

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

IN THE MATTER OF APPLICATION)
TO APPROPRIATE WATER NO.)
73-11973 IN THE NAME OF USDI,)
BUREAU OF LAND MANAGEMENT)
_____)

PRELIMINARY ORDER

On September 9, 2002, the United States Department of the Interior, Bureau of Land Management ("BLM") filed an application to appropriate water with the Idaho Department of Water Resources ("IDWR" or "Department"). IDWR assigned the application number 73-11973. IDWR published notice of the application. Western Watersheds Project ("WWP") protested the application.

On March 22, 2007, IDWR conducted a hearing for the protest in Challis, Idaho. Alan Bittner, an employee of BLM, represented BLM. Jonathan Marvel, the executive director for WWP, represented WWP. Based on the testimony and other evidence presented at the hearing, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application no. 73-11973 proposes the following:

Source:	Spring (water from spring sinks into the ground)
Flow rate:	0.02 cfs
Purpose of use:	Stockwater and wildlife
Season of use:	Year-round
Point of diversion:	Township 13 N, Range 21 E, Section 6, NENESW ¹
Place of use (three water troughs)	Township 14 N, Range 21 E, Section 28, NWSE
	Section 29, SESE
	Section 32, NESE

2. The spring from which application 73-11973 proposes to divert water is a spring located near Opal Springs but is not the Opal Springs identified on the USGS quadrangle map.

¹ In this decision, the public land survey numeric descriptor "1/4" is assumed to follow each two alpha character public land survey locator when the numeric descriptor is missing. For instance, in this example, the full description would be the NE1/4NE1/4SW1/4, Section 6, Township 13 North, Range 21East, Boise Meridian.

The locations of the spring and an existing delivery system comprised of a standpipe collector, pipes, and water troughs are depicted on Applicant's Exhibit 2.

3. Another water right held by BLM, numbered 73-2209, decreed in the Snake River Basin Adjudication (SRBA), also identifies the same spring as the source:

Source:	Spring (water from spring sinks into the ground)
Flow rate:	0.02 cfs
Purpose of use:	Stockwater and wildlife
Season of use:	Year-round
Point of diversion:	Township 13 N, Range 21 E, Section 6, SESESE
Place of use (three water troughs)	Township 14 N, Range 21 E, Section 32, SWSW
	NWSE
	SWSE

4. Although decreed water right no. 73-2209 describes three separate places of use, Applicant's Exhibit 2 only locates two troughs associated with the BLM place of use.

5. The spring is also the source of water for an additional beneficial use of water by the United States Forest Service ("Forest Service").

6. The Forest Service filed a beneficial use claim under Idaho Code § 42-243. IDWR assigned water right number no. 73-4076 to the claim. Beneficial use claim no. 73-4076 asserts the following water right elements:

Source:	Spring (tributary to Sulfur Creek)
Flow rate:	0.02 cfs
Purpose of use:	Stockwater
Season of use:	May 1 to October 30
Point of diversion:	Township 13 N, Range 21 E, Section 6, NESW
Place of use (two water troughs)	Township 13 N, Range 21 E, Section 6, SENW
	NESW

7. The SRBA Court has not decreed beneficial use claim no. 73-4076. IDWR records do not show that an adjudication claim was filed in the SRBA for the statutory beneficial use claim no. 73-4076.

8. Applicant's Exhibit 2 depicts one Forest Service water trough located in the NESE, Section 21, Township 14 North, Range 21 East, and one Forest Service water trough located in the SWSW, Section 32, Township 14 North, Range 21 East.

9. A search of IDWR's computer records for water rights with places of use in Sections 31 and 32 revealed a water right for watering stock in the name of the Forest Service. The water right is numbered 72-16518, and authorizes the following:

Source:	Spring (water from spring sinks into the ground)
Flow rate:	0.02 cfs
Purpose of use:	Stockwater
Season of use:	May 1 to October 31
Point of diversion:	Township 14 N, Range 21 E, Section 32, SWSW
Place of use (two water troughs)	Township 14 N, Range 21 E, Section 31, NESE
	SESE

10. Because of the close proximity of the point of diversion and places of use described by beneficial use claim no. 73-4076 to the point of diversion and places of use described by decree right no. 72-16518, the hearing officer determines that beneficial use claim no. 73-4076 and decree right no. 72-16518 represent the same water right.

11. Because of the close proximity of the point of diversion and places of use described by Forest Service decreed water right no. 72-16518 to the point of diversion and places of use described by BLM decreed water right no. 73-2209, the hearing officer determines that the beneficial use described by the single water right held by the Forest Service (represented by beneficial use claim no. 73-4076 and decreed right no. 72-16518) and the beneficial uses provided for by BLM right no. 73-2209 are supplied by a single, shared-system delivery system.

12. The Forest Service and BLM jointly constructed the system to deliver water for stockwatering and wildlife in adjoining Forest Service and BLM grazing allotments. The spring source is located on Forest Service property. The federal agencies excavated the spring area, and placed a vertical pipe in the vicinity of the spring. Spring water rises and collects in the vertical culvert and fills it with water.

13. A plastic conduit connects to the vertical culvert. Water gathered in the vertical culvert exits through the plastic pipe. The pipe delivers water to four water troughs. One of the water troughs is located on Forest Service property. Three of the water troughs are located on BLM property. Because of the location of a fence, however, Forest Service trough no. 1 and BLM trough no. 2 both supply water to the Forest Service grazing allotment for Frasier Creek. BLM troughs nos. 1 and 3 are located within the BLM Trail Creek grazing allotment.

14. Application no. 73-11973 proposes an extension of the existing water lines to three additional water troughs on BLM property. The additional proposed water troughs and the waterlines leading and supplying water to the proposed troughs are also depicted on Applicant's Exhibit 2.

15. The BLM grazing standards for the Trail Creek grazing allotment limit the animal unit months ("AUM's") of grazing to a maximum of 580 AUM's. During 2006, only 276 AUM's were allowed.

16. The addition of three troughs will not accommodate or be grounds for any additional cattle or stock water consumption to the Trail Creek grazing allotment. The purpose

of constructing the additional troughs is to deliver water to the ridgelines and attract cattle away from the riparian areas near Trail Creek and Frasier Creek.

17. Limiting cattle access to riparian areas reduces the damage caused by trampling and constant cattle traffic near the streambeds.

18. Sufficient water is presently diverted through the existing system to the BLM water troughs to provide all the necessary water for cattle grazing in the Trail Creek allotment.

19. Flows of water from the spring have not been measured. Water diverted into the existing system has not been measured.

20. When constructing new water trough systems, BLM currently installs a “float system” in troughs. The float is placed in the water trough and raises or lowers with the surface of the water in the trough. When the water trough is full, the float will rise until a mechanism attached to the float closes a valve in the pipe delivering water to the trough.

21. Older BLM water delivery systems providing water to stockwater tanks on BLM property did not employ a float system. For older BLM stock watering systems, water flows continuously from the water source to the water trough. When the water trough fills, water discharges from the trough by overflowing or overtopping the trough. As a result, water continuously flows through the delivery system and is often wasted on the ground.

22. At the hearing, BLM was uncertain whether the existing system for the Trail Creek grazing allotment employed a float system or a continuous diversion-overflow system.

23. No other water rights divert water from the spring other than the rights held by BLM and the Forest Service.

24. BLM has sufficient funds in its budget that it can construct the proposed water troughs and delivery system during the two years sought for completion of beneficial use.

25. BLM has already partially constructed the system and intends to complete the proposed expansion.

26. Disbursing the cattle throughout the Trail Creek grazing allotment is beneficial for the allotment.

27. Protection of range lands through conservation of water and dedication of water for other purposes is an important public value.

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. Diversion of the same amount of water previously diverted under water right no. 73-2209 to the additional three BLM troughs will not injure other water right holders.

4. There is sufficient water if the quantity of water previously diverted is not exceeded. No evidence was presented that any additional water is available for appropriation. As a result, IDWR must insure that the quantity of water previously diverted from the spring source under existing water rights is not exceeded.

5. Construction of three additional troughs without a float/sensor-valve system in both the existing and new troughs could result in significant additional water being diverted from the spring and wasted on to the ground.

6. Installation of a float/sensor shut-off valve apparatus for each BLM water trough in the system will ensure that the quantity of water previously diverted to the BLM water troughs will not be exceeded.

7. The applicant has sufficient financial resources to construct the project.

8. The application is not filed in bad faith or for purposes of speculation or delay.

9. The application is in the public interest if the quantity of water is limited to the quantity previously used by the cattle in the Trail Creek grazing allotment.

10. Installation of a float/sensor valve apparatus at each water trough will ensure that the water of the State of Idaho is conserved.

ORDER

IT IS HEREBY ORDERED that application for permit to appropriate water no. 73-11973 is approved subject to the following conditions:

1. Proof of application of water to beneficial use shall be submitted on or before **November 01, 2009**.
2. Subject to all prior water rights.
3. Stockwater use is for 250 range cattle.
4. This right, when considered with all other rights common to the same grazing allotment, is limited to the quantity of water beneficially used by the number of stock within the allotment.
5. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 73.
6. 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.
7. Upon specific notification by the Department, the right holder shall install a lockable device of a type acceptable to the Department in a manner that will provide the watermaster suitable control of the diversion.
8. A float or sensor shut-off system shall be installed on each of the water troughs described as a place of use by right nos. 73-11973 and 73-2209. When the water level in the water trough reaches a level considered full but not overflowing, the float or sensor associated with each water trough shall activate the necessary mechanism to close a valve in the pipe delivering water to the trough.

Dated this 25th day of October, 2007.


Gary Spackman
Hearing Officer

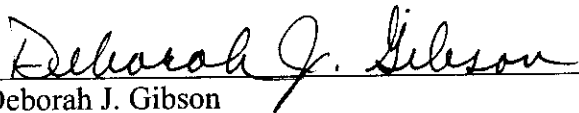
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of October, 2007, a true and correct copy of the foregoing documents described below were served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to:

Document(s) Served: Preliminary Order and an explanatory information sheet to accompany a Preliminary Order when a hearing was held.

USDI - BLM
ATTN ALAN BITTNER
1206 CHALLIS ST
SALMON ID 83467

WESTERN WATERSHEDS PROJECT
ATTN JONATHAN MARVEL
BOX 1770
HAILEY ID 83333


Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau