

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 73-12167 IN THE)
NAME OF THE UNITED STATES)
BUREAU OF LAND MANAGEMENT)

**PRELIMINARY ORDER
ISSUING PERMIT**

On November 6, 2009, the United States Bureau of Land Management, Challis Field Office ("BLM") filed an application for permit to appropriate water with the Idaho Department of Water Resources ("Department"). The Department assigned number 73-12167 to the application and advertised it to the public. Western Watersheds Project ("WWP") filed a protest.

On June 10, 2010, the Department conducted an administrative hearing regarding the WWP protest in Challis, Idaho. Fred Price and Nate Arave represented the BLM. Larry Zuckerman, WWP's central Idaho director, represented WWP. Based on the testimony and other evidence presented at the hearing, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application No. 73-12167 proposes the following:

Source:	Mahogany Creek
Tributary of:	Pahsimeroi River
Diversion Rate:	0.02 cfs
Purposes of Use:	Stockwater and Wildlife
Period of Use:	Year-round (01/01 to 12/31)
Point of Diversion:	Township 10N, Range 23E, Sec. 11, NW1/4SW1/4 (Boise Meridian)
Place of Use:	Four stockwater troughs Township 10N, Range 23E, Sec. 2, SW1/4SE1/4 Township 11N, Range 23E, Sec. 36, NW1/4NW1/4 Township 11N, Range 23E, Sec. 24, SW1/4NE1/4 Township 11N, Range 23E, Sec. 12, SE1/4SE1/4 (Boise Meridian)

2. Application No. 73-12167 is for a stockwater system that is already built and has been in operation since 2001. Water is diverted from Mahogany Creek through a mobile, screened intake cylinder into an underground pipe. The water travels through the 1.5 inch pipe for over six miles and is delivered to four separate water troughs. The diversion is shut off by removing the intake cylinder from the river. There is not a shut-off valve at the head of the system. However, there is a valve at the end of the system, allowing the system to be drained to prevent freezing.

3. The four stockwater troughs are located within a BLM grazing allotment west of the Pahsimeroi River. Historically, an irrigation ditch cut across the BLM grazing allotment. The

irrigation ditch was primarily used to convey water to private property located outside of the grazing allotment under licensed water right, 73-2098. The water right carried a diversion rate of 2.4 cfs, a priority date of 5/13/1915, and could be used for irrigation and domestic purposes. Because the ditch crossed the BLM grazing allotment, the cattle on the allotment drank water from the ditch.

4. A claim for water right 73-2098 was filed in the Snake River Basin Adjudication ("SRBA") by the Aetna Casualty and Surety Company in 1989. The claim identified irrigation and stockwater as beneficial uses. An amended claim for water right 73-2098 was filed by Sulphur Creek Livestock in January 2001, also listing irrigation and stockwater as beneficial uses.

5. The Department reviewed Sulphur Creek Livestock's amended SRBA claim and discovered that the irrigation portion of water right 73-2098 had not been used for a five-year period and was therefore lost due to forfeiture. The evidence indicated that irrigation had actually not taken place for many years. The stockwater portion of the water right, however, was used during that time period. The Department recommended that water right 73-2098 be limited to a diversion rate of 0.14 cfs for stockwater use only. The water right was decreed as recommended by the Department on October 15, 2009. The place of use associated with right 73-2098 is private property at the end of the old irrigation ditch, beyond the end of the BLM stockwater system. Right 73-2098 does not include any in-ditch stockwater for use on the BLM grazing allotment. Department records show that water right 73-2098 and the associated place of use are currently owned by Benjamin Yates. The old ditch has not been used for irrigation or stockwater since the trough system was installed in 2001. The head of the ditch has now been filled in.

6. A previous owner of water right 73-2098 attempted to convey a portion of that water right to the BLM. A change of ownership was filed by the BLM. However, the Department decided that the supporting documents did not show an actual conveyance of the water right and ultimately rejected the ownership change.

7. In 2001 Sulphur Creek Livestock filed a Notice of Diversion for Instream Stockwater Use with the Department, seeking to divert water from Mahogany Creek through a pipeline to three to six stockwater troughs. The application stated the following:

"This diversion is part of a multi-agency project to eliminate grazing impacts to Mahogany Creek. In 1999, the creek was fenced to protect riparian areas. This diversion and pipeline, to be constructed by the allotment permittee, will eliminate the need for instream stockwatering. It will fit into a larger pipeline project designed to eliminate livestock watering from an existing irrigation canal." (Exhibit A to Sulphur Creek Livestock Co. Notice of Diversion for Instream Stockwater Use)

Construction was slated to occur in March and April of 2001. This stockwater system is the same system described in the BLM's application. As part of the process of converting instream and open-ditch stockwater to a point of diversion, the Department created a statutory claim, 73-11956, in the name of the applicant, Sulphur Creek Livestock. The statutory claim created in 2001 was not subsequently claimed in the SRBA. Diversion through the existing stockwater system occurring between 2001 and the present day has been valid under statutory claim 73-11956.

8. Delivering stockwater through the use of pipes and troughs provides many benefits to the surrounding creeks and streams. Stockwater troughs keep cows out of critical riparian areas and disperse cattle throughout the allotment, more evenly grazing the available forage. Far less water is lost to seepage and evaporation when compared to an open ditch delivery system. Finally, the float systems in the troughs make it so that water is only diverted when the troughs are low. This demand-based type of delivery limits the diversion of water from the stream to the amount of water that is actually needed by the stock.

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

3. Diversion of stockwater for the BLM grazing allotment associated with this application will not injure other water right holders.

4. There is sufficient water in the lower portion of Mahogany Creek to satisfy the 0.02 cfs sought under the application. The diversion is located less than one mile from the confluence with the Pahsimeroi River. As a result of the installed pipelines and float systems on the watering troughs, the amount of water diverted under this permit will be far less than what has been historically diverted through an open ditch to water the stock within the BLM grazing allotment.

5. The BLM's application represents a water use that has been in existence for many years. The proposed water use will not impose any new or increased burden on Mahogany Creek.

6. Because the stockwater system has been installed and functioning since 2001, the Department does not need to evaluate the Applicant's financial resources or whether the application is the result of bad faith, delay, or speculation.

7. The application conserves the water resources of the state of Idaho by implementing efficiency measures to limit the amount of water lost to seepage and evaporation.

8. The application is in the local public interest because it supports the continued use of Mahogany Creek water for stockwater on the BLM grazing allotment.

9. Given the facts set forth above, the BLM may have had other options to obtain water rights for the existing stockwater system. The BLM could have pursued an SRBA claim based on the historical use of the irrigation ditch for stockwater. The BLM could have pursued an SRBA claim based on the existing statutory claim. Both of these claims, if decreed by the SRBA court, may have resulted in a 1915 priority date. The BLM could have tried to purchase and transfer a portion of water right 73-2098 to the grazing allotment. Finally, the BLM could have filed a new application for permit, resulting in a 2009 priority date. The Department cannot require the BLM to pursue any one of these options before the others. Further, the BLM is not barred from pursuing a new permit, even though other methods of obtaining water for the system may have been available.

10. Because statutory claim 73-11956 is based, at least in part, on the same beneficial use of water described in the BLM's application for permit, the permit, in combination with the statutory claim, must be limited to the full extent of the beneficial use. This limit is imposed through Condition No. 5 of the approved permit.

11. Whether there will be cows on the grazing allotment in 2010 is not relevant to this decision. All parties agree that the allotment has been used for grazing in the recent past and that the allotment can be used for grazing in future years. Because the application also identifies wildlife as a beneficial use, the existence of cows on the grazing allotment is not essential for approval of the application for permit.

12. The assertion that other BLM stockwater facilities may be in disrepair is not determinative in this matter. Mr. Zuckerman offered no evidence, other than his own testimony that other BLM stockwater troughs are in disrepair. Without additional evidence, the extent and cause of broken stockwater troughs is unknown. Even if there are BLM stockwater troughs in disrepair, a failure to maintain diversion facilities associated with unrelated water rights does not bar an applicant from seeking a new permit to appropriate water.

13. The protestant raised the concern that the stockwater troughs may act as a mosquito breeding area, but failed to provide any evidence to support his assertion. Without concrete, scientific evidence supporting the assertion, the issue of mosquitoes carried no weight in the local public interest analysis.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 73-12167 in the name of the United States Department of the Interior, Bureau of Land Management, Challis Field Office is APPROVED and ISSUED subject to the following conditions:

1. Proof of application of water to beneficial use shall be submitted on or before July 1, 2011.
2. Subject to all prior water rights.
3. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 73, Pahsimeroi River.
4. Upon specific notification by the Department, the right holder shall install a lockable device of a type acceptable to the Department in a manner that will provide the watermaster suitable control of the diversion.
5. This right, when considered with all other rights common to the same grazing allotment, is limited to the quantity of water beneficially used by the number of stock within the allotment.
6. Prior to the diversion and use of water under this approval, the right holder shall comply with all fish screening requirements of the Idaho Department of Fish and Game.
7. This right does not grant any right-of-way or easement across the land of another.

Dated this 28th day of June, 2010.

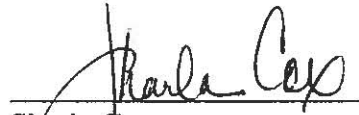


James Cefalo

Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of June 2010, I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER ISSUING PERMIT to the person(s) listed below:



Sharla Cox
Administrative Assistant

US MAIL

RE: PERMIT NO. 73-12167

BLM CHALLIS FIELD OFFICE
1151 BLUE MOUNTAIN ROAD
CHALLIS, ID 83226

FRED PRICE
USDI, BLM IDAHO STATE OFFICE
1387 S VINNELL WAY
BOISE ID 83709-1657

WESTERN WATERSHEDS PROJECT
BOX 1770
HAILEY, ID 83333

WESTERN WATERSHEDS PROJECT
PO BOX 1322
SALMON ID 83467