BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR	**)**	
PERMIT TO APPROPRIATE WATER	**)**	
NO. 65-13971 IN THE NAME OF GREG	**)**	**FINAL ORDER**
&/OR LORI LINDSEY	**)**	
	)	

A hearing was conducted for the above titled matter on December 18, 2002. The hearing officer issued a preliminary order on March 7, 2003 and an amended preliminary order on March 12, 2003. The orders approved permit to appropriate water no. 65-13971 for Greg and Lori Lindsey (Lindseys). Lindseys petitioned for reconsideration of the preliminary order. The hearing officer granted the petition for reconsideration but refused to change the preliminary order. Lindseys filed exceptions to the preliminary order.

Each exception is addressed below.

EXCEPTIONS

Objections to the Order Revoking Order Rejecting Petition for Reconsideration

The hearing officer initially rejected Lindseys' petition for reconsideration on the grounds that it was not timely filed. The year for filing proof of beneficial use was mistakenly printed as "2003" instead of "2008." The error was quickly corrected and an amended order was served again on the parties. When IDWR received the petition for reconsideration from Lindseys, the amended preliminary order and returned proof of certified mail service had not been placed in Lindseys' file even though it was in the offices of IDWR. As a result, the hearing officer used the original date of service of the first preliminary order to determine the timeliness of the petition for reconsideration and rejected the petition for reconsideration on the basis that it was untimely. The hearing officer mistakenly informed Lindseys that the original preliminary order had become a final order.

Lindseys properly identified the error and the hearing officer reversed the rejection of the petition. The hearing officer denied the petition for reconsideration in the same order that reversed rejection of the petition.

Lindseys argue that the "amended order and the returned envelope" were in IDWR's file, and that the mistake informing Lindseys that the original order was final needs to be remedied. IDWR had in its possession the amended preliminary order and the return receipt from the certified mail. It was not in the file, however. By recognizing the petition for reconsideration, the hearing officer granted what Lindseys now request. The Lindseys have been granted every available procedural remedy.

Lindseys provided two addresses to IDWR, a street and a mailing address. IDWR was uncertain whether a document sent by certified mail that must be personally delivered should be sent to their post office box. As a result, IDWR sent two copies of the order revoking the order rejecting the petition for reconsideration and order denying motion for reconsideration. A copy was sent to the street address by certified mail. A copy was also mailed to the post office box by regular mail. IDWR had earlier attempted to call Lindseys to insure that they did not miss a filing deadline. The order denying the petition for reconsideration instructed Lindseys to inform IDWR of their latest mailing address and telephone number for the purpose of insuring that Lindseys receive notice of procedural events related to their permit.

Exceptions to the Amended Preliminary Order

Lindseys argue that IDWR issued a permit to the protestant, Anna Marie Newell, without a condition that a right-of-way from BLM is required. Lindseys argue their permit should not be conditioned that a right-of-way must be obtained. A water right cannot be perfected in trespass. Lindseys' permit was conditioned to require ownership or a right-of-way to insure that Lindseys do not expend unnecessary resources on capital improvements before obtaining the necessary right-of-way. The condition also prevents additional strife between Newell and Lindseys before finalization of the land exchange pending at the time of the hearing.

Lindseys question the hearing officer's determination that Anna Marie Newell provided the best historical information about the availability and use of water from the spring sought for appropriation and also from other natural streams in the area. Anna Marie Newell has lived on property near the spring for many years. Her family also leased the grazing allotment from BLM that included the spring sought to be appropriated by Lindseys. Anna Marie Newell is witness who could testify accurately about the historical availability and use of the water.

Lindseys assert that IDWR has "changed our water right application from using the water on our land to getting it from the spring source on BLM." IDWR could only consider the use of water as proposed by the application to appropriate water. The application proposed diversion from the spring, not from other water channels or streams. It also identified the location of the spring as the point of diversion, and stated that the spring was located on BLM property.

Having considered the exceptions filed by the applicants, the director of IDWR adopts the amended preliminary order issued by the hearing officer, with some minor amendments. The director finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On July 25, 2000 Greg &/or Lori Lindsey (Lindseys) filed application to appropriate water no. 65-13971 with the Idaho Department of Water Resources (IDWR). The application was protested by Anna Marie Newell.

2. Application to appropriate water no. 65-13971 proposes the following:

Flow Rate	0.20 CFS
Purpose of Use	Irrigation
Point of Diversion	SWNESE, S14, T7N, R1E, BM
Place of Use	SWSE, S14, T7N, R1E, BM
No. of Acres	13
Period of Use	March 1 thru November 15
Source	Spring

3. The application states that water from the spring is currently being delivered through ditches. The application proposes the construction of a spring box, a pipeline to the place of use, and a pump to pressurize the water.

4. The spring from which water is sought for appropriation is located on land owned by the United States of America and managed by the Bureau of Land Management (BLM).

5. Although the spring is located on BLM property, Anna Marie Newell protested the application because she feels she has a vested interest in the spring.

6. BLM filed claim no. 65-13312 in the Snake River Basin Adjudication (SRBA), asserting a right to beneficially use water from the spring for stock and wildlife purposes, and also asserting a January 1, 1874 priority date. Claim no. 65-13312 was subsequently withdrawn.

7. Anna Marie Newell filed conflicting SRBA claim no. 65-22308, asserting the right to beneficially use water from the spring for stockwater purposes, and also asserting a January 1, 1930 priority date. Claim no. 65-22308 was subsequently assigned to BLM. Claim no. 65-22308 has now been decreed to BLM in the SRBA.

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8. The family of Anna Marie Newell previously owned the property now owned by Lindseys. Newell presently lives to the north of Lindseys and within a quarter mile of the spring. Newell testified that she has lived on or near the property for approximately 70 years. Her family grazed cattle on their private land and also upon the public land where the spring is located.

9. The public land upon which the spring is located is a small part of scattered BLM properties that are included in a large proposed land exchange. If the exchange is approved BLM will trade properties of little public value for private lands of higher public value. Because of the past history of grazing on the lands by Newell's family, Newell has the first right of refusal for obtaining the property upon which the spring is located, now owned by BLM, once the land exchange is approved.

10. In February 2002, a notice of decision approving the land exchange was issued by BLM. In May 2002, the decision became final. Lindseys, along with some other parties,

appealed the decision to the Interior Board of Land Appeals. The appeal is now pending before the Interior Board of Land Appeals.

11. In August 2000, Lindseys applied for a right-of-way with BLM to clean and maintain ditches from the spring to their property. In February 2002, the application was denied by BLM. The denial of Lindsey's application for right-of-way is final.

12. On December 15, 2000, Anna Marie Newell filed application for permit to appropriate water no. 65-22313, proposing to divert water for domestic use at her home from the spring that is the subject of Lindsey's application. The Newell application was filed approximately six months after the Lindsey application was filed. Nonetheless, IDWR processed the Newell application and approved a domestic use from the spring. Presently, Anna Marie Newell is diverting water from the spring for domestic use in her house.

13. Anna Marie Newell testified that, at the present time, there is barely enough water from the spring for her to shower with.

14. Lori Lindsey testified that, when they moved to the property, there was water flowing from the spring through channels to their property, and the alfalfa field north of their property was green. She testified that, since her initial observation, water has not flowed in the channels. Through her testimony, Lori Lindsey implied that Newell has somehow stopped the flow of water from the spring to her property.

15. Anna Marie Newell testified that, in the 70 years she has been acquainted with the property, she has never seen the flow from the spring reach the Lindsey property. Newell testified that occasionally, when there is a very large rainfall, some water flows down a natural channel from the north into the Lindsey property. Newell testified that it was probably the rainfall runoff flows that Lori Lindsey observed when Lindsey's moved to the property.

16. Anna Marie Newell also testified that the ditches on the Lindsey property, referred to by Lori Lindsey as delivery ditches from the spring, actually delivered water pumped from the Payette River to the properties. Anna Marie Newell testified that the ditches are up-gradient from the spring to the Lindsey property, and water from the spring would not flow in the ditches to the Lindsey property.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A states in pertinent part:

> In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to

complete the work involved therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the department of water resources may reject such application and refuse issuance of a permit therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the burden of proof for the factors IDWR must consider in Idaho Code § 42-203A.

3. There is water flowing from the spring in excess of the water right owned by BLM. This water can be diverted by Lindseys without injuring the BLM water rights.

4. Because the water right owned by Newell bears a priority date later than the Lindsey's water right, injury to the use of water by Newell is not an issue in this determination.

5. Based on the testimony of Anna Marie Newell, there is sufficient water for some irrigation if the water is delivered by pipeline. There is insufficient water to deliver irrigation water from the spring down the natural channels or ditches referred to by Lindseys.

6. Lindseys presently do not have a right-of-way application pending with BLM. However, a right-of-way application would probably not be considered until a decision is reached regarding the land exchange. As a result, the question of speculation and good faith cannot be resolved until after the BLM processes are complete. This is not the fault of Lindseys. As a result, the speculation and bad faith factor should not prevent issuance of a water right.

7. Lindseys have sufficient financial resources to complete the project.

8. Use of the water for irrigation or some other beneficial use is in the public interest.

9. Delivery of waters through the natural channels from the spring would not be consistent with principles of conservation of the waters of the state of Idaho. Delivery losses would deprive other possible users of water, including the use of water by Newell for domestic purposes. As a result, the use of water from the spring by Lindsey should only be by means of a spring box and pipeline that carefully conserves the water diverted.

ORDER

IT IS HEREBY ORDERED that application for permit to appropriate water no. 65-13971 is **APPROVED** subject to the following conditions:

1. Subject to all prior water rights.

2. 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.

3. The permit holders shall not commence any construction of diversion works or diversion of water under this permit until they have obtained either: (1) a right-of-way or special use permit from BLM authorizing diversion from the spring sought to be appropriated and authorizing construction of a pipeline in a corridor through BLM property; or (2) ownership of the land upon which the spring is located and the land where a corridor for the delivery works must be constructed.

4. Diversion and delivery of water must be by means of a spring box and water pipeline.

5. Proof of application of water to beneficial use shall be submitted on or before March 1, 2008.

6. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.5 afa per acre at the field headgate for irrigation of the lands above.

7. 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 determine the amount of water diverted from power records and shall annually report the information to the Department.

8. This right does not grant any right-of-way or easement across the land of another.

Dated this 23 day of July, 2003.

___/Signed/_____
L. GLEN SAXTON
Administrator
Water Management Division