

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

**IN THE MATTER OF APPLICATION FOR )  
PERMIT NO. 67-14951 IN THE NAME OF )  
ADAM W. CONSIGLIO )  
\_\_\_\_\_ )**

**PRELIMINARY ORDER  
APPROVING APPLICATION**

**PROCEDURAL HISTORY**

On February 20, 2008, Adam W. Consiglio (“Consiglio”) filed Application for Permit to Appropriate Water No. 67-14951 (“application”) with the Idaho Department of Water Resources (“Department”), to appropriate 8 cfs from ground water for the irrigation of 400 acres in Township 13 North, Range 1 West, Sections 7 and 8.

On December 29, 2008, Consiglio amended the application to 5 cfs and the irrigation of 200 acres within a 400-acre permissible place of use (PPU), and on February 6, 2009, Consiglio submitted a second amended application, which proposed diverting 6 cfs for the irrigation of 300 acres within a 400-acre PPU.

The Department published notice of the second amended application in the manner set forth in Idaho Code § 42-203A.

Protests were timely filed by Richard Allen (“Allen”), Milton Meyer (“Meyer”), and Royce Schwenkfelder, on behalf of the John W Schwenkfelder Family Trust, his brother, John R Schwenkfelder, and SS Cattle Company (“Schwenkfelder”). A prehearing conference was held on July 28, 2009. Meyer withdrew his protest during the prehearing conference. The remaining parties were not able to resolve the protests and requested a hearing.

On November 9, 2012, the Department conducted a hearing in Boise, Idaho, to take evidence in connection with the application. At the hearing, the parties represented themselves and testified on their own behalf. Consiglio called Terry Scanlan, SPF Water Engineering LLS (“Scanlan”) as an expert witness. The protestants did not call any witnesses.

Based on the administrative record, including the Department application file, well logs, and evidence and testimony presented at the hearing, the hearing officer finds, concludes and orders the following:

**FINDINGS OF FACT**

1. On the record at the November 9, 2012 hearing, Consiglio verbally amended his application for the third time, to 1.6 cfs from ground water for the irrigation of 100 acres within a 400-acre permissible place of use (PPU). (Consiglio Testimony.) The proposed point of diversion will be a new well, 16 inches in diameter, located in the SW¼ NE¼, Section 8,

Township 13 North, Range 1 West, B.M. The water-bearing zone will be between 200 and 800 feet deep.

2. The parties own the following water rights.

Owner	Right No	Priority Date	Diversion Rate (cfs)	Point of Diversion (all in Township 13 North, Range 1 West, B.M.)	Purpose
CONSIGLIO	67-10536	8/30/1915	0.08	NWNE, Section 8	DOMESTIC, STOCKWATER
CONSIGLIO	67-10537	4/13/1972	0.08	NWSW, Section 8	DOMESTIC, STOCKWATER
JOHN W SCHWENKFELDER FAMILY TRUST	67-2241	4/20/1954	0.06	NESE, Section 18	DOMESTIC, STOCKWATER
JOHN W SCHWENKFELDER FAMILY TRUST	67-7188	11/14/1973	1.07	NESE, Section 18	IRRIGATION

3. Allen owns a well that provides water for a domestic use associated with his residence. The Allen well is located in the SW¼ SE¼, Section 6, Township 13 North, Range 1 West, B.M. There is not a water right number associated with this use. The Allen use of ground water for domestic purposes is exempt from the Department licensing process pursuant to I.C. §§ 42-111 and 42-227.

4. The Allen domestic well is located approximately 0.75 mile southwest of the proposed Consiglio well. According to the well log, the Allen well was drilled in 2007 to a total depth of 220 feet. During development, the well produced 50 gpm. The water-bearing zone is “sand and strips of clay” between 177 – 220 feet. (Department well log.)

5. The pump in the Allen well was originally set at approximately 100 feet deep. In 2008, the water level in the well fell to below the pump intake and the well began to pump air. In 2008, Allen had a larger pump installed and set at 200 feet. Since the pump was reset, the well has produced sufficient water for Allen’s domestic use. (Allen Testimony.) The cause of the water level decline in the Allen well in 2008 is unknown. Water levels in the Allen well have not been measured since the pump was reset in 2008.

6. Schwenkfelder water right no. 67-2241 diverts from a 6-inch diameter well that is approximately 296 feet deep. The static water level is approximately 65 feet below the ground surface. (Department water right file no. 67-2241.) There is no well log for this well in Department records.

7. The well associated with water right no. 67-2241 supplies sufficient water for the authorized domestic and stockwater uses. Schwenkfelder has not had problems with this well or the water supply in the time that his family has leased and then owned the property. (Schwenkfelder Testimony.)

8. Schwenkfelder right no. 67-7188 diverts from a 16-inch diameter well that is 535 feet deep. The static water level is approximately 75 feet below the ground surface. Perforated pipe was set at these water-bearing intervals: 88 feet to 98 feet in coarse black sand; 240 feet to 280 feet in gravel and sand; and, 365 feet to 430 feet in “rock and crevices (sic)” and blue clay. (Department well log.) The well is located approximately 1.5 miles southwest of the Consiglio proposed well.

9. During the irrigation seasons of 2000 through 2010, the Schwenkfelder well associated with right no. 67-7188 supplied sufficient irrigation water until about mid-August of each year. By the second week of August each year, the water supply declined by about 50%. The water level declines in the Schwenkfelder irrigation well corresponded to when a neighbor, Milton Meyer, began diverting ground water to operate his pivots, after his first cutting of hay. Schwenkfelder did not communicate with Meyer regarding the effect of Meyer’s pumping on the Schwenkfelder well. (Schwenkfelder Testimony.)

10. The Meyer well is located 1.2 miles southeast of the Schwenkfelder well, in the NW ¼ SW ¼, Section 21, Township 13 North, Range 1 West, B. M. Water right no. 67-7108, for 3.8 cfs, and permit no. 67-8020 for 11.02 cfs, are associated with the Meyer well. Right no. 67-7108 has a priority date of October 1, 1972, and permit 67-8020 has a priority date of April 14, 1998.

11. In about 2007, Schwenkfelder had the pump for right no. 67-7188 pulled and reset and equipment replaced, to ensure the water supply problems were not related to well conditions or equipment failure in his own well. According to the pump vendor, the pump was originally set too deep in the well, near the bottom, which caused the well to pump sand. The pump company set the pump at a shallower depth in the well. Schwenkfelder does not know the depth at which the pump was reset or the water levels in the well. (Schwenkfelder Testimony.)

12. Meyer did not divert ground water from his well during the 2011 and 2012 irrigation seasons. Schwenkfelder did not experience the usual declines in pumping from his well in August of the 2011 and 2012 irrigation seasons. (Schwenkfelder Testimony.)

13. On October 27, 2008, the Department sent a “Rule 40” request for additional information to Consiglio. “Rule 40” refers to the Idaho Administrative Procedure Act (IDAPA) Water Allocation rule that describes information required by I.C. § 42-203A for large diversion projects. One of the defining aspects of a large diversion project is an application that proposes a diversion rate of 5 cfs or more.

14. Due to the lack of hydrogeologic information in the area of the proposed appropriation, on December 29, 2008, the Department presented Consiglio with a second letter request for additional information. The letter acknowledged that if the application flow rate was reduced to less than 5 cfs and less than 200 irrigated acres, Consiglio would not have to comply with the Rule 40 requirements, but that additional information was still needed to process the application. Specifically, the Department requested that Consiglio: [1] provide well data within two miles of the proposed point of diversion, [2] demonstrate that the water rights in the area would not be injured, [3] demonstrate that the water supply was sufficient for the proposed use and [4] provide general specification for the proposed well.

15. Consiglio hired SPF Water Engineering, LLC to respond to the request from the Department for information regarding wells within a two-mile radius of the proposed Consiglio well, the sufficiency of the proposed water supply, and information to support non-injury to ground water right holders in the area. SPF submitted a letter report to the Department on February 4, 2009.

16. The SPF report reviewed Department well records and water rights within a two-mile radius of the proposed point of diversion. SPF concluded that the water supply in the regional aquifer should be sufficient for the proposed use and quantity, and was sustainable over time, and that no other ground water rights within two miles would be injured. The conclusions were based on the second amended application which was submitted to the Department with the report. The second amended application proposed a diversion rate of 6 cfs and the irrigation of 300 acres within a 400-acre PPU.

17. The SPF report was forwarded to Dennis Owsley, who is with the Department's Hydrology Section, to review and evaluate for sufficiency of the water supply and potential injury to other water rights based on information supplied in the SPF report. Owsley projected impacts to the aquifer using a ground water diversion rate of 6 cfs, the diversion rate proposed in the second amended application filed by the applicant with the Department on February 4, 2009. (Owsley Memo.) Owsley submitted a memo to the IDWR Western Region Manager on September 25, 2009.

18. The water-bearing zone in the proposed well would be the Columbia River Basalt group. The characteristics of the basalt aquifer, the extent of hydraulic communication between the basalt aquifer and the overlying sedimentary aquifers, and the extent to which the aquifers recharge surface water, are not well understood in the area of the proposed point of diversion. (Owsley Memo, Scanlan Testimony.)

19. Owsley calculated the theoretical effects of pumping in the Consiglio well using the series approximation of the Theis equation, and made the assumptions: [1] the well would produce water from the basalt aquifer, [2] a constant pumping rate of 6 cfs or 2693 gpm, [3] no recharge to the aquifer, [4] no aquifer boundaries, [5] a well efficiency of 100%, and [6] a well diameter of 24-inches. Owsley calculated drawdown using two transmissivity values, a low regional transmissivity value of 900 feet<sup>2</sup>/day based on an USGS study of well data, and a high transmissivity value of 2673 feet<sup>2</sup>/day based on the specific yield of wells obtained from well logs. The calculations estimated a maximum drawdown at the proposed well of 300 feet and a drawdown of 59 feet at a distance of one mile from the Consiglio well. (Id.)

20. The third amended application is for a diversion rate of 1.6 cfs, or 26% of the diversion rate of 6 cfs used by Owsley in his memo. If the drawdown calculations are modified to 26% of the original results, assuming the higher transmissivity, the expected drawdown is 16 feet at one mile and 10 feet at two miles. (Scanlan Testimony.)

21. There are two water level hydrographs prepared by SPF from Department well records of two domestic wells in the region, approximately 10 and 15 miles from the proposed well, and six monitoring wells that range from 4 to 18 miles from the proposed well. The available data from the hydrographs and monitoring well data indicate that there is no decline in the water

levels and the basalt aquifer is stable. However, an evaluation of the sustainability of the water supply and the impact to the aquifer and other water rights is not possible with any degree of certainty because of the lack of aquifer and hydrogeologic data of the area. (Owsley Memo, Scanlan Testimony.)

22. Generally, the 18 wells within a two mile radius of the proposed well are productive, though the productivity varies. (Scanlan Testimony.)

23. The application is located in Basin 67, the Weiser River Basin. The Department does not consider the locale of the application as an area of ground water concern.

24. Consiglio obtained verbal cost estimates for drilling the proposed well and for running power to the well. He had soil samples analyzed to determine the suitability of the land for irrigation. The project will cost approximately \$91,000. Consiglio is employed by U.S. Bank. (Consiglio Testimony.)

## EVALUATION CRITERIA/ ANALYSIS

### Governing Statutes

1. 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.

2. Idaho Code § 42-202B (3) defines 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 on the public water resource.

### Burden of Proof

3. The Department’s Water Appropriation Rule 40.04(a) and (b) states in pertinent part:

- a. Burden of proof is divided into two (2) parts; first, the burden of coming forward with evidence to present a prima facie case, and second, the ultimate burden of persuasion.
- b. The burden of coming forward with evidence is divided between the applicant and the protestant as follows:
  - i. The applicant shall bear the initial burden of proof of coming forward with evidence for the evaluation of criteria (a) through (d) of § 42-203A(5), Idaho Code;
  - ii. The applicant shall bear the initial burden of proof of coming forward with evidence for the evaluation of criterion (e) of Section 42-203A(5), Idaho Code, as to any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall bear the initial burden of coming forward with evidence for those factors relevant to criterion (e) of Section 42-203A(5), Idaho Code, of which the protestant can reasonably be expected to be more cognizant than the applicant.

#### **Injury to Other Water Rights**

4. When determining injury, Idaho Code § 42-226 states:

[W]hile 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 pumping levels as may be established by the director of the department of water resources as herein provided.
5. Reasonable pumping levels have not been established in the Weiser River Basin (Basin 67), therefore, the impact that pumping a well will have on a neighboring well must be evaluated on a case-by-case basis.
6. The applicant has the burden of proving that all criteria of Idaho Code § 42-203 have been met. The standard of proof for an application can best be illustrated by asking who loses if none of the parties presents evidence. The answer is that the applicant loses due to the applicant's burden of proof.
7. Though a credible witness, Consiglio's sole defense of his application was there is no evidence to prove that there will be injury to other right holders or that the water supply is inadequate for his application.
8. If a decision regarding approval of the application were based solely on the applicant's testimony regarding a lack of evidence to the contrary, he would lose. In this matter, however,

persuasive testimonial evidence was provided by Terry Scanlan, the applicant's expert witness. Mr. Scanlan's testimony that in his expert opinion, there is water to satisfy the application, and that although there will certainly be an effect on the aquifer, it does not equal injury, tips the evidentiary scale in the applicant's favor.

9. Pumping of the proposed well will likely have an effect on the water level in the Allen well. However, an effect does not equal injury. The pump in the Allen well was reset at a depth of 200 feet, 100 feet deeper than when the pump was initially installed in 2007. There is no evidence that water levels in the Allen well or other wells in the area have dropped 100 feet. So, although the Allen well will likely be affected by pumping from the Consiglio well, a potential drawdown in the Allen well of 10 to 16 feet will not injure the Allen's domestic use. However, caution dictates that permit conditions should be placed on the Consiglio permit requiring pump test and monitoring of the Allen well to monitor impacts.

10. It is possible that pumping of the proposed Consiglio well will affect the water level in the Schwenkfelder well. Again, effect does not equal injury. The potential water level decline of 10 feet in the Schwenkfelder well that might result from pumping the Consiglio well will not injure the Schwenkfelder water right. Again, however, caution dictates that permit conditions should be placed on the Consiglio permit requiring pump test and monitoring of the Schwenkfelder well to monitor impacts.

### **Sufficiency of the Water Supply**

11. Allen provided credible testimony that, since lowering the pump in his well, there is sufficient water for his domestic use. Additionally, there are 17 wells within 2 miles of the proposed place of use that are operating without known water supply problems. The water supply is sufficient for the proposed use.

12. Schwenkfelder provided credible evidence that the water supply is sufficient to exercise his water right fully, even during a very dry irrigation season, such as the recent 2012 season.

13. More data is needed to understand the hydrogeology in Indian Valley. However, the data that is available from the limited monitoring and other wells and hydrographs in the area, and the professional opinion of the Department Hydrology staff and the applicant's expert indicates that the water supply is available for the Consiglio application, and is sustainable over time.

### **Good Faith or Speculation**

14. Consiglio provided credible testimony that he purchased the subject property for his future retirement, in good faith, and not for speculative purposes. The fact that he listed the property for sale for six months does not prove speculation.

## **Financial Resources**

15. Consiglio provided credible evidence that he has the financial resources to complete the project.

## **Public Interest**

16. 1.6 I.C. 42-203B (3) defines local public interest as the “interests that the people in the area directly affected by the proposed water use have in the effects of such use on the public resource.” Determining whether an application conflicts with the local public interest is not the same as determining injury to a water right, and must be evaluated separately.

17. According to Water Appropriation Rule 40.04(a) and (b), the protestant has the initial burden to provide evidence, of which a protestant would be expected to have more knowledge of than the applicant, that demonstrates a public interest conflict.

18. The protestants made conclusory statements regarding potential injury to their water uses or rights, and did not present evidence that the application would conflict with the public interest. Consiglio provided credible testimony that his application proposes a water use for agriculture, which is consistent with water uses in the vicinity. There are no public interest conflicts.

## **Conservation of resources**

19. The use proposed in the application is a beneficial use recognized by the Department and is consistent with the Idaho policy of conservation of water resources.

## **Local Economy of the Watershed**

20. The Consiglio application proposes to use water within the watershed or the local area where the water source originates. Hence, this criterion does not apply to the Consiglio application.

## **CONCLUSIONS OF LAW**

The applicant met his burden of burden of proof in satisfying the criteria of Idaho Code § 42-203A criteria.

## **ORDER**

Application for Permit No. 67-14951 is hereby APPROVED for the following elements and subject to the following conditions:

1. Priority Date: February 4, 2009  
Source: Ground Water  
Season of Use: 3/1 – 10/31  
Diversion Rate: 1.60 cfs  
Purpose of Use: Irrigation



9. Prior to diversion of water from any point of diversion for this right and/or prior to Department approval for the construction of any additional wells to be used as points of diversion for this right, the right holder shall submit an operations plan for Department approval. The plan shall include specific and credible information demonstrating how the right holder will employ a qualified professional to comply with Condition Nos. 10 through 14 regarding pump tests, observation wells, collection of flow and volume data from the right holder's irrigation wells, drawdown and water level measurements from the right holder's irrigation wells, and any changes in water levels and water production from the observation points described in Condition No. 10.

10. If the owners of the following wells agree, the wells located in SW $\frac{1}{4}$  SE $\frac{1}{4}$ , S6, T13N, R1W, currently known as the Allen Well, and in NE $\frac{1}{4}$  SE $\frac{1}{4}$ , S18, T13N, R1W, known as the Schwenkfelder 67-7188 irrigation well, will be used as observation wells. If the owners of the aforementioned wells do not agree to allow the wells to be used as observation wells, the right holder must inform the Department in writing and provide suitable alternative observation wells or piezometers. The location of the alternative observation points must be approved by the Department. The right holder shall install a continuous data logger in the observation points to record water level measurements at least daily from the beginning of the diversion and use of water in connection with this right until proof of beneficial use is filed. The first water level measurement for the observation points shall precede any irrigation under this right to establish baseline data for the observation points. The right holder shall provide written confirmation to the Department upon installation of the data logger in the observation points.

11. For the observation points noted in Condition No. 10 the right holder shall determine the cumulative water level decline during each year as follows: determine the historical ground water decline by subtracting the current ground water level from the initial ground water level measured for the observation point for that given date after right no. 67-14951 was approved. The right holder shall keep records from the data logger and make them available to the Department upon request.

12. The right holder shall conduct a pump test of at least twenty-four hours for the well used as a point of diversion for this water right. The pump test shall be designed and conducted by a qualified licensed professional, such as a hydrologist, geologist, or engineer, and shall provide a plan to be approved by the Department before being conducted. The pump test shall measure all standard parameters associated with pump tests for the right holder's irrigation well being tested and used for the pump test, and the water levels, or drawdown, in the observation points designated in Condition No. 10 and used for the pump test. The right holder shall keep records of the data collected during the pump test and submit the data and a report that includes a summary, analysis, and conclusions of the pump test to the Department within 90 days of completion of the pump test.

13. The right holder shall install a measuring device acceptable to the Department on the point of diversion authorized under this right. The measuring device shall be capable of displaying a totalized volume measurement. The right holder shall record the volume measurements monthly for any calendar year in which water is diverted and used in connection with this right until proof of beneficial use is filed, and shall make the records available to the

Department upon request. One measurement shall be collected at least one month prior to the irrigation season, to help establish a baseline condition. During the period that measurement is required, a calibration measurement shall be made at least one month prior to irrigation season, of each year the wells are being used.

14. Any well used as a point of diversion for this right shall include a measuring device or other suitable method to allow measurement of the water level in the well. The right holder shall measure the water level for the well used as a point of diversion for this right. Water level measurements shall be made monthly throughout the year from the beginning of the diversion and use of water in connection with this right until proof of beneficial use is filed. One measurement shall be collected at least one month prior to irrigation season, to help establish a baseline condition. The right holder shall keep records and make them available to the Department upon request.

15. If the Department determines, based on credible evidence from the monitoring, the monitoring report, or otherwise, that there is a substantial likelihood that diversion and use of groundwater under the permit is causing material injury to any senior water rights, the Department may issue an order to the water right holder to show cause, after notice and hearing, as to why the water right holder should not reduce existing diversions under the permit, forego additional diversions, or provide adequate mitigation to remedy any such material injury. Any senior water user alleging material injury may petition the Department to commence a show cause hearing and the Department shall conduct a hearing. Any such hearing shall be held according to the Department's rules governing contested cases and its conjunctive management rules and a final decision shall be made on the record according to the evidence. Nothing in this paragraph shall create any evidentiary presumption, establish or change any burden of proof or obligation to come forward with evidence, or otherwise modify the rights of any water right holder under Idaho law.

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

17. Violation of any condition of this right is cause for the Director to cancel or revoke the approval.

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.

Dated this 31<sup>st</sup> day of December, 2012.

  
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Vicky Music  
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31<sup>st</sup> day of December, 2012, I mailed a true and correct copy of the above and foregoing document, PRELIMINARY ORDER APPROVING APPLICATION, by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

ADAM W. CONSIGLIO  
521 GOLDEN MEADOW DR.  
ALBUQUERQUE, NM 87114

RICHARD ALLEN  
340 MUNDY GULCH RD.  
INDIAN VALLEY, ID 83632

ROYCE A. SCHWENKFELDER  
JOHN W SCHWENKFELDER FAMILY TRUST  
SS CATTLE CO.  
3315 SCHWENKFELDER RD.  
CAMBRIDGE, ID 83610



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Rachel Sommer  
Office Specialist II