BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 95-9196 IN THE NAME OF MARVIN GARDENS, LLC	))))	**PRELIMINARY ORDER**

This matter having come before the Idaho Department of Water Resources ("Department") in the form of a protested application for permit and the Department having held a conference and a hearing in the matter, the hearing officer enters the following Findings of Fact, Conclusions of Law and Preliminary Order:

FINDINGS OF FACT

1. On September 23, 2002, Marvin Gardens, LLC. ("applicant") submitted Application for Permit No. 95-9196 ("application") to the Department proposing the total diversion rate of 0.32 cubic feet per second ("cfs") of ground water to be used year-round for domestic and fire protection purposes and from March 15 to November 15 for the irrigation of 9 acres. The location of the points of diversion (2 wells) is within SE1/4SW1/4 Section 30, T51N, R3W, B.M., Kootenai County, Idaho and the proposed place of use is within the E1/2SE1/4 Section 30, T51N, R3W, B.M. Domestic water is sought for 9 homes.

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

2. The Department published notice of the application that was subsequently protested by the city of Dalton Gardens ("city" or "protestant") and by Scott and Marilyn Jordan ("protestant").

3. On September 28, 2004, the Department conducted a hearing in the matter in Coeur d'Alene, Idaho. The applicant was present and was represented by Marvin Erickson. Protestant city of Dalton Gardens was represented by Cheri Howell, the Planning Administrator for the city of Dalton Gardens. Protestant Scott and Marilyn Jordan did not appear at the hearing.

5. Issues the Department can consider in this matter are as follows:

a. Whether the proposed use will reduce the quantity of water under existing water rights;
b. Whether the water supply itself is insufficient for the purpose for which it is sought to be appropriated;
c. Whether the application is made in good faith, or is made for delay or speculative purposes;

d. Whether the applicant has sufficient financial resources with which to complete the work involved therein;
e. Whether the proposed use will conflict with the local public interest,
f. Whether the proposed use is contrary to conservation of water resources within the state of Idaho; and
g. Whether the proposed use will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates.

6. Exhibits premarked, offered or accepted as a part of the record are as follows:

Applicant's Exhibits:

1. Well Driller Report for Marvin Erickson
2. Well Driller Report for Scooter Jordan
3. NOT OFFERED
4. Map showing property owned by Marvin Erickson

Protestant's Exhibits:

NONE OFFERED

7. On August 7, 2003, the Department issued Permit 95-9148 to Marvin R. Erickson and Sharon N. Erickson as follows:

Source:	Ground water
Priority:	July 23, 2002
Rate of diversion:	0.14 cfs for domestic use year-round for 9 homes 0.09 cfs for irrigation use from March 15 to November 15 Total diversion rate = 0.20 cfs
Point of diversion:	SESW Section 30, T51N, R3W, B.M.
Place of use:	SE Section 30, T51N, R3W, B.M.
Proof due date:	August 1, 2008

The 9 lots on this permit are different from the 9 lots proposed on application 95-9196.

8. The well log for the well constructed by the applicant shows that water was first encountered at 243 feet below land surface with a total well depth of 385 feet. The well was test pumped at 60 to 70 gallons per minute for 4 hours. The well log of protestant Scott Jordan shows that water was first encountered at 388 feet below land surface with a total well depth of 425 feet. The distance between the wells is approximately three-quarters to one mile. (See applicant's exhibits 1 and 2).

9. The water sources used by protestant city of Dalton Gardens are approximately 2 miles from the applicant's wells.

10. Of the issues the Department can consider in the contested matter, the only issue of the city was the zoning of the land on which the well(s) are or will be constructed as related to the local public interest. The protestant stated that if the applicant distributes or sells water, the applicant must either change the zoning of the land associated with the water source to a Public Utility District or apply for a special use permit for a Public Utility.

CONCLUSIONS OF LAW

1. Section 42-203A, Idaho Code, provides in pertinent part as follows:

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

2. Use of water as proposed in the application will not reduce the quantity of water under existing water rights.

3. The water supply itself is sufficient for the purposes intended.

4. The application is made in good faith and not for delay or speculative purposes.

5. The applicant has sufficient financial resources with which to complete the project.

6. The application will not conflict with the local public interest if the applicant complies with applicable planning and zoning ordinances of local and state government jurisdictions.

7. The application is not contrary to the conservation of water resources within Idaho.

8. The Department should approve the application with certain conditions.

ORDER

IT IS THEREFORE hereby ORDERED that the protest of Scott and Marilyn Jordan be **SET ASIDE** for failure to appear at the hearing and will not be further considered by the Department in the matter.

IT IS FURTHER hereby ORDERED that Application for Permit No. 95-9196 is **APPROVED** subject to the following conditions:

1. Proof of application of water to beneficial use shall be submitted on or before **November 1, 2008**.

2. Subject to all prior water rights.

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

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

5. Domestic use is for 9 homes. Irrigation of lawns, gardens and landscaping associated with the homes is authorized under the irrigation component of this right.

6. This right when combined with all other rights shall provide no more than 0.02 cfs of water per acre nor more than 3.0 acre feet per acre per year at the field headgate for irrigation of the lands above.

7. The applicant shall comply with applicable planning and zoning ordinances of local and state government jurisdictions.

8. This right authorizes the diversion of ground water within the Rathdrum Prairie Ground Water Management Area (RPGWMA). Use of water under this right shall be subject to the provisions of any management plan approved by the Director for the RPGWMA. If the Director determines that the ground water supply in the RPGWMA is insufficient to meet the demands of prior water rights within the RPGWMA, the Director may order the diversion and use of water under this right to be reduced or curtailed until the Director determines that there is sufficient ground water available for this right.

Signed this 19th day of October, 2004.

L. GLEN SAXTON, P.E.
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of October, 2004, the foregoing PRELIMINARY ORDER was served by placing a copy of the same in the United States Mail, properly addressed and postage prepaid to the following:

MARVIN GARDENS LLC
4095 E ERICKSON DR
COEUR D ALENE ID 83815

CITY OF DALTON GARDENS
6360 N 4TH STREET
DALTON GARDENS ID 83815-9254

SCOTT & MARILYN JORDAN
2496 E HANLEY AVE
DALTON GARDENS ID 83315

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