BEFORE THE DEPARTMENT OF WATER RESOURCES

FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS TO APPROPRIATE WATER NOS. 84-12239 IN THE NAME OF J. R. CASCADE, INC. AND 84-12240 IN THE NAME OF ERIC RICHARDSON	)	**FINAL ORDER**

On July 30, 2007, J. R. Cascade, Inc. ("J.R. Cascade") filed an application to appropriate water with the Idaho Department of Water Resources ("IDWR" or "Department"). The Department assigned water right no. 84-12239 to the application.

Also on July 30, 2007, Eric Richardson ("Richardson") filed an application to appropriate water with IDWR. The Department assigned water right no. 84-12240 to the application.

Notice of applications nos. 84-12239 and 84-12240 was published. The applications were protested by Stephen and Norma Brand, Michael J. Beard, and Jerry Moore.

On June 4, 2009, the Department conducted a hearing for the contested case. Having considered the evidence presented at the hearing, the hearing officer, now the interim director of the Department, finds, concludes, and orders as follows:

FINDINGS OF FACT

1. J. R. Cascade and Richardson purchased approximately 150 acres located on the Frazier Plateau approximately five miles west of the town of Weippe, Idaho. The Frazier Plateau is a flat ridge approximately 2,000 feet in elevation above the Clearwater River Drainage. The Frazier Plateau is bounded on the North by Jim Ford Creek and on the South by Lolo Creek. Both of these creeks drain from east to west into the Clearwater River.

2. The 150 acres purchased by J. R. Cascade and Richardson are located in the S1/2NE1/4 and the N1/2SE1/4, Section 11, T35N, R3E, Boise Meridian.[1]

[1] Public land survey descriptions in this decision without a fraction following a two alpha character descriptor are presumed to be followed by the fraction "1/4." In addition, all public land survey descriptions are presumed to be based on the Boise Meridian. All locations are in Clearwater County.

3. Application to appropriate water no. 84-12239, filed by J.R. Cascade, proposes the following:

Source:	Ground water
Purpose of Use:	Domestic (Nine homes)
Flow Rate:	0.14 cfs
Season of Use:	1/1 through 12/31
	Irrigation
Flow Rate:	0.07 cfs
Season of Use:	4/1 through 10/31
Total Flow Rate:	0.20 cfs
Point of Diversion:	SENE, Section 11, T35N, R3E

Place of Use

Irrigation:	T35N, R3E	Section 11	SWNE	2.5 acres
			SENE	2.0 acres
Total Irrigated Acres:				4.5 acres
Domestic:			SWNE	
			SENE	

4. Application to appropriate water no. 84-12240, filed by Richardson, proposes the following:

Source:	Ground water
Purpose of Use:	Domestic (Nine homes)
Flow Rate:	0.14 cfs
Season of Use:	1/1 through 12/31
	Irrigation
Flow Rate:	0.07 cfs
Season of Use:	4/1 through 10/31
Total Flow Rate:	0.20 cfs
Point of Diversion:	NESE, Section 11, T35N, R3E

Place of Use

Irrigation:	T35N, R3E	Section 11	NESE	2.5 acres
			NWSE	2.0 acres
Total Irrigated Acres:				4.5 acres
Domestic:			NESE	
			NWSE	

5. Application no. 84-12339 proposes delivery of ground water to nine homes within the proposed place of use. Application no. 84-12440 also proposes delivery of ground water to another nine homes within the proposed place of use. Testimony at the hearing also established that ground water from each of the two wells proposed by the applications will serve nine homes within the proposed place of use described by the respective applications. In contrast, a plat map

contained in the files for the two applications depicts 10 lots platted in the place of use for application no. 84-12240 and eight lots platted in the place of use for application no. 84-12239. Despite the conflicting information on the plat map, the interim director assumes nine homes will be served within each respective place of use.

6. The Frazier Plateau is underlain by a series of Columbia River Basalts that were deposited by various volcanic actions. Each of these lava flows overlays the previous lava flow or basalt layer. The Columbia Basin Basalts are rather thick in each vertical unit. Each of the basalt layers weathered significantly along the upper surface of the layer prior to the next basalt layer being deposited by a new lava flow. The fine materials resulting from weathering block or inhibit the movement of water between the basalt layers. As a result, these boundary areas between basalt layers impede the downward vertical movement of ground water from one basalt layer to another.

7. The area of recharge for the Frazier Plateau is located to the north-northeast of the proposed points of diversion. This area of recharge is located at the interface of the basalts with the granite that forms the mountains east of the Weippe area.

8. The surface water percolating into the ground in the recharge zone flows laterally through each basalt layer in preferred flow paths within the basalt. There is limited movement of water downward into the lower basalt units from the upward basalt layers because of the impedance to flow caused by the weathered boundaries.

9. Ground water flows horizontally from the recharge zone to the locations proposed in the J.R. Cascade and Richardson applications for diversion of ground water.

10. A review of well construction reports in the area reveals that approximately half the wells drilled on the Frazier Plateau do not produce any water. Other wells produce a limited quantity of water. These variations in production are caused by horizontal isolation into various ground water aquifer units, limited recharge to aquifers in the western part of the Frazier Plateau, and increasing depths to water near the edges of the escarpment of the Frazier Plateau into the surrounding drainages.

11. Because of the restricted and very limited downward vertical movement of water from shallower to deeper basalt layers, any available ground water is more abundant in shallower basalt layers than in deeper basalt layers.

12. J.R. Cascade and Richardson each constructed a well on their respective properties proposed for development.

13. During late May and early June 2008, Richardson constructed a well to a depth of 262 feet. The Richardson well intercepted several layers of repeating clay and basalt bearing no water. The Richardson well encountered one water-bearing basalt layer at a depth of 183 – 190 feet below ground surface. PVC pipe perforated with a saw was installed between 222 – 262 feet below ground surface. The well produced a flow rate of 15 gallons per minute (0.033 cfs) at the time of construction.

14. During early June 2008, J.R. Cascade constructed a well to a depth of 302 feet. The J.R. Cascade well intercepted several layers of repeating clay and basalt bearing no water. The J.R. Cascade well encountered one water-bearing basalt layer at a depth of 245 – 270 feet below ground surface. PVC pipe perforated with a saw was installed between 242 and 282 feet below ground surface. The well produced a flow rate of 15 gallons per minute (0.033 cfs) at the time of construction.

15. On June 11, 2009, J.R. Cascade pumped its well at a rate of 0.20 cfs for approximately two hours to determine its pumping capacity. After pumping the well for approximately one hour, the depth to water in the well stabilized at a depth of approximately 220 feet.

16. On June 12, 2009, Richardson pumped his well at a rate of 0.20 cfs for approximately three hours to determine its pumping capacity. After pumping the well for approximately one-half hour, the depth to water in the well stabilized at a depth of approximately 220 feet and remained at 220 feet for approximately two hours.

17. The information from the pumping test of the Richardson well cannot be reconciled with the information from the Richardson well construction report. The Richardson well construction log reported the bottom depth of the water bearing zone at 190 feet. After 20 minutes of pumping, the pumping depth to water was 200 feet, ten feet below the bottom extent of the water bearing zone. At the time the depth of ground water dropped below the single water bearing strata, the ground water from the water zone would flow out of the entire vertical profile of the water zone, and the well would not have additional ground water profile to provide the additional water. Water levels should have continued to decline. Either the water bearing zones were not properly identified on the driller's report or the pump test information is not accurate.

18. J.R. Cascade and Richardson agreed that diversion from each well should be limited to no more than 7,200 gallons per day.

19. Exhibit D is a driller's report for a well constructed on the Jerry Moore property. During October of 1979, the Moore well was constructed to a depth of 190 feet. The Moore well provides water for domestic purposes. The Moore well intercepted several layers of repeating clay and basalt bearing no water. These various layers of basalt and weathered boundaries are very similar to the lithology described by the J.R. Cascade and Richardson well construction reports. The Moore well encountered one water-bearing basalt layer at a depth of 164 – 190 feet below ground surface. Perforated PVC pipe was installed between 130 and 190 feet below ground surface. The well produced a flow rate of 12 gallons per minute (0.027 cfs) at the time of construction.

20. Moore's well is located within one-quarter mile of J.R. Cascade's and Richardson's wells. The depth of the bottom of Moore's well is 190 feet below land surface. Coincidentally, the depth of the bottom of the water bearing zone for the Richardson well is 190 feet. Moore's well receives its water from the same aquifer unit that is the production zone for the Richardson well and probably from the same aquifer unit as the J.R. Cascade well. During

the pump tests of the J.R. Cascade well and the Richardson well, water level elevations in the J.R. Cascade well and the Richardson well declined to a depth that is probably deeper than the bottom of the Moore well.

21. In addition, other wells are located in close proximity to the J.R. Cascade and the Richardson wells. In the approximately radial distance of one-quarter mile from these wells, Exhibit A shows wells owned by Marvin Brown, Bill McKinnon, and by Clearwater County at Frasier Park.

22. Because water availability is diminished with depth on the Frazier Plateau, it is unlikely that Moore can drill his well deeper to find additional water. This conclusion is confirmed by the non-water-bearing basalt zone described by the J.R. Cascade well construction report and the non-water-bearing granite zone for the Richardson well construction reports at depths deeper than the zone in which water was encountered.

23. A new well located within one-quarter mile of an existing well may be close enough to the existing well that pumping from the new well may affect water levels in the existing well.

24. The well owned by Michael Beard is located approximately five miles west from the proposed J.R. Cascade and Richardson wells. The Beard well is positioned near the rim of the Frazier Plateau where it drops off to Lolo Creek. Beard drilled one dry well near the edge of the Frazier Plateau escarpment. Beard subsequently located a well site north and away from the escarpment and found water. Beard's water availability is probably more related to his location on the Frazier Plateau than any relationship to the J.R. Cascade or Richardson wells. Beard's well is far enough away from the J.R. Cascade and Richardson wells that pumping from the J.R. Cascade and Richardson wells would not affect Beard's water availability.

25. The well owned by Stephen and Norma Brand is located in Section 5, T35N, R4E, approximately 4 miles west northwest of the J.R. Cascade and Richardson wells. Brands' well is far enough away from the J.R. Cascade and Richardson wells that pumping from the J.R. Cascade and Richardson wells would not affect Brands' water availability.

CONCLUSIONS OF LAW

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

> In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary

to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the ultimate burden of proof regarding all the factors set forth in Idaho Code § 42-203A.

3. Idaho Code § 202B(3) defines the local public interest as follows:

"Local public interest" is defined 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.

4. Idaho Code § 42-111 defines the phrase "domestic purposes."

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

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

1951 Idaho Sess. Laws, ch. 200, § 1, p. 423 (approved Mar. 19, 1951) (emphasis added) (currently codified with subsequent amendments at Idaho Code § 42-226).

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

SECTION 2. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. – The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be in any way affected by this act; providing such wells and withdrawal devices are subject to

> inspection by the department of reclamation and the department of public health. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.

Id., § 2, p. 424.

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

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

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

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

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

10. In 1978, the Idaho Legislature amended the Ground Water Act again. The 1978 amendment modified Section 2 of the 1951 Ground Water Act, now codified as Idaho Code § 42-227, to provide that domestic wells are exempt only from the permit requirements of Idaho

Code § 42-229, by striking the words "in any way affected by this act," and substituting the words "subject to the permit requirement under section 42-229, Idaho Code":

> AN ACT
>
> RELATING TO DOMESTIC WELL REGULATIONS; AMENDING SECTION 42-227, IDAHO CODE, TO CLARIFY THAT DOMESTIC WELLS ARE EXEMPT FROM THE PROVISIONS OF SECTION 42-229, IDAHO CODE.
>
> Be It Enacted by the Legislature of the State of Idaho:
>
> SECTION 1. That Section 42-227, Idaho Code, be, and the same is hereby amended to read as follows:
>
> 42-227. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be ~~in any way affected by this act~~ subject to the permit requirement under section 42-229, Idaho Code; providing such wells and withdrawal devices are subject to inspection by the department of water resources and the department of health and welfare and providing further that the drilling of such wells shall be subject to the licensing provisions of section 42-238, Idaho Code. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.
>
> Approved March 29, 1978.

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

11. The Moore domestic well was constructed in 1979. As a result, its water level is not protected by the exemption from the reasonable ground water pumping level requirement enjoyed by pre-1978 domestic wells under the amended ground water act described above. *See Parker v. Wallentine*, 103 Idaho 506, 510-12, 650 P.2d 648, 652-54 (1982). If water levels decline, Moore must modify or reconstruct his well to divert water from a reasonable pumping level.

12. 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.

13. Here, the record shows that construction of a deeper well, or other diversion changes, at the location of Moore's domestic well will not result in additional water for Moore. Therefore, the bottom depth of 190 feet in the Moore well plus sufficient water depth to provide submergence for Moore's pump intakes at Moore's maximum diversion is the reasonable pumping level.

14. Pumping from the J.R. Cascade and the Richardson wells is likely to negatively affect the pumping water levels and may reduce the availability of water needed to satisfy approved uses from the Moore well and other wells with senior rights in close proximity to the J.R. Cascade and Richardson wells.

15. There may not be sufficient ground water supply for the J.R. Cascade and Richardson proposed uses in combination with the existing ground water uses in close proximity to the J.R. Cascade and Richardson wells.

16. J.R. Cascade and Richardson should be required to pump their respective wells at maximum capacity and for sufficient time to determine impact on existing water rights. During the test, JR Cascade and Richardson should monitor their wells, Moore's well, and offer other water users in the area the opportunity to monitor their well during the test.

17. J.R. Cascade and Richardson have sufficient resources to complete the projects proposed by the applications.

18. The applications are not filed for purposes of speculation, or delay, or in bad faith.

19. If pumping does not diminish the quantity of water available under existing water rights, the proposed appropriation is in the public interest.

20. The limited water use proposed by the applications results in the conservation of the waters of the state of Idaho.

ORDER

IT IS HEREBY ORDERED that applications nos. 84-12239 and 84-12240 are **Approved** and are each subject to the following conditions.

Proof of application of water to beneficial use shall be submitted on or before November 1, 2014.

Subject to all prior water rights.

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

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

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.

Prior to the construction of homes, diversion works, or diversion of ground water under this permit, the water right holder shall conduct a pumping aquifer test. A plan for the test must be submitted and approved by the Department prior to conducting the test. As a component of the test, the water right holder must offer to monitor ground water depths in the well currently owned by Jerry Moore during the duration of the aquifer test. The Moore well shall be monitored for a sufficient period of time that the effect of pumping on the Moore well may be analyzed. In addition, the water right holder must notify Marvin Brown, Bill McKinnon, and Clearwater County when it will conduct the test and offer to monitor the wells or allow Marvin Brown, Bill McKinnon, and Clearwater County to individually monitor their wells during the test.

Prior to diverting water under this water right, the right holder shall mitigate, as determined necessary by the Director, for any reduction in the water supply required to satisfy the approved use of water under water rights senior to this right or for increases in the cost of pumping water under the senior rights resulting from pumping ground water under this right. If the right holder fails to mitigate the reduction in the required water supply available to the senior appropriator, the Department may cancel the permit.

This right when combined with all other rights shall provide no more than 0.03 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the lands above.

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.

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

Domestic use is for 9 homes. Irrigation of lawn, garden, and landscaping associated with the homes are authorized under the irrigation component of this right.

DATED this 22nd day of October, 2009.

Gary Spackman

Gary Spackman
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of October, 2009, a true and correct copy of the document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Documents Served: Final Order and explanatory information to accompany a Final Order issued by the Department.

ATTENTION PETER KLENAK
JR CASCADE INC
3208 50TH ST CT NW STE 205D
GIG HARBOR WA 98335-8549

ERIC RICHARDSON
22604 48TH ST E
BUCKLEY WA 98321

STEPHEN BRAND
4294 LOWER FORDS CREEK RD
OROFINO ID 83544

MICHAEL J BEARD
4357 HWY 11
OROFINO ID 83544-9648

JERRY MOORE
4205 HWY 11
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Deborah J. Gibson

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Admin. Assistant