

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR PERMIT NO. 61-12274 IN THE	)	
<u>NAME OF LOUIS D. JEFFREY</u>	)	PRELIMINARY ORDER
		ISSUING PERMIT

On June 12, 2012, Louis D. Jeffrey ("Jeffrey" or "Applicant") filed an application with the Idaho Department of Water Resources ("Department"), seeking a permit to divert 0.03 cfs from ground water within the SE ¼ NW ¼ SW ¼ of Section 33, T05S, R10E, for irrigation and stockwater use near Glenns Ferry in Elmore County. The application was assigned number 61-12274 ("Application 61-12274"). On July 3, 2012, Jeffrey amended Application 61-12274 to increase the diversion rate to 0.06 CFS and to include wildlife as a beneficial use.

The Department published notice of Application 61-12274 beginning on July 18, 2012. Protests were filed by Edward T. Potucek ("Potucek"), Idaho Fresh Pak, LLC ("IFP"), and Robert K. Hall ("Hall"). Potucek, IFP and Hall are collectively referred to in this order as "the Protestants."

Protestants Potucek and Hall assert that the supply of ground water in the Glenns Ferry area is insufficient to support the proposed diversion and that the use of ground water proposed by Jeffrey will interfere with their ability to divert ground water for existing domestic uses.

The Protestants also assert that, because private stipulated agreements are in place between IFP and Potucek and between IFP and Hall (whereby IFP or its successor in interest is required to assure a supply of domestic water to Potucek and Hall), any new negative effect on the domestic ground water diversions of Potucek and Hall, will have to be mitigated by IFP or its successor in interest.

An administrative hearing was conducted on September 18, 2013, at the Department's main office in Boise, Idaho. Protestants Potucek and Hall were present at the hearing and represented themselves. IFP was represented by an attorney, Jerry Rigby. Mr. Rigby noted that IFP had recently sold the processing facility in Glenns Ferry to a new owner. The Applicant was also present at the hearing and represented himself.

The following witnesses testified at the hearing:

- Applicant Louis D. Jeffrey
- Protestant Robert K. Hall
- Protestant Edward T. Potucek
- Roger Warner of Rocky Mountain Environmental Associates, Inc. testified as an expert witness for Protestant Idaho Fresh Pak, LLC.

The following exhibits were accepted into the administrative record:

- Exhibit A1 – Written statement from Jeffrey, well log for Jeffrey’s well (Well ID No. 431907), photograph of the place of use for Application 61-12274, and the cover sheet of an owner’s manual, with pump specifications, for the submersible pump used by Jeffrey to divert water at the proposed point of diversion.
- Exhibit 1 – Report prepared by Rocky Mountain Environmental Associates, Inc.
- Exhibit 2 – Agreement between Magic West, Inc. (“Magic West”) and Hall (May 6, 1999).
- Exhibit 3 – Agreement between Magic West and John R. Solosabal (May 6, 1999).
- Exhibit 4 – Agreement between Magic West and Jerry L. and Shirley A. Heath (May 6, 1999).
- Exhibit 5 – Agreement between Magic West and Elizabeth Eichholtz (March 18, 1999).
- Exhibit 6 – Agreement between Magic West and Fred Mackey (May 6, 1999).
- Exhibit 7 – Agreement between Magic West and Potucek, Gary N. Nelson, and Nancy Nelson (May 12, 1999).
- Exhibit 8 – Water Permit Report for Water Right No. 61-7724.

FINDINGS OF FACT

Applicant – Louis D. Jeffrey

1. Amended Application 61-12274 proposed the following:

Flow Rate:	0.06 cfs for irrigation 0.02 cfs for stockwater 0.06 cfs for wildlife Total Rate: 0.06 cfs
Purposes of Use:	Irrigation of 2.0 acres, stockwater, and wildlife
Source of Water:	Ground Water
Period of Use:	Irrigation: March 15 - November 15 Stockwater & Wildlife: January 1 - December 31
Point of Diversion:	NWSW, Section 33, T05S, R10E, B.M., Elmore County
Place of Use:	NESW and NWSW, Section 33, T05S, R10E, B.M., Elmore County

2. The proposed point of diversion for application 61-12274 is a ground water well drilled by Artesian Company under Drilling Permit No. 914097-862727 and identified by the Department as Well ID No. 431907 (“Well 431907”).
3. Well 431907 was completed on April 17, 2012, with a casing diameter of 8-inches, and a depth of 738 feet.

4. The well driller's report for Well 431907 describes a water temperature in the well of 72-75 degrees Fahrenheit and a static water level of 44 feet. A pumping test was performed by the driller, which resulted in a yield of 4.7 gallons per minute (gpm) after pumping for 240 minutes, and a drawdown of 230 feet. A pumping rate of 4.7 gpm is equivalent to 0.01 cfs.
5. The Applicant installed a ½ horse power pump with a 230 volt, 5 amp electrical connection in Well 431907. With this configuration, the Applicant can divert 0.01 cfs to a single sprinkler bird equipped with a 1/8-inch nozzle. The Applicant uses five separate permanent-set sprinklers to irrigate approximately 1.5 acres (based on 2012 and 2013 aerial photos).
6. Irrigation of the 1.5 acres is accomplished by rotating the water individually amongst the five sprinklers, such that each sprinkler is delivered water for approximately 12 hours, with all five sprinklers receiving one rotation of water over a period of seven and a half days, after which the rotation is repeated.
7. The Applicant also uses Well 431907 to fill two troughs for livestock and wildlife purposes. It takes approximately 12 hours of pumping to fill the troughs. The troughs are filled once per week.
8. Well 431907 is not used to provide water for a home or for any other buildings.
9. The Applicant used his well and pump configuration to irrigate 1.5 acres during the 2012 and 2013 irrigation seasons. During this time the applicant observed no decline in water levels within Well 431907 that would result in the water table being below his submersible pump, which is set at a depth of 300-350 feet.
10. The Applicant has a second well located approximately 2,000 feet to the northeast of Well 431907. While pumping Well 431907 during the 2012 and 2013 irrigation seasons, the Applicant observed a rise in the water level in the other well.
11. The Applicant testified that Well 431907 is completely built out at this time and that he does not intend to change the pump or electrical configuration of the well to increase its pumping capacity.

Protestant – Edward T. Potucek

12. Potucek owns and operates a well located in SE ¼ NE ¼, Gov't Lot 9, Section 32, T05S, R10E, for domestic and stockwater purposes (under water right 61-10331). The well produces low temperature geothermal water with a reported temperature of 104 degrees Fahrenheit. Water right 61-10331 authorizes a diversion rate of 0.04 cfs.
13. Potucek's well was already constructed at the time he purchased the property in 1972.

14. Potucek's well is located approximately 2,080 feet to the northwest of Applicant's Well 431907 and is completed to a depth of approximately 1,200 feet.
15. Potucek's well is free flowing when IFP is not using its processing plant well ("Well 393018"). In the past, free flowing conditions at the Potucek well have been measured at 27 inches (0.50 cfs).
16. When IFP is pumping from Well 393018 water levels decline in Potucek's hot water well to the point that it is no longer free flowing.
17. It takes approximately two days for the impacts of pumping from IFP's Well 393018 to affect Potucek's well.
18. Potucek's well is currently a free flowing well and has been for several years.
19. Potucek protested Application for Permit 61-7724 (filed by Magic West). To resolve that protest Potucek entered into a private agreement with Magic West (IFP's predecessor in interest), whereby Magic West agreed to mitigate domestic and stockwater shortages experienced by Potucek due to ground water diversions from Well 393018.

Protestant – Idaho Fresh Pak, LLC

20. Application 61-12274 was protested by IFP on the grounds that it may cause injury to or create additional mitigation obligations under IFP's Permit 61-7724.
21. IFP owns and operates a well located in SW ¼ SW ¼ SE ¼, Section 29, T05S, R10E, for industrial purposes (at a potato processing plant). The industrial use is limited to the diversion of 0.67 CFS of ground water in association with Permit 61-7724.
22. The point of diversion associated with Permit 61-7724 is IFP's processing plant well, which is identified by the Department as Well 393018.
23. Well 393018 was drilled in 1974. It is located approximately 2.3 miles to the northwest of Applicant's Well 431907 and is completed to a depth of approximately 1,230 feet.
24. IFP acquired the processing plant and Permit 61-7724 from Magic West.
25. In a memo prepared by Department hydrologist Shane Bendixsen dated May 3, 2001, ground water diversion records from September 26, 1996 to April 3, 2001 were summarized for Well 393018. IFP's average ground water diversion rate from Well 393018 was reported to be 1.3 million gallons per week, or 0.29 CFS.
26. Diversion records from well 393018 after April 3, 2001 were not presented at hearing and are not part of the Department's water right records.

27. Currently the IFP Glenns Ferry processing plant is not in operation and Well 393018 is not in use. The facility has not been in production since at least 2011.

Protestant – Robert K. Hall

28. Hall owns and operates a well located in NE ¼ NE ¼, Section 35, T05S, R09E, for domestic purposes (under water right 61-10013). Water right 61-10013 authorizes a diversion rate of 0.04 cfs.
29. Hall's well was constructed around 1952.
30. Hall's well is located approximately 3.3 miles to the west of Applicant's Well 431907 and is completed to a depth of greater than 500 feet.
31. Hall's well is a free flowing well when IFP is not using its processing plant Well 393018.
32. When IFP is pumping from Well 393018 water levels decline in Hall's well to the point that he no longer has free flowing conditions.
33. It takes approximately two days for the impacts of pumping from IFP's Well 393018 to affect Hall's well.
34. Hall's well is currently a free flowing well and has been for several years.
35. Hall protested Application for Permit 61-7724 (filed by Magic West). To resolve that protest Hall entered into a private agreement with Magic West (IFP's predecessor in interest), whereby Magic West agreed to mitigate domestic and stock water shortages experienced by Hall due to ground water diversions from Well 393018.

Hydrogeology – Glens Ferry Area

36. There are two aquifers in the Glenns Ferry area: a shallow, cold water aquifer and a deep, low-temperature geothermal aquifer. The interaction between the two aquifers is not well defined.
37. In 2001, Department hydrologist Shane Bendixsen described the cold water aquifer as "quite stable." He found the deep geothermal aquifer to have increasing ground water levels in the eastern part of Glenns Ferry and possible decreasing levels in the western part of Glenns Ferry.
38. As part of its ground water level measurement program the Department regularly measures ground water levels for well 05S 10E 28DBA1 (Heath Well), a well located northeast of Glenns Ferry, completed at a depth of 995 feet. From 2005 to 2011, water levels in the Heath Well have increased by approximately 13 feet, and since 2008 water levels have remained at an elevation above land surface (flowing).

39. As part of its ground water level measurement program the Department regularly measures ground water levels for well 05S 09E 36DAB1 (Airport), a well located at the Glenns Ferry Airport, completed at a depth of 1,100 feet. From 2005 to 2013, water levels in the Airport Well have increased by approximately 18 feet.

CONCLUSIONS OF LAW

1. Idaho Code § 42-227 states that a person drilling a ground water well for “domestic purposes” is not required to pursue and obtain a water right permit.
2. Idaho Code § 42-111 defines "domestic purposes" as:
 - (a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or
 - (b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.
3. 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 . . . 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.
4. The applicant bears the ultimate burden of proof regarding all the factors set forth in Idaho Code § 42-203A.
5. Idaho Code § 42-226 states in pertinent part:

[W]hile the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director

6. The Idaho Supreme Court ruled in *Parker v. Wallentine*, 103 Idaho 506 (1982), that domestic wells drilled prior to 1978 are exempt from the provisions of Idaho Code § 42-226. In other words, the reasonable pumping level standard of Section 42-226 cannot be applied to domestic wells drilled prior to 1978.

7. Idaho Code § 42-231 states in pertinent part:

In addition to other duties prescribed by law, it shall be the duty of the director of the department of water resources . . . to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.

Legal Analysis

8. The proposed water use is not associated with a home and exceeds the ½ acre irrigation limit described in Idaho Code § 42-111(a).
9. The Applicant testified that water would be diverted at a rate of 0.01 cfs (4.7 gpm) over a multiple day time period. 0.01 cfs diverted for 24 hours equates to 6,700 gallons per day. This exceeds the 2,500 gallon per day limit set forth in Idaho Code § 42-111(b).
10. The proposed ground water use described in Application 61-12274 does not meet the definition of “domestic purposes” set forth in subsections (a) and (b) of Idaho Code § 42-111 and, therefore, the proposed use requires a water right permit.
11. The Applicant testified that he would be satisfied with a total diversion rate of 0.01 cfs to be used for irrigation purposes and for the filling of stockwater/wildlife troughs. He stated that the well currently produces 0.01 cfs and he does not intend to increase the capacity of the well.
12. The two stockwater/wildlife troughs are filled approximately once a week throughout the entire year. The troughs take approximately 12 hours to fill. The diversion of 0.01 cfs for 12 hours per week equates to approximately 3,300 gallons per week or 170,000 gallons per year (0.5 acre-feet per year).
13. The proposed irrigation season of use is from March 15 to November 15 (246 days). A continuous diversion of 0.01 cfs for the entire irrigation season (246 days) is equal to 4.9 acre-feet. However, at least 12 hours per week will be dedicated to pumping for stockwater/wildlife (0.4 acre-feet). Therefore, the annual volume used for irrigation will be approximately 4.5 acre-feet. The Applicant’s combined annual volumetric needs for irrigation, stockwater, and wildlife equals approximately 5.0 acre-feet.
14. Protestants Potucek and Hall testified that ground water levels in their wells decline dramatically when IFP diverts water from Well 393018. The decline in ground water

levels is observed within days of the start of pumping from Well 393018. In addition, a positive effect on ground water levels at the Hall and Potucek wells are observed within days of IFP ceasing ground water diversions from Well 393018. The evidence in the administrative record strongly suggests that the previous declines in water levels in the Hall and Potucek wells are directly attributable to the pumping of IFP's Well 393018 under Permit 61-7724.

15. Pursuant to Idaho Code § 42-226, ground water appropriators are not entitled to historic or absolute ground water levels, but reasonable pumping levels. Because Permit 61-7724 does not describe a domestic use, it is subject to the reasonable pumping level standard set forth in Section 42-226.
16. Ground water diversions for domestic purposes that commenced prior to 1978 are exempt from the reasonable pumping level standard. The domestic water use from Hall's well began around 1952. The domestic water use from Potucek's well began prior to 1972. Therefore, Hall's well and Potucek's well may be exempt from the reasonable pumping level standard described in Idaho Code § 42-226.
17. Both Hall and Potucek currently have a sufficient supply of water from their wells, even during times when the Applicant has been pumping ground water from Well 431907. The evidence in the administrative record indicates that the Applicant's diversion of 0.01 cfs had no appreciable effect on any of the Protestants' wells in 2012 and 2013.
18. To resolve protests against its Permit 61-7724, Magic West entered into private mitigation agreements with seven different parties, including Potucek and Hall. In its mitigation agreements, Magic West (and its successors in interest) agreed to protect the existing water uses of the parties, including Potucek and Hall. IFP argues that because the private mitigation agreements are now in place, IFP (or its successors) could be held responsible to mitigate for diversions under water rights junior to Permit 61-7724.
19. The Department was not a party to any of the private agreements associated with Permit 61-7724 and is not legally bound thereunder. In addition, the Department was not asked to and did not approve any of the private agreements.
20. It is not reasonable that a series of private mitigation contracts between Magic West and a small subset of the water users in the Glenns Ferry area could preclude all future ground water development in the area. Furthermore, the Department does not know how a court of law would interpret and enforce the private agreements.

Satisfaction of Idaho Code §42-203A Criteria

21. Diversion and use of water as described by the Applicant in his testimony, limited to a diversion rate of 0.01 cfs and an annual diversion volume of 5.0 acre-feet, will not appreciably reduce the quantity of water under existing water rights.

22. The local ground water supply is sufficient for the proposed water use. Jeffrey was able to pump 0.01 cfs from Well 431907 throughout 2012.
23. The application has been made in good faith and is not speculative as evidenced by the fact that the system proposed in Application 61-12274 has already been constructed.
24. The Applicant has sufficient financial resources to complete the project as evidenced by the fact that all improvements associated with the beneficial use of Application 61-12274 have already been paid for and installed.
25. The application is in the local public interest because it supports the full economic development of the ground water resource as described in Idaho Code § 42-226. In the event that local aquifer levels change substantially in the future, Well 431907 should be equipped with a lockable device.
26. The proposed diversion and delivery system is consistent with principles of conservation of the water resources as long as the rotational practice described by the Applicant, whereby water is rotated individually amongst five separate permanent set sprinklers, is implemented.

ORDER

IT IS HEREBY ORDERED that Application 61-12274 is **APPROVED** with the following elements and conditions:

Flow Rate:	0.01 cfs for irrigation 0.01 cfs for stockwater 0.01 cfs for wildlife Total Rate: 0.01 cfs
Purposes of Use:	Irrigation of 1.5 acres, stockwater, and wildlife
Source of Water:	Ground Water
Priority Date:	July 3, 2012
Period of Use:	Irrigation use: March 15 - November 15 Stockwater & Wildlife use: January 1 - December 31
Point of Diversion:	NW ¼ SW ¼, Section 33, T05S, R10E, B.M., Elmore County
Place of Use:	NW ¼ SW ¼, Section 33, T05S, R10E, B.M., Elmore County

Conditions:

1. Proof of application of water to beneficial use shall be submitted on or before **April 01, 2015**.
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. The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.
5. Any license issued by IDWR pursuant to the right or portion thereof for the use of trust water is subject to a term review of 20 years after the date of this approval to determine availability of water for the use and to re-evaluate the public interest at the end of the term.
6. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the place of use.
7. Stockwater use is for 50 head of mixed stock.
8. Prior to diversion of water under this right, the right holder shall install a lockable device, subject to the approval of the Department, in a manner that will provide suitable control of the diversion.

Dated this 11th day of March, 2014.


James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th, day of March, 2014, a true and correct copy, certified and postage prepaid, of the forgoing PRELIMINARY ORDER ISSUING PERMIT to the person(s) listed below:

U.S. MAIL – CERTIFIED

RE: Preliminary Order Issuing Permit No. 61-12274

**Louis D Jeffrey
2050 E Medicine Wheel Ln
King Hill ID 83633**

**Edward T Potucek
1890 E Potucek Ln
King Hill ID 83633**

**Idaho Fresh Pak LLC
c/o Lep Herbert
357 Constitution Way
Idaho Falls ID 83204-3538**

**Robert K. Hall
2975 W Latty Dr
Glenns Ferry ID 83623-5010**

**Rigby Andrus and Rigby
PO Box 250
Rexburg ID 83440**

**Rocky Mountain Environmental Associates
482 Constitution Way #300
Idaho Falls ID 83402**



**Sharla Cox
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.