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 STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT	)	**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"). IDWR assigned the application number 51-13040. On March 25, 2009, the BLM submitted an amended application ("Application") changing the proposed place of use.

The IDWR caused the application to be published in the Owyhee Avalanche on April 1, 2009 and April 8, 2009, in accordance with Idaho Code 42-203(A) and Rule 40.02.a.i of the Water Appropriation Rules (IDAPA 37.03.08.040.02.a.i). The published 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, the IDWR conducted a prehearing conference. The BLM and J&J Ranches requested that a hearing be scheduled.

On June 7, 2011, the IDWR conducted a hearing to resolve the protest filed against the application. Frederic W. Price ("Price"), Water Rights Specialist, appeared on behalf of the BLM. John W. Urquidi ("Urquidi"), General Partner in J&J Ranches, Inc. appeared on behalf of the J&J Ranches.

J&J Ranches argues that the Application should be rejected for the following reasons:

(1.) the water supply is insufficient for the proposed use;

(2.) the proposed appropriation would reduce the quantity of water available for J&J Ranches' rights and has, in fact, injured J&J Ranches' Little Jack's Creek and spring water rights for approximately 40 years, and injury is ongoing;

(3.) the application is speculative;

(4.) the application is not in the local public interest; and,

(5.) the application will adversely affect the local economy.

At the hearing, the hearing officer admitted the following items into evidence:

- Exhibit AA – BLM electronic mail regarding a well inspection
- Exhibit AB – IDWR Well Driller's log
- Exhibit PC – USGS Topographic map

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 ¼ NW ¼ NW ¼, 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 ¼ NW ¼, and Section 31, the NW ¼ NE ¼;
Township 10 South, Range 2 East, B.M.: Section 5, the SW ¼ NE ¼; Section 8, the NW ¼ NE ¼; and, Section 2, the NW ¼ SW ¼

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. Urguidi'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 application for permit no. 51-13040 is **DENIED** without prejudice.

Dated this 28th day of July, 2011.

VICKY MUSIC
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of July, 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 Postal Service, postage prepaid, and properly addressed to the following:

Document(s) Served: Preliminary Order Denying Application for Permit and Explanatory Information to Accompany a Preliminary Order when a hearing was held

US DEPT OF INTERIOR
BUREAU OF LAND MANAGEMENT
LOWER SNAKE RIVER DISTRICT
3948 DEVELOPMENT AVE
BOISE, ID 83705

US DEPT OF INTERIOR
BUREAU OF LAND MANAGEMENT
ATTN: FRED PRICE
1387 S VINNELL WAY
BOISE, ID 83709

JOHN B URQUIDI
DBA J & J RANCHES
34276 HOT CREEK RD
BRUNEAU, ID 83604

Denise Buffington

Denise Buffington
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

> Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
>
> (a) The petition for reconsideration is disposed of; or
> (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.