

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

IN THE MATTER OF APPLICATION)
TO APPROPRIATE WATER NO. 61-12090) **FINAL ORDER**
IN THE NAME OF NEVID LLC)
_____)

PROCEDURAL BACKGROUND

On September 28, 2006, Boise-Highland Development Co. filed an application to appropriate water with the Idaho Department of Water Resources (“IDWR” or “Department”). IDWR assigned number 61-12090 to the application.

On October 17, 2007, Boise-Highland Development Co. assigned ownership of application no. 61-12090 to Nevid LLC (“Nevid”).

Notice of application no. 61-12090 was published on April 16 and 23, 2008. The application was timely protested by Daniel S. Van Grouw.

Application no. 61-12090 proposes the appropriation of 5.0 cubic feet per second (“cfs”) for a 176 unit subdivision on 300 acres located in Elmore County.

On April 7, 2009, the Department conducted a hearing for the contested case. On June 23, 2009, the hearing officer, Gary Spackman, issued a preliminary order.

On July 9, 2009, Nevid petitioned the hearing officer to reconsider the preliminary order.

On July 16, 2009, the hearing officer was appointed as the interim director of the Department.

ISSUES RAISED BY PETITION FOR RECONSIDERATION

The issues raised by the petition for reconsideration are, quoted from the headings in the petition for reconsideration:

1. The hearing officer should reconsider his finding regarding the amount of water available for appropriation in the Elk Creek Village Area.
2. The hearing officer should reconsider his conclusion that water be shared among all of the applicants, regardless of priority.
3. The hearing officer should reconsider the limitation on the use of water for irrigation of open space to recognize the practical realities of waste water use.

Each of these issues will be listed as a margin heading below and discussed within text following the margin heading.

Sufficiency of the Water Supply

Nevid asserts that a high estimate of water availability is 8,400 acre-feet and a low estimate of water availability is 2,400 acre-feet.

Nevid estimated the "high" or maximum water availability using estimates of evapotranspiration computed with METRIC (Mapping EvapoTranspiration at high Resolution with Internalized Calibration). The preliminary order rejected the use of "METRIC" estimates (referred to in the preliminary order as "SEBAL") because METRIC is a model that was developed for estimating evapotranspiration for irrigated cropland and METRIC has not been extensively ground-truthed for other land use classifications. Adjustment of METRIC output would be required to quantify rangeland evapotranspiration with reasonable confidence. The adjustment is necessary because the magnitude of actual evapotranspiration might be smaller than the range of error (error band) within which METRIC can estimate evapotranspiration.

This final order continues to reject the METRIC estimates of evapotranspiration because the model was adjusted for irrigation, not for rangeland. The use of the METRIC values is not reliable in this case. Finding no. 17 will be edited to focus on the unreliable use of METRIC data calibrated to cropland as the cause of rejection.

The hearing officer also explained in findings of fact nos. 19-22 why the value of 2,400 acre-feet was considered to be a high value of recharge:

19. To compute the recharge value of 2,400 acre-feet per year, Nevid divided the contributing basin, or the recharge area, into two sub-areas. The upper one-third of the area is identified as granitic rock in the upper Sand Hollow Creek and Bowns Creek watershed. In its computations, Nevid assumed that all water falling on the upper granitic area that is not consumed by evapotranspiration contributes to surface water flows in the ephemeral streams whose channels run through the contributing area. Nevid further assumed that all of this surface water

flow contributes to recharge of the target aquifer from which Nevid proposes to divert ground water.

20. The lower two-thirds of the contributing area is characterized as the "capture area." Nevid assumed five percent of the precipitation that falls on the capture area would also contribute to recharge.

21. By adding all the surface water flow derived from the upland area with five percent of the precipitation falling on the capture area, Nevid computed an annual recharge value of 2,400 acre-feet.

22. Nevid computed a recharge value of 2,400 acre-feet to the target aquifer by estimating the highest value of recharge for surface water runoff (100 percent) and also a high value for percolation in the capture area (5%). ...

The hearing officer computed a lower water availability number using other factors. Nevid's expert witness, Christian Petrich, referred to a percolation percentage of 3% for the capture area used in a previous computation (See Exhibit 3A). In addition, computations in Exhibit 3A and the attachment to Exhibit 4 applied a recharge percentage of 14% to the upland area. Applying these reduced numbers resulted in a total recharge estimate of 821 acre-feet annually.

The hearing officer reviewed the information contained in Exhibits 2, 3A, and 4. Exhibit 3A, titled *Groundwater Supply Evaluation for Elk Creek Village, Application for Permit No. 61-12090*, employed the following assumptions:

- A capture area for areal infiltration in the lower portion of the contributing basin that was delineated by drawing a two-mile buffer around the Elk Creek Village property and then extending the capture area up-gradient to the boundary with the granitic uplands.
- A ground water percolation percentage of 3% of total precipitation in the lower portion of the contributing basin.
- A recharge percentage of 14% of the difference between precipitation and evapotranspiration in the uplands portion of the contributing basin.
- Using METRIC evapotranspiration estimates that were developed for irrigated cropland and the above assumptions, Nevid computed a high and low estimate of recharge within the total contributing area.

Based on discussions with Department staff, Nevid prepared Exhibit 2, a memorandum titled *Response to IDWR memos regarding aquifer recharge along the I-84 corridor*. The memo changed Nevid's initial approach for estimating recharge. Exhibit 2 employed the following assumptions:

- A capture area with a one mile buffer for areal infiltration in the lower portion of the contributing basin.
- A recharge percentage of 100% applied to the difference between precipitation and evapotranspiration in the lower portion of the contributing basin.
- A recharge percentage of 100% applied to the difference between precipitation and evapotranspiration in the uplands portion of the contributing basin.

- Using METRIC evapotranspiration estimates that were developed for irrigated cropland and the above assumptions, Nevid computed a “high” estimate of recharge within the total contributing area.
- Using ET Idaho evapotranspiration estimates for a weather station at Anderson Ranch Dam and the above assumptions, Nevid computed a “low” estimate of recharge within the total contributing area for a mix of rangeland vegetation types.

In Exhibit 2, Nevid’s latest submittal, Nevid discusses that 5% of the precipitation will infiltrate and recharge the aquifer in the capture zone, but the assumed infiltration percentage has absolutely no bearing on the recharge computation. This is because the assumed infiltration amount is subtracted from the difference between precipitation and evapotranspiration in order to calculate surface channel seepage but that same amount is then added to surface channel seepage in order to calculate aquifer recharge.

The revised water budget summary table on page 23 of Exhibit 2 contains 13 rows of information, but only five of the rows are relevant to Nevid’s computation. The first line contains the total annual precipitation of 24,300 acre-feet on the contributing area. The fourth line is the METRIC value of annual evapotranspiration of 15,900 acre-feet. The 15,900 acre-feet of evapotranspiration subtracted from the precipitation of 24,300 acre-feet equals 8,400 acre-feet, 100% of the computed recharge, and is Nevid’s high estimate of recharge.

The value in line five is the annual evapotranspiration of 21,900 acre-feet derived from the Anderson Ranch weather station. Evapotranspiration of 21,900 subtracted from precipitation of 24,300 acre-feet equals the low annual recharge estimate of 2,400 acre-feet, but is, again, 100% of the recharge computed in a different way. Only lines one, four, five, twelve, and thirteen contribute to or are a result of the computation. As described above, the assumed infiltration percentage does not affect Nevid’s high and low recharge estimates

The hearing officer rejected and the prior reasoning in this analysis rejects the use of METRIC as a method of computing ET for rangeland. Therefore, 2,400 acre-feet is the high value for annual recharge because it assumes all the water not consumed by the rangeland plants is recharge.

The hearing officer’s recharge estimate of 811 acre-feet annually was derived using some of the percentage values used by Nevid in Exhibit 3A. Because the recharge value of 2,400 acre-feet assumes 100% recharge, it is the high estimate of recharge. Only a portion of this volume of water would be available for use within the Elk Creek Development. The hearing officer cited factors that would limit Nevid’s ability to access this water:

24. Nevid’s computations of recharge assume that there is no effect on the target aquifer from other ground water withdrawals outside of the contributing area. This assumption increases the estimate of ground water available for appropriation.

25. Nevid’s method of estimating recharge also assumes that, because of the location of the proposed development, all water recharging the aquifer up-gradient from the proposed development is available for appropriation. Precipitation on the granitic uplands is a major source of recharge for the aquifer

system down gradient from the Elk Creek Village development. As a result, the total water within the aquifer is more limited than estimated by Nevid.

In addition, Nevid's computation assumes that the entire recharge can be captured by Nevid. Recharge water may be retained by aquitards that prevent downward vertical movement of water to the target aquifer. Some of the recharge water may move through the capture area as underflow. Nevid's inability to capture these waters further reduces the water available for appropriation.

Nevid's method of estimating available water for appropriation is, at best, crude. The determination of the size of the contributing area is arbitrary. Nevid could have increased the contributing area, or recharge area, by using a buffer that is larger or smaller than one mile. The use of a larger buffer would have included existing wells within the capture area that are outside of the one that was delineated with a one mile buffer.

Finally, there is little or no geologic analysis in the evidence.

The method of determining a minimum value for total recharge employed by the hearing officer was reasonable, particularly given the uncertain assumptions, the several attempted approaches, and the simplified methods of determining the volume of water recharging the ground water in the vicinity of the proposed development. The method employed by the hearing officer was used to estimate recharge in an adjacent basin, was based on actual flow measurements, and had been used by Nevid in Exhibit 3A. A reduction in the minimum recharge estimate of 811 acre-feet to a lesser water availability of 345 acre-feet is also reasonable given the factors that would prevent Nevid from capturing all the water recharged to ground water. The annual water volume limitation in the earlier preliminary order of 345 acre-feet will not be disturbed by this decision.

The hearing officer will amend finding of fact no. 19 to include shallow ground water underflow as part of the water contributed from the Danskin Hills. This amendment does not change Nevid's assumption, however, that all water from the Danskin Hills recharges the target aquifer.

Local Public Interest

Nevid argues that the Department cannot consider the demands on a limited ground water resource of other pending proposals for use of ground water when reviewing its application for the local public interest because (1) the review conflicts with the prior appropriation doctrine of first in time first in right, and (2) any review must be limited to alternate uses, not uses of a similar or identical nature.

The filing of an application establishes a prospective priority date. Until the application matures into a water right permit and a subsequent license, the prior appropriation doctrine does not bestow any right to preempt the Department's consideration of other subsequently filed applications or of reasonably likely future uses of the water sought to be appropriated. The Department must consider "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-202B(3). Because of the existing multiple proposals for domestic and municipal uses, one of

the primary water interests of the people in the area is for residential expansion. Because there is limited recharge to the public ground water resource, limited appropriations of water will protect and conserve the limited supply for the anticipated future domestic and municipal uses of water.

The hearing officer does not agree that the instruction in *Shokal v. Dunn*, 109 Idaho 778 (1985) that the Department may consider “alternative uses” prohibits the Department from considering like uses that may bear prospective later priority dates. *Shokal* supports the determination that the Department should consider all prospective uses that might be made “within a reasonable time.” This reasoning is strengthened by the later enactment of Idaho Code § 42-202B(3) which directs the Department to consider the “interests of the people in the local area” and the “effects of such use on the public water resource.”

Logical Development Progression

Nevid argues that prohibition of direct irrigation of common areas and a requirement that the common areas be irrigated solely with waste water effluent ignores the realities of development progression. Without this restriction, however, the developer could implement all the irrigation of the common areas and sell very few residential lots, ultimately perfecting an irrigation water right without the accompanying domestic use of the limited water supply. Nevid can build houses and irrigate common area with effluent water proportional to the level of development. Alternatively, Nevid can acquire existing water rights and attempt to transfer them to irrigate the common areas.

Based on evidence presented at the hearing, the interim director finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application to appropriate water no. 61-12090 proposes the following:

Purpose of Use:	Municipal
Source:	Ground water
Flow Rate:	5.0 cubic feet per second (“cfs”)
Uses Within Municipal Use:	
In house domestic	0.60 cfs
Irrigation	2.76 cfs
Commercial	0.04 cfs
Fire Protection	2.20 cfs
Points of Diversion:	SESE ¹ , Section 2; SWNE, NWSE, and NENE, Section 11; all located in Township 1 South, Range 4 East.
Place of Use:	Township 1 South, Range 4 East, Section 2, NESE, S1/2SE, and Section 11, NE, NWSE

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

2. Nevid named the proposed development "Elk Creek Village." Elk Creek Village is the first phase of a larger development referred to as "Elk Creek Canyon." The Elk Creek Canyon development includes both the 300 acres that is the subject of this application and an additional 400 acres located east of the 300 acres. In addition, Nevid also owns or has the option to acquire 1,351 acres located in Sections 5, 6, 7 and 8 of Township 1 South, Range 5 East. This property is located approximately one-half mile east of the Elk Creek Canyon proposed development.

3. Approximately 176 lots will be platted within the Elk Creek Village. The application originally proposed the irrigation of approximately 88 acres associated with the residential lots. In addition, the application proposed irrigation of 50 acres of common area. Nevid computed the proposed irrigation flow rate of 2.76 cfs by multiplying the total 138 irrigated acres by 0.02 cfs.

4. Total annual ground water withdrawal is estimated to be approximately 580 acre-feet. Average annual consumptive use is estimated to be approximately 420 acre-feet.

5. At the hearing, Nevid presented evidence that approximately 1/3 acre will be irrigated for each lot on which a home is constructed. This would result in the irrigation of approximately 59 acres.

6. With the reduced irrigated acres, at a rate of 0.02 cfs per acre, the flow rate for irrigation of 59 acres associated with the residential lots would be 1.18 cfs, and the flow rate for irrigation of 50 acres of common area would be 1.00 cfs, for a total flow rate of 2.18 cfs.

7. IDWR standards recognize a volume of 0.6 acre-feet annually per home for in-house use. IDWR also allows a maximum volume of four acre-feet per acre of irrigated land for growing crops at the location of the proposed development.

8. The annual volume of water needed for in-house use is $176 \times 0.6 = 106$ acre-feet. The annual volume of water needed for irrigation of lots associated with homes is $176/3 \times 4.0 = 235$ acre-feet. Approximately four acre-feet is an estimate of the volume of water needed for commercial use. The total projected annual volume of water needed for home and commercial use is 345 acre-feet.

9. Nevid owns the 300 acre place of use free and clear of indebtedness. Nevid has spent \$500,000 to \$1,000,000 in engineering and design. Nevid has submitted a conceptual design to Elmore County for approval.

10. Elk Creek Village will be a master planned subdivision under the planned community portions of the Elmore County ordinances.

11. Nevid submitted two technical reports calculating an estimate of a water balance for a limited area surrounding the proposed Elk Creek Village development (capture area) and an estimated recharge area up-gradient from the development (upland area) that might contribute recharge to the ground water underlying this area.

12. The first report, dated December 17, 2007 (Exhibit 3A), used a two mile buffer from the proposed development to delineate the capture area for recharge by infiltration. The two mile buffer was extended to the northeast approximately in the direction of up-gradient surface topography until it encountered the upland recharge areas in the Danskin Hills. This area will be referred to hereafter as “the capture area.” The upland area in the Danskin Hills that is tributary to the capture area will be referred to hereafter as “the upland recharge area.” The combination of the capture area and the upland recharge area will be referred to hereafter as “the contributing basin.”

13. IDWR staff prepared a staff memorandum (Exhibit 4), dated February 24, 2009 that evaluated “aquifer recharge in areas of planned community applications along the I-84 corridor from Boise to Mountain Home.” The memorandum identified “11 pending applications to appropriate water for planned communities along the I-84 corridor with a total combined appropriation of 172 cfs.” The report concluded that “aquifer recharge is limited in the surrounding area . . .”

14. After reviewing reports prepared by IDWR staff regarding an adjacent proposed subdivision (attached to Exhibit 4), Nevid prepared a second report. The second report is dated March 30, 2009 (Exhibit 2). The second report reduced the buffer for delineation of the capture area to approximately one mile. The second report extended this capture area to the northeast approximately in the direction of up-gradient surface topography until it encountered the upland recharge area in the Danskin Hills.

15. The March 30, 2009 report estimated the range of annual volumetric recharge within the identified area from a low of 2,400 acre-feet per year to a high of 8,400 acre-feet per year.

16. Nevid used different methods to determine the low and high estimates of recharge. Nevid estimated the upper annual recharge volume of 8,400 acre-feet per year by using evapotranspiration values computed with METRIC (Mapping EvapoTranspiration at high Resolution with Internalized Calibration). METRIC estimates evapotranspiration by balancing infrared energy that is calibrated to reference weather information and derived evapotranspiration.

17. The dominant land type in the area of this development is rangeland. METRIC has not been demonstrated to be a reliable method of determining rangeland plant evapotranspiration. The METRIC data used by Nevid was calibrated for irrigated land, not for rangeland. Consequently, the hearing officer rejects the upper value of recharge calculated by Nevid.

18. Nevid calculated the lower recharge value of 2,400 acre-feet per year using evapotranspiration estimates derived from data gathered at a weather station located at Anderson Ranch Dam. The evapotranspiration estimates derived from Anderson Ranch Dam data are similar to evapotranspiration values derived using data from the Boise Seven North weather station located in the foothills west and north of Boise. The use of data from the Anderson Ranch Dam weather station is a reliable means of estimating evapotranspiration at the development site.

19. To compute the recharge value of 2,400 acre-feet per year, Nevid divided the contributing basin, or the recharge area, into two sub-areas. The upper one-third of the area is identified as granitic rock in the upper Sand Hollow Creek and Bowns Creek watershed, or the upland recharge area. In its computations, Nevid assumed that all water falling on the upland recharge not consumed by evapotranspiration either contributes to surface water flows in the ephemeral streams whose channels run through the contributing area or underflows into the capture area. Nevid further assumed that all of this surface water flow or underflow contributes to recharge of the target aquifer from which Nevid proposes to divert ground water.

20. The lower two-thirds of the contributing area is the capture area. Testimony in the record and some of the documents assert that Nevid assumed that five percent of the precipitation that falls on the capture area would also contribute to recharge as areal infiltration.

21. Nevid computed an annual recharge value of 2,400 acre-feet to the target aquifer in the water budget summary table found on page 23 of Exhibit 2. The value in line five of the table is the annual evapotranspiration for 21,900 acre-feet derived from the Anderson Ranch weather station. Annual evapotranspiration of 21,900 subtracted from annual precipitation of 24,300 acre-feet equals the annual recharge estimate of 2,400 acre-feet. The annual recharge estimate of 2,400 is a high estimate of recharge because it assumes that 100% of the difference between precipitation and evapotranspiration is recharge. The assumed fraction of precipitation that infiltrates to the aquifer is not germane to Nevid's calculation of aquifer recharge.

22. The USGS and the Department estimate a percentage of precipitation recharge to the target aquifer underlying the capture area of two to three percent of precipitation. In addition, other computations of recharge by surface channel seepage to be less than 100 percent. For instance, a previous computation of recharge by Nevid's consultant in this matter (Exhibit 3A) and in an adjoining basin (Attachment to Exhibit 4) estimated that 14% of the surface runoff actually recharges the target aquifer.

23. In the previously issued preliminary order, to calculate a low value for recharge, the hearing officer assumed: (a) three percent of the precipitation in the capture area recharges the shallow aquifer system rather than five percent; and (b) surface channel seepage recharge to the target aquifer is 14 percent of the difference between precipitation and evapotranspiration in the upland portion of the contributing basin. Three percent of the average precipitation in the capture area for infiltration (14,800 acre-feet per year) is 444 acre-feet per year. In addition, 14 percent of the difference between precipitation and evapotranspiration on the granitic uplands is assumed to recharge the target aquifer system as surface channel seepage. The average annual precipitation in the upper Sand Hollow and Bowns Creek basins is 9,500 acre-feet per year. The evapotranspiration for plants growing on the 5,400 upland acres is computed by multiplying the upland acres by the estimated upland evapotranspiration of 1.26 acre-feet per acre. The computed evapotranspiration in the upland area is 6,804 acre-feet per year. Subtracting 6,804 acre-feet from 9,500 acre-feet results in a difference of 2,696 acre-feet. Fourteen percent of 2,696 acre-feet is 377 acre-feet of recharge annually from the uplands. Adding the recharge from the uplands (377 acre-feet per year) to the estimated infiltration in the capture area (444 acre-feet per year) yields a total recharge of 821 acre-feet per year. Because of other ground water withdrawals, the amount available for appropriation is 10 acre-feet less than the total recharge, or 811 acre-feet per year.

24. Nevid's computations of recharge assume that there is no effect on the target aquifer from other ground water withdrawals outside of the contributing area. This assumption overestimates the ground water available for appropriation.

25. Nevid's method of estimating recharge also assumes that, because of the location of the proposed development, all water recharging the aquifer up-gradient from the proposed development is available for appropriation. Precipitation on the granitic uplands is a major source of recharge for the aquifer system down-gradient from the Elk Creek Village development. As a result, Nevid overestimates the amount of water available for appropriation.

26. In addition, Nevid's computation assumes that the entire recharge can be captured by Nevid. Recharge water may be retained by aquitards that prevent downward vertical movement of water to the target aquifer. Some of the recharge may move through the capture area as underflow. Nevid's inability to capture these waters further reduces the water available for appropriation.

27. Nevid's method of estimating available water for appropriation is, at best, crude. The determination of the size of the contributing area is arbitrary. Nevid could have increased the contributing area, or recharge area, by using a buffer that is larger or smaller than one mile. The use of a larger buffer would have included existing wells within the capture area that are outside of the one that was delineated with a one mile buffer.

28. Finally, there is little or no geologic analysis in the evidence.

29. The above factors and the limited recharge in the larger hydrologic area raise significant concerns about the sufficiency of the water supply to provide the requested appropriation.

30. A reduction in the minimum recharge estimate of 811 acre-feet to a lesser water availability of 345 acre-feet is reasonable given the factors that would prevent Nevid from capturing all the water recharged to ground water. The annual water volume limitation in the earlier preliminary order of 345 acre-feet will not be disturbed by this decision.

31. There is a demand for housing in the Treasure Valley area. The area proposed for development has potential for growth with limited water resources available to supply the development. Presently, there are 11 significant applications to appropriate water proposing points of diversion from ground water in the vicinity of the points of diversion proposed by this application.

32. Ground water is presently the sole source of potable and culinary water in the vicinity of the Elk Creek Village development.

33. The applicant intends to irrigate parks, common areas, and ball fields with treated water from an independent sewage treatment facility.

CONCLUSIONS OF LAW

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

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

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

3. Idaho Code § 202B(3) defines the local public interest as follows:

"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.

4. Idaho Code § 202B(6) defines municipal purposes as follows:

"Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

5. Idaho Code § 202B(5)(c) defines municipal provider to include:

A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in section 39-103(10), Idaho Code.

6. It is in the local public interest to promote the full use of the limited ground water resources in the desert areas that approximately straddle the Ada County - Elmore County border. There are many developments proposed in this area. It would not be in the public interest to approve an appropriation of water that could significantly commit a large portion of the ground water resources to a single development.

7. Nevid implicitly asserts that it should be entitled to all or a major portion of all the estimated recharge within or up-gradient of the proposed Elk Creek Village development. Because its property is located closer to the Danskin Hills than other down-gradient properties, Nevid argues that it should be able to capture all or a significant portion of the recharge water derived from the Danskin Hills to the exclusion of down-gradient landowners.

8. The doctrine of prior appropriation harshly recognizes that the first appropriator in time receives all the water before the next appropriator receives any water. If IDWR strictly applied notions of the prior appropriation doctrine when it considers applications to appropriate water, Nevid might be entitled to all the unappropriated water recharging up-gradient from the Elk Creek Village property.

9. The local public interest definition requires, however, that IDWR consider “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.” Because of the limited ground water supply in the area of the proposed points of diversion, it is in the local public interest to restrict ground water use to in-house use and limited irrigation of lots associated with constructed homes.

10. Common areas within the proposed development should only be irrigated with treated waste water from homes and other culinary or potable uses.

11. The irrigation portion of the water right should be limited to a flow rate of 1.18 cfs. The total flow rate authorized for municipal use should be limited to 1.82 cfs. A separate purpose of use for fire protection should be limited to 2.20 cfs. The total flow rate authorized should be limited to 4.02 cfs. The total volume diverted should be limited to 345 acre-feet.

11. The development will not injure other water users if properly limited.

12. The water supply is sufficient if the use is properly limited.

13. The applicant has sufficient resources to complete the project.

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

15. Use of water proposed is in the local public interest if limited to in-house use and irrigation of not more than one-third acre associated with each constructed house.

16. The application, if properly limited, will result in the conservation of the waters of the state of Idaho.

ORDER

IT IS HEREBY ORDERED that application to appropriate water no. 61-12090 is **Approved.**

IT IS FURTHER ORDERED that the diversion rate and annual volume for water right no. 61-12090 is limited to no more than the following:

	<u>Flow Rate</u>	<u>Volume</u>
Municipal Use:	1.82 cfs	345 acre-feet
Fire Protection	<u>2.20 cfs</u>	<u>(no additional volume added)</u>
Total Flow	4.02 cfs	Total Volume 345 acre-feet

IT IS FURTHER ORDERED that permit no. 61-12090 is subject to the following conditions:

Proof of application of water to beneficial use shall be submitted on or before October 1, 2014.

Subject to all prior water rights.

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

Place of use is within the area served by the public water supply system of Elk Creek Village. The place of use is generally located within Township 1 South, Range 4 East, Section 2, NESE, S1/2SE, and Section 11, NE, NWSE.

Prior to the diversion of water in connection with this right, the right holder shall provide the Department with a plan for monitoring ground water levels in the vicinity of the place of use for this water right. The monitoring should occur in parallel with development and production and should include identification of non-producing wells and timelines for measuring and reporting. The right holder shall not divert water in connection with this right until the monitoring place is approved by the Department. Failure to comply with the monitoring plan once it is accepted shall be cause for the Department to cancel or revoke this right.

Prior to or in connection with the proof of beneficial use statement to be submitted for municipal water use under this right, the right holder shall provide the Department with documentation showing that the water supply system is being regulated by the Idaho Department of Environmental Quality as a public water supply and that it has been issued a public water supply number.

After specific notification by the Department, the right holder shall install a suitable measuring device or shall enter into an agreement with the Department to determine the amount of water diverted from power records and shall annually report the information to the Department.

Common areas, parks, school grounds, golf courses, and any other large parcels may only be irrigated under this water right with wastewater that has been previously beneficially used for potable or culinary purposes, has been treated in a wastewater treatment plant, and is delivered to the parcel irrigated.

The direct irrigation occurring under this municipal use shall not exceed 1/3 acre within each platted subdivision lot upon which a home has been constructed. This right does not provide for the direct irrigation of lots upon which homes have not been constructed

A map depicting the place of use boundary for this water right at the time of this approval will be attached to the approval document for illustration purposes.

Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had not control.

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

Dated this 30th day of September, 2009.

A handwritten signature in cursive script that reads "Gary Spackman". The signature is written in black ink and is positioned above a solid horizontal line.

Gary Spackman
Interim Director

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on this 15th day of October, 2009, a true and correct copy of the above and foregoing document described below was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Final Order, and Statement of Available Procedures and Applicable Time Limits for Responding to Final Orders

DANA HOFSTETTER
HOFSTETTER LAW OFFICE
608 W FRANKLIN ST
BOISE ID 83702

NORMAN M SEMANKO
ROSE LAW GROUP BORTON
6223 N DISCOVERY WAY, STE 200
BOISE ID 83713

SPF WATER ENGINEERING
ATTN ROXANNE BROWN
300 E MALLARD DR STE 350
BOISE ID 83706


Deborah J. Gibson
Administrative Assistant
Water Management Division