

BEFORE THE DEPARTMENT OF WATER RESOURCES

FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION TO	)	
APPROPRIATE WATER NO. 45-7745	)	
IN THE NAME OF THE UNITED STATES	)	PRELIMINARY
DEPARTMENT OF AGRICULTURE,	)	ORDER
FOREST SERVICE	)	
	)	

On January 30, 2007, the Idaho Department of Water Resources ("IDWR") conducted a hearing for protests filed against the above-titled matter. Randall J. Bramer, Assistant U.S. Solicitor, appeared on behalf of the United States Department of Agriculture, Forest Service ("Forest Service"). Roger Ling, Attorney at Law, appeared on behalf of the intervener, Andrwood, Inc ("Andrwood"). Earl Warthen appeared representing himself. Leo Bell also appeared representing himself. Protestant Fred Hawker failed to appear at the hearing. The following is a narrative of the proceedings leading up to and occurring at the hearing. The findings of fact and conclusions of law will follow the explanation of the proceedings.

NATURE OF THE PROCEEDINGS

On September 3, 1999, the Forest Service filed application to appropriate water no. 45-7745. The application was protested by Earl Warthen and Water District no. 45-F, Marsh Creek. Leo Bell petitioned to intervene and was aligned with the protestants. Andrwood, Inc. petitioned to intervene and was aligned with the applicant. Andrwood is the owner and operator of the Pomerelle Ski Resort ("Pomerelle"), which is located upon Forest Service property in Cassia County. IDWR granted the petitions to intervene filed by Leo Bell and Andrwood.

On March 23, 2001, IDWR received a withdrawal of protest from Water District No. 45-F, signed by the chairman of the water district, Thomas V. Geary.

On January 11, 2007, IDWR received a letter from Norman Semanko, Attorney at Law, who represented Earl Warthen in this contested case. Mr. Semanko stated that Earl Warthen had settled a dispute with the Forest Service regarding other water rights claimed in the Snake River Basin Adjudication ("SRBA"). Mr. Semanko stated that application no. 45-7745 should be limited to the terms of a SRBA settlement agreement

related to claims 45-4114 and 45-13795 in the SRBA. Based on these assertions, Mr. Semanko's letter asked that the hearing officer "consider this as a formal withdrawal" of Mr. Warthen's protest. The letter implies that the protest was withdrawn if any approval by IDWR would limit the use sought by application no. 45-7745 to the terms of the SRBA settlement agreement. Finally, Mr. Semanko stated that he would not appear at the hearing, but that Mr. Warthen would appear at the hearing to observe and possibly testify as a public witness.

As a preliminary matter at the hearing, the hearing officer questioned Mr. Warthen and the Forest Service about their understanding of the terms of the withdrawal of protest. The Forest Service stated that a limitation of the total flow rate contained in the SRBA settlement agreement could also limit the flow sought to be appropriated. The Forest Service also stated, however, that protested application no. 45-7745 sought year-round use of water, and that the Forest Service would not accept the SRBA stipulation limitation that water would only be used within the periods of use defined by the SRBA stipulation. As a result, the hearing officer determined the withdrawal of protest filed by Norman Semanko on behalf of Earl Warthen was not acceptable to the Forest Service and did not accept Mr. Warthen's withdrawal of protest.

Earl Warthen objected to IDWR's consideration of application no. 45-7745, asserting that it would increase elements of historical use. Earl Warthen also objected to the hearing officer conducting the hearing because Warthen's attorney was not at the hearing. In response, the hearing officer determined Earl Warthen and his counsel bore the responsibility to insure that the conditions proposed in his withdrawal of protest were acceptable to the Forest Service.

During the hearing, the evidence established that the Forest Service intended a direct use of water diverted from Bennett Spring and Pomerelle or Ski Run Spring for snowmaking that was not described by the application. In discussions with the parties, the hearing officer determined the application could be amended as a result of the evidence presented without formally filing an amendment and without advancement of prospective priority. Mr. Bramer moved to amend the application to reflect the intent of the Forest Service, and the hearing officer granted the motion. The details of the change will be described in the findings of fact.

FINDINGS OF FACT

1. Application to appropriate water no. 45-7745 proposes the following:

Source: Unnamed streams, Bennett Spring, and Pomerelle or Ski Run Spring (hereafter referred to as "Pomerelle Spring")

Proposed Priority: September 3, 1999

Nature of Use, Quantity & Period of Use:

Diversion to Storage	0.06 cfs	January 1 – December 31
Commercial Storage	16.3 afa	January 1 – December 31
Commercial from Storage	16.3 afa	October 15 – December 31
Total Storage	19.4 afa	

Points of Diversion:

T13S R24E	Section 1	NWNENW ¹	Bennett Spring
	Section 2	NWSE, SESW	Two surface runoff reservoirs
	Section 11	NWNENE	Pomerelle Spring & reservoir

Place of Use:

T13S R24E	Section 1	NWSW, SWSW
	Section 2	SWNE, SENE, NESE, SESW, SE
	Section 11	N1/2NE, NENW

2. The Forest Service claimed two other water rights in the SRBA that assert the right to use water at Pomerelle. The SRBA Court decreed the claimed water rights as follows:

Right no. 45-4114

Source: Springs tributary to Howell Creek

Nature of Use, Flow Rate, and Season of Use:

Commercial	0.06 cfs*	November 1 – April 30
------------	-----------	-----------------------

Priority Date: June 1, 1962

Basis of Claim: Beneficial Use

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 NW1/4NE1/4NW1/4, Section 1, Township 13 South, Range 24 East, Boise Meridian.

Points of Diversion: T13S R24E Section 1 Lot 1 (NWNENW) (Bennett Spring)
Section 11 NWNENE (Pomerelle Spring)

Place of Use: T13S R24E Section 1 NWSW

Right no. 45-13795

Source: Springs tributary to Howell Creek

Nature of Use, Flow Rate, and Season of Use:

Domestic	0.06 cfs*	January 1 – December 31
Diversion to Storage	0.06 cfs*	January 1 – December 31
Domestic Storage	0.18 afa	January 1 – December 31
Domestic from Storage	0.18 afa	January 1 – December 31

Priority Date: June 1, 1962

Basis of Claim: Beneficial Use

Points of Diversion: T13S R24E Section 1 Lot 1 (NWNENW) (Bennett Spring)
Section 11 NWNENE (Pomerelle Spring)

Place of Use:

T13S R24E Section 1	NWSW (Domestic)
Section 2	SESE (Diversion to Storage, Domestic Storage)

* The combined flow rate authorized by claims nos. 45-4114 and 45-13795 is limited to 0.06 cfs.

3. At the hearing, the testimony established that the Forest Service and Andrwood intend to divert and use water during the October 15 – December 31 time period from the ponds and directly from the two springs for snowmaking.

4. At the hearing, the Forest Service moved to amend application no. 45-7745 to show a diversion directly from the springs during the October 15 – December 31 time period. The Forest Service could divert water from the springs to the reservoirs during the October 15 – December 31 period of time while at the same time, releasing water from storage. Adding a direct flow component will not change or enlarge the proposed use of the water for snowmaking. As a result, the hearing officer allowed an additional direct flow description of 0.06 cfs for snowmaking without requiring a formal amendment to the application. A precondition of allowing the additional direct flow use was that direct diversion could not result in an enlargement of the proposed uses.

5. Andrwood is the holder of a special use permit from the Forest Service authorizing the operation of a ski resort on Forest Service property within the Sawtooth

National Forest. Although the Forest Service is the applicant, Andrwood is the active operator behind the application. As a result, this decision will refer to Andrwood as the active operator and co-participator in gathering and presenting evidence to the hearing officer.

6. The ski resort is located approximately 12 miles southwest of Albion, Idaho, and is named the Pomerelle Ski Resort ("Pomerelle").

7. Andrwood acquired Pomerelle in 1973. Since the acquisition, Pomerelle has steadily grown in size and usage. Pomerelle is frequented primarily by local skiers, although it draws skiers from many counties in Idaho and some of the surrounding states.

8. In 1997, Andrwood sought approval from the Forest Service for an expansion of its ski facilities. The proposed expansion includes a beginners' lodge and additional ski facilities within Andrwood's special use and lease boundaries. In addition to these physical improvements, Andrwood also proposed to begin manufacturing artificial snow. Andrwood needs a source of water for snowmaking purposes.

9. In 2000, the Forest Service approved an amended special use permit for Andrwood. The provisions of the special use permit recognize and authorize snowmaking on Forest Service property within the special use boundaries.

10. Andrwood proposes the construction of three small reservoirs on the Forest Service lease property. The locations of the reservoirs are shown on the map attached to the application.

11. The three reservoirs will be constructed in natural swales and will capture snowmelt and retain it behind a small dam at each of the reservoir sites.

12. The total storage capacity of the three reservoirs will not exceed 16.3 acre-feet ("af"). The maximum depth of the reservoirs will be 10 feet.

13. Based on evaporation computations by Andrwood's expert witness, the total surface area of the reservoirs will be approximately two acres.

14. The Forest Service proposes to fill the reservoirs from two primary sources of water, springs and surface water runoff.

15. Two springs currently provide water for Pomerelle. The two springs are commonly known as Pomerelle Spring and Bennett Spring. The Forest Service proposes to divert water from these springs for storage or snow making when water is available.

16. Andrwood proposes to begin diverting water from the springs to the reservoirs after water is available in the fall following reduced or non-existent irrigation demands. Andrwood estimates that it can begin diverting water from the springs on approximately October 15.

17. After construction of the reservoirs during the summer construction time period, Andrwood proposes beginning diversion of water in the fall and winter from Bennett Spring at a rate of 0.06 cubic feet per second ("cfs") to the reservoirs. In addition, an additional flow of about 0.01 cfs (5 gpm) may discharge into one of the reservoirs from Pomerelle Spring.

18. During November and December, demands for snowmaking would probably outpace the rate of water being diverted to the reservoirs. Andrwood would probably divert the full amount of water available to it for snowmaking during November and December.

19. On or about January 1 of the year following construction, Andrwood would cease the snowmaking activities but would continue to divert water from the springs to the reservoirs until demands for irrigation in Howell Creek require discontinuation of the spring diversion.

20. Despite continuous diversion from the springs to the reservoirs, diversion from the springs will not fill the reservoirs.

21. During the spring runoff, Andrwood proposes to complete the storage in the reservoirs with snow runoff. Excess water not stored would be discharged downstream into Howell Creek. At the end of the spring freshet, approximately 16.3 acre-feet of water will be stored in the reservoirs.

22. During the summer months, approximately 6.3 acre-feet of water will evaporate from the ponds. On or about October 15, only approximately 10.0 acre-feet will remain in the reservoirs. Pomerelle will again begin delivering water from the springs for snowmaking.

23. If 27 gpm (0.06 cfs) is diverted from Bennett Spring for approximately 75 days (October 15 through December 31) and 5 gpm (approximately 0.01 cfs) flows into a storage reservoir from Pomerelle Spring for the same 75 days, the accumulated volume diverted from Bennett Spring plus the natural inflow to the reservoir from Pomerelle Spring will accrue 10.6 acre feet of water by December 31. The unevaporated storage and the spring inflow will exceed the 19.4 acre feet cumulatively sought for appropriation.

24. If 19.4 acre-feet is the storage necessary for snowmaking and another 6.3 acre-feet must be supplied to replace storage lost to evaporation, the total quantity of water diverted will equal 25.7 acre-feet. Application no. 45-7745 does not expressly seek to appropriate water for the additional 6.3 acre-feet needed to replace evaporated storage.

25. In 1999, when application no. 45-7745 was filed, IDWR did not require that applications to appropriate water for small storage projects identify an additional total volume of water for losses in storage caused by evaporation.

26. When an application to appropriate water proposes direct flow from a source, the application and any approved permit for the application do not expressly limit the volume of water that can be appropriated under the permit. After beneficial use is complete and proof of beneficial use has been filed, the volume limitations for direct flow uses are usually imposed at the time of licensing.

27. Andrwood estimates its snowmaking activities will add 13.08 acre-feet of extra water in the form of snow during the spring and summer runoff. This extra water will probably melt and discharge down Howell Creek during high runoff. Some of the water may also percolate into the ground. The extra water will not significantly contribute to base flows in Howell Creek during times of regulated deliveries of water from Howell Creek. Andrwood should not be authorized to divert water from the springs out of priority during times of regulation.

28. Andrwood estimates that the total consumption to the hydrologic system caused by snowmaking is 8.28 acre-feet. The consumption results from snow sublimation and pond evaporation. Andrwood offered to cease irrigating 2.8 acres of land identified as a place of use by water right no. 45-311. Water right no. 45-311 authorizes diversion of water from Marsh Creek, to which Howell Creek is tributary, and bears a priority date of April 1, 1876. Water right no. 45-311 is deliverable in most if not all years.

29. Excess water flows down the Howell Creek channel during the non-irrigation season (November 1 through March 31) that is not captured and used by water users who hold water rights authorizing diversion from Howell Creek.

30. Water flowing in Howell Creek after the beginning of the irrigation season, particularly in April and May, is not always sufficient to satisfy all water right demands or water deliveries in Howell Creek.

31. Andrwood owns the facilities at Pomerelle free and clear and has no debt. Many of the water diversion facilities are already in place. Andrwood has sufficient funds to build the project.

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. Idaho Code § 42-211 states:

In connection with any application on which permit has not been issued, amendments may be made by indorsement by the applicant or his agent on the original application, which indorsement shall be initialed and dated. If the amendment will result in the use of more water than originally asked, the priority of the right shall be changed to the date of said amendment. The applicant shall also be required to pay any additional filing fee as a result of an amendment of the rate of diversion or volume of storage requested in such amended application. If amendment is made after publication of notice of the original application, said notice shall be republished following amendment, upon payment by the applicant of the statutory fee for republication as in this act provided.

4. The application filed in 1999 sought to use 19.4 acre-feet for snowmaking purposes. The additional storage needed to replace the evaporation, although not expressly sought, was an implied component of the application. The total volume of use sought by the application was 19.4 acre-feet plus the 6.3 acre-feet evaporated from the storage ponds. The total volume of water sought by the application was 25.7 acre-feet.

5. The addition of a direct flow component is not an enlargement of use of the original application provided the total water diverted annually does not exceed a volume of 25.7 acre feet. Because the addition of a direct flow component is not an enlargement and does not change the intent of the application, advancement of priority and republication of the application is not necessary.

6. During the non-irrigation season, other water users do not depend on water flowing from Pomerelle Spring and Bennett Spring. Diversion of water as proposed by the application will not injure other water right holders during the non-irrigation season.

7. During the non-irrigation season, there is sufficient water flowing from Pomerelle Spring and Bennett Spring to provide water for snowmaking.

8. During the irrigation season, without strict controls, the diversion and use of water proposed by the applicant will injure other water users. Water that otherwise would have gone down the channel of Howell Creek will be impounded in the upstream reservoirs or will be diverted from springs for impoundment into the reservoirs. IDWR must carefully condition any approved permit to prevent injury. Furthermore, because of the remote location of the ski resort, the Forest Service and Andrwood should bear the burden of insuring that the Forest Service is adhering to the conditions of its water rights.

9. Diversion of water during the irrigation season should only be allowed upon the express approval of the water master. During the irrigation season, the water right holder and/or its agent/operator must inquire of the watermaster if water can be diverted under this water right and obtain express approval from the watermaster prior to diverting water.

10. Adequate measuring devices and controlling works must be installed to insure adherence to the conditions and limitations of this water right.

11. The application is not filed for purposes of speculation or delay.

12. The Forest Service, or its operator, Andrwood, Inc., has sufficient financial resources to complete the project.

13. The application is in the local public interest.

14. The use of water proposed by the application will be consistent with principals of conservation of the waters of the state of Idaho.

ORDER

IT IS HEREBY ORDERED that application for permit to appropriate water no. 45-7745 is **Approved** as follows:

Commercial	0.06 cfs		10/15 to 12/31
Diversion to storage	0.06 cfs		1/1 to 12/31
Commercial storage		22.6 afa	1/1 to 12/31
Commercial from storage		16.3 afa	10/15 to 12/31
Totals:	0.06 cfs	25.7 afa	

IT IS FURTHER ORDERED that permit no. 45-7745 is subject to the following conditions:

Proof of application of water to beneficial use shall be submitted on or before **July 1, 2012.**

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.

Subject to all prior water rights.

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. 45-F.

Prior to diverting water during the irrigation season under this water right, the water right holder and its agents/operators shall inquire of and obtain express approval from the watermaster that water can be diverted under this right.

During the irrigation season, any water flowing into an upstream reservoir from Pomerelle Spring must be measured and passed through the reservoir to the Howell Creek Channel unless the watermaster expressly approves storage of the surface water flows.

Water will be stored for commercial use in 3 ponds limited to a total capacity of 16.3 acre-feet and a total surface area of 2 acres. This right authorizes additional storage in the amount of 6.3 afa to make up losses from evaporation.

All constructed ponds must be lined with impervious liners. The impervious liners must be maintained to prevent seepage of stored water into the ground.

The source for unnamed streams is surface runoff.

Commercial use is for snowmaking at Pomerelle Ski Resort.

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.

Prior to diversion of water under this right, the right holder shall provide a means acceptable to the department to measure the amount of water entering the reservoir from Pomerelle Springs and the amount of water released from the reservoir.

Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department as part of the diverting works at Bennett Springs.

To mitigate for the depletion of water resulting from the use of water under this right and to prevent injury to senior water right holders, the right holder shall cease diverting and using water as authorized by the following water rights for the purposes and amounts specified below. Moreover, the official record for the following water right will be changed to show that diversion and use of water is not authorized because the rights, or portion thereof, are being dedicated to mitigation purposes.

Right No.	Use Changed to Mitigation	Mitigation Rate (cfs)	Mitigation Acres
45-0311	Irrigation	0.06	2.8

Prior to diversion of water under this right, the right holder must identify, in writing, 2.8 acres of the place of use for water right no. 45-0311 that will not be irrigated.

If the specified mitigation right, or portion thereof, is sold, transferred, leased, used on any place of use, or is not deliverable due to a shortage of water or a priority call, then the amount of water authorized for diversion under this approval shall be reduced by the same proportion as the reduction to the mitigation rights.

Dated this 25th day of June, 2007.



Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

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

Document(s) Served: Preliminary Order, and
Explanatory Information to Accompany a Preliminary Order with a hearing.

STEVE SPENCER
USDA FOREST SERVICE
161 E MALLARD DR #110
BOISE ID 83706-3974

WOODY ANDERSON
ANDRWOOD INC
PO BOX 158
ALBION ID 83311

SCOTT G NANNENGA
USDA FOREST SERVICE
3650 S OVERLAND AVE
BURLEY ID 83318

ROGER D LING
LING NIELSEN & ROBINSON
PO BOX 396
RUPERT ID 83350

EARL L WARTHEN
PO BOX 145
ALBION ID 83311

LEO BELL
HC 36 BOX 26
ALBION ID 83311

NORMAN M SEMANKO ESQ
ATTORNEY AT LAW
1010 W JEFFERSON ST STE 101
BOISE ID 83702

FRED HAWKER
361 W 400 S
BURLEY ID 83318

ROCHELLE MAUREEN DAVIS
BARKER RSHOLT & SIMPSON
LLP
PO BOX 2139
BOISE ID 83701-2139

CHARLES G BROCKWAY PE
BROCKWAY ENGINEERING
2016 N WASHINGTON ST STE 4
TWIN FALLS ID 83301

ALLEN MERRITT
IDWR – SOUTHERN REGION
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380


Deborah J. Gibson
Administrative Assistant