

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 15-7381 IN THE)
NAME OF ANTON AND LACIE JENSEN)

**PRELIMINARY ORDER
ISSUING PERMIT**

On July 21, 2014, Anton and Lacie Jensen (“Jensen”) filed Application for Permit 15-7381 with the Idaho Department of Water Resources (“Department”), seeking a ground water right for irrigation and domestic uses. On August 5, 2014, Jensen filed an amended application which corrected the proposed point of diversion and place of use and decreased the total diversion rate.

The amended application was advertised to the public beginning on August 21, 2014, and was protested by Samaria Water & Irrigation Company (“SWIC”). A pre-hearing conference was held on October 3, 2014. The parties were unable to resolve the issues of protest at that time and requested that a hearing be held to decide the contested case.

An administrative hearing was conducted on December 4, 2014, at the Malad City / Oneida County Fire Department Building in Malad, Idaho. The parties (Jensen and SWIC) offered testimonial and documentary evidence into the record. After carefully considering the evidence in the administrative record for this case, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Amended Application for Permit 15-7381 proposes diverting ground water to irrigate 24 acres in Sections 13 and 14, T15S, R35E. The application also proposes providing year-round domestic water for a new home, to be constructed on the property. The proposed point of diversion, a new ground water well, would be located in the NENE of Section 14.
2. The proposed point of diversion and place of use are situated on lands owned by Jensen.
3. The original application described a total diversion rate of 0.52 cfs. Jensen’s amended application reduced the total diversion rate to 0.48 cfs.
4. During the hearing, Jensen requested that the permit development period be extended from one year to two years. SWIC had no objections to that change.
5. In the past, 12 of the 24 acres have been periodically irrigated with surface water (3.9 shares in SWIC). Jensen proposes to permanently move those shares of water to other lands upon approval of this permit.

6. Jensen hired Tom Wood of Clearwater Geosciences, LLP to evaluate the potential drawdown impact to existing wells and springs within a ½ mile radius of the proposed well. Wood prepared an initial report which was based on the elements listed in the original application. Wood prepared a revised report, dated October 11, 2014, which claimed to use a corrected flow rate for the revised analysis but which still appears to be based on the 0.52 cfs from the original application.

7. To determine the aquifer parameters in the area of the proposed well, Wood relied on information obtained from a pump test conducted on April 23, 2011 on a well located approximately 0.6 miles south of the proposed well. Based on the pump test data, Wood estimated the transmissivity of the local aquifer to be 78,000 ft²/day. This transmissivity value is consistent with another pump test conducted by Wood in the same area, which suggested a local transmissivity of 51,000 ft²/day.

8. The storativity of the local aquifer could not be determined through the pump tests. Wood estimated a storativity of 0.1, which he asserts is typical for unconsolidated aquifer materials. (See Exhibit A1, page 2)

9. Assuming a transmissivity value of 78,000 ft²/day and a storativity value of 0.1, Wood created a model to predict the drawdown occurring ½ mile from the proposed well. A number of other assumptions were incorporated into the model. Wood assumed that Jensen would divert at a full proposed diversion rate (0.52 cfs) for six months (180 days). He also assumed no-flow aquifer boundaries 4,000 feet to the west of the proposed well, 28,000 feet to the east of the proposed well, and 7,400 feet south of the proposed well. Applying this set of assumptions, the model predicted 1.75 feet of drawdown at the proposed well and 0.8 feet of drawdown at a distance of ½ mile from the proposed well.

10. The assumptions incorporated in Wood's model are conservative and over-estimate the potential drawdown effects. The amended application proposes a diversion rate of 0.48 cfs. The model, however, appears to be based on a diversion rate of 0.52 cfs. Further, the model assumes a diversion of 0.52 cfs for 180 consecutive days (185 acre-feet). It is unlikely that the proposed ground water well would be pumped for 180 days straight. New ground water rights in the Malad River drainage (Basin 15) are generally limited to 3.5 acre-feet per acre at the field headgate. Therefore, Permit 15-7381 would be limited to a maximum annual diversion volume of 84 acre-feet, less than half of the diversion volume used in the Wood model.

11. SWIC relies on two separate springs to provide water to its patrons during the irrigation season. Warm Springs is located approximately 2 miles to the northwest of the proposed well. A cold water spring (also known as Big Malad Spring or Elam Spring) is located approximately 6 miles to the northwest of the proposed well. The differences in temperature and water chemistry between the springs suggest that the Warm Springs and the Big Malad Spring are distinct hydrologic sources.

12. SWIC has two irrigation water rights from the Warm Springs (15-2023 and 15-2024). These rights, in combination, authorize the diversion of 6.5 cfs.

13. SWIC has experienced considerable declines in spring flow in recent years, particularly from the Warm Springs during the summer months. Representatives of SWIC assert that the Warm Springs dried up entirely for 11 days in 2013 and the north part of the springs (known as the Goddard right) did not flow for two months during 2014. According to company records, half as much water was delivered in 2013 as was delivered in 2008, which is a direct result of a lack of flow from the springs. The same records also indicate that present day delivery from the two springs is about one-third of historical levels.

14. SWIC representatives have observed that the flow from Warm Springs declines when nearby wells are turned on at the beginning of the irrigation season. SWIC asserts that flow reductions are visible within one week of the start of ground water pumping, and that spring flows generally return or recover within two weeks of well shutdown. The present flow of Warm Springs is approximately 200 inches, or 4.0 cfs, which represents the non-irrigation season spring discharge.

15. Department records show 74 ground water irrigation rights exist within a 3-mile radius of the Warm Springs. 24 of these rights are represented by active water right permits with priority dates of 1996 and later. The spatial distribution of these rights is mostly to the east of the Warm Springs, although the closest irrigation well is situated 300 feet to the southwest of the spring.

16. Department records show 11 additional ground water rights which may divert within the same 3-mile radius. These water rights are statutory claims (filed pursuant to Idaho Code § 42-243) and may represent an additional 1,250 acres of ground water irrigation. Neither the Department nor a court has ever verified the elements listed in the statutory claims.

17. Jensen testified that surface water from SWIC has been used to irrigate the proposed place of use in the past. Jensen affirms that he holds a total of 16.9 shares of SWIC stock, including the 3.9 shares which are proposed to be permanently moved to other farm ground. Shares in SWIC may be moved around on acres within the company based on demand. Jensen testified that he rotates the 3.9 shares between the proposed place of use and his other farm ground according to his needs and based on water availability. Therefore, it is difficult to identify the number of SWIC shares that are associated with the proposed place of use.

18. One share in SWIC entitles the shareholder to 2.00 cfs for a 6-hour period per turn (approximately 1 acre-foot of water per turn). During the years 2008 to 2012, shareholders received 4 to 5 turns per year (with each turn being a 6-hour block of water). However, in recent years, with the decline in spring flow, there has only been enough water to supply SWIC shareholders less than 3 turns per year.

19. Jensen testified that he used only 1 turn of SWIC shares to irrigate the proposed place of use during 2014. Jensen asserts that the east half of the property has a high water table and the grass pasture there will usually support grazing through July without irrigation. Jensen further testified that with ground water irrigation he anticipates he will be able to harvest up to

three cuttings of alfalfa hay on the west half of the proposed place of use, and provide augmentation water to the grass pasture on the east half of the property.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A(5) 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 . . . 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 ultimate burden of proof regarding all factors set forth in Idaho Code § 42-203A(5).

Injury to Other Water Rights

3. Rule 45.01.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the evaluation criteria for determining whether a proposed water use will reduce the quantity of water under existing water rights. A reduction will occur if "[t]he 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." (IDAPA 37.03.08.45.01.a.i)

4. Injury to surrounding ground water wells is governed by Idaho Code § 42-226, which states: "Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources . . ." Reasonable pumping levels have not been established for the Basin 15. Therefore, the reasonableness of drawdown impacts to neighboring wells must be evaluated on a case-by-case basis

5. The expected drawdown impact to nearby ground water wells is reasonable. Wood predicts the potential drawdown at a distance of ½ mile from the proposed well to be 0.8 feet. The actual drawdown impact at ½ mile from the proposed well will be much less than 0.8 feet because the Wood model overestimates the total volume diverted at the proposed point of diversion. Permit

15-7381 will be limited to a maximum diversion volume of 84 acre-feet, less than half the volume used in the Wood model.

6. SWIC's main issue of protest related to potential impact to spring flow from Warm Springs and Big Malad Spring. SWIC's spring is located 2 miles from the proposed point of diversion. Evidence in the record suggests it is unlikely that the proposed diversion by Jensen will have any effect on SWIC's Warm Springs. The proposed diversion will have no measureable impact on the Big Malad Spring.

7. Smaller springs (such as Thorpe springs) are located within ½ mile to the southeast of the proposed well. There are water rights associated with the springs, which are represented by statutory claims filed pursuant to Idaho Code § 42-243. There is not enough information in the administrative record to determine whether diversion from the proposed well will reduce the flow from these springs below the amount recorded by the claims. The lack of historical measurement records for Thorpe springs and other springs in the area makes it difficult to determine injury.

8. The Applicant has shown by a preponderance of the evidence that the proposed ground water diversion will not reduce the quantity of water under existing water rights.

Sufficiency of Water Supply

9. The Applicant met his burden of showing that the water supply is sufficient for the proposed beneficial use. Wood's previous pump tests confirm that the local aquifer has a good water yield.

Speculation / Financial Resources

10. The Applicant met his burden of showing that the application was made in good faith and that he has sufficient financial resources to complete the proposed irrigation project. The lands are owned by applicant and he is farming other lands in the area.

11. The Applicant's request that the development period for the permit be extended to two years is reasonable and does not constitute speculation.

Local Public Interest

12. The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a). Local public interest is defined 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." (Idaho Code § 42-202B(3)) The evidence presented by the protestants was focused on the question of injury (addressed above). There was no evidence presented by the protestants pertaining to the question of local public interest. Application 15-7381 states that ground water will be used for agricultural purposes, the primary use of ground water in the local community. The Applicant met his burden of proof for this element.

Conservation of Water Resources

13. The Applicant met his burden of showing that the proposed use will be compatible with the conservation of water resources within the state of Idaho. The proposed project will incorporate sprinkler irrigation, a conservative use of water.

14. According to the evidence provided, Jensen has already used most of his SWIC shares on other farm ground out of necessity. The small amount of surface water used on the property is negligible. With reduced turns per share, shareholders in SWIC have been forced to assign more shares to farm acres. SWIC testified that it is unlikely that the annual delivery to its patrons will return to historic levels. Therefore, for purposes of this contested case, Jensen's surface water shares will not be permanently tied to the proposed place of use.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 15-7381 in the name of Anton and Lacie Jensen is APPROVED with the following elements and conditions:

Priority Date: August 5, 2014
Source: Ground Water
Season of Use: 4/1 – 10/31 (Irrigation)
 1/1 – 12/31 (Domestic)
Diversion Rate: 0.48 cfs (Irrigation)
 0.04 cfs (Domestic)
Total Diversion Rate: 0.48 cfs
Point of Diversion: NENE, Sec 14, T15S, R35E
Place of Use: Sec 13, T15S, R35E NWNW 10.6 acres
 SWNW 1.4 acres
 Sec 14, T15S, R35E NENE 12.0 acres
 Total 24.0 acres

Permit Conditions

1. Proof of application of water to beneficial use shall be submitted on or before **February 01, 2017.**
2. Subject to all prior water rights.
3. After specific notification by the Department, the right holder shall install a suitable measuring device or shall enter into an agreement with the Department to use power records to determine the amount of water diverted and shall annually report the information to the Department.
4. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
5. Domestic use is for one home.

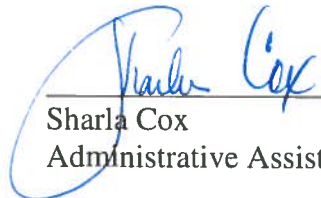
6. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.
7. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

Dated this 6th day of January, 2015.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of January, 2015, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER ISSUING PERMIT, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:


Sharla Cox
Administrative Assistant

US MAIL

RE: PRELIMINARY ORDER ISSUING PERMIT

**Anton & Lacie Jensen
80 Reynolds St
Malad, ID 83252**

**Samaria Water & Irrigation Co.
c/o David Reel
5176 South 4400 West
Malad, ID 83252**

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.