

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

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 57-11849 IN THE NAME OF
JUNAYO RANCH LIMITED
PARTNERSHIP

**PRELIMINARY ORDER REJECTING
APPLICATION**

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

On June 10, 2014, Junayo Ranch Limited Partnership (“Junayo”) filed Application for Permit to Appropriate Water No. 57-11849 (“application”) with the Department of Water Resources (“IDWR” or “Department”). The application proposes the onstream storage of water from an unnamed tributary of Salmon Creek for stockwater and wildlife purposes.

Idaho Code § 42-203A(5) directs IDWR to evaluate certain criteria in connection with each application for permit to appropriate water:

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.

IDWR published notice of the application as required by Idaho Code § 42-203A. Richard Brandau (“Brandau”) protested the application. After informally exploring options for resolving the protest, Junayo and Brandau determined they could not reach an agreement. Consequently, on March 15, 2016, IDWR conducted a hearing in Boise to take testimony and evidence in connection with the application.

At the hearing, Owen H. Orndorff, general partner of Junayo, represented Junayo pro se. Attorneys Laura A. Schroeder and James Browitt represented Brandau.

Brandau's attorneys stated in the hearing that Brandau's protest is based on four of the review criteria stated in Idaho Code § 42-203A(5):

- Whether the proposed appropriation will reduce the quantity of water under existing rights.
- Whether the water supply is insufficient for the intended purpose.
- Whether the application will conflict with the local public interest.
- Whether the application is contrary to conservation of water resources within the State of Idaho.

At the conclusion of the hearing, the Hearing Officer authorized post-hearing briefs. In accordance with the schedule set by the Hearing Officer, the parties submitted the following items:

- Junayo: *Brief in Support of Memorandum*
- Brandau: *Motion to Strike Exhibits Submitted with Applicant's Brief and Any References Included Therein, or in the Alternative to Reopen Hearing*
- Brandau: *Protestant's Response Brief*
- Junayo: *Response to Motion to Strike Exhibits or Reconvene Hearing and Response to Protestant's Response Brief*

In its *Brief in Support of Memorandum*, Junayo sought to enter into the record four exhibits that were not offered at the hearing. Because Junayo did not offer the exhibits in time for them to be considered at the hearing, on June 22, 2016, the Hearing Officer issued an *Order Striking Exhibits*.

Based on careful consideration of the administrative record, including the application file and evidence and testimony presented at the hearing, the Hearing Officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Junayo grazes cattle on land it owns in the SW¼NW¼, Section 33, Township 1 South, Range 4 West, B.M. An unnamed stream sometimes called Little Salmon Creek flows across the Junayo land from north to south. The unnamed stream is tributary to Salmon Creek, which is tributary to Reynolds Creek. A small perennial seep flows into the unnamed stream on the Junayo land. The seep flows approximately 0.30 to 0.40 cubic feet per second ("cfs"). Other than the seep, the source of water in the unnamed stream is runoff from snowmelt, which typically occurs in February or March, peaks during those months, and diminishes markedly by April 1. Orndorff Testimony. In dry years, the flow of the unnamed stream diminishes so much by summer that there is no surface flow from it into Salmon Creek about 2.5 miles downstream from the location of Junayo's proposed reservoir. Orndorff Testimony. In wet years, surface water sometimes flows down Salmon Creek drainage and into Reynolds Creek during the irrigation season. Brandau Testimony. In recent years, dry conditions have prevailed. Orndorff Testimony; Brandau Testimony. Even in dry years, storms may result in short-term events that send water down the Salmon Creek drainage into Reynolds Creek during the late spring and summer. Shaw Testimony; Exhibits 2 and 3.

2. Because of the steep terrain on Junayo's land and the steep banks of the unnamed stream there, Junayo's cattle have difficulty accessing the water in the unnamed tributary, especially when runoff has passed and the only flow is from the tributary seep. Orndorff Testimony.
3. On June 10, 2014, Junayo filed Application for Permit to Appropriate Water No. 57-11849 with IDWR. The application seeks authorization for the construction of an onstream reservoir to impound the flow of the unnamed stream flowing across Junayo's land. The proposed reservoir would also impound water from the seep tributary to the unnamed stream. The proposed point of diversion and place of use for the reservoir are both in SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 33, Township 1 South, Range 4 West, B.M. The proposed water uses are Stockwater Storage and Wildlife Storage. The proposed season of use is from January 1 to December 31 each year. Junayo intends the proposed reservoir to provide a more accessible water supply for its cattle and for various species of wildlife, including deer, elk, and horses. Orndorff Testimony.
4. Junayo envisions the proposed reservoir filling mostly from snowmelt runoff in the late winter and early spring. When the reservoir is full, incoming flows would pass through the reservoir. The tributary seep would continue to augment the water impounded in the reservoir throughout the year. Orndorff Testimony.
5. The record does not clearly define exactly how much water Junayo proposes to appropriate. In item 4 of its application, Junayo states 15 acre-feet for Stockwater Storage and 15 acre-feet for Wildlife Storage. In item 5 of the application, Junayo lists the total quantity to be appropriate as 15 cfs, not acre-feet. In item 6.b of the application, Junayo states the total reservoir capacity will be 10 acre-feet, and refill will occur "from adjacent spring east of pond on hillside." The information in item 11 of the application suggests a reservoir of 10 acre-feet (surface area of 2 acres with an average depth of 5 feet) and potential evaporation losses of 5 acre-feet. According to the application fee schedule in Idaho Code § 42-221.A, the \$100.00 filing fee paid by Junayo is sufficient for a maximum of 20 acre-feet of storage. The legal notice published by IDWR states the total appropriation would be 15 acre-feet. In its post-hearing *Brief in Support of Memorandum*, Junayo states the application is for storage of "a maximum of 30 acre feet."
6. If the seep identified in the application as a source of storage water flows 0.3 cfs all year, it provides a total of 217 acre-feet of water in a year. If the seep identified in the application as a source of storage water flows 0.40 cfs all year, it provides a total of 290 acre-feet of water in a year.
7. Junayo's application states that its proposed reservoir is for "500 pairs of range cattle." At the hearing, Junayo testified that it will graze approximately 200 to 300 cattle on its land at the proposed reservoir site for four to six months each year.
8. Junayo's proposed reservoir is within Water District 57R, which is responsible for the delivery of water in the Reynolds Creek drainage to water right holders according to the priority dates of their water rights. Water District 57R is necessary for the administration of water rights because the flow of water in the Reynolds Creek drainage is not sufficient to satisfy all the water rights in the drainage all the time. The watermaster of Water District

57R actively regulates water rights during the irrigation season every year. Exhibits 8, 9, 12, 13, 15, 16, 18, and 19.

9. A water measurement structure called the Outlet Weir divides Reynolds Creek into an upper basin segment, upstream from the Outlet Weir, and a lower basin segment, downstream from the Outlet Weir. A water measurement structure called the Upper Weir or Tollgate Weir is located on Reynolds Creek approximately eight miles upstream from the Outlet Weir. The more senior water rights in the Reynolds Creek drainage are located downstream from the Outlet Weir. Twenty-six water rights in the upper basin portion of the Reynolds Creek drainage, all with priority dates in 1911 or later, are conditioned such that they are not authorized to divert water during the irrigation season unless 57 cfs of water is flowing in Reynolds Creek at the Outlet Weir and 37 cfs is flowing in Reynolds Creek at the Upper Weir. Shaw Testimony; Water right records on file at the Department. When 57 cfs or more of water is flowing in Reynolds Creek at the Outlet Weir, lower basin senior water right holders are not entitled to make a delivery call against upper basin junior water users. Brandau Testimony.
10. Irrigation water rights in the Lower Basin of Reynolds Creek are authorized to begin diverting and using water starting on March 15 each year.
11. Salmon Creek is tributary to Reynolds Creek less than half a mile upstream from the Outlet Weir.
12. Rule 50.04 of the Department's Water Appropriation Rules (IDAPA 37.03.08) states:

Applications approved for on-stream storage reservoirs will, unless specifically waived by the Director, require permanent flow measuring devices both upstream and downstream from the reservoir.

Installing measuring devices upstream and downstream from an on-stream reservoir enables the watermaster of a water district to know when a reservoir is filling, passing water through the reservoir, or emptying.
13. Junayo does not want to install measuring devices on the inflow and outflow from the proposed reservoir. Junayo argues that such devices would be both expensive to maintain and unnecessary. According to Junayo, measuring devices would be difficult to maintain because they could wash out during high flow events. According to Junayo, measuring devices are unnecessary because flows in the unnamed stream taper off so rapidly that any water passed through the proposed reservoir during the irrigation season would seep into the ground before arriving at the point of diversion for any downstream senior water right. Orndorff Testimony.
14. A futile call occurs when curtailing an upstream junior right provides no water to an unsatisfied downstream senior right because the water seeps into the channel before reaching the senior's point of diversion. When a futile call occurs, the upstream junior water right holder may be allowed to continue diverting water.

15. In lieu of upstream and downstream measuring devices, Junayo is willing to install a staff gauge that could show, if paired with a rating table and checked multiple times, how fast a reservoir is filling or emptying. Orndorff Testimony; Shaw Testimony.
16. Junayo does not plan to install controlling works allowing it to regulate the rate of filling of the proposed reservoir. Orndorff Testimony.
17. The flow of water into an off-stream reservoir can be measured and regulated at a single point of diversion from the stream. To regulate an off-stream reservoir, the watermaster of a water district typically closes and locks the diversion works when the reservoir is full or when the right to fill it is out of priority. Junayo does not want to create an off-stream reservoir because there is no suitable location away from the current stream channel and because it does not want to have to create and maintain a new channel around the proposed reservoir site. Junayo is afraid a new, alternate channel could wash out during high flow events. Orndorff Testimony.
18. Rule 45.01.a.iv of the Department's Water Appropriation Rules states:

An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.
19. While arguing that it is not necessary, Junayo nevertheless proposes to mitigate for injury to senior water right holders on Reynolds Creek by releasing up to 30 acre-feet of water from one of the existing reservoirs it operates on Macks Creek or Reynolds Creek into Reynolds Creek. Junayo proposes to mitigate only when its proposed reservoir has not filled prior to the start of the irrigation season on March 15. Junayo proposes that the watermaster of Water District 57R determine how much water should be released to offset the amount of water needed to complete the initial filling of the proposed new reservoir after March 15 each year. Orndorff Testimony; Junayo's *Brief in Support of Memorandum*.
20. According to the water rights database maintained by the Department, Junayo owns the following water rights authorizing the storage of Reynolds Creek water or Mack Creek water:

Water Right	Priority Date	Source(s)	Storage Volume (Acre-Feet)
57-2325	8/10/1966	REYNOLDS CREEK	160.0
57-7040	2/24/1970	REYNOLDS CREEK	60.0
57-7400	1/13/1984	REYNOLDS CREEK	150.0
57-7454	6/30/1986	MACKS CREEK	25.0
57-7472	8/20/1987	REYNOLDS CREEK	10.0
57-7525	4/17/1990	MACKS CREEK	250.0
57-7532	12/13/1990	REYNOLDS CREEK	80.0
57-7583	1/14/1994	MACKS CREEK	90.0
57-7610	2/17/1995	MACKS CREEK, REYNOLDS CREEK	183.0
57-11629	5/21/2003	MACKS CREEK	9.9

21. According to the database of water rights maintained by the Department, the following water rights authorize year-round diversions of water from Reynolds Creek downstream from the mouth of Salmon Creek for stock watering purposes:

Water Right	Source	Priority Date	Stockwater Rate (cfs)
57-6	REYNOLDS CREEK	5/1/1875	0.09
57-281	REYNOLDS CREEK	12/12/1887	0.09
57-278	REYNOLDS CREEK	10/27/1887	0.02
57-275	REYNOLDS CREEK	10/28/1887	0.03
57-274	REYNOLDS CREEK	10/28/1887	0.02
57-273	REYNOLDS CREEK	1/27/1888	0.05
57-272	REYNOLDS CREEK	9/26/1884	0.03
57-2094K	REYNOLDS CREEK	2/15/1916	0.05
57-2041	REYNOLDS CREEK	9/26/1911	0.03
57-2000	REYNOLDS CREEK	6/10/1903	0.09
57-11877	REYNOLDS CREEK	9/26/1884	0.02
57-11839	REYNOLDS CREEK	10/28/1887	0.01
57-11777	REYNOLDS CREEK	3/22/1889	0.02
57-11776	REYNOLDS CREEK	3/22/1889	0.02
57-11164	REYNOLDS CREEK	1/1/1875	0.02
57-11164	REYNOLDS CREEK	1/1/1875	0.02
57-11160	REYNOLDS CREEK	1/1/1875	0.02
57-11159	REYNOLDS CREEK	1/1/1875	0.02
Total			0.65

22. Seven prior water rights authorize diversion of water from Salmon Creek downstream from Junayo's proposed point of diversion:

Water Right	Priority Date	Diversion Rate	Water Use(s)
57-1033	4/1/1957	0.220	IRRIGATION
57-2026A	4/29/1908	0.811	DOMESTIC, IRRIGATION, STOCKWATER
57-2026B	4/29/1908	0.189	IRRIGATION
57-10930A	9/1/1863	0.020	STOCKWATER
57-11166	1/1/1875	0.020	STOCKWATER
57-11173	1/1/1875	0.020	STOCKWATER
57-11766	6/1/1875	0.020	STOCKWATER

23. The stockwater component of Right 57-2026A is for 0.05 cfs.
24. Each of the five stockwater rights listed in Finding of Fact No. 22 authorizes year-round water use.
25. Downstream from Junayo's proposed reservoir site, the nearest authorized diversion points for irrigation purposes are on the "Boston place." The Boston place is three or four miles downstream from Junayo's proposed reservoir site along Salmon Creek. Water rights for the Boston place, 57-1033 and 57-2026A, are diverted from Salmon Creek, but there is no

measuring device on the points of diversion for these water rights. Orndorff Testimony; Hoagland Testimony. It is not clear why there are no measuring devices for the Boston rights. One possibility is that there is rarely sufficient water in Salmon Creek for irrigation. However, the daily records of the watermaster of Water District 57R show water use for the Boston place as late as July 12 as recently as 2011. Exhibit 9. The watermaster's daily records for 2013 through 2015 show no water use for the Boston place. Exhibits 12, 16, and 19.

26. The location of Junayo's proposed reservoir is remote from most of the other diversions regulated by Water District 57R. Orndorff Testimony. Accessing it to evaluate flows into the reservoir would represent a significant new expense and time obligation for the watermaster of Water District 57R. Young Testimony.

CONCLUSIONS OF LAW

Governing Statutes and Rules

1. Idaho Code § 42-201(2) states:

No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.

2. Idaho Code § 42-202(1) states, in pertinent part:

For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall, before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources for a permit to make such appropriation.

3. Idaho Code § 42-203A(5), quoted above in this order, lists the criteria the Department must consider when evaluating an application to appropriate water. If the application fails to meet any of these criteria, IDWR may reject the application and refuse issuance of a permit.
4. Rule 45 of the Department's Water Appropriation Rules (IDAPA 37.03.08) further interprets the review criteria established in Idaho Code § 42-203A(5).

5. 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.”
6. Pursuant to Rule 40.04.c of the Department’s Water Appropriation Rules, the applicant bears the ultimate burden of persuasion regarding all the factors set forth in Idaho Code § 42-203A(5).

Quantity Proposed for Appropriation

7. The application cannot be for 30 acre-feet of water because Junayo did not submit a filing fee sufficient to cover 30 acre-feet. Junayo’s filing fee is sufficient for the storage of 20 acre-feet of water, but 20 acre-feet is not specifically listed anywhere on the application or in Junayo’s exhibits or testimony. The application cannot be for 15 cfs, as stated on the application, because it is for onstream storage, which is always expressed in acre-feet. The application should be limited to the storage of 15 acre-feet of storage because “15” is the number stated on the application as the total, even if “cfs” was stated in error. This conclusion is supported by the fact that 15 acre-feet is the total quantity stated in the legal notice published by the Department and the fact that Junayo’s filing fee is sufficient to cover 15 acre-feet of storage.

Potential for Injury to Existing Water Right Holders

8. Rule 45.01.a.i of the Water Appropriation Rules establishes the relevant criterion for determining whether the proposed use will reduce the quantity of water under existing water rights. An application will be found to cause injury to another water user if:

The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

9. For injury analysis purposes, the key factor in this case is Junayo’s unwillingness to install measuring devices and controlling works, except for possibly a staff gauge, at its proposed reservoir. If measuring devices (or a staff gauge) and controlling works were installed at the proposed reservoir, the watermaster would have the tools to regulate the storage of water as needed to prevent injury to downstream water users under any hydrologic circumstances. Without the measuring devices and controlling works, there will be no way for the watermaster to regulate the filling of the proposed reservoir by priority to prevent injury to downstream senior water right holders. Without the ability to regulate the storage of water, Junayo’s application can be approved only if the potential for injury is completely absent.
10. Junayo correctly asserts that in recent dry years, and even in dry parts of wetter years, regulating the filling of the proposed reservoir in an attempt to satisfy downstream senior water rights would be a futile call. However, as Brandau, who has decades of experience farming and ranching in the Salmon Creek and Reynolds Creek area, testified, the dry

conditions that would result in a futile call do not always prevail throughout the year in every year. Brandau's testimony is corroborated by Shaw's testimony and by Exhibits 2, 3 and 9. While Exhibits 2 and 3 show the flows of Reynolds Creek, not Salmon Creek, it is reasonable that the timing of flows in Salmon Creek is similar to that of the Reynolds Creek drainage as a whole. From the record it is not possible to conclude that water impounded in the proposed reservoir would never reach the diversion points for downstream senior water rights if left unimpeded. Therefore, it cannot be concluded that impounding the flow of water in the proposed reservoir would never cause injury to senior water rights.

11. There are three categories of senior water rights that could be injured by the initial filling of Junayo's proposed reservoir or by the unregulated ongoing filling to overcome depletions caused by evaporation, seepage, and consumption by stock and wildlife.
12. The first set of water rights that could be injured is senior Reynolds Creek rights authorizing diversions during the irrigation season. The proposed reservoir could cause injury to these water rights if it is filling or replenishing losses (evaporation, seepage, or use) while the flow of water in the unnamed stream, including the tributary seep, at the location of the proposed reservoir is connected to Salmon Creek and Reynolds Creek and the watermaster of water district 57R is actively regulating diversions by priority. Under these circumstances, injury would occur to downstream Reynolds Creek rights by directly depriving them of the natural flow of water. Injury could also occur to water right holders in the upper Reynolds Creek basin who must let water pass to achieve the 57 cfs threshold at the Outlet Weir when the water being impounded in the proposed reservoir would otherwise contribute to the Reynolds Creek flows at the Outlet Weir.
13. Junayo's proposed mitigation plan is intended to offset any injury that could occur to Reynolds Creek water rights during the irrigation season. The flaw with Junayo's mitigation proposal is that it addresses only the quantity of water needed to complete the initial filling of the proposed reservoir each year. It does not address the ongoing filling from the seep to replenish seepage and evaporation losses and water use during times when the flow from the unnamed stream is reaching Salmon Creek and, ultimately, Reynolds Creek, and water rights in Water District 57R are being regulated by priority. Conceivably, the mitigation plan could be adjusted to address the ongoing filling. The adjustment would authorize the watermaster to require storage releases from Junayo's Macks Creek or Reynolds Creek reservoirs to offset flow into the proposed reservoir during the regulated irrigation season if the watermaster thinks the flow into the proposed reservoir would otherwise reach Reynolds Creek. However, Junayo has not offered such mitigation.
14. The seven senior water rights diverted from Salmon Creek downstream of the proposed reservoir are the second set of water rights that could be injured by Junayo's proposal. Among these seven rights are the Boston place irrigation rights. Each of the seven water rights could potentially be injured by Junayo's proposed storage of water during the irrigation season if the flows originating at or upstream from the proposed reservoir location would naturally contribute to the flow of water at the downstream points of diversion. Junayo asserts that the Boston place irrigation points of diversion have no measuring devices because the flows in Salmon Creek are too paltry to either sufficiently irrigate the authorized place of use or contribute to the flows in Reynolds Creek during the periods that water

deliveries are being regulated in Water District 57R. However, Exhibit 9 shows the Boston place water rights were used deep into the irrigation season in 2011. The mere existence of the Boston place water rights, which could only be based on a record of past usage, combined with the 2011 water district records, confirms that water is available during the irrigation season in Salmon Creek in some years. It is possible that at some times water from the unnamed tributary does not reach Salmon Creek, and the water in Salmon Creek available for appropriation arises within Salmon Creek itself or is contributed from other tributaries. However, stream flows vary so much from year to year and time to time within the Reynolds Creek drainage that it is likely there are times during some irrigation seasons when impounding flows of the unnamed tributary, as Junayo proposes, would deprive downstream senior Salmon Creek water right holders of water. At the hearing Junayo suggested that the Boston water rights might not be injured because they have not been used recently. Just because a right has not been used recently does not mean it could not be used, in priority, at any time. Allowing the proposed reservoir to continue to impound water without regulation would injure the Boston place irrigation water rights at times they are being used. If the Boston place water rights would be injured during the irrigation season, so would the other five Salmon Creek water rights. Moreover, because it would not add water to Salmon Creek, Junayo's proposed mitigation plan does not offset the injury that would occur to the Salmon Creek water rights.

12. The third set of water rights to evaluate for injury is the downstream rights authorizing stock watering during the non-irrigation season. The year-round stock watering rights diverted from Salmon Creek downstream from Junayo's proposed reservoir total 0.13 cfs. The year-round stock watering rights diverted from Reynolds Creek downstream from the mouth of Salmon Creek total 0.65 cfs. Exhibit 2 shows that Reynolds Creek flows can be zero or very close to zero at the Outlet Weir in September, October, November, and December. The flows of Salmon Creek are also likely very paltry during October, November, and December. Therefore, even a slight change in stream flow could reduce the water available to satisfy the stock watering rights. The record does not support the conclusion that water from the unnamed stream never reaches Salmon Creek or Reynolds Creek during the non-irrigation season. Therefore, the proposed reservoir project could injure the downstream stock water rights. Because it does not contribute water to Salmon Creek or provide water to Reynolds Creek during the non-irrigation season, the proposed mitigation plan does not offset the injury that would occur to the stock watering rights.
13. Because Junayo's proposal could injure senior water rights, Junayo has not met its burden of persuasion regarding injury.

Sufficiency of the Water Supply

14. Rule 45.01.b of the Water Appropriation Rules establishes:

[T]he water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant), unless there are noneconomic factors that justify application approval.

15. During the snowmelt period in the early spring of at least some years, there is sufficient water flowing in the unnamed stream to fill the proposed reservoir. In addition, the seep flowing into the proposed reservoir site provides sufficient water to fill the proposed reservoir.
16. Junayo has met its burden of persuasion regarding the sufficiency of the water supply for the proposed use.

Application is Made in Good Faith and not for Delay or Speculative Purposes

17. Rule 45.01.c.i of the Water Appropriation Rules establishes the relevant criterion for determining whether the application was made in good faith:

The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and

18. Brandau is not disputing the good faith nature of Junayo's application.
19. Because Junayo owns the land at the proposed point of diversion and place of use, it has the required access necessary to construct and operate the proposed project.
20. Junayo has met its burden of persuasion for an application made in good faith.

Sufficiency of the Applicant's Financial Resources

21. Rule 45.01.d.i of the Water Appropriation Rules establishes the relevant criterion for determining whether the applicant has sufficient financial resources to complete the project:

An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director.

22. Brandau is not disputing the sufficiency of Junayo's financial resources.
23. Junayo has successfully completed other reservoir projects on its ranch land in the upper Reynolds Creek drainage.
24. Junayo has met its burden of persuasion regarding its financial ability to complete the project.

Local Public Interest

25. 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 water use on the public water resource.” The current definition of local public interest was adopted in 2003 and supersedes the evaluation criteria set forth in Rule 45.01.e of the Water Appropriation Rules which dates from 1993.
26. The current definition of local public interest requires an analysis of the effects of the proposed use on the public water resource itself. In other words, will the proposed use impact the public water resource in a way that renders it unable to accomplish other compelling public needs, such as important alternative uses or instream values?
27. One alternative for the water in the unnamed stream is that it provides drinking water and habitat for wildlife of many species. However, the proposed reservoir would provide even easier access to water for wildlife.
28. The other alternative for the water of the unnamed stream is the obligation to satisfy prior water rights, which is addressed under the heading “Potential for Injury to Existing Water Right Holders” above. The obligation to satisfy prior water rights is the overriding public interest consideration for the water in the unnamed stream.
29. Junayo has not met its burden of persuasion for the local public interest.

Conservation of Water Resources in Idaho

30. In 1990 the Idaho legislature implemented the conservation of water resources requirement for water appropriations. The Department’s Application Processing Memorandum No. 48, which addressed the requirement, states:

The term “conservation” is not defined in the legislative intent or in the amendment. . . . Due to lack of stated legislative intent, the department will apply the criterion in terms of efficiency as is generally suggested by the term.

The requirement has been interpreted by the Department to require standards of water use efficiency so that the proposed beneficial use is accomplished while preserving as much water as possible for other benefits.

31. Junayo did not provide the arithmetic to justify the quantity of water it is proposing to store. The application states the water is for 500 pairs of range cattle and for wildlife. A pair of cattle means a cow and its calf. The Department normally accepts that 500 range cattle will consume 6.7 acre-feet of water in a year. The Department normally determines wildlife consumption to be negligible, perhaps 0.1 AF per year. To provide enough water for the proposed beneficial use, the volume of water in the proposed reservoir must be sufficient to overcome seepage and evaporation losses. Junayo did not address seepage losses, but it did estimate evaporation losses at 5.0 acre-feet per year. It is customary in Idaho to allow

reservoir operators to carry over some storage from one year to the next so that the water supply in wet years can offset the deficit in dry years. Junayo's cattle would not be on-site to consume water from the proposed reservoir all year, so 6.7 acre-feet likely overestimates the amount of water the cattle would consume from the reservoir in a year. Nevertheless, 15 acre-feet is not an unreasonable request for consumption by 500 pairs of cattle and some wildlife when accounting for evaporation and seepage losses and some carryover.

32. Regardless of the potential for injury to downstream senior water rights, Junayo's total appropriation cannot exceed 15 acre-feet of water. (See the discussion in Conclusion of Law No. 7, above.) Junayo apparently proposes a reservoir covering two acres of surface area an average of five feet deep, or ten acre-feet total. Junayo also proposes that the seep will continually add to the proposed reservoir to help keep it full. According to Junayo, if the reservoir is full, incoming flow will pass through the proposed reservoir and over the spillway into the downstream channel. For Junayo's pass-through proposal to work without exceeding an annual diversion of 15 acre-feet of water, the proposed reservoir must be sized such that the volume initially filling the reservoir, the volume replacing seepage losses, the volume replacing evaporation losses, and the volume replacing consumption by stock and wildlife does not exceed 15 acre-feet. Junayo did not provide sufficient information about potential seepage losses to calculate the maximum reservoir size that will meet the 15 acre-feet limitation. The alternative would be for Junayo to install measuring devices and controlling works that could be used to regulate the storage of water in the proposed reservoir so that all incoming water is passed through the reservoir once the 15 acre-foot limit has been stored. However, Junayo does not propose to install measuring devices and controlling works.
33. Because Junayo has not provided sufficient information to show how its proposed reservoir would not exceed the 15 acre-feet it has applied to appropriate, Junayo has not met its burden of persuasion for the conservation of water resources in Idaho.

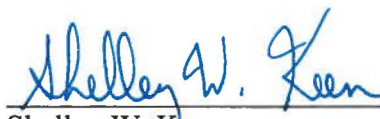
Effects on the Local Economy

34. This criterion applies only to "out-of-basin" appropriations. It does not apply in this case.

ORDER

Application for Permit No. 57-11849 is hereby **REJECTED** and issuance of a permit is **REFUSED**.

Dated this 22nd day of June, 2016.



Shelley W. Keen
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2016, I mailed a true and correct copy, postage prepaid, of the foregoing **ORDER STRIKING EXHIBITS AND PRELIMINARY ORDER REJECTING APPLICATION** to the person (s) listed below:

RE: Application for Permit 57-11849

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