BEFORE THE DEPARTMENT WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 51-12990 IN THE NAME OF KENT KOHRING	**FINAL ORDER**

This matter came before the Director ("Director") of the Idaho Department of Water Resources ("Department") as an Application for Permit to Appropriate Water No. 51-12290 filed by Kent Kohring ("Kohring"). The Director finds, concludes and orders as follows:

PROCEDURAL HISTORY

On July 18, 2003, Kohring submitted *Application for Permit to Appropriate Water No. 51-12990* ("application") for irrigation from a cold (<85°F) ground water source. Notice of the application was published in the Owyhee Avalanche newspaper on September 3, and 10, 2003. The Bruneau Ground Water Management District ("Protestant") timely submitted a protest.

On September 4, 2008, the Department received a technical report by Paul Drury, P.E. of ERO Resources Corp., prepared for Kohring. The report is titled *Resolution of Protest and Information for Application for Permit #51-12990 Owyhee County, Idaho* ("ERO Report"). On March 21, 2011, the Protestant withdrew its protest.

On January 26, 2012, the Department issued a *Preliminary Order Denying Application for Permit.* The order denied the application because the applicant failed to demonstrate or establish the following: 1) that sufficient water was available; 2) that the proposed diversion would not reduce the quantity of water available under existing water rights; and 3) that the proposal would not conflict with the local public interest.

On February 9, 2012, Kohring filed a *Petition for Reconsideration of Preliminary Order Denying Application for Permit.* On February 16, 2012, the Department issued an *Order Granting Petition for Reconsideration and Withdrawing Preliminary Order.*

On November 9, 2012 and September 4, 2013, Kohring, through his attorney, submitted additional information to the Department in support of the application.

On October 21, 2013, the Department issued a *Preliminary Order Denying Application for Permit No. 51-12990* ("Preliminary Order").

On November 4, 2013, Kohring filed with the Department a *Petition for Reconsideration of Preliminary Order Denying Application for Permit* ("Petition"). The Department issued an

Amended Preliminary Order Denying Application for Permit No. 51-12990 ("Amended Preliminary Order") on November 15, 2013.

On December 4, 2013, Kohring filed *Exceptions to Amended Preliminary Order Denying Application for Permit* ("Exceptions"). Kohring did not request oral argument.

EXCEPTIONS TO PRELIMINARY ORDER

In the Exceptions, "Kohring takes exception to the Amended Preliminary Order generally to the extent that it denies his pending application for permit... ." *Exceptions* at 1. Kohring identifies findings and conclusions he takes exception with and, as in Kohring's Petition for Reconsideration, argues that the statements contained in the Amended Preliminary Order are incorrect or arbitrary and capricious legal standards. He argues that the Amended Preliminary Order "imposes a standard for evaluating permit applications that equates 'no injury' with 'no effect' or 'no impact'." *Exceptions* at 3. He also argues that the Amended Preliminary Order "imposes a standard for evaluating permit applications that equates a withdrawal of ground water or a reduction in ground water level with reducing 'the supply available to existing ground water rights.'" *Exceptions* at 4.

Water Supply Available to Existing Ground Water Rights

Kohring argues that the Department applied the wrong standard for evaluating an application for permit. All applications are evaluated using I.C. § 42-203A(5), which provides seven factors that must be evaluated prior to issuing a permit. The first two factors in I.C. § 42-203A(5) address sufficiency of water: (a) whether the proposed diversion "will reduce the quantity of water under existing water rights", or (b) whether "the water supply itself is insufficient for the purpose for which it is sought to be appropriated." I.C. § 42-203A(5)(a) and (b). The Department is not required to provide evidence in an I.C. § 42-203A(5) inquiry. The director must look at the evidence presented and weigh it against the factors provided in the statute.

In addition, because Kohring's proposed point of diversion is within a ground water management area, the application is subject to additional, evaluation criteria. I.C. § 42-233b provides that applications "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." This review is in addition to the factors in I.C. § 42-203A(5) and elevates the standard for approving an application in a ground water management area because the Director has determined water levels in the area may be approaching the conditions of a critical ground water area (i.e. approaching not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal). *In the Matter of the Grandview-Bruneau Ground Water Management Area – Order Establishing a Ground Water Management Area* (Oct. 29, 1982).

The Grandview-Bruneau Ground Water Management Area ("GBGWMA") was established because of declining trends in the water levels of the regional aquifer. In fact equilibrium has not been achieved with current rates of diversion and until such equilibrium is established, water levels will continue to decline. So while it may be a "fundamental hydrologic concept that withdrawal of groundwater will have some effect on the source...," considering the

impact the proposed diversion would have on the entire aquifer is not "conjectural or theoretical" as suggested by Kohring. *Exceptions* at 4.

The evidence supports the Department's conclusion of insufficient water. Water levels in the GBGWMA declined an average of 7.6 feet in the 2000-2010 period. Mike McVay, *Summary of Groundwater Levels in the Grand View-Bruneau Ground Water Monitoring Network – 2011 Update* (Idaho Department of Water Resources Open-File Report, 2012, p.6). Additionally, at least four of the monitoring wells in the GBGWMA monitoring network were developed in the sedimentary-rock aquifer and all but one show declines between 5 and 17 feet during the 2000-2010 period. *Id.* at 12-14. Even water levels in a well owned by Mr. Kohring, located 0.4 miles from the point of diversion, show a decline. Mike McVay, Review of "*Resolution of Protests and Information for Application for Permit 51-12990 Owyhee County, Idaho*" (Idaho Department of Water Resources memo, 2011, p. 7).

While water level declines are greater in the volcanic-rock aquifer (Charles Berenbrock, *Effects of Well Discharges on Hydraulic Heads in and Spring Discharges from the Geothermal Aquifer System in the Bruneau Area, Owyhee County, Southwestern Idaho*, USGS Water-Resources Investigations Report 93-4001, 1993, p.41.; ERO Report at 5.) increased pumping in the sedimentary-rock aquifer will affect the entire regional aquifer due to the hydrologic connection between the two (Berenbrock 1993; ERO Report; McVay 2011.). Given the hydrologic connection between the sedimentary and the volcanic-rock aquifers and continued declines, there can be no other conclusion than the proposed withdrawal by Kohring will affect the regional aquifer. This is not a presumption of injury and insufficiency of supply that Kohring is forced to rebut and disprove, as Kohring suggests. *Exceptions* at 7. This is an evidence-based conclusion to which Kohring's evidence contributed.

Kohring argues that his application must be evaluated "concerning water conditions at his proposed point of diversion and facts concerning actual expected effects on the source attributable to pumping at his proposed point of diversion." *Exceptions* at 5 (emphasis in original). Kohring's argument fails to consider, as discussed above, the state of entire aquifer. The information submitted by Kohring is considered with evidence about the conditions in the regional aquifer. The ERO Report and the pump test shows that the proposed point of diversion is located in the sedimentary-rock aquifer. The evidence establishes that the volcanic and sedimentary-rock aquifers are hydrologically connected. A single pump test does not prove that Kohring's point of diversion is isolated. Further, evidence that a well completed in the sedimentary-rock aquifer less than two miles from the proposed point of diversion has had a relatively stable hydrograph since 1985, also does not take into account the effect pumping from the sedimentary-rock aquifer can have on the volcanic-rock aquifer. The system is hydraulically connected, and the hydraulic connection must be considered when evaluating new applications for permit. Further withdrawals will exacerbate the problem of continued decline.

Standard for Evaluating New Applications in a Ground Water Management Area

To support his claim of error, Kohring states "delivery calls by senior surface water and ground water users against junior ground water users, requires proof of 'material injury' before a junior right may be curtailed." *Exceptions* at 4 (emphasis omitted). The standard for curtailment is not part of either I.C. §§ 42-203A(5) or 42-233b. The key considerations for the Director in

this proceeding are whether there is sufficient water for the proposed appropriation and if other rights will be injured by the new appropriation.

The evidence shows that: 1) the aquifer system is hydraulically connected; 2) water levels in the aquifer system are declining; 3) due to the connected system, the aquifer levels will continue to decline, thereby injuring other existing water rights. The burden is on Kohring, not the Department, to prove that sufficient water is available and that other prior water rights will not be injured. The evidence Kohring points to fails to convince the Director that there is sufficient water for his appropriation and that Kohring's pumping will not result in injury to other water rights. This analysis does not equate to a "no effect" or "no impact" standard.

In addition, Kohring references I.C. § 42-226 emphasizing that "first-in-time, first-in right shall 'not block full economic development of underground water resources,'[and p]rotection of prior ground water appropriators is to be provided by the "maintenance of reasonable ground water pumping levels as may be established by the director....'" *Exceptions* at 4 (emphasis omitted). As discussed in *Clear Springs Foods, Inc. v. Spackman*, "the reference to 'full economic development of underground water resources' refers to promoting full development of ground water by not permitting a ground water appropriator with an unreasonably shallow well to block further use of the aquifer." 150 Idaho 790, 803 (2011). The court goes further by stating, "[t]here is nothing in the language of the statute that purports to permit a junior ground water appropriator to cause material injury to the water rights of a senior appropriator as long as the junior appropriator is maintaining a reasonable pumping level. Furthermore, Idaho Code § 42–237 provides, in part, 'Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, *the present or future use of any prior surface or ground water right* ....' (Emphasis added)." *Id.* As discussed previously, Kohring has failed to meet his burden to show that there is sufficient water available and that other prior water rights will not be injured by this appropriation. Asserting the need for full economic development does not change the facts.

FINDINGS OF FACT

1. The application proposes the following appropriation:
   Applicant: Kent Kohring
   Priority Date: July 18, 2003
   Source and Point of Diversion: Cold ground water (<85°F) from a well located in Township 6 South, Range 4 East, Section 25, the NW¼ NW¼, B.M.
   Water Use: Sprinkler irrigation supplemental to waste water Permit No. 51-7358
   Quantity: 4.0 cfs
   Season of Use: 03/01 to 11/15
   Place of Use: 200 acres irrigation within a 320 acre permissible place of use Township 6 South, Range 4 East: Section 24, the SE¼ NE¼, and NE¼ SE¼; and Section 19 the SW¼ NW¼, SE¼ NW¼, NE¼ SW¼, SW¼ SW¼ and SE¼ SW¼, B.M.

2. The proposed appropriation would allow Kohring to withdraw up to 900 acre feet of ground water annually when waste water is not available.

3. The proposed point of diversion is one of four wells used as points of diversion for Kohring's existing water right nos. 51-2214 and 51-12977. Water right no. 51-2214 is approximately 0.4 miles from the proposed point of diversion and it has shown water level declines or production reductions. McVay 2011 at 7.

4. The well at the proposed point of diversion was drilled in 1950 and completed to a depth of 1,750 feet. Letter from Kent Kohring to Steve Lester, IDWR, (July 15, 2003). In 2003, Sam Johnston of Johnston Well Drilling reported the total well depth as 800 ft with a static water level of 33 feet below ground level. The bottom hole temperature was reported to be 69°F - 70°F. Sam Johnston written statement (December 13, 2003). On June 28, 2011, the Department issued Drilling Permit No. 861385 authorizing modification of the proposed point of diversion to obtain the well's original depth of 1,750 feet or a bottom hole temperature of 85°F or less, whichever is first encountered. Kohring collected a water sample to be analyzed on March 15, 2006. Results of the analysis indicate a fluoride level of 2.86 mg/L. Idaho Department of Health & Welfare Bureau of Laboratories report (March 15, 2006). Water temperature and fluoride levels measured at the point of diversion indicate the water is currently sourced in the sedimentary-rock aquifer.

5. The proposed point of diversion and place of use are located in the GBGWMA. The GBGWMA was created in 1982 to address ongoing ground water level concerns in the Grand View-Bruneau area. The order establishing the GBGWMA states, "ground water resources in the Grand View-Bruneau area may be approaching the conditions of a critical ground water area as described in Section 42-233a, Idaho;...the estimated withdrawal from the aquifer system at the present state of development may exceed the present recharge to the system; and, ...the record of the department indicate the potential withdrawal would be doubled if all existing permits and pending applications to appropriate ground water are developed... ." *In the Matter of the Grandview-Bruneau Ground Water Management Area – Order Establishing a Ground Water Management Area* (Oct. 29, 1982).

6. Since the designation of the GBGWMA, new consumptive ground water development has been curtailed. Despite restrictions on the amount of new appropriations, the water levels in the area aquifer system continue to gradually decline resulting in an ongoing state of un-equilibrium (withdrawals exceed aquifer recharge).

7. The Bruneau Ground Water Management District was created in 2000 to promote local control over the low-temperature geothermal aquifers, to obtain funding for investigation, repair and abandonment of wells, and to eliminate leaks and other losses from the aquifers. Inclusion into the district was voluntary at the time of its creation. Because including into the district was voluntary, not all wells within the GBGWMA, including Kohring's proposed point of diversion, are included within the district.

8. The point of diversion and place of use are located in an area subject to the 2002 Recovery Plan for the Bruneau Hot Springsnail. The Bruneau Hot Springsnail was listed as endangered in 1998 under the Endangered Species Act. The springsnail inhabits flowing geothermal springs and seeps. The principal threat to the springsnail is the reduction of their geothermal spring habitat. The U.S. Fish and Wildlife recovery plan includes monitoring of the geothermal aquifer, efforts to reduce or conserve diversions from the aquifer, and habitat restoration efforts. Jeri Wood and Steven Lysne, *Recovery Plan for the Bruneau Hot*

Springsnail, US Fish and Wildlife Service, 2002. Known populations of the Bruneau Hot Springsnail have been found in spring flows of Hot Creek and small flowing thermal springs and seeps along the Bruneau River within the GBGWMA. Springsnails were known to inhabit flows from the Indian Bathtub thermal springs, in upper Hot Creek, until declining spring flows eliminated the habitat in the area.

9. The ERO Report assertion that the Indian Bathtub thermal springs sourced in the volcanic-rock aquifer agrees with past data and studies. Since 1964, the hydraulic head of the springs has declined 34 ft; currently there is no spring discharge. The point of diversion is located 13 miles down/cross gradient of the thermal springs. The Indian Bathtub Area includes monitoring well 06S04E-14ABC1 (volcanic rock aquifer) which shows 70 feet of water level decline between 1967 and 1991.

10. The local geologic conditions presented in the ERO Report are generally consistent with the current understanding of this area. *See* A. M. Piper, *Geology and Water Resources of the Bruneau River Basin Owyhee County, Idaho*, Idaho Bureau of Mines and Geology Pamphlet 11, 1924; R.T. Littleton and E.G. Crosthwaite, *Ground-Water Geology of the Bruneau-Grand View Area, Owyhee County, Idaho*, USGS Water Supply Paper 1460-D, 1957; H. W. Young and R. L. Whitehead, *Geothermal Investigations in Idaho Part 2. An Evaluation of Thermal Water in the Bruneau-Grand View Area, Southwestern Idaho*, IDWR Water Information Bulletin No. 30, 1975; C. T. Rightmire, H. W. Young, and R. L. Whitehead, *Geothermal Investigations in Idaho Part IV Isotopic and Geochemical Analyses of Water from the Bruneau-Grand View and Weiser Areas, Southwest Idaho*, USGS Open-File Report 76-166, 1976; H. W. Young and R. E. Lewis, *Hydrology and Geochemistry of Thermal Ground Water in Southwestern Idaho and North-Central Nevada*, USGS Geological Survey Professional Paper 1044-J, 1982; Charles Berenbrock, *Effects of Well Discharges on Hydraulic Heads in and Spring Discharges from the Geothermal Aquifer System in the Bruneau Area, Owyhee County, Southwestern Idaho*, USGS Water-Resources Investigations Report 93-4001, 1993. The shallow alluvial aquifer is a cold-water aquifer of limited areal extent. It exists primarily along stream channels and is located above the regional geothermal aquifer. The regional geothermal aquifer can be found beneath the entire GWMA. It is composed of two general lithologies: the sedimentary-rock aquifer and the volcanic-rock aquifer. The sedimentary-rock aquifer is composed of undifferentiated Idaho Group sediments, primarily unconsolidated clay, silt and fine sand. The volcanic-rock aquifer is beneath the sedimentary-rock aquifer and is composed of basalt (Banbury Basalt) and underlying, highly fractured silicic volcanic rocks. Recharge to this aquifer originates as precipitation in the Jarbidge and Owyhee Mountains to the south, and occurs as seepage into highly faulted and fractured volcanic rocks along the mountain range fronts.

11. The ERO Report reiterates the current understanding that there is a hydraulic connection between the sedimentary-rock and volcanic-rock aquifers and cites "recharge to the sedimentary-rock aquifer is primarily from upwelling from the volcanic-rock aquifer." *ERO Report* p. 5.

12. The Department manages a groundwater-level monitoring network in the GBGWMA. The monitoring network currently consists of 18 wells that are measured on a monthly basis. These wells show long-term water level declines, with 16 of the 18 wells showing declines of 4.6 to 17 feet during the 1990 to 2010 period. On average, water levels in

the GBGWMA have declined 7.6 feet during the period between 2000 and 2010. The regional geothermal aquifer is in a continued state of decline, and has yet to reach equilibrium in terms of recharge and discharge. At least four of the monitoring wells in the network are sourced in the sedimentary-rock aquifer. All but one of those wells show declines between 5 and 17 feet during the 2000 to 2010 period. Mike McVay, *Summary of Groundwater Levels in the Grand View-Bruneau Ground Water Monitoring Network – 2011 Update* (Idaho Department of Water Resources Open-File Report, 2012).

13. Many of the local deep wells in the GBGWMA are constructed with minimal casing and annular seals allowing comingling of water between aquifers at various depths.

14. The ERO Report states the following in regard to wells within three miles of the proposed point of diversion:

> Thick sequences of clays and shales within the sedimentary aquifer are consistent with Berenbrock's characterization of sedimentary-rock aquifer as a confined system. Water producing zones, obtained from well driller logs, show that production zones differ greatly between wells within the east-west cross section. Based on available data and because of the locally confined nature of the sedimentary-rock aquifer to the east and west of the POD which isolate the shallow sedimentary-rock aquifer from the deeper ground water, there is a reasonable degree of certainty that pumping of the POD will not have a significant measurable impact on shallow wells in the area... . *ERO Report* p. 7.

15. Department staff memo dated August 15, 2011 states in response:

> Most wells in the area (including the proposed point of diversion) access many of the production zones in an attempt to obtain usable volumes of water. These production zones exist as irregular, lenticular zones of relatively higher transmissivity within the greater aquifer, not as independent aquifers of great volume (Littleton and Croswaite, 1957). Instead of an area characterized by shallow wells (shallow sedimentary-rock aquifer, not alluvial aquifer) isolated from deeper wells by thick, low-transmissivity materials, the area is characterized by wells open to many strata, which provide hydrologic connection that circumvents the imperfect confining layers (Pieper, 1924; Littleton and Crosthwaite, 1957; Young and Whitehead, 1975, Mink and Lockwood, 1995). Mike McVay, Review of "*Resolution of Protests and Information for Application for Permit 51-12990 Owyhee County, Idaho*" (Idaho Department of Water Resources memo, 2011, p. 8).

16. The ERO Report states that "fault and fracture zones would act as a recharge boundary for the cone of depression associated with pumping of the POD, and pumping of the POD will not have significant measureable impact on wells to the south." *ERO Report* p.7. Department staff memo dated August 15, 2011 states "faults acting as recharge boundaries provide enhanced connection with the volcanic-rock aquifer, and the boundaries that prevent drawdown to the south increase impacts to the volcanic-rock aquifer." Mike McVay, *Review of*

"*Resolution of Protest and Information for Application for Permit 51-12990 Owyhee County, Idaho*" (Idaho Department of Water Resources memo, 2011, p. 9).

17. The sedimentary-rock and volcanic-rock aquifers are conceptualized as two hydraulically connected members of the regional geothermal resource.

18. Kohring proposes withdrawal of cold water (<85°F) from the sedimentary-rock aquifer. The ERO Report generally states that since the mid 1950s, water levels in the sedimentary-rock aquifer have been relatively stable. Charles Berenbrock, *Effects of Well Discharges on Hydraulic Heads in Spring Discharges from the Geothermal Aquifer System in the Bruneau Area, Owyhee County, Southwestern Idaho* (USGS Water-Resources Investigations Report 93-4001, 1993). Recent data from the Department's ground water monitoring network in the GBGWMA shows that the sedimentary-rock aquifer is in a state of decline. Mike McVay, *Summary of Groundwater Levels in the Grand View-Bruneau Groundwater Monitoring Network – 2011 Update* (Idaho Department of Water Resources Open-File Report, 2012).

19. On September 4, 2013, Kohring submitted, to the Department, a single pump test of the proposed point of diversion completed on October 23, 2012. The pump test included water level measurements at a monitoring well located ½ mile south of the tested well. The test consisted of pumping 600 gpm at the proposed point of diversion for the duration of two hours. During the duration of the test, water levels were measured and recorded at the monitoring well every 15 to 20 minutes. Reported results did not show any fluctuation in water levels at the monitoring well during the duration of the test. The pumping test did not include any discussion or analysis of well construction, water level conditions prior to and following the test, the adequacy of conditions of the test, or interpretation of results of the test.

CONCLUSIONS OF LAW

Water Sufficiency

1. Idaho Code § 42-233b states 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.
>
> Emphasis added.

2. A conclusion of the ERO Report implies that the GBGWMA was intended to protect only the geothermal ground water resource. The 1982 order designating the GBGWMA states "that the ground water resources in the Grand View-Bruneau area may be approaching the conditions of a critical ground water area… ." The 1982 order further states "the estimated withdrawal from the aquifer system at the present stage of development may exceed the present recharge to the system… ." The 1982 order designating the GBGWMA does not specifically identify a geothermal aquifer as the source, but rather indicates the "ground water resources" and the "aquifer system" in this area as being the resource approaching the conditions of a critical ground water area. Thus, the GBGWMA designation includes all of the area's ground water resources, i.e. the entire aquifer system in the area. Furthermore, interconnectivity requires consideration of the sedimentary-rock and the volcanic-rock aquifers together.

3. Kohring argues that the well proposed as the point of diversion is sourced from an isolated portion of the sedimentary-rock aquifer and that because it is isolated, his pumping would not have an impact on other wells. The evidence shows that: 1) the aquifer system is hydraulically connected; 2) water levels in the aquifer system are declining; 3) due to the connected system and comingling of waters from improper well construction, the declining aquifer water levels will affect the entire aquifer including the protected Bruneau Hot Springsnail. Given this evidence, the single well pump test is not enough to prove Kohring's well is sourced in an isolated aquifer. Even if an appropriately conducted pump test resulted in little or no measureable impact to another well in the area, the Department could not conclude that the proposed point of diversion is sourced from an isolated aquifer. The complex and layered nature of the sedimentary-rock aquifer can make it very difficult to see direct pumping impacts on other wells. The Department established the GBGWMA because of the overall trends of declining water levels in the interconnected aquifers. Kohring has failed to provide credible evidence to support his allegation that his well is sourced from an isolated aquifer and the remaining evidence indicates the proposed withdrawal will have a negative impact on the regional aquifer.

4. The application fails to meet the requirements for approval pursuant to Idaho Code § 42-233b because the Director cannot determine, from available information, that the water supply in the GBGWMA is sufficient to support additional appropriations of water and that additional appropriations of water in the area would not injure other prior water rights.

Idaho Code § 42-203A(5) Criteria

5. Idaho Code § 42-203A (5) 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.

a. Reduction of quantity of water to existing water rights & sufficiency of supply: Kohring provided one pump test to demonstrate that pumping from the proposed point of diversion will not impact nearby wells. As discussed in Legal Conclusions No. 3 above, the pump test lacks sufficient detail, so the Department cannot draw any meaningful

conclusions from it. The Department established the GBGWMA because of the overall trends of declining water levels in the interconnected aquifers. Without any credible evidence to the contrary, the Department can only assume that additional pumping will reduce the already-declining water supply to the detriment of existing water rights.

b. Good faith, delay, speculation: Kohring is a long time and active farmer who has established a record with the Department of showing good faith in his actions. The application has been made in good faith.

c. Sufficient financial resources: Kohring is a well established landowner and farmer. The point of diversion well exists and the place of use is already developed for cropland. Development costs would be minimal. Kohring has sufficient financial resources to complete the project.

d. Local public interest: Idaho Code § 42-202B(3) defines the local public interest "as the interests that the people in the area directly affected by a proposed water use have in the effects of such use of the public water resource." Kohring has failed to demonstrate that existing water right holders will not be injured by this proposal. Injury to existing water rights is not in the local public interest.

Kohring proposed withdrawal of cold water (<85°F) from the sedimentary-rock aquifer from the point of diversion well that is 13 miles down/cross gradient of the Indian Bathtub thermal springs. Withdrawal of cold water (<85°F) from the sedimentary-rock aquifer alone may not create a direct effect on the springs. However, withdrawal from the sedimentary-rock aquifer may potentially induce additional recharge to this unit from the volcanic-rock aquifer based on the hydraulic connection between the two aquifers and the fact that upwelling from the volcanic-rock aquifer is a source of recharge to the sedimentary-rock aquifer. This may lead to further declines in water levels of the volcanic-rock aquifer, which in turn would directly impact the thermal springs. Impact to the thermal springs does not comply with the objectives presented in the Recovery Plan for the Bruneau Hot Springsnail. Additional appropriation of the geothermal resource would be contrary to the intent of the Bruneau Ground Water Management District to conserve the geothermal resource or repair wells to avoid leakage and waste. The application conflicts with the local public interest.

e. Conservation of water resources: The application proposes the use of a sprinkler system to irrigate the place of use from a ground water source to supplement a waste water source (authorized under Permit No. 51-7358). Use of a sprinkler system is an efficient method to distribute water for irrigation purposes. Use of waste water as the primary supply conserves the ground water resource. Kohring's proposal is not contrary to conservation of water resources as long as the waste water source remains the primary supply.

6. Kohring established the following elements set forth in Idaho Code § 42-203A(5): (c) the Application was made in good faith, (d) Kohring has sufficient financial resources and (f) the proposal is not contrary to conservation of water resources.

7. Kohring failed to establish the following elements set forth in Idaho Code § 42-203A(5): (a) the proposed diversion will not reduce the quantity of water under existing rights, (b) the water supply is sufficient for the purposes sought, and (e) the proposal will not conflict with local public interest.

Trust Water Criteria

8. Pursuant to Idaho Code § 42-203C, applicants proposing appropriations of water held in trust by the State must meet certain criteria, one of which being if the proposed use would significantly reduce the amount of trust water available. Water Appropriation Rule 25 (IDAPA 37.03.08.25) and Rule 45 (IDAPA 37.03.08.45.02.a and b) provide specific guidance on evaluation of applications to appropriate trust water including individual and cumulative criteria.

9. Water Appropriation Rule IDAPA 37.03.08.45.02 states in pertinent part:

> a. Individual test for evaluating significant reduction. A proposed use will be presumed to not cause a significant reduction if when fully developed and its impact fully felt, the use will individually reduce the flow of the Snake River measured at Murphy Gauge by not more than two (2) acre-feet per day. An irrigation project of two hundred (200) acres or less located anywhere in the Snake River Basin above Murphy Gauge proposing to use trust water is presumed to not reduce the flow at Murphy Gauge by more than two (2) acre-feet per day. The presumption of this section is not applicable to application or permits to be reprocessed which the Director determines to be part of a larger development.
>
> b. Cumulative test for evaluating significant reduction. A proposed use will be presumed to not cause a significant reduction if the use when fully developed and impact is fully felt and considered cumulatively with other existing uses...will not deplete the flow of Snake River measured at Murphy Gauge by more than: Forty Thousand (40,000) acre-feet per calendar year when considered with all other uses of trust water approved for development. Forty thousand (40,000) acre feet over a 4 year average, and twenty thousand (20,000) from filings which meet the individual test above.

10. The 200 acres of irrigation meets the individual test criteria (a). A review of Department records shows the cumulative test criteria (b) has been met pursuant to Rule 45. IDAPA 37.03.08.45.02.a and b.

11. The application meets the criteria for appropriating water in the designated Trust Water Area pursuant to Idaho Code § 42-203C.

ORDER

IT IS HEREBY ORDERED, that because the application fails to meet the requirements for approval pursuant to I.C. § 42-233b because the Director cannot conclude, from available information, that the water supply in the GBGWMA is sufficient to support additional

appropriations of water and that additional appropriations of water in the area would not injure other prior water rights and because Kohring failed to establish the following elements set forth in I.C. § 42-203A(5): (a) the proposed diversion will not reduce the quantity of water under existing rights, (b) the water supply is sufficient for the purposes sought, and (e) the proposal will not conflict with local public interest, Application for Permit No. 51-12990 in the name of Kent G. Kohring is **DENIED**.

IT IS FURTHER ORDERED, that the Exceptions to Amend Preliminary Order Denying Application for Permit filed by Kohring are **REJECTED**.

Dated this 14th day of February, 2014.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of February, 2014, I mailed a true and correct copy of the foregoing document, postage pre-paid, to the following:

KENT KOHRING
28924 DAVIS ROAD
BRUNEAU ID 83604

MICHAEL CREAMER
GIVENS PURSLEY LLP
PO BOX 2720
BOISE ID 83701-2720

SID ERWIN
BRUNEAU GROUNDWATER
MANAGEMENT DISTRICT
29711 STATE HWY 51
BRUNEAU ID 83604

DAVID SHAW
ERO RESOURCE CORP
4001 EAST MAIN ST
EMMETT ID 83617

Deborah J. Gibson

Deborah Gibson
Admin. Assistant for the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) The petition for reconsideration is disposed of; or
(b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.