
Boise, ID 83702

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

Angela Schaer Kaufmann
Angela Schaer Kaufmann

RECEIVED
APR 20 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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19136 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

PREHEARING MEMORANDUM OF POINTS
AND AUTHORITIES

COMES NOW, Duane and Laura Pancheri and Darwin and Joan Pancheri
(collectively referred herein as the "Pancheris"), by and through their counsel of record
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHID , and hereby submits this PreHearing
Memorandum of relevant legal points and authorities pertinent to this matter.

I. INTRODUCTION

Applicant Carol Lynn MacGregor (hereinafter "MacGregor") seeks to appropriate certain geothermal resources of the State of Idaho. The Pancheris have protested on the basis that her application, if approved, may injure their preexisting water rights.

II. FACTS

MacGregor has filed several applications for permit which were protested by the Pancheris. Pursuant to the Hearing Officer's Order Consolidating Proceedings, dated January 14, 2005, Applications for Permit Number 65-13986, 65-13912, and 65-13913 are at issue in this particular matter, and each application will be briefly summarized herein.¹

Application for Permit Number 65-13986 seeks to appropriate 2.0 cubic feet per second of groundwater for irrigation purposes. The proposed point of diversion is Township 13 North, Range 3 East, Section 13, the NE 1/4 of the SE 1/4, with an additional point of diversion in the SE 1/4 of the NE 1/4 of the same section. According to the remarks section of the Application for Permit, MacGregor also seeks to use "spent low-temperature geothermal fluids diverted under 65-13913 for irrigation, provided that the heat value is utilized prior to irrigation." Application for Permit Number 65-13986. The Pancheris protested this Application on the basis that the Application, if granted, could injure the Pancheris' preexisting water rights, and that there is potential overlap between this Application and Application for Permit Number 65-13913.

Application for Permit Number 65-13912 seeks to appropriate 0.50 c.f.s. of water from Belvidere Hot Springs for heating and commercial purposes. The proposed point of

¹ MacGregor also filed Application for Permit Number 65-13978, which the Pancheris protested. However, on June 12, 2001, the Pancheris withdrew their protest.

diversion is Township 13 North, Range 3 East, Section 13, the NE 1/4 of the SE 1/4 of the NE 1/4. In expanding on the proposed purpose of use, MacGregor stated that the water would be used for “heating – space heating of commercial, office, and residential structures. commercial [sic] – resort w/spa, swimming pool, and recreation facilities.” Application for Permit Number 65-13912. The Pancheris filed a notice of protest to this Application, asserting their senior water rights as the basis for protest. Stated more clearly, the Pancheris are concerned that this Application for Permit, if granted, will injure their existing geothermal water rights.

The same is true of Application for Permit Number 65-13913, MacGregor seeks to appropriate 2.0 cubic feet per second of ground water for heating and commercial purposes. The remarks provision of the application provides that the “[a]ctual number of wells and well depths will be determined based on results of exploratory drilling. Two low-temperature geothermal wells and one cold water well are currently anticipated.”

The Pancheris own three water rights which utilize Belvidere Hot Springs – 65-12891, 65-13332, and 65-13458.

III. LEGAL ISSUES/AUTHORITIES

A. Burdens of Proof of The Respective Parties

Water right applications are processed under consideration of various criteria set forth in Idaho Code Section 42-203A. 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.² *See* IDAPA Sections 37.03.08040.04(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

² Criteria (a) through (e) of Idaho Code Section 42-203A(5) are as follows:

- (a) Injury to Preexisting Water Rights;
- (b) Sufficiency of Water Supply;
- (c) Good Faith Application;
- (d) Necessary Financial Resources; and
- (e) Public Interest

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.³

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.

B. Evaluation Criteria

1. Injury to Preexisting Water Rights

The Idaho Department of Water Resources may deny an application for permit if it will reduce the quantity of water under existing water rights Idaho Code Section 42-203A(5). The Department's Water Appropriation Rules provide:

³ 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) / 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)

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). Therefore, in this matter, the applicant must come forward with evidence to present a *prima facie* case that her proposed appropriation will not injure the Pancheris' preexisting water rights, i.e., that the proposed appropriation will not reduce the amount of water available to the Pancheris below the amount recorded in their license; that the proposed appropriation will not force the Pancheris to an unreasonable effort to divert their licensed water right; and that the proposed appropriation will not make the quality of the water available to the Pancheris unusable for the purposes defined in their license, or that the water cannot be restored to usable status in the absence of unreasonable effort or expense. In addition to these affirmative evidentiary burdens, the applicant also bears the ultimate burden of persuasion regarding each of the aforementioned criteria as well.

2. Sufficiency of Water Supply

In addition to the injury criterion discussed above, the Department may 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). Regarding the source sufficiency criterion, 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). As with the injury criterion, the applicant in this matter must come forward with the necessary evidence establishing that the water source for her proposed appropriation is sufficient to satisfy both the economic and noneconomic factors that would justify application approval. Likewise, the applicant also bears the ultimate burden of persuasion on this criterion as well.

3. Good Faith Application

The Department can further deny an application for permit if it determines that the applicant's application was not made in good faith, rather that it was instead made for delay and/or speculative purposes. Idaho Code Section 42-203A(5). As such, 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) Thus, the applicant in this matter bears both the evidentiary burden and the ultimate burden of persuasion that her application was made in good faith, *i.e.*, that she has legal access to the property necessary to construct and operate the proposed project; that she has, or is in the process of, secured/securing any and all permits necessary for the project; and that there are no obvious impediments that would prevent successful completion of the project

4. Necessary Financial Resources

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:

- d. 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). Thus, the applicant in this matter must also make a sufficient evidentiary showing and bear the ultimate burden of persuasion that she has sufficient financial resources either personally, or through other funding, to undertake and complete project construction in order to ultimately apply the water to the proposed beneficial use(s). Absent such a showing, the Department may deny the applicant's application.

5. Public Interest

The Department may 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). Additionally, the Department's Water Appropriation Rules 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 37.03.08045.01(e)(i-iii). Due to the legislature's July 2003 change in the law, the Department's Water Appropriation Rules (promulgated in July of 1993), as they relate to the

public interest criterion, may no longer be valid to the extent that they may conflict with the newer public interest definition. Regardless of this potential definitional tension, however, the applicant still bears the evidentiary burden of coming forward with evidence as to any factor affecting the local public interest of which she is knowledgeable, while the Pancheris (protestants) are charged with coming forward with evidence as to any factor affecting the local public interest of which they are knowledgeable, or at least are more cognizant of than the applicant. *See* IDAPA Section 37.03.08040.04(b). Despite the split evidentiary burden as between the applicant and a protestant regarding this criterion, the applicant still bears the ultimate burden of persuasion on this point. IDAPA Section 37.03.08040.04(c).

6. Conservation of Water Resources

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. Unfortunately, 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 significant case law in that arena, or are there decisions from the Idaho Department of Water Resources either. What is known, however, is that the applicant 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). Therefore, the applicant in this matter must persuade the Department that her proposed use of water for which she seeks appropriation is not contrary to the conservation of water resources in the state of Idaho.

IV. CONCLUSION

Regarding MacGregor's application for permit in this matter, she bears significant and specific evidentiary and persuasive burdens of proof. Failure to meet any one of the burdens

enumerated above serves as a sufficient basis upon which to deny the her application Of particular import in this matter is the need for the Ms. MacGregor to show, and ultimately persuade the Department, that her proposed appropriation will not injure the preexisting water rights undeniably held, used, and enjoyed by the Pancheris in this matter If MacGregor's proposed appropriation and use of water in this matter will likely injure the Pancheris' rights, then her application may be, and must be, properly denied.

DATED this 20th day of April, 2005.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Angela Schaer Kaufmann
Angela Schaer Kaufmann – 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 29th day of April, 2005, I caused a true and correct copy of the foregoing **PREHEARING MEMORANDUM OF POINTS AND AUTHORITIES** 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
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile


Angela Schaer Kaufmann

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APR 19 2005
Department of Water Resources

Attorneys for Duane and Laura Pancheri
and Darwin and Joan Pancheri

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19136.0

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
MACGREGOR

AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April, 2005, I caused a true and
correct copy of the **REQUEST THAT IDAHO DEPARTMENT OF WATER RESOURCES STAFF**
(JOHN WESTRA) BE MADE AVAILABLE to be served by facsimile transmission to Peter R.
Anderson, Hearing Officer.

DATED this 18th day of April, 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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April, 2005, I caused a true and correct copy of the foregoing **AMENDED CERTIFICATE OF SERVICE** to be served by the method indicated below, and addressed to the following:

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Angela Schaer Kaufmann
Angela Schaer Kaufmann

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APR 18 2005
DEPARTMENT OF
WATER RESOURCES

Attorneys for Duane and Laura Pancheri
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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
MACGREGOR

REQUEST THAT IDAHO DEPARTMENT OF
WATER RESOURCES STAFF (JOHN
WESTRA) BE MADE AVAILABLE

Duane and Laura Pancheri and Darwin and Joan Pancheri ("Pancheris"), by and
through their counsel of record MOFFATT, THOMAS, BARRETT ROCK & FIELDS, CHARTERED, and
in accordance with IDAPA 37.01.01.201 and 602 and the Hearing Officer's Request for IDWR
Staff Memorandum, hereby request that the Idaho Department of Water Resources make John
Westra available to testify in the above-referenced matter.

Mr. Westra has previously been designated by the Pancheris as a witness, because he prepared the IDWR Staff Memorandum requested by the Hearing Officer. Thus, he appears to be the most logical IDWR employee to testify regarding the matters set forth therein.

The hearing in the above-captioned matter is scheduled for April 21 - 22, 2005. Mr. Westra's presence would not be needed on April 21, because the applicant will be presenting her case that day. Therefore, the Pancheris request that Mr. Westra be made available for testimony on Friday, April 22, 2005.

DATED this 18th day of April, 2005.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell - Of the Firm

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

CERTIFICATE OF SERVICE

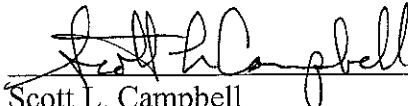
I HEREBY CERTIFY that on this 18th day of April, 2005, I caused a true and correct copy of the foregoing **REQUEST THAT IDAHO DEPARTMENT OF WATER RESOURCES STAFF (JOHN WESTRA) BE MADE AVAILABLE** to be served by the method indicated below, and addressed to the following:

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Scott L. Campbell

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APR 18 2005

**DEPARTMENT OF
WATER RESOURCES**

Attorneys for Duane and Laura Pancheri
and Darwin and Joan Pancheri

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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
MACGREGOR

**MOTION IN LIMINE RE EXHIBITS, OR,
ALTERNATIVELY, MOTION TO CONTINUE
HEARING**

COMES NOW, Duane and Laura Pancheri and Darwin and Joan Pancheri
(collectively referred herein as the "Pancheris"), by and through their counsel of record
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHID., and hereby move the Department for an
order excluding certain exhibits identified by Applicant, Carol Lynn MacGregor, in Applicant's
Exhibit Index and Witness List dated April 8, 2005 ("Exhibit Index"), which exhibits were not
timely disclosed and/or produced, as more particularly set forth herein. Alternatively, the
Pancheris respectfully request that the Hearing Officer vacate the current hearing dates of

**MOTION IN LIMINE RE EXHIBITS, OR, ALTERNATIVELY,
MOTION TO CONTINUE HEARING - 1**

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April 21-22, 2005, continue the hearing to a later date, and further order the Applicant to produce a full and accurate copy of all exhibits identified in her Exhibit Index.

I. BACKGROUND

On or about January 7, 2005, Hearing Officer Peter R. Anderson issued a Scheduling Order in this proceeding. The Scheduling Order provided, *inter alia*, the following:

April 8, 2005: Parties **shall exchange** on or before this date witness and exhibit lists, and copies of pre-marked exhibits. . . .

Scheduling Order, p. 2 (emphasis added). The plain meaning of the above-quoted language is that all exhibits to be used at the hearing of this matter were to be pre-marked and exchanged, together with witness lists, on or before April 8, 2005. The Pancheris complied with the Scheduling Order by providing counsel for Applicant with a true, accurate, and complete copy of each of their pre-marked exhibits on April 8, 2005. However, Applicant failed to do the same

On April 8, 2005, Applicant served counsel for the Pancheris with the Exhibit Index and a binder purportedly containing copies of each of Applicant's exhibits. However, exhibit numbers 18, 19, 21, 34, and 42, although identified in the Exhibit Index, were not provided in accordance with the Scheduling Order. Additionally, Applicant "reserved" exhibit nos. 14, 15, 31, 32, 35, and 36, although she neither disclosed the nature of the exhibit to be "reserved," nor provided the Pancheris with a copy of each of the "reserved" exhibits. These deficiencies clearly violate Hearing Officer Anderson's January 7, 2005 Scheduling Order, and prejudice the Pancheris by inhibiting their ability to adequately prepare for the hearing of this matter.

II. ARGUMENT

A. Applicant Failed to Exchange All Identified Exhibits In Accordance With The Scheduling Order, Thereby Prejudicing the Pancheris.

Pursuant to IDAPA provisions 37.01.01510 and 37.01.01513 (Rules of Procedure of the Department of Water Resources), Hearing Officer Anderson ordered formal disclosure and exchange of exhibits in his January 7, 2005 Scheduling Order. The purpose of the prehearing conference, among others, is to arrange for the exchange of proposed exhibits or prepared testimony in order to expedite orderly conduct and disposition of the pertinent proceeding. *See* IDAPA Section 37.01.01510. To further the purposes of the prehearing conference, the hearing officer is authorized to issue any and all necessary orders resulting from the prehearing conference. *Id.* at Section 37.01.01513. The effect of any such orders is that they “control the course of subsequent proceedings unless modified by the presiding officer for good cause.” *Id.*

In judicial proceedings, scheduling orders are not meaningless papers to be cavalierly disregarded, as Idaho Rule of Civil Procedure 16(i) specifically provides for sanctions against any party’s or their attorney’s failure to obey a scheduling or pretrial order. *Id.*; *see also Fish Haven Resort, Inc.*, 121 Idaho at 121. When considering sanctions (the most drastic being the dismissal of an action or entry of judgment against a litigant), a trial court should “balance the equities by comparing the culpability of the disobedient party with the resulting prejudice to the innocent party.” *Southern Idaho Prod. Credit Ass’n v Astorquia*, 113 Idaho 526, 532 (1987). Before ordering the most drastic sanctions, the trial court must first consider whether lesser sanctions would be inadequate. *Id.* at 531. It stands to reason that prehearing orders in administrative proceedings be afforded the same respect given their “controlling” nature as set forth by IDAPA Section 37.01.01513.

While specifically identified in Applicant's Exhibit Index, Applicant has failed to produce copies of her Exhibit nos 18, 19, 21, 34, and 42. In her Exhibit Index, Applicant identified Exhibit 18 as "Maps," but the sole page included under tab 18 is labeled Exhibit 19. The Pancheris are not sure what "Maps" the Applicant is referring to, and they cannot prepare for the hearing based on that general description. Several different maps have been disclosed and/or provided by Applicant or Applicant's expert witnesses. Therefore, the maps must be specifically identified and produced so that the Pancheris may thoroughly examine those documents.

Applicant identified Exhibit 19 as "Drawings of Project." The Pancheris are not sure if the document labeled Exhibit 19 and found under the tab for Exhibit 18 was, in fact, exhibit 19. If not, the Pancheris cannot prepare for the hearing based on Applicant's general description of this exhibit. The drawings must be produced and the Pancheris allowed adequate time to review and develop a strategy for responding to the same.

Applicant identified Exhibit 21 as "Financial Assurance Document." Again, the Pancheris cannot prepare for the hearing based on Applicant's general description of this exhibit. The Pancheris have no inkling what this document is, let alone its import, if any. This document must be produced and the Pancheris allowed adequate time to review and develop a strategy for responding to the same.

Applicant identified Exhibit 34 as "Illustrative Exhibits for Geologica [sic]." While the Pancheris presume that this exhibit is somehow connected to exhibit no. 33, which is identified as "Geologica Report dated 2/14/05," the Pancheris have no way of knowing for sure because exhibit 34 was not exchanged in accordance with the Scheduling Order.

Lastly, Applicant identified Exhibit 42 as “Illustrative Exhibits for SPF.” The Pancheris have no idea what, specifically, the acronym “SPF” stands for, and have no way of finding out the meaning of “SPF” because these “Illustrative Exhibits for SPF” were not exchanged.

As set forth above, review of Applicant’s exhibits is essential to allow the Pancheris and their counsel time to thoroughly examine the exhibits, and develop a strategy for responding to the same. By Applicant’s failure to exchange these exhibits in accordance with the Scheduling Order, the Pancheris have been prejudiced. Therefore, these documents must be produced and the Pancheris must have ample opportunity to review the same before the hearing in this matter in order to adequately advocate their position.

B. Applicant Failed to Disclose All Exhibits She Intends To Offer At Hearing In Violation of the January 7, 2005 Scheduling Order.

In addition to failing to exchange all identified exhibits, Applicant also “reserved” exhibit nos. 14, 15, 31, 32, 35, and 36. The Pancheris are not sure what Applicant means by reserving certain exhibit numbers. Applicant did not identify with particularity the nature of the “reserved” exhibits, nor did she provide copies of the “reserved” exhibits, which is in direct contravention to the Scheduling Order.

The Pancheris, their counsel, and their witnesses simply cannot prepare for the hearing in this matter unless they are able to thoroughly review all proposed exhibits prior to the hearing. The reason for requiring parties to disclose their witness and exhibit lists, and to exchange copies of their pre-marked exhibits prior to hearing, is to allow the other party time to thoroughly examine the exhibits, and develop a strategy for responding to the same. The Pancheris have simply been denied this opportunity. The Applicant knew of the disclosure and exchange deadline a full three months prior to its arrival, and has offered no excuse or rationale

for her non-compliance. The Pancheris, who appreciated the controlling nature of Hearing Officer Anderson's Scheduling Order, should not be allowed to be ambushed by the Applicant's disregard of the same order, either by her failure to exchange listed exhibits, or by her "reservation" (i.e., non-disclosure and failure to exchange) of certain others

III. CONCLUSION

The Pancheris have been prejudiced by the Applicant's failure to timely identify and produce her proposed exhibits. The Pancheris, therefore, respectfully request that the Hearing Officer rule that Applicant shall be barred from offering exhibit nos 14, 15, 18, 19, 21, 31, 32, 34, 35, 36 and 42 as evidence at the hearing. In the alternative, the Pancheris respectfully request that the Hearing Officer vacate the hearing currently scheduled to commence on April 22, 2005, to reset the hearing to a later date, and to require Applicant to produce a full and accurate copy of each of her proposed exhibits, so that they may properly ascertain the basis, reason, and applicability of each of the proposed exhibits.

DATED this 18th day of April, 2005

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
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

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Peter R. Anderson
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Scott L. Campbell

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APR 18 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
19136 0

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
MACGREGOR

AFFIDAVIT OF ANGELA SCHAER
KAUFMANN IN SUPPORT OF MOTION IN
LIMINE RE EXHIBITS, OR,
ALTERNATIVELY, MOTION TO CONTINUE
HEARING

State of Idaho)
) ss.
County of Ada)

ANGELA SCHAER KAUFMANN, being first duly sworn upon oath, deposes

and says:

1. I am one of the attorneys of record providing legal representation to Duane
and Laura Pancheri and Darwin and Joan Pancheri (collectively, the "Pancheris") in the above-

captioned matter. I have knowledge of the files pertinent to this matter, and I make this affidavit based upon personal knowledge.

2. I have reviewed the Applicant's Exhibit Index and Witness List dated April 8, 2005 (the "Exhibit Index").

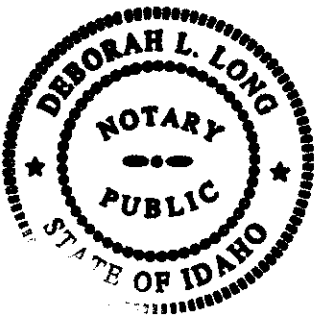
3. Upon review of the Exhibit Index, I noticed that copies of exhibit numbers 18, 19, 21, 34, and 42 were not included, and thus not exchanged, in the binder which accompanied the Exhibit Index as required by the January 7, 2005 Scheduling Order.

4. Upon further review of the Exhibit Index and binder, I noted that exhibit numbers 14, 15, 31, 32, 35, and 36 were marked "reserved." Thus, these exhibits were neither identified, nor was a copy of the exhibit exchanged, as required by the January 7, 2005 Scheduling Order.

DATED this 18 day of April, 2005

Angela Schaer Kaufmann
Angela Schaer Kaufmann

SUBSCRIBED AND SWORN to before me this 18th day of April, 2005



Deborah Long
NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires 10/10/07

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18~~th~~ day of April, 2005, I caused a true and correct copy of the foregoing **AFFIDAVIT OF ANGELA SCHAER KAUFMANN IN SUPPORT OF MOTION IN LIMINE RE EXHIBITS, OR, ALTERNATIVELY, MOTION TO CONTINUE HEARING** 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

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Scott L. Campbell

RECEIVED

APR 18 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 &
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OF THE STATE OF IDAHO

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

**REQUEST THAT IDAHO DEPARTMENT OF
WATER RESOURCES STAFF (ROB
WHITNEY) BE MADE AVAILABLE**

Duane and Laura Pancheri and Darwin and Joan Pancheri ("Pancheris"), by and through their counsel of record MOFFATT, THOMAS, BARRETT ROCK & FIELDS, CHARTERED, and in accordance with IDAPA 37 01 01 201 and 602 and the Hearing Officer's Request for IDWR Staff Memorandum, hereby request that the Idaho Department of Water Resources make Rob Whitney available to testify in the above-referenced matter.

Mr. Whitney has previously been designated by the Pancheris as a witness, because he has been involved in the matter of the above captioned applications for permit for

sometime, in his capacity as an IDWR employee. Thus, he is a logical IDWR employee to testify regarding the applications.

The hearing in the above-captioned matter is scheduled for April 21 - 22, 2005.

Mr. Whitney's presence would not be needed on April 21, because the applicant will be presenting her case that day. Therefore, the Pancheris request that Mr. Whitney be made available for testimony on Friday, April 22, 2005.

DATED this 18th day of April, 2005.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
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

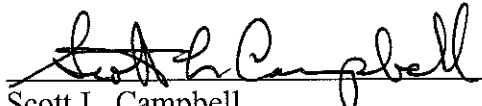
I HEREBY CERTIFY that on this 13th day of April, 2005, I caused a true and correct copy of the foregoing **REQUEST THAT IDAHO DEPARTMENT OF WATER RESOURCES STAFF (ROB WHITNEY) BE MADE AVAILABLE** to be served by the method indicated below, and addressed to the following:

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Scott L. Campbell

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**DEPARTMENT OF
WATER RESOURCES**

Attorneys for Duane and Laura Pancheri
and Darwin and Joan Pancheri

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

PANCHERIS' WITNESS AND EXHIBIT LIST

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(collectively referred herein as the "Pancheris"), by and through their counsel of record
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHID, pursuant to the Hearing Officer's
Scheduling Order issued January 7, 2005, and hereby submits the following list of witnesses the
Pancheris may call to testify at the hearing scheduled to commence on April 21, 2005, as well as
a list of exhibits the Pancheris may offer at the hearing.

WITNESSES

The Pancheris may call the following witnesses to testify at the hearing:

1. Duane Pancheri;
2. Laura Pancheri;
3. Darwin Pancheri;
4. Joan Pancheri;
5. Sherl L. Chapman;
6. Ron Shurtleff;
7. John Westra; and
8. Rob Whitney.

In addition to the above-named witnesses, the Pancheris reserve the right to call any witnesses designated by the Applicant, Carol Lynn MacGregor, or previously identified by Dr. MacGregor during the course of discovery in this proceeding or in previous disclosures filed with the Idaho Department of Water Resources. Additionally, the Pancheris reserve the right to call any and all previously identified witnesses as rebuttal or impeachment witnesses to testify at the hearing.

EXHIBITS

The Pancheris may offer the following exhibits into evidence at the hearing:

NO.	DATE	DESCRIPTION
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The Pancheris reserve the right to supplement this Exhibit list.

DATED this 8th day of April, 2005.

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By Scott L. Campbell
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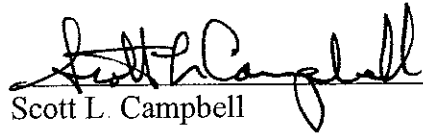
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**DEPARTMENT OF
WATER RESOURCES**

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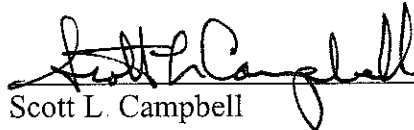
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