

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

**IN THE MATTER OF APPLICATION )  
FOR WATER RIGHT NO. 67-08030 )                   FINAL ORDER  
IN THE NAME OF US DEPARTMENT )  
OF INTERIOR, BUREAU OF LAND )  
MANAGEMENT. )  
\_\_\_\_\_ )**

A preliminary order regarding the above titled matter was issued on January 26, 2000, and served on February 1, 2000.

On February 22, 2000, Doris Baker, protestant, faxed a letter to Karl Dreher, Director of the Idaho Department of Water Resources ("IDWR"), questioning the legal reasoning of the preliminary order. The contents were not specifically identified as exceptions to the preliminary order. Nonetheless, the letter was filed timely, and the arguments therein will be considered as exceptions to the preliminary order.

**ANALYSIS**

Baker argues that the federal government is not entitled to hold water rights because it is an "entity" not a person. She also argues that the water is owned by the state, not the federal government, and the federal government should not be able to take water from the states.

Idaho Code § 42-501 states:

The bureau of land management of the department of interior of the United States may appropriate for the purposes of watering livestock any water not otherwise appropriated, on the public domain.

Section 42-501 then describes how the Bureau of Land Management ("BLM") should file its applications with the IDWR and establishes a maximum flow rate of five (5) miners inches rate and maximum storage of fifteen (15) acre feet.

Application for water right no. 67-08030 seeks appropriation of 0.02 cubic feet per second ("cfs"), which is equivalent to one miners inch. This quantity is within the statutory authorization described by Section 42-501. The application was filed on forms furnished by IDWR. The application was processed according to procedures dictated by IDWR. It appears that BLM complied with all the statutory requirements. Rule 10.03 of the Water Appropriation Rules defines an applicant as a "person, corporation, association, firm, governmental agency or other entity." The rules allow appropriation by BLM under chapter 2 of the Idaho Code.

The legislature specifically granted BLM the authority to file applications, obtain permits, and perfect licenses for livestock purposes. As a result, the following findings of fact, conclusions of law, and order adopt the earlier preliminary order issued in this matter:

### FINDINGS OF FACT

1. On February 23, 1999, the U.S. Department of Interior, Bureau of Land Management ("BLM") filed application for water right no. 67-08030 with IDWR. The application was protested by Doris Baker.

2. Application no. 67-08030 proposes the following:

Source:	Spring tributary to sinks
Flow Rate:	0.02 cfs
Purpose of Use:	Stockwater (389 head) and Wildlife
Point of Diversion:	SW1/4NW1/4SW1/4, Section 33, T14N, R1E
Place of Use:	NW1/4SW1/4, Section 33, T14N, R1E
Season of Use:	1/1 through 12/31

3. In the late 1960's, Weldon Branch ("Branch"), the current grazing permit holder, excavated a pond in the area of a small spring at the proposed point of diversion. Water from the spring filled the pond, and Branch's cattle drank from the pond. The spring and pond were located on BLM property.

4. In 1986 Branch replaced the pond with a holding tank and a tractor tire that fills with water from the spring.

5. BLM filed a claim in the Snake River Basin Adjudication asserting perfection of a water right by beneficial use at the location. BLM subsequently withdrew its adjudication claim and filed application no. 67-08030 seeking a water right permit for the already existing water use.

6. Water from the spring does not flow overland to a surface water source. The Little Weiser River is located approximately one-half mile away from the spring, however. Percolating water from the spring is probably hydraulically related to the flows of the Little Weiser River.

7. Branch testified that the spring probably does not flow at the rate of nine gallons per minute (0.02 cfs). He testified, however, that during the fall of 1999, after an extended period without any rainfall, one of his employees visited the spring and found the tire trough full of water. Branch testified that water probably discharges from the spring during the entire year.

8. No one else has filed for a water right for stockwater from the spring described by the application.

9. BLM filed application no. 67-08030 for the benefit of allotment holders who graze cattle on lands administered by BLM.

10. Grazing by cattle on BLM allotments and the consumption of water by cattle on federal lands are important components of the cattle industry in the state of Idaho. The cattle industry is an integral part of the economy of the local area.

11. The waters of the Little Weiser River are regulated by a watermaster. During periods of low flow, some water rights are curtailed as a result of the regulation.

12. Applicant's Exhibit no. 3 is a copy of the grazing permit issued to Weldon Branch by BLM. Water from the spring will be consumed by cattle grazing on the Granger Butte Allotment. The grazing periods are from April 2 to June 30 and from October 15 to December 12. These are periods of time when additional water is available for appropriation in the Weiser River Drainage. Any other incidental ingestion during the year by wildlife or by limited stock would be nonconsumptive.

### CONCLUSIONS OF LAW

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

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the department of water resources may reject such application and refuse issuance of a permit 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 burden of proof for the factors IDWR must consider in Idaho Code § 42-203A.

3. While flows from the spring into the ground water may ultimately connect with flows of the Little Weiser River, the drinking of water during the grazing allotment

time periods and other incidental drinking during the remainder of the year will not injure other water users.

4. While the exact quantity of water flowing from the spring is not quantified, water is available the entire year, and the small amount of water sought should not be reduced.

5. The protestant argues that BLM should not be able to obtain a water right, and that any rights to water on public land should vest in the grazing allotment holder. Idaho Code § 42-501 recognizes the right of BLM to appropriate water for stockwater purposes.

6. The development proposed by the application is already complete. The application is not filed for purposes of speculation, delay, or in bad faith. Furthermore, because the water use is developed, the applicant has sufficient financial resources to complete the project.

7. The application is in the local public interest because the local cattle will use the water to the benefit of the local people. Use of the spring by cattle for watering will also relieve pressure on the riparian areas and other streams.

8. This application is consistent with conservation of the waters of the State of Idaho.

9. Water right no. 67-08030 should be approved.

### ORDER

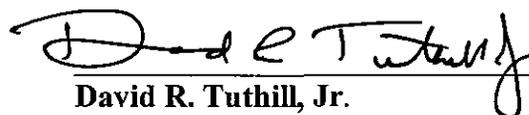
**IT IS HEREBY ORDERED** that application no. 67-08030 is **APPROVED**, subject to the following conditions:

1. Stockwater use is limited to 389 cattle.

2. Proof of beneficial use is due on or before July 1, 2009.

3. This right, when considered with all other rights common to the same grazing allotment, shall be limited to the quantity of water beneficially used by the number of stock within the allotment.

Dated this 29<sup>th</sup> day of June, 2008.



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David R. Tuthill, Jr.  
Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26<sup>th</sup> day of June, 2008, a true and correct copy of the document(s) described below were served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Final Order and Explanatory Information sheet for a Final Order when a hearing was held.

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USDI - BLM  
3948 DEVELOPMENT AVE  
BOISE ID 83705

DORIS BAKER  
1096 HIGHWAY 95  
INDIAN VALLEY ID 83632



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Water Allocation Bureau