

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

IN THE MATTER OF APPLICATION FOR)	
PERMIT TO APPROPRIATE WATER NO.)	
51-13040 IN THE NAME OF THE UNITED)	ORDER GRANTING PETITION FOR
STATES DEPARTMENT OF THE INTERIOR,)	RECONSIDERATION AND
BUREAU OF LAND MANAGEMENT)	CLARIFICATION AND AMENDED
_____)	PRELIMINARY ORDER DENYING
	APPLICATION FOR PERMIT

PROCEDURAL HISTORY

On July 28, 2008, the United States Department of the Interior, Bureau of Land Management ("BLM") submitted an application to appropriate water to the Department of Water Resources ("IDWR"). On March 25, 2009, the BLM submitted an amended application ("Application") changing the proposed place of use. The Application's identification number is 51-13040. The protest deadline date was April 20, 2009. IDWR received a timely protest against the application from J and J Ranches, Inc ("J&J Ranches").

On July 31, 2009, IDWR conducted a prehearing conference. The BLM and J&J Ranches requested that a hearing be scheduled.

On June 7, 2011, IDWR conducted a hearing at the IDWR Western Region Office, Boise, Idaho.

On July 29, 2011, IDWR issued the Preliminary Order ("Order") Denying Application for Permit 51-13040.

On August 11, 2011, the BLM submitted a Petition for Reconsideration and Clarification ("Petition") of IDWR's Order. Attached to the Petition were the following documents:

Affidavit of David L. Lahtinen, BLM grazing permittee;
Affidavit of Chester W. Sellman, BLM grazing permittee;
Shelley Edelen Cooper, P.E., Civil Engineer for the BLM; and,
Affidavit of Dr. Gary A. Madenford, Water Rights Team Leader, BLM, Idaho State Office, with fourteen (14) photographs attached.

ANALYSIS OF PETITION FOR RECONSIDERATION AND CLARIFICATION

The analysis will not address every error or mischaracterization made in the BLM the Petition but only those that the hearing officer believes are significant.

1. Testimony and evidence presented at hearing

The Petition states that “IDWR’s denial appears to be based primarily on the childhood memories of the Protestant...” Petition at 1. This is false. The hearing officer made the 24 Findings of Fact and 15 Conclusions of Law of the Order based on the totality of the testimony and evidence presented at the hearing.

Mr. Urquidi’s testimony was very credible and was based on approximately 45 years of experience living and working on the property, and his extensive research and knowledge of ranching, and the history and water uses of the area.

In contrast, Mr. Price had very little personal knowledge of the area and offered only himself as a witness. Mr. Price declined to cross-examine Mr. Urquidi regarding his testimony. Mr. Price offered no evidence to meet the BLM’s burden of proof regarding injury. The BLM now attempts to supplement the record with post-hearing affidavits of other witnesses and experts. As described below, this information is not timely and hearing officer declines the BLM’s invitation to consider this information now.

2. Weight given to Urquidi’s testimony regarding the “wet drainage”

Many pages of the Petition, and most of the content of the four affidavits attached to it, attempt to counter Urquidi’s testimony regarding the existence of a “wet drainage” north of the proposed point of diversion. The attention the BLM spends on this testimony is inordinate to the weight given to it by the hearing officer. It was a small part of the very credible testimony of Mr. Urquidi and was addressed by the hearing officer in only 2 out of the 24 Findings of Fact in the Order, Findings 22 and 23. Likewise, only Conclusions of Law no. 5 of the 15 Conclusions made in the Order mentions the “wet drainage.”

3. Evidence regarding findings and conclusions that the BLM proposed point of diversion decreased spring flow in the Urquidi springs

Particularly disturbing is Mr. Price’s statement in the Petition that “I remember the Hearings (sic) Officer cautioned me on my response, although I’m not sure why.” Petition at 3. This statement gives the impression that the hearing officer stymied potential testimony by Mr. Price that would contradict Mr. Urquidi’s testimony regarding decreased spring flow.

A review of the record reveals the hearing officer did not comment during Mr. Price’s very brief testimony regarding potential injury to the Urquidi springs. When asked, Mr. Price declined to cross-examine Mr. Urquidi.

4. Evidence submitted with petition

The Idaho Administrative Procedure Act Procedure states:

(3) At the hearing, the presiding officer:

* * *

(b) Shall afford all parties the opportunity to respond and present evidence and argument on all issues involved

I.C. § 67-5242(3) (emphasis added).

Attached to the petition for reconsideration were 4 affidavits from individuals who were not parties or witnesses at the hearing. The Applicant had nearly 24 months to identify potential witnesses and prepare for the hearing. The BLM did not call any lay or expert witnesses or submit documentary evidence other than the well log and inspection report. The testimony in the petition and attached documents cannot be considered now by the hearing officer without reopening the record and allowing further testimony and cross-examination. The hearing officer will not consider this information.

5. Without prejudice

The BLM incorrectly interpreted the hearing officer's intent behind including the phrase "without prejudice" in the Order section of the preliminary order. The language was not intended to be an invitation for the BLM to present new evidence, but was intended to provide the BLM the opportunity to reach an agreement with Urquidi whereby Urquidi might agree not challenge another future application if the concerns raised by Urquidi are addressed. This was based on Urquidi's testimony that he was willing to work with the BLM on such issues. However, the hearing officer now sees that the inclusion of the language caused confusion and could lead to additional litigation in the future. Because of this, the hearing officer grants the petition for reconsideration and clarification and amends the preliminary order to remove the reference to "without prejudice." The intent was never to allow the BLM to get a "second bite at the apple" absent a settlement with Mr. Urquidi.

6. Request for clarification

The petition asks for clarification as to the effect of the Order on the BLM project that is proposed in the application. Specifically, the Petitioner asks if the Order precludes the BLM from pursuing the beneficial use proposed in the application without a water permit.

The clarification seeks a determination that is beyond the scope of authority of the hearing officer. IDAPA 37.01.01.413.

7. Conclusion

Based on the foregoing, the hearing officer hereby issues the following Amended Preliminary Order Denying Application for Permit. This amended order removes reference to "without prejudice" in the Order section. No changes to the findings of fact or conclusions of law are made.

FINDINGS OF FACT

1. Application 51-31040 proposes the following appropriation:

Applicant: BLM

Priority Date: July 28, 2008

Source and Point of Diversion: Ground water from a well located in Township 10 South, Range 2 East, Section 9, the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$, B.M.

Water Use: Stockwater for 380 of range cattle and incidental wildlife

Quantity: 0.05 cfs

Season of Use: 01/01 to 12/31

Place of Use: Township 9 South, Range 2 East, B.M.: Section 30, the NW $\frac{1}{4}$ NW $\frac{1}{4}$, and Section 31, the NW $\frac{1}{4}$ NE $\frac{1}{4}$;
Township 10 South, Range 2 East, B.M.: Section 5, the SW $\frac{1}{4}$ NE $\frac{1}{4}$;
Section 8, the NW $\frac{1}{4}$ NE $\frac{1}{4}$; and, Section 2, the NW $\frac{1}{4}$ SW $\frac{1}{4}$

2. The BLM manages the federally-owned land on which the well and the proposed place of use ("POU") are located.

3. The BLM has a planning and budgetary process for its capital improvement projects. This Application has been through the process and construction was approved. The BLM seeks to use a preexisting well as the proposed point of diversion because it costs the BLM less than drilling a new well.

4. The Well Driller's log presented as Exhibit AB, drilling permit no. 045363, states that the BLM is the well owner. It is the only well log on file with IDWR in Township 10 South, Range 2 East, B.M. The well log is for the proposed point of diversion.

5. The well that is the proposed point of diversion was drilled in 1974 to a total depth of 443 feet below ground level (bgl). A surface seal was installed to 20 feet bgl. The well was cased from the surface to the total depth and perforated pipe was installed from 335 feet bgl to 435 feet bgl. During drilling, water was encountered from 45 feet bgl to 443 feet bgl. The static water level in the well after completion was measured at 14 feet bgl.

6. Item 9 of the well log indicates the lithology is brown and black rhyolite that is broken from 167 feet to 222 feet bgl and from 297 feet to 443 feet bgl, a total extent of nearly 200 feet.

7. Item 7 of the well log is incomplete. Information regarding the flow, water temperature and pressure were omitted on the log and it must be assumed this well information was not obtained by the driller.

8. Item 8 of the well log is incomplete. Information regarding whether a pump or bailer or other well test was conducted is blank and it must be assumed no well tests were conducted by the driller.

9. The BLM provided an electronic mail ("e-mail"), dated September 2, 2005, between BLM personnel regarding an inspection of a well conducted in 2005 using a downhole camera (Exhibit AA). The camera recorded the current condition of the "Collier Well". There is no legal description of the "Collier Well" on the e-mail. However, on a topographic map of the Urquidi property, there is a label "Collier Place." The inspection referenced in the e-mail is an inspection of the well that is the proposed point of diversion.

10. Based on the inspection, the well was properly constructed to current standards and the well casing is intact. The e-mail states that a well pump test was planned the following week but no evidence of a pump test was submitted during the hearing.

11. The BLM is a federal agency authorized by several acts of the U.S. Congress to manage public domain land. The BLM is authorized to maximize grazing efficiency by distributing water and livestock over allotments.

12. The proposed point of diversion is located about 200 feet east of one of the unnamed tributaries that merges with Little Jack's Creek. The tributary merges with Little Jack's Creek in Section 5, Township 10N, Range 2 East, B.M., on the J&J Ranches' ranch land.

13. The proposed point of diversion is located approximately 0.2 to 0.25 miles southeast of springs located on J&J Ranches' land. The springs are located in the SESWSE, NESESE and SWSESE, Section 5, Township 10N, Range 2 East, B.M.

14. The well was the second of two wells drilled in the 1970s for the BLM's Little Jacks Creek Pipeline Project, which was to provide water for 24,000 animal unit months ("AUMs") through 40 miles of pipeline. The first well did not produce water in the quantities needed for the Little Jacks Creek Project and was not used. IDWR has no records of this well. The second well was drilled deeper and completed. The Little Jacks Creek Pipeline Project was discontinued due to environmental issues and both wells were sealed but not permanently decommissioned.

15. J&J Ranches owns 648 acres and operates a cattle ranch in Sections 4 and 5, Township 10 South, Range 2 East, B.M., and in Section 33, Township 9 South, Range 2 East, B.M., of Little Jacks Creek Basin.

16. J&J Ranches has a grazing permit from the BLM for 365 AUMs, or 50 – 70 head of range cattle. The permit allows J&J Ranches to graze cattle on public land in the Little Jacks Creek Basin area for four months per year beginning on June 1st of each year. J&J Ranches' family has had the grazing permit as long as they have owned the ranch.

17. John Urquidi is the owner of record of the following water rights used on this ranch. The SRBA Court issued Partial Decrees for the rights in 1999, 2000 and 2001:

Water Rt. No.	Priority date	Source	Purpose	POD	Quantity
51-2058A	07/28/1915	Little Jacks Creek Tributary: Bruneau River Unnamed Stream Tributary: Little Jacks Creek	Irrigation – 30 acres Stockwater	T10S R02E S05 NENENE	0.60 CFS
51-2058B	07/28/1922	Little Jacks Creek Tributary: Bruneau River Unnamed Stream Tributary: Little Jacks Creek	Irrigation – 62 acres Stockwater	T10S R02E S05 NENENE	0.92 CFS
51-2065	04/05/1919	Springs Tributary: Little Jacks Creek	Irrigation – 30 acres Stockwater	T10S R02E S05 SESWSE , NESESE, SWSESE	0.80 CFS
51-2230	07/15/1919	Unnamed Stream Tributary: Little Jacks Creek	Stockwater Storage Stockwater From Storage Irrigation Storage Irrigation From Storage	T10S R02E S05 LOT 1 (NENE)	4 AFY
51-10229	03/15/1930	Unnamed Stream Little Jacks Creek Tributary: Jacks Creek	Stockwater (Instream)	T09S R02E S33 LOT 2 (SWSESW)/ SENWSE (Instream Beginning/ Ending Points) LOT 4 (NWNWNW/ LOT 4 (NENWNW) (Instream Beginning/ Ending Points) NWSE	0.02 CFS

18. The climate in the area of the proposed place of use for the application is arid with deep snowfalls in the winter and dry, hot summers, typical of high desert. Precipitation is mainly in the form of snow during the winter months.

19. In the area of the J&J Ranches' springs and the proposed point of diversion, Little Jack's Creek is an ephemeral stream fed by snowmelt from several unnamed tributaries. The unnamed tributaries originate in the higher elevations approximately 2 to 3 miles south, west, and southeast of the J&J Ranches' springs, located in the SESE, Section 5, Township 9 South, Range 2 East, B.M. Little Jacks Creek continues to flow north to northeast, fed by several additional unnamed tributaries and becomes a perennial stream about 4.5 miles north of the J&J Ranches' springs.

20. Historically, the greatest flow in Little Jacks Creek and the spring sources for the Urquidi water rights occurs on J&J Ranches' ranch in March and April. The water in the creek and springs gradually diminishes through the spring and summer. In mid- summer there is often not enough water to satisfy the Urquidi water rights.

21. Generally, aquifers of an igneous or volcanic origin, such as basalt and rhyolite, are not as homogenous as sedimentary aquifers, such as unconsolidated sand or sandstone. Volcanic aquifers, such as the rhyolite aquifers described on the well log for the BLM well, can produce water along weathered contacts between flows, or along fractures, faults, or other features related to the lava flow. Unpredictable porosity and permeability characterize volcanic aquifers.

22. Urquidi testified that there was a "wet drainage" north of the proposed point of diversion that was present when his family moved to the adjacent land in the late 1960s. The drainage dried up after the BLM wells were drilled for the Little Jacks Creek Project. Urquidi also testified to decreased flows in the springs after the wells were drilled.

23. The BLM did not present evidence or testimony challenging Urquidi's testimony regarding the dried up drainage or the decreased spring flows. The exhibits submitted by the BLM, an e-mail and a well log, did not provide evidence regarding this now dry drainage or the well's impact on J&J Ranches' springs.

24. Based on the relatively short distance between the well and the water sources J&J Ranches relies upon (200 feet to the surface water and 0.2 to 0.25 miles to the springs) and based upon Urquidi's testimony describing the impact of the wells on the surface water and the springs, the hearing officer finds that the water-bearing strata described in the well log for the proposed point of diversion are hydrologically connected to each other and to the J&J Ranches' springs and Little Jacks Creek. Based upon the above facts and testimony, the hearing officer finds that a diversion of water from the hydrologically connected subsurface strata will likely diminish the creek and spring flows J&J Ranches relies upon for its water supply.

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. The BLM did not meet the statutory burden of proof in providing evidence that the development proposed in the Application will not reduce the quantity of water available to the J&J Ranches' rights.

The majority of Price's testimony was restating and misstating the law, IDWR procedure and the Idaho Constitution. Price testified incorrectly that any allegation of injury was premature according to IDWR policy and that the water call process was the appropriate process, after an application ripens into a water right, to allege injury. Price's argument contradicts Idaho Code § 42-203A.

4. Price's testimony was mostly broad and conclusory statements. Price testified incorrectly that there could be no communication between the aquifer producing in the well and the springs or any other surface water source. Price provided no fact-specific evidence to support this assertion. Price has no training or experience as a hydrogeologist and is not qualified to testify regarding hydrologic processes.

5. The J&J Ranches family has owned the ranch adjacent to the proposed BLM project for over 40 years. Urquidi is very knowledgeable about the water resources in the area. Urquidi's testimony regarding his experience on the ranch for the past several decades, the history of water use both regionally and on his property, ranching and grazing practices, regional climate, changes in water availability and the disappearance of the wet drainage proximate to the proposed point of diversion was very specific and very credible.

6. The BLM did not meet the statutory burden of proof in providing evidence that there is sufficient water for the project proposed in the Application.

BLM testimony regarding the sufficiency of water for the proposed project was to point to the well log (Exhibit AB) and the e-mail (Exhibit AA) for the proposed point of diversion and stated that water was found.

7. The well log form (Exhibit AB) was designed to provide specific information as to whether the water supply is adequate for its proposed purpose. Item 7 of the well log for the proposed point of diversion did not provide information requested about whether the well was flowing, the instantaneous flow, temperature or shut in pressure or temperature. Nor does it provide, in Item 8, the well test data requested, such as the discharge in gallons per minute, the drawdown or hours pumped. Thus, the very information that establishes water sufficiency is missing.

8. Price testified that the e-mail (Exhibit AA) further supports his testimony that water is sufficient because the well is intact and water was observed. However, the mere existence of a properly constructed well and the presence of water does not mean there is sufficient water for the proposed use. Furthermore, the document itself states that a pump test is planned and that if the well pumps a minimum of 20 gallons per minute, then the project will proceed.

9. Price correctly points out that usually an application is approved and a permit issued before a well is drilled, hence IDWR has more information regarding the sufficiency of water than it usually has when evaluating applications. However, in this case, BLM's own exhibits cause the hearing officer to question water sufficiency. The sections of the well log form that describe water supply were left blank. The pump test discussed in the e-mail either never took place or simply wasn't presented at hearing. This information likely would have established whether water is sufficient for the purpose which it is sought to be appropriated. Instead, due to the factual omissions on the well log and the lack of evidence regarding the pump test discussed in the e-mail, there are questions about material facts that remain unanswered.

10. The Application is not speculative as argued by J&J Ranches. The Application seeks to accomplish what the BLM is federally mandated to accomplish. "Speculation" does not mean to "guess" or "presume". Speculation, in the water right application context, means "an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence." IDAPA 37.03.08.045.01.c.

11. The hearing record supports a conclusion that the BLM will apply the water to a beneficial use with reasonable diligence. The BLM filed the Application according to its federal mandates and initiated the required budgetary and project approval, and scheduling according to its own policies and procedures. The BLM performed the downhole camera inspection in 2005 to obtain information regarding the integrity of the well and its potential as a point of diversion for this project. The Application was filed in good faith without intending to cause delay or speculation.

12. The BLM has sufficient financial resources with which to complete the work. The BLM budgeted for this project and has demonstrated sufficient financial resources to complete the project proposed in the Application.

13. The water uses proposed in the application are not in the local public interest if there is injury to senior water right owner and BLM allotment permittee, J&J Ranches. The BLM did not meet its evidentiary burden of proof and did not demonstrate the Application is in the local public interest.

14. The Application is consistent with conservation of water resources in Idaho.

15. The BLM does not propose to divert water from the watershed to another area or watershed. Therefore, this review criterion regarding the impact on the local economy is not applicable to the Application.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration and clarification in the matter of the application for permit no. 51-13040 is **GRANTED** for the purpose of resolving confusion regarding the phrase "without prejudice" in the Order section of the July 28, 2011 Preliminary Order Denying Application for Permit.

IT IS FURTHER ORDERED that application for permit no. 51-13040 is **DENIED**.

Dated this 29th day of August, 2011.



VICKY MUSIC
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of August, 2011, 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:

Document(s) Served: **Order Granting Petition for Reconsideration and Clarification
and Amended Preliminary Order Denying Application for
Permit.**

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