BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 61-11944 IN THE NAME OF THE NATIONAL DEFENSE VETERANS FOUNDATION	)))))	**PRELIMINARY ORDER**

On September 10, 2001, the National Defense Veterans Foundation (Foundation) filed an application for a new water right with the Idaho Department of Water Resources (IDWR). The application is numbered in the files of IDWR as 61-11944. The application was timely protested by Charles Olson and David Olson.

A hearing for the protest was conducted on April 19, 2002 in Mountain Home, Idaho. After presentation of evidence, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. The Foundation filed application for permit to appropriate water no. 61-11944 with IDWR, seeking the appropriation of ground water as follows:

Purpose of Use:	Domestic
Flow Rate:	0.19 cfs
Point of Diverson:	SWNW, Sec. 35, T03S, R06E
Place of Use:	SWNW, Sec. 35, T03S, R06E
Season of Use:	January 1 through December 31.

2. The point of diversion is located within the Mountain Home Groundwater Management Area. The Mountain Home Groundwater Management Area was created in 1982. At the time of creation, data suggested that the withdrawals from ground water nearly equaled the recharge to ground water. Since 1982, IDWR has approved a limited number of new water rights in the Mountain Home Groundwater Management Area for domestic and municipal purposes.

3. Application no. 61-11944 seeks the appropriation of water for use in five (5) homes and irrigation of associated lawns and shrubbery.

4. Application no. 61-11944 proposes the diversion of water from an existing well located on the proposed place of use. The well is a 16-inch diameter well drilled to a depth of 852 feet. The well was drilled in 1972.

5. Hal Franck appeared at the hearing on behalf of the Foundation.

6. Franck testified that the Foundation is a non-profit Idaho corporation formed to benefit veterans. Franck is the controller for the corporation. He stated that the organization has built ramp accesses in homes for disabled veterans.

7. The proposed place of use is a five-acre parcel located approximately one and one half mile south of the City of Mountain Home. A building parcel of approximately one acre, shown as "Tract 2" on page four of Protestants' Exhibit A, was split from the five acres in a partition allowance under the Elmore County Zoning Ordinances. The remaining property was subdivided into four additional lots. The lots are described as "Lot 1, Lot 2, Lot 3, & Lot 4" in Protestants' Exhibit A. Each lot is approximately one acre.

8. Contrary to the proposal in the application to build five individual homes, Franck testified that the Foundation now proposes to build a duplex on each of lots one, two, and three and a caretaker's home on tract two, the parcel that was originally split before the subdivision was approved. No building will be built on lot four, which is the lot upon which the well was constructed. Franck's proposal would result in the construction of seven dwelling units rather than the five units originally proposed by the application.

9. The protestants submitted a letter from the Elmore County Attorney, received into evidence as Protestants' Exhibit D, stating that the Elmore County Commission approved the building of a single-family residence on each of lots one, two, and three. The letter states that the approval did not authorize construction of duplexes. In addition to the three single-family homes that could be built in the subdivision, Franck testified that a home could be built on tract two as authorized by the original partition.

10. At most, the Foundation is authorized by Elmore County to build four dwelling units on its five-acre parcel.

11. The Foundation did not present any evidence regarding other water rights or the possible effect its proposal would have on these rights.

12. The Foundation did not present any information about the sufficiency of water supply and whether there is water available for appropriation.

13. Charles Olson and David Olson own farms located approximately 5-6 miles southeast of the Foundation's proposed point of diversion. Olsons irrigate their crops with ground water. Olsons also rely on ground water to supply their domestic water.

14. David Olson testified that the water level in his irrigation well has declined approximately 55 feet in the last ten years. He testified that the present water level in the well is 385 to 400 feet below land surface.

15. Charles Olson testified that the water level in his domestic well has declined 34 feet in the last 17 years. Charles Olson testified that the water level in his domestic well is presently 475 feet below land surface.

16. Protestants' Exhibit C is a compilation of hydrographs in the vicinity of the proposed point of diversion and in the larger Mountain Home area. The hydrograph labeled "#17" is a depiction of historical water levels in the well proposed to be used by the Foundation. The current water level in the Foundation well is approximately 450 feet below ground surface. The hydrograph for the Foundation well shows a water level decline of approximately 60 feet during the past 30 years. The hydrograph curve slopes downward at an approximate average water level decline of two feet per year. The declining hydrograph curve is evidence of an aquifer from which more water is being diverted than is being recharged. The hydrograph also demonstrates that there has not been an equalizing inflow of water to stabilize the aquifer as water levels have declined.

17. The present depth to water in the Foundation well and the present depths to water in the Olson wells are approximately the same distance. The declines in water levels are similar, although the water level in the irrigation well owned by David Olson has declined at a greater rate than the water levels in the Foundation or the Charles Olson wells. Nonetheless, the evidence shows that the wells are completed in the same aquifer. IDWR refers to the aquifer as the "regional aquifer." The evidence showed that water levels in the regional aquifer are steadily declining.

18. Franck stated that the Foundation has not estimated the cost of building the dwellings he proposes. When asked about a source of financing, Franck stated that the Foundation would attempt to raise the necessary money and, if the money could not be raised, the Foundation would seek grants to cover the costs of the housing.

19. Franck testified that the homes would be made available for local veterans living in the Mountain Home area. He stated that some of the veterans were living in less than acceptable conditions, and that the nicer homes would provide a better standard of living for the disabled veterans.

20. Franck stated that the Foundation would employ methods of conservation to ensure that the water is not wasted.

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 therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the burden of proof for the factors IDWR must consider in Idaho Code § 42-203A.

3. The Foundation did not provide any evidence about whether the diversion of water would reduce the quantity of water under existing water rights.

4. The Foundation did not submit any evidence about the sufficiency of the water supply. In contrast, the protestants submitted evidence to show that the water level in the

levels are evidence that withdrawals are exceeding recharge to the aquifer. As a result, there is insufficient water for the purpose sought.

5. The Foundation did not present evidence that it had sufficient financial resources to construct the project.

6. The Foundation proposes a use that is not permitted by Elmore County. The application is speculative until the Foundation can show that the County will or is likely to approve the building of dwelling units proposed to be supplied water by the water right application.

ANALYSIS

Improving the living conditions of veterans is a laudable goal of unquestionable merit. The local public interest would be well served by constructing homes for veterans who need better housing. The law, however, must be applied to the facts presented as evidence. The Foundation bore the responsibility of presenting facts into evidence showing that the proposed use of water would satisfy the law. The Foundation did not bear its burden of proof.

Failure to prevail in this contested case does not mean that the meritorious proposal by the Foundation cannot be accomplished. It is possible that existing water rights could be acquired and transferred to the Foundation property to supply the water needs for the veteran housing. There are also other alternatives that can be explored by the Foundation. IDWR will diligently assist the Foundation to explore options for finding domestic water for the proposed veteran housing if the Foundation continues to pursue its proposal.

ORDER

IT IS HEREBY ORDERED that application for water right no. 61-11944 is **REJECTED** and the issuance of a permit therefore is **REFUSED**, without prejudice.

Dated this 11th day of June, 2002.

Gary Spackman
Hearing Officer