

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

**IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 63-31218 IN THE)
NAME OF JAMES E. MAHONEY)
_____)** **PRELIMINARY ORDER**

This matter came before the Idaho Department of Water Resources (“Department”) as a protested application to appropriate ground water in the Boise River Drainage. A hearing having been held, the hearing officer now enters this preliminary order:

FINDINGS OF FACT

1. James E. Mahoney (“applicant”) filed application for permit No. 63-31218 (“the application”) on March 23, 2001 seeking to appropriate 0.14 cubic feet per second (“cfs”) of ground water for domestic, heating, irrigation and diversion to storage purposes. The application also seeks the right to store 20 acre feet per annum (“af/a”) from ground water for aesthetics, recreation, wildlife and fire protection purposes.

2. The application includes the following details:

Point(s) of Diversion: Two wells located in the SE1/4NE1/4 Section 32,
Township 5 North, Range 4 East, Boise Meridian, Boise
County, Idaho.

Place of use: All uses will occur in the SE1/4NE1/4 Section 32,
Township 5 North, Range 4 East, Boise Meridian.

Area to be Irrigated: Two acres

Number of Homes: One home, plus a guest house

Rates of Diversion: Domestic 0.04 cfs

Heating 0.04 cfs

Irrigation 0.06 cfs

Diversion to Storage: 0.14 cfs

Storage for aesthetics,
recreation (fishing), wild-
life and fire protection: 20 af/a

Total: 0.14 cfs and 20 af/a

Period of Use: Year-round for all uses except irrigation is 4/1 to 10/31.

3. The application includes a mitigation plan intended to prevent injury to existing rights to surface water from the Boise River. The plan offers to retire 0.06 cfs of

water right No. 63-00270 appurtenant to three (3) acres of land in the Boise Valley downstream from Lucky Peak Dam. Water right No. 63-00270 is described in the records of the Department as follows:

Owner:	Sylvan and/or Barbara Williamson
Source:	Boise River
Priority:	April 1, 1865
Rate of Diversion:	Six (6) cfs
Purpose of use:	Irrigation
Period of uses:	March 1 to November 15
Point of Diversion:	Lot 6 (SW1/4NE1/4) Section 22, Township 4 North, Range 1 East, Ada County, Idaho
Place of Use:	300 acres within parts of Sections 15, 16, 21 and 22, Township 4 North, Range 1 East.

4. Notice of the application was published on May 2 and 9, 2001, in the Idaho World, a newspaper printed in and of general circulation in Boise County, Idaho. The Department also gave notice of the application by posting information on the Department's homepage and by direct mailing to those requesting to be notified. Timely protests were received from the following (collectively referred to as "protestants"):

Robert and Pamella Smolczynski
Rex Lanham
Kevin Smith and/or Debra Borley
Francis and/or Shirley Mangum.

5. The protestants listed the following concerns in objecting to the approval of the application and development and use of water as proposed:

- a. The proposed use will reduce the quantity of water under existing water rights.
- b. The water supply is insufficient for the proposed use.
- c. The proposed use will conflict with the local public interest.
- d. The proposed use is contrary to the conservation of water resources within the state of Idaho.

6. The Department dismissed two of the protests. On September 21, 2001, the Department issued an order to Rex Lanham compelling discovery and conditionally dismissing Mr. Lanham's protest if he failed to respond to the discovery order on or before October 10, 2001. The hearing record indicates that Mr. Lanham did not comply with the discovery order and his protest was, therefore, dismissed. On October 11, 2001, the Department entered an order dismissing the protest of Francis and/or Shirley Mangum after the Department received a withdrawal of the protest from their attorney of record.

7. On November 6, 2001, a hearing was held at Boise, Idaho. The applicant was present and represented by attorney John Marshall. Protestants Kevin Smith, Debra

Borley, and Pamella Smolczynski were present. The parties presented testimony, witnesses and exhibits.

8. The development proposed in the application is essentially in place. The two wells have been constructed and equipped with pumps, the residence and guest house have been constructed and occupied, an existing natural pond has been renovated and landscaping and other plantings requiring irrigation are in place. Space heating using water-to-air heat pumps has been occurring since December 1998 and the return flow from heating has been re-injected since April 1, 2001 (Applicant's Exhibit No. 3). Details of the wells constructed by the applicant are as follows:

Well No. 1 (information from Applicant's Exhibit No. 4, except as noted):

Date Constructed:	October 1997
Location on Driller's Report:	SW1/4NE1/4 Section 32, Township 5 North, Range 4 East.
Surface Casing Diameter:	6 inch
Total Depth:	263 feet
Casing Depth:	263 feet (perforated from 165 feet to 262 feet)
Seal Depth:	21 feet
Pump:	5 horsepower (hp) diverts 35 gallon per minute (gpm) (testimony of applicant)
Use:	Domestic and heating (testimony of applicant).

Well No. 2 (information from Applicant's Exhibit No. 4, except as noted):

Date Constructed:	October 1999
Location on Driller's Report:	SW1/4NE1/4 Section 32, Township 5 North, Range 4 East
Surface Casing Diameter:	8 inch
Total Depth:	338 feet
Casing Depth:	338 feet (perforated from 230 feet to 270 feet and from 290 feet to 338 feet)
Seal Depth:	18+ feet
Pumps:	5 hp and 2 hp combined divert 60 gpm (testimony of applicant)
Use:	Irrigation and storage (testimony of applicant).

9. Terry Scanlan, a consultant representing the applicant, and Roger Braun, a consultant representing protestants Francis and Shirley Mangum, conducted a study to determine the effect of pumping the applicant's 8-inch diameter well on water levels in

other wells in the area and on the flow of Mangum Springs (Applicant's Exhibit No.7). The test included measuring water levels in wells (including those of the protestants and the flow of Mangum Springs every other day for a two-week period while the 8-inch diameter well was not pumped and for another two-week period while the 8-inch diameter well was pumped continuously at 40 gpm. The test began on July 11, 2001 and was completed on August 10, 2001. Mr. Scanlan concluded from the test and other water level information that:

- a. Pumping of the Mahoney 8-inch diameter well did not affect the flow of Mangum Springs. The flow of the spring was affected by precipitation events during the test period.
- b. Pumping of the Mahoney 8-inch diameter well had no discernable effect on the water level in the well owned by protestants Smolczynski.
- c. Pumping of the Mahoney 8-inch diameter well had a measurable but insignificant effect on the level in the two wells owned by protestants Smith-Borley.
- d. There is a hydraulic connection between the applicant's wells and some other wells in the area, including those owned by protestants Smith-Borley, but pumping of the applicant's well during the study did not have an adverse impact on the water level in the wells.
- e. Construction and use of the applicant's wells has not affected ground water availability to the protestants because the water level in the wells owned by protestants Smolczynski and Smith-Borley were at or above the levels noted on the driller's reports at the time the wells were constructed.

10. The driller's report for the applicant's 8-inch diameter well indicates that water was encountered in a zone located from 56 feet to 67 feet below land surface and another zone from 74 feet to 85 feet below land surface. The driller's report indicates that the 8-inch diameter well casing extends through these zones with the bore diameter of 10-inch reducing to 8-inch. The surface seal placed in the annular space between the casing and the well bore extends only to about 18 feet below land surface. The driller's report does not confirm that water is prevented from moving down the annular space from the first two water bearing zones encountered as the well was constructed. Downward flow from these zones would not be affected by the pumping regimen used in the aquifer test because depths to water in the well were 111 feet or more throughout the test. If water is moving downward around the casing, the aquifer test did not fully assess the effect of constructing the applicant's 8-inch diameter well on water-bearing zones above the water level in the well.

11. The applicant testified that:

- a. Because the wells are constructed and in use, the application is not for speculation or delay and that his financial resources are adequate to develop the project as proposed in the application.

b. Diversion and use of water as proposed in the application is in the public interest because the local community benefits from wildlife (including deer, elk, turkeys, ducks and geese) watering from the pond and the pond is valuable as a landmark and source of water for fighting wildfire.

c. Technology is being used to conserve water. The irrigation system uses sprinklers controlled by timers and other efficient methods of application. Water-to-air heat pumps efficiently use water in heating and cooling.

12. Terry Scanlan testified that precipitation is sufficient in the area to recharge the aquifers adequately to support the uses proposed in the application. He further testified that the impact of the applicant's proposed uses to surface water sources in the area (Clear Creek and Mores Creek) would not be significant or measurable.

13. Terry Scanlan testified that the annual volume of water to be diverted under the project proposed in the application would be 28 acre feet and of that amount less than 10 acre feet would be consumptively used. He further testified that the historic consumptive use under right no. 63-00270 exceeds 13.5 acre feet per year, that use of this right has never been curtailed by a priority call on the Boise River and that the right had not been forfeited.

14. Pamella Smolczynski testified that the Smolczynski's have an unrecorded right to use ground water from their well. The right was developed within the domestic exemption for use of ground water (Ref. Section 42-227, Idaho Code), and diversion and use of water does not exceed the limitations in Section 42-111, Idaho Code. The water right dates from the drilling and use of the well on October 28, 1998.

15. Pamella Smolczynski testified that she was concerned that long-term use of the applicant's wells would adversely affect water availability to her well, would conflict with the local public interest because it would reduce the flow of Clear Creek restricting recreational use and water availability for fighting wildfire on dry years such as 2001. She also testified that the proposed use will not conserve water for use in the state of Idaho because the proposed rate of water use is 80 times greater than that required for one home. She indicated that the proposed withdrawals will exceed recharge to the aquifer and may deplete ground water resources for use in the area.

16. Kevin Smith testified that the significant drawdowns measured in the applicant's wells while pumping and the significant difference in static water level existing in the applicant's 6-inch diameter well from the level measured when constructed, indicate a limited ground water resource. He is concerned that the applicant's proposed uses will, over the long-term, deplete water supplies for his use and community needs. He noted that because the pond will be full all summer, the total annual volume evaporated will be larger than estimated by the applicant. He testified that evaporation of 19,000 gallons per day by the applicant would not be in the local public interest or conserve water for use in Idaho when his home uses only 250 gallons per day.

17. Debra Borley testified that Kevin Smith and she had developed a water right under the domestic exemption for use of ground water (Ref. Section 42-227, Idaho Code) with uses within the limitations set forth in Section 42-111, Idaho Code. She expressed similar concerns for the adequacy of the water supply and concern for injury to their water right.

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 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, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the department of water resources may reject such application and refuse issuance of a permit therefore, 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 burden of proof for the factors the Department must consider under Section 42-203A, Idaho Code, but both the applicant and the protestants have the burden of coming forward with information concerning factors affecting the local public interest of which they can be expected to be more cognizant than the other parties. Rule 40.03 Water Appropriation Rules, IDAPA 37.03.08.

3. Prior appropriators of ground water shall be protected in the maintenance of reasonable pumping levels as may be established by the Director of the Department of Water Resources (Section 42-226, Idaho Code), except that holders of rights for domestic purposes from ground water with priority dates earlier than March 29, 1978 are protected in historic pumping levels (Parker v. Wallentine, 103 Idaho 506 (1982)).

4. The diversion and use of water proposed in the application will not reduce the quantity of water under existing rights when used in accordance with the conditions of approval.

5. The water supply is sufficient for the purposes proposed in the application.

6. The application is not made for purposes of speculation or delay.

7. The applicant has the financial resources needed to complete the proposed project.

8. Diversion and use of water proposed in the application will not conflict with the local public interest when used in accordance with the conditions of approval.

9. Diversion and use of water proposed in the application will conserve water for use in the state of Idaho when used in accordance with the conditions of approval.

10. The application should be approved with conditions to protect other existing rights, the local public interest and to conserve water in the state of Idaho.

ORDER

IT IS HEREBY ORDERED that application for water right no. 63-31218 is **APPROVED** subject to the following conditions:

1. Proof of beneficial use of water in accordance with the terms of this permit shall be submitted on or before _____ (a date to be included in the permit issued when this order becomes final not to exceed 1 year after that date).

2. Measuring devices shall be installed and maintained to allow measurement of the rate and volume of diversion from each of the wells and to allow the volume of water re-injected after use for heating purposes to be measured.

3. During the permit development period, as designated in Condition No. 1, the permit holder shall measure and record the volume of water diverted under this water right each month. The permit holder shall measure and record the static depth to water (i.e., the well in which the water level is being measured has not been pumped for at least two hours immediately prior to the measurement) in the 8-inch diameter well authorized under this permit each month during the permit development period. The report of monthly water diversion volumes and depth to water shall be submitted to the Department with the proof of beneficial use or at the end of the permit development period if proof of beneficial use is filed earlier. The need to continue measuring and reporting will be addressed when a license is issued.

4. The permit holder shall provide information to satisfy the Department that 0.06 cfs appurtenant to three (3) acres under water right no. 63-00270 has been permanently acquired by the applicant to mitigate flow depletions in the Boise River below Lucky Peak Dam. The portion of water right no. 63-00270 acquired by the permit holder shall be assigned to the water bank operated by the Idaho Water Resource Board to be used solely for the purpose of mitigating water use under permit no. 63-31218.

5. Diversion and use of water under this right is subject to the control of the Watermaster of Water District No. 63, Boise River.

6. Information shall be provided to the Department to demonstrate to the satisfaction of the Director, that the wells authorized by this permit were constructed or have been reconstructed so that ground water is only diverted from water-bearing zones located at least 100 feet below land surface. The information shall be submitted on or before the date set for filing proof of beneficial use as designated in Condition No. 1. The permit holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.

7. Water diverted for heating purposes shall be re-injected into the ground water. The permit holder shall comply with the permitting requirements of Chapter 39, Title 42, for underground injection of fluids.

8. The diversion and use of water under this permit is subject to all prior rights. Diversion and use under this right shall not reduce the quantity of water to any existing right from springs or other sources of surface water determined by the Department to be hydraulically connected to the ground water source appropriated by the permit holder. Diversion and use of water under this permit shall not reduce the pumping level of any right for domestic purposes existing on or before March 29, 1978, and shall not reduce the pumping level of any other right from ground water below a reasonable pumping level determined by the Department.

9. The priority for diversion and use of water under this permit is March 23, 2001 relative to management of water above Lucky Peak. Diversion and use under the permit shall be considered to have satisfied calls by water rights from the Boise River and tributaries below Lucky Peak Dam with priorities junior to April 1, 1865 as long as water is not used under right 63-00270 in accordance with the mitigation plan offered by the applicant.

10. Diversion and use of water under this permit is limited to 0.14 cfs, a total annual diversion volume of 28 acre feet, and a total annual consumptive use of 10 acre feet.

Dated this _____ day of November, 2001.

Norman C. Young
Hearing Officer

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this _____ day of November, 2001, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

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