BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS TO APPROPRIATE WATER NOS. 63-32089 AND 63-32090 IN THE NAME OF THE CITY OF EAGLE	)))))	**FINAL ORDER**

On January 19, 2005, the City of Eagle ("Eagle") filed two applications for permits to appropriate water, numbered in the files of the Idaho Department of Water Resources ("IDWR" or "Department") as 63-32089 and 63-32090. IDWR published notice of the applications in the Idaho Statesman on April 21 and 28, 2005. The applications were protested by the following individuals: Roy Barnett; Tim Cheney; City of Star; Dean and Jan Combe; Michael Dixon/Hoot Nanney Farms; Bill Flack; Bob and Elsie Hanson; Michael Heath; Charles Howarth; Corrin Hutton; Norma Mares; Michael McCollum; Charles Meissner, Jr.; LeRoy and Billie Mellies; Robyn and Del Morton; Frank and Elaine Mosman; Joseph, Lynn, and Mike Moyle; Eugene Muller; Tony and Brenda O'Neil; Bryan and Marie Pecht; Dana and Viki Purdy; Sam and Kari Rosti; Ronald Schreiner; Star Sewer and Water District; Jerry and Mary Taylor; United Water Idaho; and Ralph and Barbara Wilder.

IDWR conducted a prehearing conference on July 28, 2005. At the prehearing conference, Scott Reeser hand-delivered a letter to IDWR. In the letter, Scott Reeser asked to intervene in the contested case.

On September 13, 2005, IDWR issued an order granting Scott Reeser's petition to intervene.

Several protestants failed to appear at the prehearing conference. IDWR mailed a notice of default to the non-appearing protestants. The following non-appearing protestants who failed to show good cause for non-appearance were dismissed as parties: Roy Barnett, Bryan and Marie Pecht, Del and Robin Morton, Tony and Brenda O'Neil, and Frank and Elaine Mosman.

The hearing officer conducted a second prehearing conference on October 18, 2005. At the prehearing conference, Eagle proposed to drill two wells for conducting a pump test. Eagle proposed to pump water from one of the wells and measure water levels in other wells in the vicinity of the pumped well to determine the impacts of pumping.

On December 22, 2005, IDWR approved two drilling permits to construct wells for the pump test.

On January 17, 2006, IDWR received a "notice of protest" from Bud R. Roundtree. IDWR interpreted the document as a petition to intervene.

On January 19, 2006, the hearing officer issued a *Notice of Hearing, Order Authorizing Discovery, and Prehearing Order*. The hearing officer scheduled the hearing for April 10 through April 14, 2006. On February 28, 2006, Eagle notified the hearing officer that the two test wells had not been constructed. The letter stated "the City of Eagle will not be able to get the pump test completed pursuant to the existing schedule." As a result of the notice, the hearing officer canceled and continued the hearing. In the *Order Continuing Hearing and Canceling Prehearing Deadlines*, the hearing officer ordered the following:

> ...[U]pon completion of construction of the test wells, the City of Eagle shall arrange a time for the anticipated pump tests with the other parties. When the date(s) for the pump tests have been arranged, the City of Eagle shall notify the Department of the test date(s). After receiving notice of the test date(s), the Department will inquire about available dates for a hearing. The hearing will be scheduled no earlier than ninety days following the date of the test to allow the exchange of information and discovery previously authorized.

On July 11, 2006, the City of Eagle notified the hearing officer that "the pump test conducted by the City of Eagle has been completed."

Sometime during late summer or the fall of 2006, Eagle submitted a report titled *City of Eagle – 7 Day Aquifer Test* to IDWR staff for review. The document is dated "June 2006," but the test was not completed until June 19, 2006.

On September 6, 2006, the hearing officer issued a second *Notice of Hearing, Order Authorizing Discovery, and Prehearing Order*. The Notice of Hearing scheduled the hearing for December 6 through 8, 2006 and December 11 and 12, 2006. At the time of service of the notice of hearing, IDWR had not acted on the petition to intervene filed by Bud Roundtree. The record does not show that IDWR ever determined whether Roundtree should be allowed to intervene. Roundtree received notice of all the proceedings, however, and IDWR treated Roundtree as a full party to the contested case.

On November 7, 2006, Star Sewer & Water District withdrew its protest.

On November 13, 2006, protestants Joseph, Lynn, and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., and Charles Howarth filed a *Motion to Continue the Hearing*. On November 15, 2006, the above protestants filed an *Amended Motion to Continue Hearing*. The protestants filing the motion for continuance asserted: (1) various scheduling conflicts of the protestants; and (2) Eagle failed to "arrange a time for the anticipated pump test with the other parties" as required by the hearing officer's March 10, 2006 *Order Continuing Hearing and Canceling Prehearing Deadlines*.

On November 20, 2006, the hearing officer denied the *Amended Motion for Continuance*. This order will not discuss the grounds for refusing the continuance based on scheduling conflicts. A discussion of the prearrangement of the pump test is germane, however.

In denying the request for a continuance on the grounds of failure to jointly conduct a pump test, the hearing officer wrote:

> ...The hearing officer intended that all the parties interested in the pump test have an opportunity to participate in the test. If Eagle failed to arrange the timing of the test with the parties, the hearing officer is dismayed that Eagle did not follow the dictates of the order.
>
> Nonetheless, even assuming Eagle did not arrange a time for the pump test with the protestants as required by the hearing officer's March 10, 2006 order, the protestants have known that the City of Eagle completed its pump test since receiving the July 11, 2006 letter. The hearing officer also notified the protestants of the completion of the pump test in his August 16, 2006 letter and alluded to the completion of the test in his September 6, 2006 order. Failure of the city to fully coordinate the pump test with the protestants should have been raised as an issue at the time the protestants were notified that the pump test had been completed. Instead, the protestants waited until less than a month before the scheduled hearing to complain. Despite Eagle's failure, the protestants' inaction after learning of the completion of the pump test for approximately four months leads the hearing officer to surmise that the protestants were disinterested in participating actively in the pump test. Consequently, failure to coordinate the pump test is not grounds for postponing the hearing at this late date.

On November 22, 2006, protestants Joseph, Lynn, and Michael Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., and Charles Howarth filed a *Motion in Limine*. The protestants participating in the *Motion in Limine* argued that the "...data and results collected from the seven-day pump test conducted by the City of Eagle in May and June, 2006" should be excluded from the evidence "...because the Protestants were not provided an opportunity to collect data from their wells while the pump test was conducted."

On November 30, 2006, the hearing officer issued an *Order Denying Motion in Limine, Notice of Staff Memorandum, and Amended Notice of Hearing*. In the order, the hearing officer stated:

> ...The protestants had an opportunity to complain about their inability to participate in the test long in advance of the hearing. The protestants did not avail themselves of the opportunity and should not be allowed to raise the issue just prior to the hearing as a means of preventing consideration of technical information.
>
> The *Motion in Limine* should be denied.
>
> On November 29, 2006, Sean Vincent and Shane Bendixsen submitted a Department staff memorandum to the hearing officer that evaluated the pump test conducted for the City of Eagle test wells. A copy of the staff memorandum is enclosed with this document. The staff memorandum raises several issues about the procedures of the pump test and the analysis of the pump test data. The

> questions raised by Department staff could seriously affect the credibility of the pump test evidence presented at the hearing.
>
> The hearing officer will consider the Department staff memorandum as part of the evidence in this contested case. Because the analysis of the pump test submitted to Department staff was incomplete, the hearing officer will forward any additional evidence about the pump test received into evidence at the hearing to Department staff for further review to determine possible deficiencies. After the staff review, the hearing officer will distribute the results of the Department's post hearing review to the parties who will have an opportunity to submit additional comments and possibly to request supplemental hearings about the document. This process **will delay** the ultimate consideration of the applications.
>
> The November 30, 2006 order also delayed commencement of the hearing by one day.

A hearing for the contested case was conducted on December 7 and 8, 2006, and resumed on December 11 and 12, 2006. At the end of the day on December 12, 2006, the presentation of evidence was not complete. As a result, additional evidence was presented the morning of December 18, 2006.

Bruce Smith and Tammy Zokan, attorneys at law, appeared on behalf of Eagle. Charles Honsinger and Jon Gould, attorneys at law, appeared on behalf of Joseph, Lynn, and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanney Farms. Sam Rosti, Corrin & Terry Hutton, Mary Taylor, and Jan Combe appeared individually representing themselves.

On December 20, 2006, the hearing officer issued a request for staff memorandum to Hal Anderson, Rick Raymondi, Sean Vincent, and Shane Bendixsen. The request for staff memorandum stated the following:

> Sean Vincent (Vincent) and Shane Bendixsen (Bendixsen) reviewed a technical document titled *City of Eagle, Idaho 7–Day Aquifer Test* prepared by Chris H. Duncan of Holladay Engineering Company. After the review, Vincent and Bendixsen issued a staff memorandum dated November 29, 2006. In the memorandum Vincent and Bendixsen stated that "the scope of the data collection was adequate, but the aquifer test analysis is incomplete."

The request for staff memorandum recited some of the procedural background, and further stated:

> At a hearing conducted on December 7-8, 11-12, and 18, 2006, the City of Eagle presented additional analysis of the aquifer test data. In addition, the City of Eagle called Vincent to testify regarding the November 29, 2006 staff memorandum.
> . . .

THEREFORE, the hearing officer invites department staff to augment the November 29, 2006 staff memorandum regarding the above captioned matter, which could include, without limitation:

1. A full scrutiny of the methods of gathering data, the data presented, and results of the aquifer test contained in the *City of Eagle, Idaho 7-Day Aquifer Test* report dated June 2006.

2. Presentation and analysis of additional data available to department staff to enhance the hearing officer's understanding of the hydrogeology and aquifers in the vicinity of the proposed appropriations of water, including, but not limited to data related to aquifer tests performed for the Lexington Hills well and the Floating Feather well.

3. An independent analysis of Eagle's 7-Day Aquifer Test data using commonly accepted scientific methods in the field of geology, hydrogeology, and engineering.

4. A technical review and critic (sic) of any information and analysis of data presented as evidence during the contested case hearing conducted on December 7-8, 11-12, and 18, 2006.

On February 27, 2007 (date on the document was February 27, 2006), Sean Vincent of IDWR submitted to the hearing officer a staff memorandum titled *Review of Addendum to City of Eagle, Idaho 7-Day Aquifer Test Report*. Attached to the staff memorandum was a document titled *Addendum to City of Eagle 7-Day Aquifer Test Report.*

In the staff memorandum, Vincent states that "the Addendum adequately addresses comments made in a previous memo to you dated November 29, 2006."

On March 13, 2007, Eagle mailed copies of the written addendum reviewed by IDWR staff to the parties who attended the December hearing.

On March 27, 2007, the hearing officer mailed a copy of the staff memorandum written by Vincent to the parties who attended the December hearing. The hearing officer also served a *Notice of Consideration of Additional Evidence and Post Hearing Order* on the parties. The document informed the parties that the hearing officer would consider the information in the addendum and the staff memorandum, and granted the parties until April 25, 2007 to review documents and to submit technical comments about the addendum to the hearing officer and/or request a supplemental hearing.

On March 27, 2007, the hearing officer issued an order dismissing the following parties from the contested case: Michael McCollum, Michael and Nancy Heath, Tim Cheney, Bob & Elsie Hanson, Bill Flack, Ronald Schreiner, City of Star, Scott and Nancy Reeser, Bud Roundtree, Ralph and Barbara Wilder, and Norma Mares.

On April 24, 2007, Mary Taylor submitted written comments to Eagle's addendum.

On April 25, 2007, protestants Joseph, Lynn, and Mike Moyle, Eugene Muller, Dana and Viki Purdy, Charles Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanny Farms, Inc., submitted comments to Eagle's addendum and the IDWR staff memorandum.

On July 17, 2007, the hearing officer issued a preliminary order approving applications nos. 63-32089 and 63-32090. On July 18, 2007, the preliminary order was served on the parties by mailing a copy of the preliminary order to each of the parties via the United States Postal Service.

The following parties filed timely petitions for reconsideration: United Water Idaho; Joseph, Lynn and Mike Moyle ("Moyles"), Eugene Muller, Dana and Viki Purdy, Charles W. Meissner, Jr., Charles Howarth, and Mike Dixon/Hoot Nanney Farms, Inc., all represented by Ringert Clark Chartered; Mary Taylor; and the City of Eagle. In addition, the hearing officer received individual comments from Mike Moyle, Eugene Muller, and Charles Howarth.

On August 2, 2007, United Water Idaho filed a *Withdrawal of Petition for Reconsideration.*

On August 14, 2007, Ringert Clark Chartered withdrew as counsel for Dana and Viki Purdy. Dana & Viki Purdy are parties now representing themselves.

On August 21, 2007, the hearing officer issued an order granting the petitions for reconsideration, stating that the merits of the petition would be addressed expeditiously.

On October 4, 2007, the hearing officer addressed the petitions for reconsideration by issuing an *Amended Preliminary Order.*

On October 17, 2007, Moyles filed a "Petition for Reconsideration of Amended Preliminary Order." Because the *Amended Preliminary Order* responded to previously filed petitions for reconsideration, the Director will consider the petition for reconsideration filed by Moyles as exceptions to the hearing officer's order.

On October 18, 2007, the City of Eagle filed exceptions with the Director.

EXCEPTIONS

The following is a summary of the issues raised by the exceptions. Some of the issues will be resolved summarily in the response following the statement of each issue. If the issue is stated without immediate written analysis, the issue will be analyzed in greater detail in the text following the statement of the issues. If an issue is analyzed in the text following the full statement of the issues, the issue heading will refer to one or more of the identified numbered issues. Numbered findings of fact or conclusions of law in the following statement of issues and analysis all refer to numbers assigned in the *Amended Preliminary Order.* Findings and conclusions in this final order have been renumbered because of amendments to the original text.

Issues Raised by the City of Eagle

Eagle took exception to the *Amended Preliminary Order* as follows:

1. The record supported approval by IDWR of a permit appropriating water for future anticipated municipal needs.

2. IDWR does not have the authority to change the nature of use sought by Eagle's application (municipal) to another nature of use.

3. Reduction in artesian pressure does not constitute injury to a water right, and mitigation for the reduction in artesian pressure is not required by *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

4. The hearing officer failed to designate and fix the record at the time of the hearing, denying Eagle due process.

5. The hearing officer considered information not part of the evidentiary record, denying Eagle due process. This information included comments filed by Mike Moyle, Eugene Muller, and Charles Howarth.

6. The *Amended Preliminary Order* imposes obligations in excess of IDWR's authority. The Director assumes this exception includes the issues of changing a portion of the municipal application to fire protection as a beneficial use, reporting of water use during the permit development period, and construction of observation wells.

7. The *Amended Preliminary Order* failed to identify the portions of the record upon which the findings were based.
Response: The hearing officer is not required to reference all testimony and documentary evidence in the record upon which the decision is based.

8. The hearing officer considered issues not raised by protestants.
Response: Eagle does not specifically identify the issues it alleges were improperly considered, and, as a result, the Director cannot respond to this exception.

9. The applications seek water for 2,000 water connections within Block One of the western expansion area, not directly for the Legacy or Eaglefield developments.
Response: The final order corrects this distinction.

10. A reference in Finding of Fact no. 11 to the "existing Eagle municipal water system" is ambiguous because it does not describe the "existing Eagle municipal water system."
Response: Eagle owns and operates a municipal water system and proposes to expand the municipal water system mainlines and trunk lines to serve additional development including the Legacy and Eaglefield developments. The reference to the "existing Eagle municipal water system" is general but is not ambiguous. The finding of fact was not changed.

11. The coefficients 0.116 and 0.5 multiplied by the Theis equation draw downs to obtain shallow and intermediate aquifer responses, respectively, were not arbitrary numbers "with no basis in scientific or technical literature or derived from actual data."

12. The phrase "nearby wells" in Finding of Fact no. 30 is not defined.
Response: The word nearby was stricken from the text.

13. Use of the word "some" in Finding of Fact no. 32 implies that the hearing officer consulted information not in the record.
Response: The finding of fact was amended to identify other sources of information.

14. There is no basis for Finding of Fact no. 35 stating: "The relationship between the rate of pumping and the draw downs is linear. In other words, a change in the pumping rate will result in a proportional change in the draw down."
Response: An administrative agency is entitled to apply its own expertise in evaluating evidence presented during the hearing for a contested application. A change in the pumping rate will result in a proportional change in the draw down. Nonetheless, this final order relies on simulated draw downs directly calculated using the Theis equation at a pumping rate of 2.23 cfs for various radial distances from the pumping well. Average values for storativity and transmissivity were taken from Eagle Exhibit no. 14, titled *City of Eagle, Idaho 7-Day Aquifer Test.* A table of these values replaces the table of similar values previously calculated by extrapolation.

15. There is no basis in the record for Findings of Fact nos. 38 and 39.
Response: The facts set forth in Findings of Fact nos. 38 and 39 were taken directly from the testimony of Mike Moyle, and were not changed.

16. Finding of Fact no. 40 improperly infers that mink died as a result of pumping by Eagle.
Response: The facts contained in Finding of Fact no. 40 were taken from the testimony of Mike Moyle and were not changed. The finding does not refer to pumping activity by Eagle.

17. Findings of Fact nos. 41, 49, 53, and 55 are arbitrary and capricious and the use of the table in Finding of Fact no. 36 cannot be used to establish the facts stated therein.
Response: The Director assumes that Eagle takes exception to the drawdown values contained in the table found in Finding of Fact no. 36. The draw down values were recalculated using the Theis equation as described in paragraph 14 above. Findings of fact referring to the draw down values were amended.

18. Finding of Fact no. 58 is not supported by the record.
Response: The location of the Taylor well in the City of Star was estimated from the water right information for claim no. 63-5040 submitted by Taylor. The range of distance was determined by measuring the distance from the most westerly well proposed by Eagle to both the nearest and farthest boundaries of the quarter-quarter section in which the point of diversion for claim no. 63-5040 was claimed. Draw downs for the distance were taken from the amended table in the findings of fact.

Moyles took exception to the *Amended Preliminary Order* as follows:

19. *Parker v. Wallentine* requires compensation to senior water right holders when pumping by a junior water right holder causes declines in artesian pressures.
Response: See response to issue no. 3 in the text below. This final order holds that Moyles' non-domestic water rights do not create a right to maintenance of historical water levels or pressures.

Discussion of Issues Raised by Exceptions

Future Anticipated Needs for a Municipality (Issue no. 1)

Because of the unique obligations of a municipal water provider to the patrons served by the provider's municipal water system, the law allows municipal providers to obtain water rights for "reasonably anticipated future needs" for which full completion of works and beneficial use is not required. Idaho Code § 42-202(2) states:

> An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made.

To appropriate water for reasonably anticipated future needs, the municipal provider carries an extra evidentiary burden to establish the "planning horizon" for the municipality or municipalities served, and to submit "population and other planning data" in support of the anticipated needs within the planning horizon. If a municipal provider seeks a water right for reasonably anticipated future needs, the planning horizon and supporting data cannot be inconsistent with the comprehensive land use plans. Furthermore, water rights for reasonably anticipated future needs cannot be granted to a municipal provider in areas "overlapped by conflicting comprehensive land use plans."

The intent of a municipality to seek water rights for reasonably anticipated future needs should be documented with the application for a municipal use. The original applications nos. 63-32089 and 63-32090 did not expressly state whether the applications sought a portion of the proposed appropriation for reasonably anticipated future needs. As a result, on February 8, 2005, a letter written by Lori Graves of IDWR stated:

> Other information that must be provided for each application includes the following:
>
> . . .

> 4. Clarification that the applications are or are not for reasonably anticipated future needs. If they are, please specify and justify the planning horizon.

In a response to the IDWR inquiry, on March 7, 2005, Chris Duncan of Holliday Engineers, wrote the following:

> **Clarification that the applications are or not for reasonable anticipated future needs.**
>
> The requested appropriation reflects an immediate need to supply municipal water service in Block 1 of the City of Eagle Municipally Owned Water System Amended Master Plan. Construction is anticipated to begin in 2005.

Eagle expressly stated in its initial documents supporting its applications that it was seeking to appropriate water for its immediate needs.

During the hearing, Eagle submitted evidence about the flow rate necessary to provide municipal water for 2,000 water connections within Block 1 of the Eagle Master Plan. Eagle also presented evidence that it projected the 2,000 connections would be completed within five years. Eagle Exhibit 7 graphically depicts a one hour peak demand of 2.23 cfs for general municipal use and an additional 6.68 cfs for fire protection for the 2,000 connections, or the full 8.91 cfs sought by the applications.

During Bruce Smith's direct examination of Vern Brewer, also of Holliday Engineers, the following exchange was recorded:

Bruce Smith: "Are you familiar with the term 'future needs water rights?'"

Vern Brewer: "Yes, I am."

Bruce Smith: "In terms of the water that is being applied for right now on these two applications, are these future needs water rights?"

Vern Brewer: "No, they are not."

Bruce Smith: "Are they for current use?"

Vern Brewer: "Correct."

Bruce Smith: "Current being five years?"

Vern Brewer: "Yes, as demonstrated on Exhibit 7, they are for the first block of roughly 2,000 homes which will be projected to be built out in about five years."

Eagle consistently maintained throughout the pendency of the applications that the applications did not seek appropriation of water for reasonably anticipated future needs. Even if

the exhibits received into evidence contained some information regarding population projections, the planning horizon, and water needs in the future, Eagle did not rely on the information to make a case for an appropriation of water for reasonably anticipated future needs. On the other hand, the protestants and the hearing officer understood that the applications only proposed appropriation of water for current needs. Eagle cannot now assert that the applications sought more than was represented.

The hearing officer quoted statutory language prohibiting approval of a municipal water right for reasonably anticipated future needs when there are conflicting comprehensive plans for the area. The amended preliminary order's refusal to approve a municipal water right for reasonably anticipated future needs for Eagle was not based on a conflict between comprehensive plans. Any discussions of conflicting impact areas for Eagle and the City of Star have been eliminated.

Authority to change the nature of use sought by Eagle's applications (municipal) to another nature of use. (Issue no. 2)

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 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.

Eagle did not seek an appropriation for reasonably anticipated future needs. Eagle's own testimony established that it was seeking an appropriation for 2.23 cfs for peak one hour demand and 6.68 cfs for fire protection that would serve Eagle's five year development needs. IDWR approves permits for a development period of up to five years.

The statutory identification of many sub-uses within the municipal use umbrella, including fire protection, does not prohibit the Department from limiting the uses, if necessary, to satisfy the criteria it must consider under Idaho Code § 42-203A or to ensure that other statutory provisions are satisfied or are not violated. Recognizing the entire 6.68 cfs for fire protection within the broad municipal definition would create a de facto water right for reasonably anticipated future needs. The fire protection portion of the appropriation should be separately identified and limited as water

that can only be used to fight a fire or prevent an existing fire from spreading. As a result, the hearing officer correctly approved the applications in part and granted a municipal permit for a smaller quantity of water by limiting the extra 6.68 cfs to a fire protection use.

Injury resulting from reduction in artesian pressure and mitigation for the reduction in artesian pressure. (Issue no. 3)

Eagle asserts that *Parker v. Wallentine* does not protect artesian pressure, but only protects water levels in a well that must be pumped to lift the water to the surface.

This order re-examines whether the protection of ground water pumping levels discussed in *Parker* extends to water rights that authorize diversion of ground water for non-domestic uses. This order concludes that water rights authorizing diversion of ground water for non-domestic uses, bearing priority dates earlier than the 1953 amendment to the Ground Water Act, including portions of water rights authorizing diversion of ground water from artesian wells owned by Moyles, do not create a right to protection of historic ground water levels. Water rights authorizing non-domestic uses are subject to reductions in ground water levels provided the ground water levels do not decline below reasonable pumping levels.

Moyles' wells provide water by artesian pressure for non-domestic and domestic uses. This order must address the question raised by Eagle of whether *Parker* protects artesian pressures for domestic uses. *Parker* states:

> Under the doctrine of prior appropriation, because Parker's domestic well was drilled prior to Wallentine's irrigation well, Parker has a vested right to use the water for his domestic well. That right includes the right to have the water available at the historic pumping level or to be compensated for expenses incurred if a subsequent appropriator is allowed to lower the water table and Parker is required to change his method or means of diversion in order to maintain his right to use the water.

The first portion of the second sentence quoted above states that "historic pumping level[s]" are protected, but when discussing compensation, the Supreme Court states the protection is afforded if the subsequent appropriator lowers the water table and the senior appropriator is "required to change his method or means of diversion in order to maintain his right to use the water."

Where the artesian pressure raises water levels in a well, but not to the elevation of ground surface, the water user must pump water from the well to extract it for beneficial use. These artesian conditions would directly qualify as an "historic pumping level" under *Parker*. Adoption of Eagle's argument would protect artesian pressures that did not cause water levels to rise above ground surface but would exclude from protection artesian pressures that caused water to free flow at ground surface. Determining *Parker* protection based on whether a well is a pumped artesian well or a free flowing artesian well is not a reasonable distinction.

If all artesian pressures were not protected under *Parker*, IDWR would have difficulty subtracting out the portion of ground water surface elevation caused by artesian pressure and only protecting the non-artesian water levels.

Finally, if water has historically free flowed from an artesian well, and artesian pressure is the means by which water was diverted and distributed for the beneficial use, a reduction in artesian pressure caused by a subsequent appropriator that diminishes the flow will result in a significant and probably costly change in the water user's method or means of diversion in order to "maintain his right to use the water."

Parker protects historic ground water levels for qualifying domestic uses, whether or not they are caused by artesian pressure. Eagle's citation to *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 759 P.2d 891 (1988) is misplaced. The decision obliquely refers to a proposed conclusion in a draft IDWR order stating, "reduction in the artesian pressure was not considered an injury." The facts leading to this statement are not included with the Supreme Court decision, and the Supreme Court did not consider the issue. *Collins Bros. Corp.* did not address the issue of whether or not artesian pressure is protected under *Parker*.

Establishing the record at the time of the hearing and post hearing information considered by the hearing officer (Issue nos. 4 and 5)

During the hearing, the hearing officer informed the parties that IDWR staff would review the hearing record, particularly the technical information offered into the record by Eagle, and would analyze the information in a supplemental staff memorandum. Although unsolicited by the hearing officer, Eagle prepared and submitted additional technical documentation (titled *Addendum to City of Eagle 7-Day Aquifer Test Report*) to IDWR staff about its pump tests. Sean Vincent of IDWR wrote an additional staff memorandum to the hearing officer regarding both the evidence presented at the hearing and the additional information submitted by Eagle. The additional staff memorandum was submitted to the hearing officer. Eagle distributed its addendum to the parties.

On March 27, 2007, the hearing officer mailed a copy of the staff memorandum written by Vincent to the parties who attended the December hearing. The hearing officer also served a *Notice of Consideration of Additional Evidence and Post Hearing Order* on the parties. The document informed the parties that the hearing officer would consider the information in Eagle's addendum and the staff memorandum, and granted the parties until April 25, 2007 to review the documents and to submit technical comments about the addendum to the hearing officer and/or request a supplemental hearing. Additional comments were received from the parties.

Eagle now argues that the hearing officer improperly considered its post hearing addendum that it asked IDWR staff to review and make a part of the supplemental staff memorandum submitted to the hearing officer. Eagle also argues that the hearing officer improperly considered comments to the addendum and staff memorandum.

The *Notice of Consideration of Additional Evidence and Post Hearing Order* granted a time period for the parties to review the additional documents, submit technical comments, and/or

request a hearing. These post hearing procedures were recognized as affording sufficient due process in the case previously cited by Eagle, *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 759 P.2d 891 (1988). Furthermore, written comments submitted by Mike Moyle, Eugene Muller, and Charles Howarth can be characterized as argument and restatement of the record rather than additional factual evidence.

The hearing officer considered additional evidence because Eagle submitted the addendum to the original pump test report, and implicitly requested consideration of the additional evidence. The additional evidence contained in the addendum and the amended staff memorandum enhanced the evidence already submitted by Eagle, and did not act to the prejudice of Eagle. The post hearing procedures afforded Eagle necessary due process.

Conditions Requiring Construction/Identification of Monitoring Wells and Measurement and Reporting of Beneficial Use (Issue no. 6)

The *Addendum to City of Eagle 7-Day Aquifer Test Report* submitted by Eagle, suggested that Eagle be required to monitor water levels during the development period. The hearing officer adopted Eagle's own recommendation to verify that the water supply is sufficient and to ensure that its pumping does not injure other water rights. This final order amends the previously ordered number and nature of observation wells.

IDWR has the authority to condition approvals and is also expressly given the authority to require measurement and reporting in Chapter 7, Title 42 of the Idaho Code. Measurement and reporting of beneficial use is a reasonable requirement and will assist IDWR at the time of examination to determine the extent of beneficial use.

Basis for Multipliers in Eagle Exhibit 24 to Determine Draw Downs in Shallow and Intermediate Aquifers (Issue no. 11)

The hearing officer questioned Chris Duncan about the basis for the coefficient multipliers of 0.116 and 0.50 to determine draw downs in the shallow and intermediate aquifers, respectively. Duncan stated that 0.116 was derived from one measured response in monitoring well no. 10, completed in the shallow aquifer, during the pump test. A plot of the water level elevations for monitoring well no. 10 is contained in Appendix C.6 of Exhibit 14. Duncan testified the difference in pumping and the post recovery non-pumping elevation in well no. 10 was approximately 3/10 of a foot, or between three and four inches. This small amount of ground water level fluctuation could have been caused by a variety of factors and could have been easily influenced by other pumping from the shallow aquifer. In its addendum to the pump test report, Eagle stated: "The minor draw down in Well no. 10 is attributed to interference from another well . . ."

In addition, water levels in Well no. 10 declined most during the recovery period, not during the seven-day period when the test wells were being pumped, raising doubt about whether pumping from the deep aquifer had any effect on the shallow aquifer. Duncan testified that his own calculations, although not in evidence, would not show any effect on the shallow aquifer by pumping from the deep aquifer.

Finally, water levels in another well completed in the shallow aquifer (monitoring well no. 9) showed no declines in water level during the pump test (Exhibit 14, Appendix C5).

The hearing officer found the relationship between the draw down in monitoring well no. 10 and the calculated drawdown in the deep aquifer to be unreliable, and found that pumping from the deep aquifer would not cause draw downs in the shallow aquifer. The findings will be amended to reflect this reasoning, but the determination of no influence will not be changed.

Duncan testified that, during the pump test, there were no monitoring wells with production zones completed in the intermediate aquifer. Duncan stated that the 0.50 coefficient multiplier was a professional estimate, and was not derived from data. Based on evidence presented at the hearing, the hearing officer found that there is a hydraulic relationship between the intermediate and the deep aquifers. Eagle did not prove that modeled declines in water levels/pressures caused by pumping water from the deep aquifer diminished by 50% in the intermediate zone. Because of failure to prove the extent of the hydraulic relationship between the deep and intermediate aquifers, the hearing officer determined that pumping ground water from the deep aquifer would directly affect both the intermediate and deep aquifers uniformly. Finding of Fact no. 29 was not changed.

Requirement for Moyles to Test Pressure and Flow (Issue no. 19)

Moyles established they own water rights entitled to *Parker* protection. Based on evidence presented by Eagle, pumping by Eagle will cause a decline in artesian pressures in Moyles' wells. Moyles rely on the artesian pressure to deliver domestic water. Although the artesian pressures in Moyles' wells are entitled to Parker protection, the reduction in flow rate caused by the decline in artesian pressure, or degree of injury, is not yet known. The declines in pressure head could result in injury or no injury because the pressure decline may only cause an insignificant reduction in flow. Because of this uncertainty, Moyles must test the flow response to artesian head reductions as set forth herein.

Having considered the evidence presented at the hearing, and the information subsequently submitted to the hearing officer, the Director finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On January 19, 2005, the City of Eagle submitted two applications to appropriate water to IDWR. IDWR assigned application numbers 63-32089 and 63-32090 to the applications.

2. Application to appropriate water no. 63-32089 proposes the following:

Source:		Groundwater
Flow Rate:		4.0 cfs
Purpose of Use:		Municipal
Proposed Priority:		January 19, 2005
Period of Use:		Jan. 1 through Dec. 31
Points of Diversion:		
Township 04 North, Range 01 West,	Section 10	NWNE[1]
	Section 11	SENW
	Section 10	NWNW
	Section 11	NWSE (two wells)
Place of Use:		The municipal service area for the City of Eagle.

3. Application no. 63-32090 proposes the following:

Source:		Groundwater
Flow Rate:		4.91 cfs
Purpose of Use:		Municipal
Proposed Priority:		January 19, 2005
Season of Use:		Jan. 1 through Dec. 31
Points of Diversion:		
Township 04 North, Range 01 West,	Section 10	NWNE
	Section 11	SENW
	Section 10	NWNW
Place of Use:		The municipal service area for the City of Eagle.

4. The two applications identify eight possible separate well locations. The three points of diversion listed in application no. 63-32090 duplicate locations described in application no. 63-32089. Eagle only intends to construct a maximum of five wells.

5. Eagle owns and operates a municipal water system that serves a geographical area within a portion of the municipal boundaries of the City of Eagle. The Public Utilities Commission granted Eagle a certificated area of service for the Eagle municipal water system that also includes lands outside of the city boundaries. The certificated area for service by the Eagle

[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 Ada County.

municipal water system is depicted in Eagle Exhibit 6 and is color-coded in pink. Eagle Exhibit 6 also shows locations of the five wells proposed by the applications.

6. A portion of Eagle's service area is located west of Linder Road, east of Highway 16, and north of Highway 44 to the edge of the foothills bounded on the north by Homer Road. This area will be referred to in this decision hereinafter as the "western expansion area."

7. Within the western expansion area, Block 1 (described in chapter 6 of Eagle Exhibit 5) will contain approximately 2,000 customer hookups to Eagle's municipal water system.

8. Two housing developments named Eaglefield and Legacy are currently proposed for construction within Block 1 of the western expansion area. The developers of Eaglefield and Legacy propose construction of approximately 2,200 homes. The homes will be constructed on approximately 800 to 900 acres in Sections 2, 3, 9, 10, and 11, Township 4 North, Range 1 West.

9. Eagle predicts that the development for the 2,200 homes will be complete within five years, although all of the homes may not be built by that time.

10. Developers proposing construction of residential housing within Eagle are required to dedicate sufficient ground water or surface water rights to the proposed developed lands to provide irrigation demands within the subdivision. When surface water is the traditional method of irrigating the lands prior to development, the developer is required to install a separate system from Eagle's municipal water system for delivery of surface water for irrigation.

11. The applications propose delivery of water primarily for in-house use in the 2,000 connections projected by the Eagle Master Plan (Eagle Exhibit 5). The peak one-hour demand for in-house use in 2,000 residential units is 2.23 cfs. In addition, Eagle is required to supply the development with 6.68 cfs for fire protection. The total projected instantaneous demand is 8.9 cfs, the rounded, combined flow rate sought by the two applications.

12. The applications do not seek to appropriate water for reasonably anticipated future needs of Eagle, but seek to appropriate sufficient water to meet the needs of 2,000 connections to the Eagle City municipal water system during the next five years.

13. The developers of the proposed subdivisions must pay for the five proposed wells and internal delivery system within the development. In addition, Eagle has set aside monies in its budget for construction of main lines and trunk lines to connect with the existing Eagle municipal water system. Eagle also has the power to levy assessments against its water users for payment of additional improvements. Finally, Eagle has the authority to form a Local Improvement District (LID) and issue bonds to be repaid by future assessments.

14. Eagle does not presently intend to employ any water storage to meet peak demands. Storage to supply short-term peak demands and fire flow demands could be a component of future use, however. Eagle Exhibit 6 identifies the location of a future storage tank at the northern boundary of the western expansion area.

15. In May 2006, Eagle constructed two wells within the proposed development property. Both of the wells were constructed according to Idaho Department of Environmental Quality standards.

16. The first well was constructed in the SENW, Section 11, Township 4 North, Range 1 West. This well will be referred to hereafter as Well no. 1 or the "Legacy Well." The second well was constructed in the NWSE, Section 11, Township 4 North, Range 1 West. This well will be referred to hereafter as Well no. 2, or the "Eaglefield Well."

17. An aquifer pump test was conducted from approximately May 25 through June 19, 2006, by pumping the Eaglefield Well (also referred to hereafter as "pumping well") and monitoring water levels in other wells (each of the wells is hereafter referred to as "observation well" or "monitoring well"). The test was conducted in three separate phases. Background testing was conducted for seven days prior to the pump test. A seven-day constant rate pump test commenced on June 2 and ended on June 9 at a pumping rate of 1,580 gallons per minute ("gpm"). Following pumping, water levels were measured in the pumping well and the monitoring wells for seven days following the end of the pumping period to determine recoveries of ground water levels without pumping.

18. Eagle monitored the water levels in eight wells. One of the monitoring wells was the pumping well (Eaglefield Well). Water levels in the Legacy Well were monitored. Water levels in six other privately owned wells were also monitored. Other parties to this contested case were not given an opportunity to participate in the test and monitor their own wells during the test.

19. Eagle submitted to IDWR a report titled *City of Eagle, Idaho 7-Day Aquifer Test.* The report was received into evidence as Eagle Exhibit 14. Copies of the aquifer test were made available to the parties.

20. IDWR staff reviewed the report. In a staff memorandum dated November 29, 2006, staff found several deficiencies in the report. The staff memorandum stated, among other things, the following:

a. A higher pumping rate than was originally proposed for the lower yielding Monitoring Well # 1 (Legacy Well) could and should have been used to stress the system. If Eagle had done so, the effect on other nearby wells and possible boundary conditions would have been more clearly identified.

b. Site hydrogeology should have been consulted to determine whether the test data and conceptual models were reasonable.

c. Other factors such as water level trends, barometric pressure fluctuations, and fluctuations caused by nearby pumping wells should have been examined and used to correct and/or interpret the test data.

d. Tables should have been prepared to identify the various wells and their construction characteristics. Methods of analysis other than the Theis Equation should have been

employed. This would have verified the results of the Theis estimates. Use of other methods would have better analyzed the water level recovery data.

e. Significant differences in the values estimated for storativity were not well explained.

f. Some water levels recovered to an elevation higher than the initial static water level.

21. The above deficiencies were discussed at the hearing. As a result of these concerns, the hearing officer requested additional analysis of data and information following the conclusion of the presentation of evidence.

22. Ground water levels measured in a monitoring well owned by Ricks (referred to as Monitoring Well no. 6 in *City of Eagle, Idaho 7-Day Aquifer Test*) showed some signs of a boundary condition. The Ricks well began a steeper decline in water levels approximately four to five days into the pump test. Because the rate of pumping of the Eaglefield Well was not as high as it could have been, and because the pumping test was of somewhat short duration, this possibility of boundary conditions was never explored.

23. In an addendum to its original report submitted to the hearing officer after the hearing, Eagle addressed some of the concerns raised by IDWR staff. As a result, IDWR staff issued a supplemental staff memorandum dated February 27, 2007. The author of the supplemental memorandum, Sean Vincent, wrote the following:

1. The water level and aquifer test data presented in the Addendum generally support the authors' primary conclusion (i.e., the deep sand layers that are targeted for production have sufficient capacity for additional withdrawals). The fact that static water levels in the deep system near the area of proposed development are above land surface and appear to be relatively stable suggest that the deep aquifer system is not currently in a state of overdraft.

2. An exception to the relatively stable water level trend described above is the hydrograph for Well 04N01W-31AAA1, which is located approximately 5 miles southwest of the area of proposed development. The water level in this well has declined by approximately 10 to 15 feet since 1970. Because the aquifer strata are dipping, however, this 462-foot deep well may not be producing from the same aquifer system that is targeted for the development by the City of Eagle.

3. The inclusion of a conceptual hydrogeologic model, hydrographs for area wells, and additional analyses using the Cooper-Jacob (1946) and Theis (1935) residual drawdown methods, significantly improves the value of the aquifer test as a basis for evaluating the water supply.

4. As discussed in the Addendum, semilogarithmic plots of drawdown and residual drawdown suggest that both positive (recharge) and negative (finite aquifer) boundaries affected the test data. The observed behaviors are consistent with the conceptual model of a finite, confined aquifer that receives recharge from the surrounding uplands. Given the available data, application of the Theis (1935) solution to estimate the aquifer properties is appropriate for this hydrologic setting.

5. The Addendum also includes calculations for estimating potential impacts to existing wells. The calculations, which also are based on the Theis (1935) solution, are conservative in that they neglect to account for aquifer recharge but non-conservative in that they are premised on the assumption of an infinite aquifer.

6. The 1-year timeframe for evaluating impacts to existing wells is appropriate, in my opinion, and is consistent with guidance for determining yield for public drinking water supply wells (IDEQ, 2007). The ranges of transmissivity and storativity values used to estimate drawdown also are appropriate based on available information.

7. I verified that the drawdown estimates presented in Table 4 of the Addendum were calculated correctly using the series approximation of the Theis (1935) solution and the assumed input values.

8. Although the data analysis provides the basis for estimating hydraulic properties for the target aquifer system, the aquifer test was not of sufficient duration to definitively evaluate aquifer boundary conditions and long-term impacts associated with pumping. As recommended in the Addendum (Recommendations 15 and 16), a long-term water level and discharge rate monitoring program should be implemented if the water right applications are approved in order to evaluate water level trends as affected by pumping. Dedicated upgradient and downgradient monitoring wells that are completed in the deep aquifer system within the zone of influence of the aquifer test are recommended.

24. The Director adopts the Vincent analysis text quoted above as findings of fact. The Director specifically finds that "static water levels in the deep system near the area of the proposed development are . . . relatively stable and suggest that the deep aquifer is not currently in a state of overdraft." The Director also specifically finds that the evaluation of draw downs in other wells from pumping by Eagle using the Theis analysis is reasonable.

25. Ground water underlying the location of the proposed wells resides in three aquifers separated by discontinuous clay aquitards. The discontinuity of the impervious clay strata allows some communication between the aquifers. This communicative relationship between the aquifers will be discussed in subsequent findings.

26. The shallow aquifer is a water table aquifer extending from land surface to approximately 100 feet below land surface. The intermediate aquifer is generally found from 100-200 feet below ground surface and is at least semi-confined. The deep aquifer is located at depths below approximately 200 feet and is under artesian pressure. There may also be deeper aquifers, including geothermal aquifers.

27. Two of the monitoring wells are completed in the shallow aquifer. Eagle Exhibit 14 shows that three of the monitoring wells are completed in the intermediate aquifer, although Chris Duncan testified that none of the observation wells were completed in the intermediate aquifer. The Eaglefield Well, the Legacy Well, and one of the United Water wells are completed in the deep aquifer. Evidence at the hearing established that a United Water intermediate aquifer monitoring well and a United Water deep aquifer monitoring well were completed within the same borehole. Upon construction, United Water nested strings of casing inside a single well. The casing for the monitoring well identified as having been constructed into the deep aquifer commingled the intermediate and deep aquifers together, resulting in a mixing of water from the intermediate and deep aquifers, and also mixing the pressures of the two zones. This commingling probably skewed the data gathered from the United Water deep aquifer well. As a result, the only direct measurements of draw downs of a monitoring well completed in the deep aquifer caused by pumping are the measurements of draw downs for the Legacy well.

28. Eagle Exhibit 8 is a summary of the potential effects on the protestants' wells of pumping the proposed Eagle wells at various flow rates.

29. Eagle Exhibit 24 contains information about the protestants' wells and tables estimating draw downs using the Theis equation at various radial distances from a producing well in the three different aquifers: the shallow aquifer, the intermediate aquifer, and the deep aquifer.

30. Table 1 of Eagle Exhibit 24 is a modeled estimate of potential draw downs in the shallow aquifer caused by continuous pumping of the Eaglefield Well at various flow rates and distances from the Eaglefield Well. The estimates were calculated by multiplying modeled Theis equation draw downs in the deep aquifer by 0.116. The 0.116 multiplier was computed by dividing a 3/10 of a foot drawdown in monitoring well no. 10 by the computed Theis draw down in the deep aquifer at the same location as well no. 10. The coefficient multiplier is derived from data gathered from only a single monitoring well (monitoring well no. 10) showing an almost insignificant draw down of 3 to 4 inches. Water levels in well no. 10 declined most during the recovery period, not during the seven day period when the Eaglefield well was being pumped, raising doubts about the relationship between pumping and the measured declines. The minimal water level declines in monitoring well no. 10 were most likely caused by pumping water from another nearby well constructed in the shallow aquifer. As a result, the coefficient is disregarded as being unreliable.

31. There are substantial aquitards between the deep and shallow aquifers that significantly reduce the hydraulic communication from the deep to the shallow aquifer. Pumping from the deep aquifer causes little or no effect on the shallow aquifer.

32. Table 2 of Eagle Exhibit 24 is a modeled estimate of potential draw downs in the intermediate aquifer caused by continuous pumping of the Eaglefield Well at various flow rates and distances from the Eaglefield Well. The draw downs were calculated by multiplying the modeled Theis equation draw down values for the deep aquifer by 0.5. The 0.5 multiplier has no basis in technical literature or data analysis.

33. There is a hydraulic relationship between the intermediate aquifer and the deep aquifer from which Eagle proposes to produce water. Although the relationship may be limited by the separation from the deep aquifer, the degree of the limitation was not established by the record. As a result, the Director assumes the full Theis equation draw downs will occur in the intermediate aquifer without applying a fractional multiplier, and will use a modification of Table 3 of Eagle Exhibit 24 to determine the impacts of pumping the proposed wells on wells constructed in the intermediate aquifer.

34. Table 3 of Eagle Exhibit 24 contains results of a direct Theis equation calculation of draw downs caused by continuous pumping of the Eaglefield Well at various flow rates and distances from the Eaglefield Well. Pumping from the deep aquifer will directly affect other water users diverting from the deep aquifer as predicted by Eagle Exhibit 24.

35. Water residing in the intermediate and deep aquifers in the area of proposed well construction is under artesian pressure. Artesian pressure in the deep aquifer causes water to rise above land surface in some wells constructed with a production zone in the deep aquifer. These artesian pressures have been used by some of the protestants to supply water to their beneficial uses.

36. The following is a table of the active protestants' names, water right priorities/dates of construction, and the depths of their wells. Most of this information is taken from Eagle Exhibit 24. Additional information was added from testimony, protestants' water right exhibits, or scaling distances from maps provided as exhibits.

Protestant	Water Right	Priority - Construction	Distance from Nearest Proposed Eagle Well	Comments
Dean & Jan Combe	63-2858A	8/5/1956	5,900 ft	Well is 65 feet deep
Mike Dixon	63-2957 63-2958 63-31988	8/28/1953 8/28/1953 3/1/1976		No information about the depth or number of wells was presented at the hearing
Charles Howarth	Domestic (not recorded)	2002	1,399 ft	Well is 333 feet deep
Corrin & Terry Hutton	Domestic		11,992 ft	Well is 115 feet deep
Charles W. Meissner	Three wells. Well logs for	July 1981 July 1970	4,800 ft	Well is 90 feet deep Well is 103 feet deep

	two of the wells. No recorded water rights.			
Mike Moyle	63-2546 63-2609	12/12/1939 2/15/1944	5,643 ft to 7,200 ft	Six wells, all completed in the deep aquifer
Eugene Muller	63-22650	7/25/1887	3,286 ft	Well was initially completed in the shallow aquifer. The well was redrilled in 1979, and now the production zone is in the deep aquifer
Dana & Viki Purdy	63-2920 63-15680 63-22652	1/2/1953 6/1/1900 6/1/1967	3,390 ft 2,700 ft approx.2,640 ft	Well is 90 feet deep Well is 250 feet deep Well is 120 feet deep
Sam & Kari Rosti	Domestic (not recorded) 63-11715	1980 1992	3,444 ft	Well is 255 feet deep Well is 445 feet deep

Jerry & Mary Taylor	63-5040 63-2858B 63-17523 63-3296 63-32189	3/1/1941 6/10/1951 6/1/1960 6/5/1962 3/31/1976	2-3 miles	Artesian, free flowing Other wells completed in the shallow aquifer

37. Given Eagle's projected growth, 2.23 cfs is the flow rate needed for Eagle's anticipated expansion. The residual flow of 6.68 cfs is for occasional and sporadic fire protection use.

38. Pumping of Eagle's proposed wells at a rate of 2.23 cfs will reduce the artesian pressure in wells constructed in the deep aquifer. Pumping will also reduce artesian pressures in wells constructed in the intermediate aquifer.

39. Department staff calculated the draw downs using the Theis equation at a pumping rate of 2.23 cfs for various radial distances from the pumping well. Values for storativity and transmissivity were taken from Eagle Exhibit no. 14, titled *City of Eagle, Idaho 7-Day Aquifer Test.* The storage coefficient used was derived from the average value presented in the original aquifer test documentation at 5.53×10^{-3} and an average aquifer transmissivity value of 18,700 ft^2/day for 365 days. The modeled draw downs are as follows:

Distance from Pumping Well (ft)	Calculated Water Level Draw Down from Pumping 2.23 cfs for 365 Days (ft)	Distance from Pumping Well (ft)	Calculated Water Level Draw Down from Pumping 2.23 cfs for 365 Days (ft)
1,200	6.23	4,500	4.07
1,400	5.98	5,000	3.9
1,600	5.76	6,000	3.6
1,800	5.57	7,000	3.35
2,000	5.4	8,000	3.13
2,500	5.03	9,000	2.94
3,000	4.73	10,000	2.77
3,500	4.48	15,000	2.13
4,000	4.26		

Moyles

40. Joseph, Lynn, and Mike Moyle own six wells constructed in the deep aquifer that flow under artesian pressure. Four of the wells are described as points of diversion by water rights nos. 63-2546 and 63-2609, bearing priority dates of 1939 and 1943, respectively. These water rights have been decreed in the Snake River Basin Adjudication. A fifth well is the point of diversion for an unrecorded domestic use for a home built by Joseph and Lynn Moyle in approximately 1970. The sixth well was constructed in 1997 to supply water to Mike Moyle's home.

41. Moyles have measured the closed-in pressure in the wells at 10 pounds per square inch ("psi"). Ten psi correlates to a water level or pressure head of approximately 23 feet. The flowing artesian wells have supplied stock water for as many as 43,000 mink on Moyles' property. In addition, Moyles' wells have provided, by artesian pressure, irrigation water and water for commercial refrigeration and cooling. Finally, the flowing artesian wells provide domestic water for several homes. In some locations, small, relift pumps at the location of the water use increase the pressure for commercial and domestic uses.

42. The four Moyle wells described by decreed or claimed water rights are remote from an electrical supply. As a result, pumping the wells would require a substantial expenditure to provide electrical power or other means of operating a water pump if the artesian pressure declines are large enough that the flow is significantly diminished.

43. As artesian pressure declines, the flow from the artesian wells will decrease. During the end of June 2006 or the first part of July 2006, the pressure dropped in some of the artesian wells. Moyles discovered that artesian water was not flowing to the end of the water lines providing drinking water for the mink. As a result, some of their mink died from lack of water.

44. If Moyles' nearest well is approximately 5,643 feet away from a new well pumping continuously at a flow rate of 2.23 cfs, the table in Finding of Fact no. 39 predicts a decline in

artesian pressure of approximately 3.6 to 3.9 feet. A reduction from an artesian pressure head of 23 feet down to approximately 19 feet may reduce the flow needed to supply the domestic, commercial, stockwater, and irrigation needs for Moyles.

Muller

45. Eugene Muller holds water right no. 63-22650 for domestic and stockwater uses. The original well was constructed to a depth of 70 feet, and the production zone was in the shallow aquifer. In 1979, the well could no longer provide water for Muller's beneficial use, and Muller drilled a new well in the deep aquifer. The new well is a flowing artesian well.

46. Muller testified that water flowed from the original well. His testimony is inconsistent with the described characteristics of the shallow aquifer. Nonetheless, any loss of pressure or water level in the original well occurred prior to 1979 when the original well failed, requiring construction of a new well in the deep aquifer.

Howarth

47. In approximately 2001 or 2002, Charles Howarth constructed a domestic well in the deep aquifer. The domestic well is under artesian pressure, maintaining a closed in pressure of 3 to 7 psi.

Meissner

48. Charles Meissner, Jr. owns three wells. One of the wells is completed in the shallow aquifer at a depth of 90 feet.

49. A second well was constructed to a depth in excess of 103 feet (See Protestants Exhibit 404, second page) in 1970, and is used for domestic and stockwater purposes. This well will be referred to as the "Double R Cattle Well." The well casing is not perforated, and the water in the well is derived from the bottom of the casing. The casing passes through a significant layer of clay from 70 to 85 feet in depth that probably acts as an aquitard. The water underlying the aquitard is under artesian pressure, but the water does not flow above land surface. The production zone for the well is completed in the intermediate aquifer.

50. The table contained in Finding of Fact no. 39 establishes that, at a distance of 4,800 feet from the nearest proposed Eagle well and at a continuous pumping rate of 2.23 cfs for one year, water levels in the Double R Cattle Well will decline approximately four feet.

51. The depth and other information about Meissner's third well was not presented, except Meissner speculated that the well has collapsed.

Purdy

52. Dana and Viki Purdy hold water right no. 63-2920 authorizing irrigation from ground water. The point of diversion is a well approximately 90 feet deep. Purdys pump

supplemental ground water for irrigation when surface water is not available for irrigation. The water right for the irrigation well bears a priority date of 1953, but the well is constructed in the shallow aquifer.

53. Water right no. 63-15680 authorizes use of water for domestic and stockwater purposes and bears a priority date of June 1, 1900. The well is constructed to a depth of 250 feet. Viki Purdy testified that the well has been in place during several decades she has lived on the Purdy farm and that the well had not been worked on or replaced. Water in the well is under artesian pressure but does not free flow. The production zone for this well is most likely completed in the deep aquifer.

54. The table contained in Finding of Fact no. 39 establishes that, at a distance of 2,700 feet from the nearest proposed Eagle well and at a continuous pumping rate of 2.23 cfs for one year, water levels in the well for water right no. 63-15680 will decline approximately five feet.

55. Water right no. 63-22652 authorizes domestic and stockwater uses, and bears a priority date of June 1, 1967. The point of diversion for water right no. 63-22652 is a well drilled to a depth of 120 feet. The well is constructed in the intermediate aquifer. Water in the well is under artesian pressure, but water does not free flow at ground surface. The well was constructed in 1966.

56. The table contained in Finding of Fact no. 39 establishes that, at an approximate distance of 2,640 feet from the nearest proposed Eagle well and at a continuous pumping rate of 2.23 cfs for one year, water levels in the well for water right no. 63-22652 will decline approximately five feet.

57. A well log for another well associated with a home owned by Dana Purdy's mother was received into evidence. The well was drilled in 1991.

Taylor

58. Jerry and Mary Taylor own several water rights. Three of the water rights authorize a total irrigation of 17 to 18 acres. Another water right authorizes domestic use. The Taylor wells described by these four water rights are completed in the shallow aquifer.

59. Claim no. 63-5040 is for a domestic/commercial use in the City of Star. The point of diversion described by claim no. 63-5040 is in excess of two miles (between 10,000 and 15,000 feet) away from the nearest well proposed for construction by Eagle. Water levels in the well identified by claim no. 63-5040 would decline by two to three feet after pumping the nearest proposed Eagle well at a continuous pumping rate of 2.23 cfs for one year.

Combe

60. Dean and Jan Combe hold a water right for a domestic use from a well with a priority date of August 5, 1956. The well is 65 feet deep, and is completed in the shallow aquifer.

Rosti

61. Sam and Kari Rosti own a domestic well drilled in 1980. In addition, they own a 445 foot deep irrigation well completed in the deep aquifer drilled in 1992.

Boise River

62. Diversion of water from the deep aquifer would have little or no effect on the Boise River in the reach from Lucky Peak to just below Star Bridge. The flows of the Boise River in this zone are affected primarily by water residing in the shallow aquifer. Water in the deeper zones is separated by an aquatard or several aquatards. Water in the deep aquifer migrates westerly toward the Snake River.

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 § 42-111 defines the phrase "domestic purposes." Stockwater use of up to 13,000 gallons a day is recognized as use of water for domestic purposes.

4. In 1951, the Idaho Legislature enacted legislation known as the Ground Water Act. The Ground Water Act, as amended, is currently codified in Idaho Code §§ 42-226 through 42-237g. Section 1 of the 1951 Ground Water Act provided as follows:

> SECTION 1. GROUND WATERS ARE PUBLIC WATER. -- It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined. All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.

1951 Idaho Sess. Laws, ch. 200, § 1, p. 423 (approved Mar. 19, 1951) (emphasis added).

5. Section 2 of the 1951 Ground Water Act provided an exception for ground water rights for domestic purposes:

> SECTION 2. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. – The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be in any way affected by this act; providing such wells and withdrawal devices are subject to inspection by the department of reclamation and the department of public health. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.

Id., § 2, p. 424.

6. Importantly, with respect to the administration of all non-excepted rights to the use of ground water, Section 4 of the 1951 Ground Water Act provided that, "the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act." *Id.*, § 4, p. 424 (currently codified at Idaho Code § 42-229).

7. In 1953, the Idaho Legislature amended Section 1 of the 1951 Ground Water Act, adding the italicized language below relating to the full economic development of the resource at the end of the first sentence of the section:

> SECTION 1. GROUND WATERS ARE PUBLIC WATER. -- It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined *and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer as herein provided.* All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their

appropriation and allotment to those diverting the same for beneficial use. All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.

1953 Idaho Sess. Laws, ch. 182, § 1, p. 278 (approved Mar. 12, 1953) (italics in original) (emphasis added).

8. The 1953 amendment recognized that ground water rights would be administered according to the prior appropriation doctrine, but that prior water rights should not prevent the full economic development of the ground water resources of the State of Idaho, and that ground water appropriators would be required to pump from a "reasonable pumping level" established by the Department. The "reasonable pumping level" provision applied to "all rights to the use of ground water, whenever or however acquired or to be acquired ... unless specifically excepted" from the Ground Water Act. Idaho Code § 42-229.

9. In 1978, the Idaho Legislature amended the Ground Water Act again. The 1978 amendment modified Section 2 of the 1951 Ground Water Act, now codified as Idaho Code § 42-227, to emphasize that domestic wells are exempt from the permit requirements of Idaho Code § 42-229, by striking the words "in any way affected by this act," and substituting the words "subject to the permit requirement under section 42-229, Idaho Code":

AN ACT

RELATING TO DOMESTIC WELL REGULATIONS; AMENDING SECTION 42-227, IDAHO CODE, TO CLARIFY THAT DOMESTIC WELLS ARE EXEMPT FROM THE PROVISIONS OF SECTION 42-229, IDAHO CODE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-227, Idaho Code, be, and the same is hereby amended to read as follows:

42-227. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be ~~in any way affected by this act~~ subject to the permit requirement under section 42-229, Idaho Code; providing such wells and withdrawal devices are subject to inspection by the department of water resources and the department of health and welfare and providing further that the drilling of such wells shall be subject to the licensing provisions of section 42-238, Idaho Code. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.

Approved March 29, 1978.

1978 Idaho Sess. Laws, ch. 324, § 1, p. 819.

10. In 1987, the Idaho Legislature amended the Ground Water Act to address concerns involving the administration of rights to the use of low temperature geothermal ground water resources, most specifically to restrict its use for non-heating purposes by the addition of Idaho Code § 42-233. 1987 Idaho Sess. Laws, ch. 347, § 3, p. 741. The 1987 amendments also added the following language to Idaho Code § 42-226 relating to reasonable pumping levels: "In determining a reasonable ground water pumping level or levels, the director of the department of water resources shall consider and protect the thermal and/or artesian pressure values for low temperature geothermal resources and for geothermal resources to the extent that he determines such protection is in the public interest." The 1987 act also amended what originally was the last sentence of Section 1 of the 1951 Ground Water Act, later codified as Idaho Code § 42-226, to read as follows:

> ~~All~~ This act shall not affect the rights to the use of ground water in this state ~~however~~ acquired before ~~the effective date of this act are hereby in all respects validated and confirmed~~ its enactment.

1987 Idaho Sess. Laws, ch. 347, § 1, at 743.

11. The effect of this latter amendment to Idaho Code § 42-226 under the 1987 act was to make the new restriction on the use of geothermal rights prospective only. Thus, all pre-1987 geothermal water rights for non-heating purposes remain unaffected by the restriction in the 1987 act. The 1987 amendment to Idaho Code § 42-226 does not have the effect of exempting all pre-1951 ground water rights from administration under the Ground Water Act. Section 4 of the 1951 Ground Water Act, codified at Idaho Code § 42-229, continues to provide that, "the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act."

12. The constitutional and common law principles upon which Idaho Code § 42-226 is based, date from the early part of the twentieth century. Art. 15, §§ 1, 3, and 7, Idaho Const.; Idaho Code § 42-101; *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915) ("It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes."); *Stickney v. Hanrahan*, 7 Idaho 424, 433, 63 P. 189, 191 (1900) ("It is the policy of the law to prevent wasting of water.").

13. In *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), the Idaho Supreme Court noted::

> . . . [T]he original version of what is now I.C. § 42-226 was enacted in 1951. 1951 Idaho Sess.Laws, ch. 200, § 1, p. 423. *Both the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute.* Therefore, we fail to see how I.C. § 42-226 in any way affects the director's duty to distribute water to

the Mussers, whose priority date is April 1, 1892. 125 Idaho 392, 396, 871 P.2d 809, 813 (1994) (emphasis added).

14. The legislative history of the Ground Water Act demonstrates that the Idaho Supreme Court in *Musser* was incorrect when it noted that, "Both the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute." As stated above, the 1951 Ground Water Act provided: "All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed." 1951 Idaho Sess. Laws, ch. 200, § 1. The 1951 Ground Water Act also provided that, "the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act." *Id.*, § 4.

15. It was only in 1987 that the Legislature in acting to address concerns involving the administration of rights to the use of low temperature geothermal ground water resources amended what originally was the last sentence of Section 1 of the 1951 Ground Water Act, later codified as Idaho Code § 42-226, to read as follows:

> ~~All~~ This act shall not affect the rights to the use of ground water in this state ~~however~~ acquired before ~~the effective date of this act are hereby in all respects validated and confirmed~~ its enactment.

1987 Idaho Sess. Laws, ch. 347, § 1, at 743.

16. Again, the effect of this change is that all pre-1987 geothermal water rights for non-heating purposes remain unaffected by the restriction regarding low temperature geothermal water in the 1987 act. The 1987 amendment to Idaho Code § 42-226 does not have the effect of exempting all pre-1951 ground water rights from administration under the Ground Water Act. Section 4 of the 1951 Ground Water Act, codified at Idaho Code § 42-229, continues to provide that, "the administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted herefrom, be governed by the provisions of this act."

17. The understanding that only a limited class of water rights are "excepted" from the provisions of the Ground Water Act is consistent with the Idaho Supreme Court's decision in *Baker v. Ore-Ida Foods, Inc*, 95 Idaho 575, 513 P.2d 627 (1973). There, senior ground water users who held six irrigation water rights with priority dates of 1948, 1950, and 1959, brought an action in district court to enjoin junior ground water irrigators from pumping until such time as the senior wells resumed normal production. *Id.* at 577, 513 P.2d at 629. During trial, it was established that ground water pumping by juniors and seniors resulted in withdrawals from the aquifer in excess of the reasonably anticipated rate of future natural recharge, resulting in mining of the aquifer. *Id.* Because pumping by senior ground water irrigators did not exceed the reasonably anticipated rate of future natural recharge, the district court entered an order enjoining junior ground water irrigators from pumping and assigned further administration to the Department. *Id.* at 578, 513 P.2d at 630. In affirming the district court, the Idaho Supreme Court framed two issues on appeal:

> This Court must for the first time, interpret our Ground Water Act (I.C. § 42-226 et seq.) as it relates to withdrawals of water from an underground aquifer in excess of the annual recharge rate. We are also called upon to construe our Ground Water Act's policies of promoting "full economic development" of underground water resources and maintaining "reasonable pumping levels."

Id. at 576, 513 P.2d at 628.

18. In response to the issue of reasonably anticipated rate of future natural recharge, the Court first examined its prior decisions on maintenance of water table levels, particularly *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933), which found "that a senior appropriator of ground water is forever protected from any interference with his method of diversion. Under *Noh* the only way that a junior can draw on the same aquifer is to hold the senior harmless for any loss incurred as a result of the junior's pumping. If the costs of reimbursing the senior become excessive, junior appropriators could not afford to pump." *Id.* at 581, 513 P.2d at 633. In analyzing the Ground Water Act, the Court stated that the Act "forbids 'mining' of the aquifer." *Id.* at 583, 513 P.2d at 635. Therefore, ground water withdrawals by juniors are permitted under the Ground Water Act, provided that the "reasonably anticipated rate of future natural recharge" is not exceeded. *Id.* "Where the clear implication of a legislative act is to change the common law rule we recognize the modification because the legislature has the power to abrogate the common law. We hold *Noh* to be inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest. *Noh* is further inconsistent with the Ground Water Act." *Id.* (internal citations omitted).

19. In response to the Act's requirement of "full economic development" of the State's underground water resources, the Court found that "the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. Art. 15, § 7. Full economic development of Idaho's ground water resources will benefit all of our citizens." *Id.* at 584, 513 P.2d at 636.

20. While full economic development was prescribed by the Ground Water Act, the Court stated that the Act did protect holders of senior ground water rights through the maintenance of "reasonable pumping levels," but did not state that the senior irrigation wells that pre-dated the enactment of the Ground Water Act were excepted:

> In the enactment of the Ground Water Act, the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water in order to promote full economic development of the resource. The legislature has said that when private property rights clash with the public interest regarding our limited ground water supplies, in some instances at least, the private interests must recognize that the ultimate goal is the promotion of the welfare of all our citizens. *See* Clark, 5 Water and Water Rights, § 446 at 474 (1972). We conclude that our legislature attempted to protect historic water rights while at the same time promoting full development of ground water. Priority rights in ground water are and will be protected insofar as they comply

> with reasonable pumping levels. Put otherwise, although a senior may have a prior right to ground water, if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected.

Id. at 584, 513 P.2d at 636.

21. Under the Ground Water Act as affirmed by *Baker*, full economic development of Idaho's underground water resources is required. Unless a water right is specifically excepted under Idaho Code § 42-229, holders of senior ground water rights are protected if junior ground water diversions exceed the reasonably anticipated rate of future natural recharge, or if pumping levels become unreasonable.[2]

22. In this case, there is no evidence that diversions have exceeded the reasonably anticipated rate of future natural recharge or that pumping levels are unreasonable.

23. In *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), the Idaho Supreme Court determined that a later in time appropriator should be enjoined from pumping ground water for irrigation that almost immediately dried up a domestic well located nearby. The Court held that the water right for the domestic well was perfected prior to the irrigation water right and before the reasonable pumping level standard was applied to domestic uses by the Legislature in 1978, and that the domestic water right holder was entitled to the protection of the ground water pumping level existing prior to pumping by the junior appropriator. The Court held that the injunction was not permanent, and could be absolved upon compensation by the junior appropriator for the expenses incurred by the senior appropriator.

24. In *Parker*, the Court stated:

> Under the doctrine of prior appropriation, because Parker's domestic well was drilled prior to Wallentine's irrigation well, Parker has a vested right to use the water for his domestic well. That right includes the right to have the water available at the historic pumping level or to be compensated for expenses incurred if a subsequent appropriator is allowed to lower the water table and Parker is required to change his method or means of diversion in order to maintain his right to use the water. *See Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933).

Id. at 512, 650 P.2d at 654 (emphasis supplied). The Court went on to note that:

> Parker will not be deprived of any right to his use if water can be obtained for Parker by changing the method or means of diversion. The expense of changing

---

[2] In the contested administrative case *In the Matter of Application to Amend Permit to Appropriate Water no. 63-12448 in the Name of the City of Eagle* (Sept. 22, 2005), IDWR determined that two water rights authorizing non-domestic uses were entitled to protection of historic pumping levels under *Parker*. This order determines that water rights authorizing non-domestic uses that bear priority dates earlier than the 1953 amendment to the ground water act do not create a right to protection of historic ground water levels. The holding in this order supercedes the previous holding in the decision for application to amend permit no. 63-12448.

> the method or means of diversion, however, must be paid by the subsequent appropriator, Wallentine, so that Parker will not suffer any monetary loss. Thus, upon a proper showing by Wallentine that there is adequate water available for both he and Parker, it is within the inherent equitable powers of the court upon a proper showing and in accordance with the views herein expressed to enter a decree which fully protects Parker and yet allows for the maximum development of the water resources of the State.

Id. at 514, 650 P.2d at 656.

25. Under *Parker*, if (1) pumping of ground water by junior ground water appropriators causes declines in pumping water levels in the wells of holders of senior-priority domestic water rights because of local well interference, and (2) the water rights held by the senior domestic water right holders bear priority dates earlier than 1978, the holders of the senior domestic water rights are entitled to compensation for the increased costs of diverting ground water caused by the declines in ground water levels. The maintenance of historic pumping levels that was discussed in *Noh* and relied upon in *Parker* to protect senior-priority domestic ground water rights cannot be extended to non-excepted ground water rights, such as those for irrigation. Idaho Code § 42-229. As stated in *Baker*, *Noh* has been superseded by the Ground Water Act: "We hold *Noh* to be inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest. *Noh* is further inconsistent with the Ground Water Act." 95 Idaho 581, 513 P.2d at 633. "Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels. Put otherwise, although a senior may have a prior right to ground water, if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected." *Id.* at 584, 513 P.2d at 636.

26. The extent to which *Parker* provides protection to the protestants' water rights depends on proof of injury and similarities to the facts of the *Parker* case.

27. In *Parker*, the owner of the domestic well was unable to divert water from the domestic well within minutes of when the junior priority right holder began pumping ground water. The proof of the lowered water table caused by pumping from the irrigation well that resulted in inability to pump water from the domestic well was established through testimony about the effects of the initial pumping from the Wallentine well and by a pump test conducted by the parties and the Department.

28. In an administrative hearing for an application to appropriate water, the applicant bears the burden of proving that the proposed use of water will not injure other water rights. If a protestant seeks the protection of *Parker* that would insulate the protestant from the reasonable pumping level standard of the Ground Water Act, however, the protestant must come forward with evidence that: (1) the protestant is the holder of a domestic water right that is not subject to the reasonable pumping standard of the Ground Water Act, and (2) the protestant's diversion equipment and facilities are capable of diverting the protestant's water right at the ground water levels at or about the time the application is being considered. Once the protestant comes forward with the information, the applicant ultimately bears the burden of proving that the

proposed use of water will not injure the protestant under the *Parker* standard. If there are additional facts necessary to establish the extent of injury that can most equitably be provided by the party seeking *Parker* protection, the party seeking *Parker* protection may be required to provide the factual information.

29. Pumping of 2.23 cfs will not cause water level declines in area wells below a level that is reasonable.

30. The following describes how *Parker* applies to each of the active protestants.

Moyle

31. The priority dates of two water rights held by Moyle predate the 1953 amendment of the Ground Water Act subjecting subsequent appropriations of water to the reasonable pumping level standard. Only the portions of Moyles water rights authorizing a domestic use are entitled to maintenance of historical pumping levels. In addition, Moyles also hold a an unrecorded domestic water right bearing a priority date earlier than 1978. Moyles are entitled to protection of their historical water levels for the domestic uses from the four wells recorded by their decreed water rights and in one other domestic well associated with a home owned by Joseph and Lynn Moyle. Evidence presented established that Moyles were receiving water under artesian pressure at the time Eagle filed its applications and during the summer preceding the hearing.

32. In order to avail themselves of the benefits of *Parker*, on or before August 1, 2008, Moyles must begin semiannual measurements of the static water levels/pressures and artesian flow rates for the domestic uses receiving *Parker* protection. Moyles must allow Eagle the opportunity to observe or independently measure flow rates and water levels in the well. If Moyles monitor static water levels/pressures and artesian flow rates for the domestic uses from their wells, and water levels/pressures or artesian flows decline from the wells for the domestic uses after Eagle begins pumping water, Moyles may petition the Department for a determination of material injury. After comparison of Moyles' monitoring data with monitoring data gathered by Eagle, IDWR will determine whether Eagle must compensate Moyles for the declines.

Muller

33. The priority date for water right no. 63-22650 (1887), owned by Eugene Muller, predates the 1953 amendment to the Ground Water Act that subjects water rights to the reasonable pumping level standard. The original well for water right no. 63-22650 was constructed in the shallow aquifer. In 1979 Muller constructed a new well in the deep aquifer. *Parker* would only protect Muller's water right from injury to water levels in the shallow aquifer. The Director determines that pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. Any water levels (or pressures) in a new well constructed in 1979 are subject to the reasonable pumping level standard established by the 1978 amendment to the Ground Water Act as it relates to domestic water rights.

Howarth

34. Charles Howarth constructed a domestic well in the deep aquifer in approximately 2001 or 2002. The domestic well is under artesian pressure, maintaining 3 to 7 psi of pressure. Howarth's well is subject to the reasonable pumping level standard established by the 1978 amendment to the Ground Water Act as it relates to domestic water rights.

Meissner

35. One of Meissner's three wells derives water from the shallow aquifer. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer.

36. The Double R Cattle Well is a domestic well and is entitled to *Parker* protection because its use predates the recognition of reasonable ground water pumping levels under the 1978 amendment to the Ground Water Act.

37. The Double R Cattle Well is completed in the intermediate aquifer. Because Eagle did not satisfy its burden of proving the relationship between the intermediate and the deep aquifer, the Director will assume that the Theis equation draw downs apply directly to the intermediate aquifer. To avail himself of the benefits of *Parker*, on or before August 1, 2008, Meissner must begin semiannual measurements of the static water levels in the Double R Cattle Well. Meissner must allow Eagle the opportunity to observe or independently measure water levels in the Meissner well. If Meissner monitors static water levels in his well and water levels decline in the well after Eagle begins pumping water, Meissner may petition the Department for a determination of material injury. After comparison of Meissner's monitoring data with monitoring data gathered by Eagle, IDWR will determine whether Eagle must compensate Meissner for the declines.

38. The depth of the third Meissner well is unknown. Meissner had the burden to show that he holds a water right for a third well bearing a priority date that would qualify for *Parker* protection. Meissner did not satisfy his burden of proof for the third well.

Purdy

39. Dana and Viki Purdy own an irrigation well that is approximately 90 feet deep and is pumped to supply supplemental ground water for irrigation when surface water is not available. The water right for the irrigation well bears a priority date of 1953. Pumping from the deep aquifer will not injure water right no. 63-2920 because Purdys divert ground water from the shallow aquifer. The water level in the Purdy irrigation well is not entitled to *Parker* protection.

40. The well for water right no. 63-15680 is a domestic well entitled to *Parker* protection of ground water levels.

41. The point of diversion for water right no. 63-15680 is a well drilled to a depth of 250 feet. The well is probably completed in the deep aquifer, although the well does not free flow at land surface. In order to avail themselves of the benefits of *Parker*, on or before August

1, 2008, Purdys must begin semiannual measurements of the static water levels in the well for water right no. 63-15680. Purdys must allow Eagle the opportunity to observe or independently measure water levels in the well. If Purdys monitor static water levels in their well and water levels decline in the well after Eagle begins pumping water, Purdys may petition the Department for a determination of material injury. After comparison of Purdys' monitoring data with monitoring data gathered by Eagle, IDWR will determine whether Eagle must compensate Purdys for the declines.

42. Water right no. 63-22652 authorizes domestic and stockwater use, and bears a priority date of June 1, 1967. The well for water right no. 63-22652 is a domestic well entitled to *Parker* protection of ground water levels.

43. The point of diversion for water right no. 63-22652 is a well drilled to a depth of 120 feet. The well is constructed in the intermediate aquifer. Water in the well is under artesian pressure, but water does not free flow at ground surface. The well was constructed in 1966. To avail themselves of the benefits of *Parker*, on or before August 1, 2008, Purdys must begin semiannual measurements of the static water levels in the well for water right no. 63-22652. Purdys must allow Eagle the opportunity to observe or independently measure the water levels in their well. If Purdys monitor static water levels in their well and water levels decline in the well after Eagle begins pumping water, Purdys may petition the Department for a determination of material injury. After comparison of Purdys' monitoring data with monitoring data gathered by Eagle, IDWR will determine whether Eagle must compensate Purdys for the declines.

44. Purdys also presented evidence about a well supplying water to Dana Purdy's mother's home. This well was drilled after domestic wells were subjected to the reasonable pumping level standard.

Taylor

45. All but one of the Taylor wells are completed in the shallow aquifer. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. The water levels in the shallow Taylor wells are not entitled to *Parker* protection.

46. The domestic portion of water right no. 63-5040 is entitled to *Parker* protection. The well is located in excess of two miles away from the nearest proposed Eagle well.

47. Water free flows under artesian pressure from the well described as a point of diversion for water right no. 63-5040. The well is probably constructed in the deep aquifer. To avail themselves of the benefits of *Parker*, on or before August 1, 2008, Taylors must begin semiannual measurements of the static water levels/pressures and artesian flow rates for the domestic uses receiving *Parker* protection under water right no. 63-5040. Taylors must allow Eagle the opportunity to observe or independently measure the flow rates and water levels/pressures in their well. If Taylors monitor static water levels/pressures and artesian flow rates for the domestic uses from their well and water levels/pressures or artesian flows decline in the well after Eagle begins pumping water, Taylors may petition the Department for a determination of material injury. After comparison of Taylors' monitoring data with monitoring

data gathered by Eagle, IDWR will determine whether Eagle must compensate Taylors for the declines.

Combe

48. The Combe well is 65 feet deep, and within the shallow aquifer. Pumping from the deep aquifer will not injure water rights diverting from the shallow aquifer. The water level in the Combe well is not entitled to *Parker* protection.

Rosti

49. Rostis own a domestic well drilled in 1980. The Rosti domestic well was drilled after the 1978 amendment to the Ground Water Act that subjected domestic wells to the reasonable pumping level. The Rosti domestic well is not entitled to *Parker* protection of ground water levels.

50. The Rosti irrigation well completed in the deep aquifer was drilled in 1992. The Rosti irrigation well was constructed after the 1953 amendment to the Ground Water Act. The Rosti irrigation well is not entitled to protection unless ground water levels decline below a reasonable pumping level.

51. Water levels and pressures are not declining significantly in the area where water is sought for appropriation. Nonetheless, IDWR staff raised concerns about limitations of the pump test. Furthermore, in its addendum to the pump test report, Eagle recognized some of the uncertainties about sufficiency of the water supply and injury and recommended further ground water monitoring. IDWR staff recommended the construction/identification by Eagle of two observation wells, one up-gradient and one down-gradient of the proposed wells. After further analysis, the Director determines the water level responses to pumping by Eagle can be more accurately determined by locating observation wells near one or both of the presently constructed production wells and also by identifying one additional well at a more remote location. Eagle must develop a monitoring, recording, and reporting plan for the observation wells.

52. By compensating the protestants entitled to protection of water levels/pressures under *Parker*, and by monitoring ground water levels during pumping, the proposed appropriation by Eagle will not injure other water users.

53. There is sufficient water for the purposes sought by Eagle's applications. The additional monitoring of the two dedicated observation wells will ensure that the deep aquifer in the area is not overappropriated.

54. By limiting the appropriation to 2.23 cfs for municipal use and 6.68 cfs for fire protection, the application is not filed in bad faith or for purposes of speculation or delay.

55. Eagle has sufficient monetary resources to complete the project.

56. The proposed project is in the local public interest.

57. The proposal conserves the water resources of the state of Idaho because irrigation and other outside uses of water will be provided primarily by other water rights.

ORDER

IT IS HEREBY ORDERED that applications to appropriate water nos. 63-32089 and 63-32090 are **Approved** subject to the limitations and conditions set forth below.

IT IS FURTHER ORDERED that the beneficial uses and flow rates authorized are as follows:

Application no. 63-32089

Municipal	2.23 cfs
Fire Protection	1.77 cfs

Application no. 63-32090

Fire Protection	4.91 cfs
Total	**8.91 cfs**

IT IS FURTHER ORDERED that the approved applications to appropriate water nos. 63-32089 and 63-32090 are subject to the following conditions:

Proof of application of water to beneficial use shall be submitted for both permits on or before **March 1, 2013.**

In connection with the proof of beneficial use submitted for this permit, the permit holder shall also submit a report showing the total annual volume, the maximum daily volume, and the maximum instantaneous rate of flow diverted from the points of diversion authorized for these permits during the development period. The report shall also show the maximum instantaneous rate of diversion, either measured or reasonably estimated by a qualified professional engineer, geologist, or certified water rights examiner, for the entire City of Eagle municipal water system. The report shall also describe and explain how flows diverted under these permits provide an additional increment of beneficial use of water for the City of Eagle municipal water system as opposed to an alternative point of diversion for prior water rights already held and used by the City of Eagle for its municipal water system.

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

Subject to all prior water rights.

Place of use is within the service area of the City of Eagle municipal water supply system as provided for under Idaho law.

Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department as part of the diverting works.

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

Domestic uses from four flowing artesian wells identified as points of diversion for water right nos. 63-2546 and 63-2609 and an unrecorded domestic use of ground water for the home presently owned by Joseph and Lynn Moyle are entitled to *Parker* protection. In order to avail themselves of *Parker* protection, however, on or before August 1, 2008, Moyles must initiate semiannual measurement of static water levels/pressures and semiannual testing of artesian pressure flow for each of their domestic uses to determine the reduction in delivered flow for their domestic uses. Moyles must prepare a written proposal of how the tests will be conducted and submit the proposal to the Department and the water right holder. The Department must approve the test proposal. Moyle must notify the Department and the water right holder of the date and time of the tests, and Moyles must allow the water right holder and the Department to participate in the tests.

If Moyles monitor static water levels/pressures and flow rates for the domestic uses from their wells, and water levels/pressures decline in the wells causing a reduction in flow rates for the domestic uses after the right holder begins pumping water, Moyles may petition the Department for a determination of material injury. After comparison of Moyles' monitoring data with monitoring data gathered by the right holder, IDWR will determine whether the right holder must compensate Moyles for the declines.

To avail himself of the benefits of *Parker*, on or before August 1, 2008, Meissner must begin semiannual measurements of the static water levels in the Double R Cattle Well. Meissner must allow the right holder the opportunity to observe or independently measure water levels in the Meissner well. If Meissner monitors static water levels in his well and water levels decline in the well after the right holder begins pumping water, Meissner may petition the Department for a determination of material injury. After comparison of Meissner's monitoring data with monitoring data gathered by the right holder, IDWR will determine whether the right holder must compensate Meissner for the declines.

To avail themselves of the benefits of *Parker*, on or before August 1, 2008, Purdys must begin semiannual measurements of the static water levels in the well for water right no. 63-15680. Purdys must allow the right holder the opportunity to observe or independently measure the water levels in their well. If Purdys monitor static water levels in their well and water levels decline in the well after the right holder begins pumping water, Purdys may petition the Department for a determination of material injury. After comparison of Purdys' monitoring data with monitoring data gathered by the right holder, IDWR will determine whether the right holder must compensate Purdys for the declines.

To avail themselves of the benefits of *Parker*, on or before August 1, 2008, Purdys must begin semiannual measurements of the static water levels in the well for water right no. 63-22652.

Purdys must allow the right holder the opportunity to observe or independently measure the water levels in their well. If Purdys monitor static water levels in their well and water levels decline in the well after the right holder begins pumping water, Purdys may petition the Department for a determination of material injury. After comparison of Purdys' monitoring data with monitoring data gathered by the right holder, IDWR will determine whether the right holder must compensate Purdys for the declines.

Domestic use from Taylors' flowing artesian well identified as points of diversion for water right nos. 63-5040 is entitled to *Parker* protection. In order to avail themselves of *Parker* protection, however, on or before August 1, 2008, Taylors must initiate semiannual measurement of static water levels/pressures and semiannual testing of artesian pressure flow for their domestic use to determine the reduction in delivered flow for their domestic use. Taylors must prepare a written proposal of how the tests will be conducted and submit the proposal to the Department and the water right holder. The Department must approve the test proposal. Taylors must notify the Department and the water right holder of the date and time of the tests, and Taylors must allow the water right holder and the Department to participate in the tests.

If Taylors monitor static water levels/pressures and flow rates for the domestic uses from their wells, and water levels/pressures decline in the wells causing a reduction in flow rates for the domestic uses after the right holder begins pumping water, Taylors may petition the Department for a determination of material injury. After comparison of Taylors' monitoring data with monitoring data gathered by the right holder, IDWR will determine whether the right holder must compensate Taylors for the declines.

Prior to diversion of water under this right, the right holder shall construct/identify four observation wells for future monitoring. Three wells shall be located in close proximity to one or both of the production wells. One of the wells shall be completed in the shallow aquifer, on in the immediate aquifer, and one in the deep aquifer. A fourth observation well shall be located at a more remote distance from the production wells. The completion interval for the fourth well shall be in the deep aquifer. The location and design of the observation must be approved by the Department prior to construction or designation of the observation wells. Each observation well must be constructed so that ground water in the well is derived only from one aquifer zone, and must also be constructed so that water levels in each well can be easily measured.

Prior to diversion of water under this right, the right holder shall develop and the Department must approve, a monitoring, recording, and reporting plan for the observation wells.

The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.

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.

The wells constructed at the points of diversion shall be constructed in accordance with the rules of the Idaho Department of Water Resources regarding well construction standards and measurement of diversions and the rules of the Department of Environmental Quality for Public Drinking Water Systems, IDAPA 58.01.08.

IT IS FURTHER ORDERED that the request for oral argument filed by Eagle is **Denied**.

Dated this 26th day of February, 2008.

David R. Tuthill, Jr.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of February, 2008, a true and correct copy of the foregoing document(s) described below were 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 Explanatory Sheet for "Responding to Final Orders..." when a hearing was held.

JERRY & MARY TAYLOR
3410 HARTLEY
EAGLE ID 83616

CORRIN & TERRY HUTTON
10820 NEW HOPE RD
STAR ID 83669

SAM & KARI ROSTI
1460 N POLLARD LN
STAR ID 83669

LEEROY & BILLIE MELLIES
6860 W STATE ST
EAGLE ID 83616

DEAN & JAN COMBE
6440 W BEACON LIGHT
EAGLE ID 83616

BRUCE M SMITH
MOORE SMITH BUXTON TURKE
225 N 9TH STE 420
BOISE ID 83702

JOHN M MARSHALL
GIVENS PURSLEY
PO BOX 2720
BOISE ID 83701-2720

CHARLES L HONSINGER
DANIEL V STEENSON
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773

DANA & VIKI PURDY
5926 FLOATING FEATHER
EAGLE ID 83616

Deborah J. Gibson
Administrative Assistant