BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)FOR PERMIT TO APPROPRIATE)WATER NO. 61-12239 IN THE NAME)OF CLEAR SPRINGS RANCH LLC)

PRELIMINARY ORDER APPROVING APPLICATION

PROCEDURAL HISTORY

On June 12, 2009, Clear Springs Ranch LLC ("Applicant") submitted an application to appropriate ground water for municipal use on land in Elmore County. The Department of Water Resources ("Department") designated the application no. 61-12239 ("application").

On October 13, 2009, the Department wrote the applicant a letter requesting additional information in support of the application. On December 24, 2009, the applicant submitted a letter with appendices in response to the Department's request for additional information.

The Department caused the application to be published in the *Mountain Home News* on January 20, 2010, and January 27, 2010, in accordance with Idaho Code § 42-203A(2) and Rule 40.02.a.i of the Water Appropriation Rules (IDAPA 37.03.08.040.02.a.i). The published protest deadline was February 8, 2010. The Department received timely protests against the application from the following parties (collectively the "Protestants"):

- John J. Barrutia ("Barrutia")
- Dean Withers ("Withers")
- Charles F. Whipple and Phyllis M. Whipple ("Whipple")
- Patricia A. Hamaishi ("Hamaishi")
- Rae Ann Stoecker ("Stoecker")
- Charles A. Cairns ("Cairns")
- Herbert Ralph Cole ("Cole")

On May 20, 2010, the Department held a pre-hearing conference attended by the Applicant and the Protestants. On July 21, 2010, the Department issued an order setting hearing dates in connection with the application and authorizing the parties to conduct discovery.

On October 1, 2010, the hearing officer issued orders compelling Protestants Herbert Ralph Cole and Dean Withers to respond to the Applicant's interrogatories and requests for production of documents.

On September 28, 2010, the Department received Idaho Power Company's Petition to Intervene ("petition") in the contested case. On October 21, 2010, the hearing officer issued an order denying the petition.

On December 29, 2010, the hearing officer issued an order sanctioning Protestant Herbert Ralph Cole for failing to participate in discovery in connection with this matter. The hearing officer enjoined Herbert Ralph Cole from:

- a) Making discovery requests to other parties in this matter,
- b) Calling witnesses at the hearing to be held in connection with this matter,
- c) Producing documents or other items of tangible evidence, except for the well driller's report submitted by Cole in response to the discovery requests, at the hearing to be held in connection with this matter,
- d) Appearing as a witness at the hearing to be held in connection with this matter unless called to testify by another party, in which case Cole's testimony shall not address the history of diversion and use of water on Cole's property beyond the scope of what Cole has submitted in response to the discovery requests, and
- e) Cross-examining witnesses at the hearing to be held in connection with this matter.

On January 3, 2011, the hearing officer issued an order sanctioning Protestant Dean Withers for failing to participate in discovery in connection with this matter. The hearing officer enjoined Dean Withers from:

- a) Making discovery requests to other parties in this matter,
- b) Calling witnesses at the hearing to be held in connection with this matter,
- c) Producing documents or other items of tangible evidence, except for the items submitted by Withers in response to the discovery requests, at the hearing to be held in connection with this matter,
- d) Appearing as a witness at the hearing to be held in connection with this matter unless called to testify by another party, in which case Withers' testimony shall not address the history of diversion and use of water on Withers' property beyond the scope of what Withers has submitted in response to the discovery requests, and
- e) Cross-examining witnesses at the hearing to be held in connection with this matter.

On February 17 and 18, 2011, at the Department's State Office in Boise, Idaho, the hearing officer conducted a hearing to resolve the protests filed against the application.

Protestants Barrutia, Withers, Whipple, Hamaishi, Stoecker, and Cairns were present at the hearing and represented themselves. Protestant Stoecker attended only the first day of the hearing. Protestant Cole did not attend the hearing. Attorney Michael C. Creamer represented the Applicant at the hearing.

The issues raised by the Protestants include:

- The potential for the diversion of ground water proposed in the application to diminish the supply of water available for prior, existing ground water rights.
- The sufficiency of the supply of ground water in the MHGWMA for the proposed water use.

- The potential for the ground water supply available to prior, existing water right holders to be contaminated by waste filtered through the septic systems established in connection with the water use proposed in the application.
- The public interest in conserving water within the MHGWMA for other water uses.

The following witnesses testified at the hearing:

- Terry Scanlan, P.E., P.G., of SPF Water Engineering, LLC
- Michael Eisenman, Managing Member of Clear Springs Ranch LLC
- Wes Wootan
- John Schleicher
- Charles A. Cairns
- Charles F. Whipple
- Phyllis M. Whipple
- Patricia A. Hamaishi

At the hearing, the hearing officer admitted the following items into evidence:

Exhibit No. CSR 1 CSR 2 CSR 3 CSR3A CSR 5 CSR 6 CSR 7 CSR 8 CSR 9 CSR 10 CSR 11 CSR 12 CSR 13	 Exhibit Description Appeal from the denial by the Elmore County Planning & Zoning (9 pgs) Preliminary plat showing Clear Springs Ranch Subdivision Clear Springs Ranch Subdivision Plat of Phase 1A (4 pgs) Clear Springs Ranch Subdivision phasing exhibit Ground Water Level Change 1976 vs. 2008 Additional information from SPF Engineering (23 pgs) Mountain Home Highway District letter Mountain Home Irrigation District – Michael Eisenman shares (2 pgs) Terry Scanlan's resume (4 pgs) SPF memo and DEQ approval letters (13 pgs) SPF memo regarding estimated water use and consumption (15 pgs) SPF memo regarding irrigation well data (18 pgs) Protestant well locations and well logs (11 pgs)
Hamaishi A	Written statement (2 pgs)
C. Whipple A	Report of Well Driler (well owner Henry Leydet)
C. Whipple B	Well Driller's Report (well owner Emil Stoecker)
C. Whipple C	Well Driller's Report (well owner Ollie Withers)
C. Whipple D	Well Driller's Report (well owner Charles Whipple)
C. Whipple E	Well Driller's Report (well owner Ray Cotton)
C. Whipple F	Well Driller's Report (well owner Ralph Cole)
C. Whipple G	Panel of 8 photographs – Bluegrass Subdivision
P. Whipple A1	Letter to David R. Tuthill, Director
P. Whipple A2	Letter to John Westra (2 pgs)
P. Whipple B1	Page from Mountain Home News
P. Whipple C	May 14, 2008 article in Mountain Home News

P. Whipple D	March 24, 2010 article regarding water
P. Whipple E	Legal Notice for 61-12239
P. Whipple F	February 4, 2010 protestant letter (2pgs)
P. Whipple G	Portion of document (with added notes) from SPF about permit 61-12239
P. Whipple H	December 2, 1007 Parade article
P. Whipple I	May 2008 Reader's Digest article
P. Whipple J	Excerpts from Reader's Digest article "Dry Times"
P. Whipple K	More excerpts from Reader's Digest article "Dry Times"
P. Whipple L	April 30, 2010 Idaho Statesman article
P. Whipple M	April 25, 2010 newspaper article
P. Whipple O	December 26, 2007 Mountain Home News article
C. Cairns C	Climate Change Report (4 pgs)

The hearing officer also indicated for the record that he may rely on:

- Water right records maintained by the Department for water rights that may be affected by the proposed water use.
- The cumulative file for the application.
- The Department's file on the Mountain Home Ground Water Management Area.
- Technical reports prepared by the Department to characterize the water resources in the Mountain Home Ground Water Management Area.

On February 25, 2011, the Hearing Officer issued a *Notice of Proposed Default Order* to Cole because he did not attend the hearing. After considering the written responses submitted by Cole and by the Applicant, on March 7, 2011, the Hearing Officer issued a *Default Order* dismissing Cole from the proceeding.

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

FINDINGS OF FACT

1. The Mountain Home Ground Water Management Area ("MHGWMA") extends from the north rim of the Snake River Canyon in Elmore County northward to the foothills of the Danskin Mountains and from approximately five miles east of the city of Mountain Home westward across Elmore County into Ada County.¹ The Department established the Mountain Home Ground Water Management Area on November 9, 1982, pursuant to Idaho Code § 42-233b because the anticipated rate of annual ground water withdrawal in the underlying regional aquifer exceeded the anticipated annual rate of recharge.

¹ For a more precise metes and bounds description of the boundaries of the Mountain Home Ground Water Management Area, see the November 9, 1982, *Order Establishing Ground Water Management Area*.

- 2. The regional aquifer in the MHGWMA generally consists of layers of basalt with interbedded sediments. Depth to water in the MHGWMA regional aquifer is usually more than 300 feet below ground surface.
- 3. The climate of the MHGWMA is semi-arid. Precipitation in the Danskin Mountains exceeds precipitation throughout the rest of the MHGWMA. Consequently, the source of natural recharge for the regional aquifer in the MHGWMA largely originates in the Danskin Mountains and moves southward toward the Snake River.
- 4. Interstate 84 crosses the MHGWMA from northwest to southeast, passing across the north side of the community of Mountain Home. From 1976 to 2008, water levels between the City of Mountain Home and the Mountain Home Air Force Base south of the city have declined more than 50 feet. North of Interstate 84 in the vicinity of Mountain Home, hydrographs from monitoring wells show that ground water levels fluctuate seasonally but in general have declined only 5 to 10 feet from 1976 to 2008. Some characteristic of the subterranean geologic structure, possibly a fault running more or less along the path of Interstate 84, slows or impedes the flow of ground water from north to south.
- 5. In addition to the regional aquifer, perched aquifers exist in some parts of the MHGWMA, primarily south of Interstate 84.
- 6. The application proposes the appropriation of 0.35 cfs of ground water for municipal use on land in the SW¹/4SW¹/4, SE¹/4SW¹/4, and SW¹/4SE¹/4 of Section 10, Township 3 South, Range 6 East, B.M., in Elmore County. Water for the municipal use would be diverted from two points of diversion (wells), one in the SW¹/4SW¹/4 of Section 10, Township 3 South, Range 6 East, B.M., and one in the SW¹/4SE¹/4 of Section 10, Township 3 South, Range 6 East, B.M., and one in the SW¹/4SE¹/4 of Section 10, Township 3 South, Range 6 East, B.M.
- 7. The points of diversion proposed in the application are within the boundaries of the MHGWMA on the north side of Interstate 84 in the vicinity of Mountain Home. The Applicant anticipates extending each of the two wells to depths greater than 400 feet below ground surface into the regional aquifer of the MHGWMA.
- 8. Of the wells within half a mile of the proposed points of diversion, those drilled in the 1960s and 1970s generally show some evidence of a perched aquifer located within 150 feet of ground surface, but most were extended through the perched aquifer into the regional aquifer. Wells drilled from the 1980s onward generally show less evidence of a perched aquifer.
- 9. On December 27, 2010, the Elmore County Board of Commissioners extended approval of the Applicant's preliminary plat of Clear Springs Ranch Subdivision, a 4-phase, 191 lot single family residential subdivision. The extension is until January 1, 2012.
- 10. Application no. 61-12239 proposes a supply of water for only the first phase of the proposed 191-lot subdivision. The proposed municipal water use will provide internal potable water for a total of 59 homes located on lots of one-acre, more or less, in Phases 1A and 1B of Clear Springs Ranch Subdivision and internal potable water use in a convenience store and a fire station. The Applicant also anticipates a small amount of outdoor water use for washing cars, etc., from the potable water system.

- 11. The Applicant estimates the annual total diversion volume for the proposed municipal water use to be 17.1 acre-feet based on an average daily diversion of 250 gallons per day per home, convenience store, or fire station. The 250-gallon per day estimate is less than is typically authorized by the Department in areas of Idaho with more reliable water supplies than in the MHGWMA. It is also less than national averages presented by the Protestants. However, comparable modern residential subdivisions nearby in Idaho use less than 250 gallons per day per home for non-irrigation uses.
- 12. The Applicant proposes to limit external water use from the potable water system by constructing only one hose bib per home and by limiting the types of livestock the homeowners can keep. The applicant proposes to enforce the external use restrictions through the covenants, codes, and restrictions ("CC&Rs") for the proposed development.
- 13. Each home in the proposed Clear Springs Ranch Subdivision will dispose of its wastewater through its own septic system. Approximately 95% of the water used internally in each home will be returned to the local aquifer through these septic systems. Consequently, the total estimated annual depletion for the application is 5% of 17.1 acre-feet, or about 0.85 acre-feet.
- 14. Discharge of domestic water through septic systems will occur in the shallow subsurface, and the ground water will generally filter laterally and also downward toward the regional aquifer. Natural attenuation processes such as settlement, filtration, and adsorption remove certain impurities from ground water as it travels underground.
- 15. Central District Health Department ("CDHD") regulates the installation of septic systems in the Mountain Home area. The Applicant conducted a pathogen study and received preliminary approval from CDHD for the installation of an advanced² septic system for each home in the proposed subdivision.
- 16. Michael Eisenman, managing partner for the Applicant, is entitled to the delivery of water from Mountain Home Irrigation District for the irrigation of 147.04 acres of land at the location of the proposed Clear Springs Ranch Subdivision. In addition, Michael Eisenman owns Water Right no. 61-7037, which authorizes the diversion of up to 1.53 cfs of ground water for the supplemental irrigation of 130.2 acres at the general location of the proposed Clear Springs Ranch Subdivision.
- The Applicant proposes to irrigate the lots in the Clear Springs Ranch Subdivision with water from Mountain Home Irrigation District and water diverted pursuant to Water Right no. 61-7037. The distribution lines for the proposed municipal water system and the irrigation water system will not be cross-connected.
- 18. Eisenman's irrigation water rights are sufficient in quantity to irrigate the 59 lots in Clear Springs Ranch Subdivision Phases 1A and 1B, although some changes to Water Right no. 61-7037 may be necessary. Changes to Water Right no. 61-7037 must be pursued in a separate administrative process in accordance with Idaho Code § 42-222.

² The term "advanced" was used in testimony but not explained in detail.

- 19. The Applicant is considering an ornamental water feature for Clear Springs Ranch Subdivision. The Applicant has not specified the size and nature of the proposed water feature.
- 20. The overall annual water diversion proposed in the application averages eleven gallons per minute.
- 21. The Applicant has already spent approximately half a million dollars on the Clear Springs Ranch Subdivision project.
- 22. Protestant John J. Barrutia ("Barrutia") owns decreed Water Right No. 61-10159, which authorizes the diversion of up to 0.09 cfs of ground water for domestic and stockwater purposes within the NE¹/₄NW¹/₄NW¹/₄, Sec. 14, Twp 03S, Rge 06E, B.M. The priority date for Water Right No. 61-10159 is May 1, 1959. The point of diversion for Water Right No. 61-10159 is located approximately 0.6 miles east of the applicant's nearest proposed point of diversion. Barrutia's well was drilled to a depth of 554 feet below ground surface in 1968.
- 23. Protestant Dean Withers ("Withers") owns decreed Water Right No. 61-10651, which authorizes the diversion of up to 0.08 cfs of ground water for domestic and stockwater purposes within the SE¼SW¼, Sec. 10, Twp 03S, Rge 06E, B.M. The priority date for Water Right No. 61-10651 is April 15, 1969. The point of diversion for Water Right No. 61-10651 is located between the applicant's proposed points of diversion, approximately 0.4 miles east of one and 0.2 miles west of the other. Withers's well was drilled to a depth of 427 feet below ground surface in 1988.
- 24. Protestants Charles F. Whipple and Phyllis M. Whipple ("Whipple") own decreed Water Right No. 61-10222, which authorizes the diversion of up to 0.04 cfs of ground water for domestic purposes within the SE¹/₄SE¹/₄, Sec. 10, Twp 03S, Rge 06E, B.M. The priority date for Water Right No. 61-10222 is May 20, 1960. The point of diversion for Water Right No. 61-10222 is located approximately 0.2 miles east of the applicant's nearest proposed point of diversion. Whipple's well was drilled to a depth of 425 feet below ground surface in 1992.
- 25. Protestant Patricia A. Hamaishi ("Hamaishi") owns decreed Water Right No. 61-10438, which authorizes the diversion of up to 0.04 cfs of ground water for domestic purposes within the SW¹/₄SW¹/₄, Sec. 11, Twp 03S, Rge 06E, B.M. The priority date for Water Right No. 61-10438 is September 16, 1977. The point of diversion for Water Right No. 61-10438 is located approximately 0.4 miles east of the applicant's nearest proposed point of diversion. Hamaishi's well was drilled to a depth of 300 feet below ground surface in 1977.
- 26. Protestant Rae Ann Stoecker ("Stoecker") owns decreed Water Right No. 61-10753, which authorizes the diversion of up to 0.04 cfs of ground water for domestic purposes within the SW¹/4SE¹/4, Sec. 10, Twp 03S, Rge 06E, B.M. The priority date for Water Right No. 61-10753 is January 31, 1969. The point of diversion for Water Right No. 61-10753 is located less than 0.1 miles east of the applicant's nearest proposed point of diversion. Stoecker's well was drilled to a depth of 412 feet below ground surface in 1969.

- 27. Protestant Charles Cairns ("Cairns") lives in the SW¹/₄SW¹/₄, Sec. 12, Twp 03S, Rge 06E, B.M., about 1.5 miles east of the applicant's nearest proposed point of diversion. There does not appear to be a recorded water right for the domestic water use on the Cairns land. Diversion of ground water for domestic purposes on the Cairns parcel may be authorized by the exemption described in Idaho Code § 42-227.
- 28. Applicant's exhibit no. 13 includes well driller's reports that appear to be for the wells serving as points of diversion for the Protestants' water rights.
- 29. Rule 30.01.c of the Department's Rules of Procedure (IDAPA 37.03.08.030.01.c) states:

Trust water flows under the Snake River water rights agreement are those occurring in the Snake River and tributaries in the geographic area designated in Subsection 030.01.a. which exceed the established minimum stream flows but are less than the water rights for hydropower generating facilities in the Swan Falls Dam to Milner Dam reach of Snake River, to the extent such rights were unsubordinated prior to the Snake River water rights agreement. Minimum average daily flows have been established by action of the Water Resource Board and legislature at the U.S. Geological Survey gauging station located near Murphy (Section 35, Township 1 South, Range 1 West B.M.) in the amount of three thousand nine hundred (3900) cfs from April 1 to October 31 and five thousand six hundred (5600) cfs from November 1 to March 31, and at Milner gauging station located in Section 29, Township 10 South, Range 21 East, B.M. in the amount of zero (0) cfs from January 1 to December 31.

- 30. The applicant proposes to divert trust water.
- 31. Due to the hydraulic interconnection of the MHGWMA regional aquifer and the Snake River, at some undetermined time in the future the water use proposed in this application will likely deplete the Snake River by 0.85 acre-feet annually. Not all of the depletion will occur in the portion of the Snake River between Milner Dam and Swan Falls Dam. An annual depletion of 0.85 acre-feet equates to about half a gallon per minute.

CONCLUSIONS OF LAW

Governing Statutes and Rules

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. Idaho Code § 42-226 states in pertinent part:

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. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water resources as herein provided.

- 3. Idaho Code § 42-229 applies Idaho Code § 42-226 retroactively to non-excepted ground water rights: "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."
- 4. Prior to 1978, domestic wells, pursuant to Idaho Code § 42-227, were specifically excepted from the requirements contained in Idaho Code § 42-226. In 1978, the legislature specifically amended Idaho Code § 42-227 to extend the requirements in Idaho Code § 42-226 to domestic wells. The 1978 amendment was not retroactive in its application.
- 5. Idaho Code § 42-231 states in pertinent part:

In addition to other duties prescribed by law, it shall be the duty of the director of the department of water resources ... to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.

6. Idaho Code § 42-233b says, in pertinent part:

Applications for permits made within a ground water management area shall be approved by the director only after he has determined on an individual basis that sufficient water is available and that other prior water rights will not be injured.

- 7. The Water Appropriation Rules, IDAPA 37.03.08, define the process for appropriating water in Idaho.
- 8. The applicant bears the ultimate burden of proof regarding all the factors set forth in Idaho Code § 42-203A.

Satisfaction of Idaho Code § 42-203A and 42-233b Review Criteria

A. Potential to Reduce the Quantity of Water under Existing Rights (Injury)

- 9. The determination of what constitutes a reasonable pumping level is highly fact specific and must be based on the facts, circumstances, and hydrogeologic setting of each particular case.
- 10. Since the 1978 amendment to Idaho Code § 42-227, diversions of ground water for domestic purposes established in 1978 or later are subject to the reasonable pumping level provisions of Idaho Code § 42-226. With an average diversion rate of eleven gallons per minute, the diversion of water proposed in the application is not likely to cause local ground water levels to decline beyond a reasonable pumping level.
- 11. Consistent with Idaho Code §§ 42-226, -227, and -229, the Idaho Supreme Court has held that "domestic wells drilled prior to 1978 are exempt from the provisions Idaho Code § 42-226." *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982). For domestic wells drilled prior to 1978, "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." *Id*, at 512, 650 P.2d at 654. Domestic wells with 1978 priorities or later are protected in the maintenance of their reasonable pumping levels. *Id*.
- 12. The extent to which Idaho Code §§ 42-226, -227, -229 and *Parker* provides protection to the Protestants' water rights depends on the priority dates of the water uses from the affected wells.
- 13. Within half a mile of the points of diversion proposed in the application, there are approximately 22 domestic water rights with priority dates prior to 1978. Of the 22, only Protestants Withers, Whipple, Hamaishi, and Stoecker have come forward to express their concerns about the impact the proposed diversion would have on their water usage. In addition, Protestant Barrutia, whose domestic well is just over half a mile from the proposed points of diversion and whose priority date is before 1978, has come forward. Because their wells were drilled prior to 1978, the holders of these domestic water rights are protected in the maintenance of their historic pumping levels.
- 14. Of those five Protestants, the wells currently used by Withers and Whipple were drilled after 1978. Because the priority dates of their water rights are before 1978, Withers and Whipple must have replaced their original wells. The record does not establish whether the original Withers and Whipple wells were drilled into the perched aquifer or the regional aquifer. The

record also does not establish why the Withers and Whipple wells were replaced. Since the Applicant did not provide evidence to the contrary, and the burden of proof is on the Applicant, the hearing officer must conclude that the historic pumping levels of the post-1978 Withers and Whipple wells are protected in the regional aquifer.

- 15. The Applicant did not conduct a Theis analysis, pump test, or other effort to show that its proposed water diversion will not impact the Protestants' historic pumping levels. Therefore, consistent with *Parker*, the Applicant should be required to mitigate any decrease in the historic pumping levels of the Protestants' domestic wells.
- 16. The priority date for the domestic use on Mr. Cairns's land has not been established. Because Mr. Cairns does not have a priority date associated with his domestic water right, the hearing officer will not address the impact, if any, to his water use.

B. Sufficiency of the Water Supply

- 17. Portions of the MHGWMA are suffering long-term, chronic water level declines, indicating that the rate of recharge has been exceeded by the rate of discharge. However, the order establishing the MHGWMA states, "[t]here appear to be some sub-areas within the area where additional ground water could be appropriated without injuring existing rights" Aquifer levels are not suffering substantial, chronic declines in the area where the applicant proposed to divert water.
- 18. Furthermore, the applicant has proposed measures that will minimize its overall impact on the water supply. First, the applicant has not proposed to divert additional ground water from the MHGWMA to irrigate its proposed subdivision. Instead, it intends to use existing surface water rights and an existing supplemental ground water right to irrigate the subdivision lots. Second, approximately 95% of the water used in the subdivision will be returned to the MHGWMA ground water supply through septic systems. Because there is little reliance on shallow, perched ground water, to the extent it still exists, in the vicinity of the proposed Clear Springs Ranch subdivision, a large percentage of the water filtered through the septic systems will, over time, seep into the regional aquifer. Third, the Applicant indicated at the hearing that he will, through the CC&Rs proposed for the subdivision, limit the diversion and use of ground water for livestock watering. Because CC&Rs are typically subject to amendment without input from outside the homeowners association, this particular restriction should be reinforced in the water right permit issued in connection with this application. However, limiting the stockwater component of the municipal water use would require a potentially difficult, cumbersome definition of "stock" that is better left to the CC&Rs. The more appropriate way for the Department to limit stock watering is to require sufficient measuring and reporting of diversions of water to ensure the Applicant adheres to the proposed limit of 17.1 AF of water annually.
- 19. The water supply in the area where the applicant proposes to divert and use water is sufficient for the proposed water use. However, as stated previously, the applicant should be required to mitigate injury to the historic pumping levels of Protestants' pre-1978 domestic water uses.

Satisfaction of Additional Idaho Code § 42-203A Review Criteria

C. Application is Made in Good Faith and is not Speculative

20. The Applicant's acquisition of Elmore County's approval for its preliminary plat demonstrates that the application to supply water to the homes in the proposed subdivision has been submitted in good faith and is not speculative.

D. Sufficiency of the Applicant's Financial Resources

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

E. Local Public Interest

- 22. Testimony at hearing touched on the local public interest as it is defined in Idaho Code 42-202B(3), i.e. "the effects of such use on the public water resource [emphasis added]", in two ways. First was the potential for the proposed project to degrade ground water quality to the point that the ground water is no longer useful to holders of existing water rights. Second was the opportunity cost, or alternative uses, for the betterment of the community in the vicinity of Mountain Home. Central District Health Department ("CDHD") has addressed the water quality issue by requiring advanced septic systems for each home in the 59 lots of Phases 1A and 1B of the Clear Springs Ranch Subdivision. As for the need to conserve ground water for other uses, Elmore County and the community of Mountain Home need growth and development to promote their collective economic vitality. Projects that substantially deplete the water resources of the MHGWMA for little gain would not be consistent with the local public interest. In this case, however, the applicant proposes a development project that will, potentially, provide economic activity and growth with only a very small impact on the water resources of the MHGWMA. The Elmore County Board of County Commissioners clearly thought the County's need for the Clear Springs Ranch Subdivision outweighed the need to conserve MHGWMA water, or it would not have approved and extended the preliminary plat.
- 23. A corollary of the alternative use issue is the question of the ornamental water feature proposed by the applicant. The Applicant did not show that the ornamental water feature will be non-consumptive. Therefore, the hearing office must evaluate the proposal as if it were consumptive. When a community must make do with scant water resources to provide the water necessary for the economic livelihood of its citizens, the diversion and consumption of water for a luxury like an ornamental water feature is contrary to the public interest. The ornamental water feature should not be allowed.
- 24. Pursuant to Rule 45.02.e of the Department's Rules of Procedure (IDAPA 37.03.03.045.02.e) the municipal water use proposed in the application is presumed to not cause a significant reduction in the flows of the Snake River between Milner Dam and Swan Falls Dam. Because the proposed water use will not cause a significant reduction, the local public interest evaluation of Rule 45.03 of the Department's Rules of Procedure (IDAPA 37.03.045.02.e) is not required.

25. The diversion and use of water for municipal purposes within the proposed Clear Springs Ranch Subdivision is in the local public interest. However, the diversion and use of ground water for an ornamental water feature within the subdivision is not in the local public interest.

F. Conservation of Water Resources within the State of Idaho

26. The application, as proposed, is not wasteful. Approximately 95% of the water diverted will not be consumed, but will be returned to the ground water supply. Therefore, the application is not inconsistent with the conservation of water resources within Idaho.

G. Potential to Impact the Local Economy if Water is Transferred outside the Local Area or Watershed

27. The applicant does not propose to divert water from the MHGWMA to another area or watershed. Therefore, this review criterion is not applicable to the application.

Overall

28. The application should be approved with conditions.

ORDER

IT IS HEREBY ORDERED that application to appropriate water no. 61-12239 is **APPROVED** for the proposed municipal use.

IT IS FURTHER ORDERED that permit no. 61-12239 is subject to the following conditions:

- 1. Proof of application of water to beneficial use shall be submitted on or before April 1, 2016, but not before January 1, 2016.
- 2. Subject to all prior water rights.
- 3. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.
- 4. The issuance of this right does not grant any right-of-way or easement across the land of another.
- 5. Municipal use is for internal use and limited outdoor use for 59 homes, 1 fire station, and 1 convenience store, and does not include lawn, garden, landscape, or other types of irrigation.
- 6. The right holder shall not use water diverted in connection with this right for an ornamental water feature.
- 7. Diversion and use of water under this right shall not exceed 17.1 acre-feet per year.

- 8. Points of diversion are located in Lot 2, Blk. 1, Phase 1A and Lot 28, Blk. 3, Phase 2, Clear Springs Ranch Subdivision.
- 9. Prior to diverting water under this right, the right holder shall install and maintain a totalizing measuring device of a type approved by the Department as a part of the diverting works at each authorized point of diversion. The right holder shall record the volume of water diverted in connection with this right at least once each month. The right holder shall make these records available for inspection by the Department upon request. The right holder shall maintain annual record sets for the duration of the permit stage and submit them to the Department with proof of beneficial use. Submittal of a proof of beneficial use statement without a complete record set will not be accepted by the Department and may result in cancellation of the permit.
- 10. Place of use is within the area served by the public water supply system of Clear Springs Ranch. The place of use is generally located within Section 10, T03S, R06E.
- 11. A map depicting the place of use boundary for this water right at the time of this approval is attached to this document for illustrative purposes.
- 12. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.
- 13. Any license issued by IDWR pursuant to the right or portion thereof for the use of trust water is subject to a term review of 20 years after the date of this approval to determine availability of water for the use and to re-evaluate the public interest at the end of the term.
- 14. 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.
- 15. The daily diversion volume for the fire station and convenience store using water under this municipal right shall not exceed 2,500 gallons per use and the daily diversion volume for domestic uses under this right shall not exceed 13,000 gallons per dwelling.
- 16. Prior to constructing homes or diverting water in connection with this right, the water right holder shall conduct a pumping aquifer test. A plan for the test must be submitted to the Department and approved by the Department prior to conducting the test. If the plan does not provide for the pumping of water from both proposed points of diversion, it must demonstrate how it will extrapolate the results of the pumping test to both wells. The results of the test must be submitted to the Department within 60 days of its completion. As a component of the test, the water right holder must offer to monitor ground water depths in

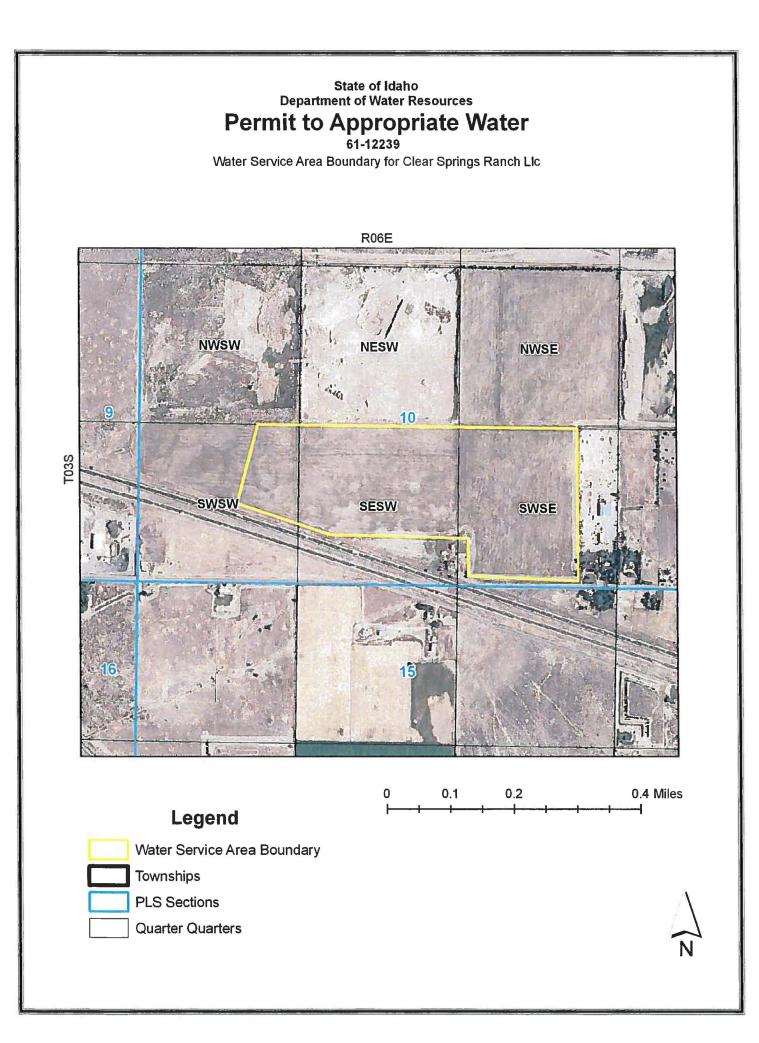
the domestic wells currently owned by Protestants Hamaishi, Barrutia, Withers, Whipple, and Stoecker during the duration of the aquifer test. Should Hamaishi, Barrutia, Withers, Whipple and Stoecker elect to participate in the test, they must first demonstrate the ability to pump water from their wells in accordance with their water rights, and then their wells shall be monitored during the pumping aquifer test for a sufficient period of time that the effect of pumping on the water levels in their wells may be analyzed.

- 17. Prior to diverting water under this water right, the right holder shall implement measures to mitigate for any reduction in the pumping level or any increased pumping costs its pumping activity will impose upon the pre-1978 domestic water rights of Hamaishi, Barrutia, Withers, Whipple, and Stoecker, as revealed by the required pumping test. The method for computing increased pumping costs and the mitigation measures must be approved in writing by the Department prior to implementation. The right holder shall not be required to supply mitigation approved by the Department but not accepted by Hamaishi, Barrutia, Withers, Whipple, or Stoecker. If any party notifies the Department in writing that the right holder has failed to implement the required mitigation measures, the Department may proceed in accordance with Idaho Code § 42-311 and could cancel the permit.
- 18. Prior to submitting proof of beneficial use, the right holder shall not assign ownership of the permit to another individual, corporation, partnership, or association without prior approval of the Department.
- 19. Noncompliance with any condition of this right, including the requirement for mitigation, is cause for the director to issue a notice of violation, cancel or revoke the right, or, if the right is included in a water district, request that the watermaster curtail diversion and use of water.

Dated this <u>13</u>th day of April, 2011.

ley W. Keen

Shelley W. Keen Hearing Officer



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of April, 2011, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, to the following:

Document Served: Preliminary Order Approving Application

CLEAR SPRINGS RANCH LLC C/O MIKE EISENMAN 22620 SE 216TH PL #A MAPLE VALLEY WA 98038-6446

SPF WATER ENGINEERING LLC C/O LORI GRAVES 300 E MALLARD DR STE 350 BOISE ID 83706

CHARLES F WHIPPLE 1106 NW BEAMAN ST MOUNTAIN HOME ID 83647-5191

HERBERT R COLE 805 NW BEAMAN ST MOUNTAIN HOME ID 83647

PATRICIA A HAMAISHI PO BOX 272 MOUNTAIN HOME ID 83647 GIVENS PURSLEY LLP C/O MICHAEL C CREAMER PO BOX 2720 BOISE ID 83701-2720

CHARLES A CAIRNS 1074 NE BEAMAN RD MOUNTAIN HOME ID 83647

DEAN A WITHERS 998 NW BEAMAN ST MOUNTAIN HOME ID 83647-5193

JOHN J BARRUTIA 489 NW BEAMAN ST MOUNTAIN HOME ID 83647

RAE ANN STOECKER 1290 NW BEAMAN ST MOUNTAIN HOME ID 83647-5190

In Smith

Danni M. Smith Office Services Supervisor