

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

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 15-7347 IN THE) **FINAL ORDER**
NAME OF LAWRENCE V. (VIC) RICHES) **ISSUING PERMIT**

On August 22, 2011, Lawrence V. (Vic) Riches, Jr. (“Applicant”), filed Application for Permit 15-7347 with the Idaho Department of Water Resources (“Department”), seeking a ground water right for the irrigation of 215 acres south of Samaria, Idaho. On September 15, 2011, the Applicant filed an amended application for permit, reducing the proposed irrigation place of use to 202.7 acres. The amended application described a diversion rate of 3.34 cfs and an annual diversion volume of 1,193 acre-feet.

The application was advertised to the public beginning on October 6, 2011, and was protested by David Reel, Brad Warren, Kody Warren, G. Marlynn Holgate, and Brent Clark on behalf of himself and Two Buck Chuck, LLC. A single protest was also filed by Darhl Hughes, Jeff Waldron, Matthew Winn, Doyle Waldron, Ramona Hughes, Randy Higly, and Dan Coleman. Mr. Hughes was the representative and spokesperson for this group during all of the proceedings. A pre-hearing conference was held on January 10, 2012. The parties were unable to resolve the protests at that time and requested a hearing to decide the contested case.

On March 19, 2012, a hearing was held at the Oneida County Road & Bridge building in Malad, Idaho. Brad Warren and Kody Warren were not present at the hearing and did not contact the Department prior to the hearing regarding their inability to attend. By failing to attend the hearing, Brad Warren and Kody Warren waived their right to present evidence, to cross-examine witnesses, and to object to the admission of evidence. The Parties in attendance offered testimonial and documentary evidence into the record.

On April 9, 2012, James Cefalo, a hearing officer for the Department, issued a Preliminary Order approving the application no. 15-7347. On April 19, 2012, Brent L Clark, Shawna A Clark, and Two Buck Chuck, LLC (all referred to as “Clarks”), filed a petition for reconsideration with Hearing Officer Cefalo. On April 30, 2012, Hearing Officer Cefalo denied the petition for reconsideration.

On May 10, 2012, Clarks filed with the Department a “Second Petition for Reconsideration” and an “Appeal to Order Denying Petition for Reconsideration.” The Director considered these two documents together as “exceptions” to the hearing officer’s orders. IDAPA 37.01.01.730.02.

In their exceptions, Clarks assert that the Department possesses historical hydrologic data that would establish diminishing ground water levels and stream flows. Clarks assert that the hearing officer erred by not reviewing and considering this data. Prior to the issuance of this final order, the Director determined that historical hydrologic records of the Department should be a part of the record and should be reviewed in reaching a final decision. On June 25, 2012, the Director issued an “Order to Augment Record.” The Director distributed hydrologic data from the Department records and notified the parties that, on or before July 23, 2012, the parties could request an additional evidentiary hearing about the data. No parties requested an additional hearing.

STATEMENT OF EXCEPTIONS

The following is a summary of exceptions taken from the various documents filed by Clarks. The exceptions will be addressed in an “Analysis of Exceptions” section following this Statement of Exceptions.

1. The preliminary order discussed impacts to domestic wells, but did not address “concerns with regard to irrigation water and surface springs.”
2. The preliminary order placed “senior water rights holders in a defensive position to protect current rights.” Clarks also state that “preserving and protecting the established water rights should be the central focus of the IDWR, rather than approve new water rights for any individual or developer who can provide supporting geological documentation to their benefit.” This exception is not clearly stated, but the Director interprets the exception as an assertion that the hearing officer required that the protesting senior water right holders improperly bore the burden of proof at the hearing.
3. The Order Denying Petition for Reconsideration improperly determined that the hearing was “not the appropriate forum for resolving basin-wide aquifer concerns . . . and not the proper venue for determining whether a basin-wide restriction on new ground water permits is warranted . . .”
4. Hydrologic data available to the Department was not considered by the hearing officer in writing the Preliminary Order.
5. One pump test on a well dissimilar to the well proposed by application 15-7347 cannot accurately predict the hydrologic effects of pumping the proposed well.
6. A theoretical determination of hydrologic effect of pumping the proposed well is not sufficient evidence to justify approval when there is anecdotal evidence of domestic wells going dry and of decreasing water supply in the Malad Valley.
7. Water supply concerns in adjoining hydrologic basins, Curlew Valley on the west and the Bear River Basin on the east, coupled with expressions of concern by the Oneida

County Commission about continued approvals of new water rights and the impact on Oneida County water supplies, should be considered by the Department in determining whether application no. 15-7347 should be approved.

8. Sufficient information was presented at the hearing to warrant protection of existing ground water levels in domestic wells under *Parker v. Wallentine*, 103 Idaho 506 (1982).

9. The Preliminary Order does not properly recognize water right no. 15-7341 (Aldrich Spring) as a valid water right and does not properly analyze the impact of the ground water diversion on Aldrich Spring.

10. The place of use proposed by application no. 15-7347 is not suitable for farming.

11. “[A]t least seven year-round surface springs are located within the meadows below Mr. Riches’ proposed well site,” and the diversion from the well proposed by application no. 15-7347 “could further decrease or stop the flow of the surface springs . . .”

12. Diversion from the well proposed by application no. 15-7347 will reduce the “quantity of water under existing water rights.”

13. The use of water proposed by application no. 15-7347 is not in the local public interest.

ANALYSIS OF EXCEPTIONS

Pump Test and Theoretical Computation of Impacts (Exceptions 5 and 6)

A pump test, like the one conducted by the Applicant’s hydrogeological expert Dr. Tom Wood, is a standard method of determining the physical characteristics of a ground water aquifer. Use of these characteristics in a “Theis” analysis or model is a common method of estimating drawdown caused by pumping. The boundaries established by Dr. Wood were reasonable. Pump tests can be expanded to gather additional data to refine the aquifer characteristics. This larger, expansive pump test would not be expected for an application to appropriate water in the Malad River Basin.

Department Hydrologic Data (Exception 4)

The Director reviewed the hydrologic data added to the record by the June 25, 2012 Order to Augment the Record. In particular, the Director reviewed ground water level data for two wells, located in T15S, R35E, Section 22, and T15, R35E, Section 1.

The well in Section 22 of T15S, R35E is nearest to Clarks’ domestic well and also nearest to the well proposed by Riches. Prior to 1970, water levels in the Section 22 well varied between 140 and 142 feet below land surface. Beginning in the 1970’s, ground water levels rose 8-15 feet.

Beginning in the 1990's until the present, water levels dropped to 134-140, but remains above pre-1970 water levels. Present data does not depict a downward trending of water levels.

The next closest well, in Section 1 of T15S, R35E, is an artesian well that sometimes free flows above ground surface. During the 1940's and 1950's, the maximum water levels measured in the well declined about 20 feet in elevation and the minimum water levels declined about 40 feet. During the 1970's and 1980's, the maximum water levels increased about 10-15 feet, and the minimum water levels increased about 35 feet. From 1990 to the present, the maximum water levels declined about 15 feet to approximately the same level as in the 1970's and 1980's and the minimum water levels declined about 35 feet to approximately the same level as in the 1970's and 1980's. During recent years the minimum ground water levels have not declined as dramatically as in earlier years. This short term stability in the data may be due to variability in the time of measurement, changes in pumping from other wells, or other unknown factors.

Data for one well, located in Section 13 of T14S R35E approximately 10-12 miles northeast of the proposed Riches well depicts declining water levels. Data for all other monitored wells in the basin depicts stable or increasing ground water levels.

There is no evidence that ground water pumping is causing significant declines in ground water levels or artesian pressures at the location for the well proposed by application no. 15-7347.

Unfortunately, most if not all of the surface water measurements for the Malad River Basin were discontinued over the last 50 years. Most recently, flow in the Malad River below Malad Springs was measured once annually from 2004 through 2010. There is not enough data in the Department's records to help determine whether ground water pumping may be affecting surface water flows. However, as described below, there are other ways to investigate whether ground water pumping affects surface water flows.

Burden of Proof (Exception 2)

In a water right hearing, the applicant bears the burden of proving, by the preponderance of evidence, that the water supply is sufficient to support the proposed use and that the proposed use will not reduce the quantity of water available for existing rights. Hearing Officer Cefalo correctly applied this standard.

Sufficiency of Water Issue (Exceptions 3 and 7)

The Director disagrees with the blanket statement that a water right hearing is not "the appropriate forum for resolving basin-wide aquifer concerns . . ." If there are basin wide declines in ground water levels, it may be appropriate to deny an application based on a determination that the water supply is not sufficient for the purpose sought. The data do not show, however, that there are basin wide declines in water levels. The data shows the ground water supply is sufficient for the purpose sought.

The Curlew Valley and the Bear River Basin are outside of the Malad River hydrologic basin and are hydraulically disconnected from the Malad River Basin in the State of Idaho. Any restrictions on appropriations of water in the two areas do not affect the sufficiency of the water supply in the Malad River Basin.

The Director agrees with the hearing officer that a contested water right application “**is not** the proper venue for determining whether a basin-wide restriction on new ground water permits is warranted . . .”

Effect on Surface Water Rights and Surface Water Supplies (Exceptions 1, 9, 11, and 12)

Testimony from Dr. Wood established that local spring flows are derived from a local shallow aquifer and that the aquifer intercepted by the proposed Riches well is separated from the shallow aquifer by confining layers that restrict movement of water, either up or down. Recognizing that the geology underlying Clarks’ and Riches’ properties is complex, the testimony by Dr. Wood is the best information available in the record. Through the testimony and technical work of Dr. Wood, the applicants satisfied their burden of proof, and the Director agrees with the hearing officer that the proposed diversion of ground water will not negatively affect surface water supplies.

Effect on Ground Water Rights (Exceptions 6, 7, and 12)

The pump test conducted by Dr. Wood and the hydrologic data added to the record satisfied the Riches’ burden of proof that the proposed appropriation of water will not reduce the quantity of water under existing water rights.

Protection of Domestic Ground Water Levels under *Parker v. Wallentine* (Exception 8)

The burden of proof for asserting *Parker v. Wallentine* ground water elevation protection is initially borne by the protestant. The protestant bears the burden of proof to establish: (1) that water was beneficially used prior to 1978, (2) the approximate pumping capacity of the well, and (3) the historical water levels in the well that must be protected. Previous water levels that declined because of other causes unrelated to the pumping proposed by Riches cannot be protected in this proceeding. If the well was reconstructed after 1978 to increase production or to chase declining water levels, or if a new pump and/or motor were installed, the protestant must also provide this information.

Once the above information is provided by the protestant, the burden of defending against the *Parker v. Wallentine* protection of ground water pumping levels is borne by the applicant.

In this case, Clarks established that their domestic well was drilled and used prior to 1978. Clarks did not present evidence about water levels in the well nor did Clarks present information about changes to the well or the pumping equipment.

There is insufficient evidence in the record that would invoke protection of ground water levels under *Parker v. Wallentine* justifying either denial of application no. 15-7547 or conditions requiring mitigation.

Suitability of Farm Land for Irrigation (Exception 10)

The question of whether land is suitable for farming goes to the core issue of whether water can be beneficially used. Beneficial use defines the boundaries of a water right. If water is diverted but not beneficially used, no water right should issue.

In this case, there was testimony that the land was suitable for raising crops and for irrigation. This use of water for irrigation and the raising crops is a beneficial use. The applicant met his burden of proof for this element of review.

Local Public Interest (Exception 13)

Clarks assert application no. 15-7547 is not in the local public interest. Idaho Code § 42-202B(3) defines the local public interest 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.” Working backward through the definition, there must be a determination of the “effects of” the proposed use “on the public water resource,” and an analysis of “the interests that the people in the area directly affected by a proposed water use.” There are legitimate interests raised by Clarks related to the value of springs, surface water streams, and maintaining ground water levels. The evidence shows that these values will not be compromised by the proposed appropriation. Application no. 15-7547 is in the local public interest.

CONCLUSION

Based on the above analysis, the Director adopts the Preliminary Order of the hearing officer in its entirety. For convenience, the hearing officer’s findings of fact and conclusions of law are restated below:

FINDINGS OF FACT

1. Application for Permit 15-7347 proposes diverting ground water to irrigate 202.7 acres in the SE1/4 of Section 23 and the NE1/4 of Section 26, Township 15 South, Range 35 East. The proposed point of diversion, a new ground water well would be located in the SE1/4SE1/4 of Section 23. The Applicant recently drilled a stockwater well near the proposed well site. The stockwater well is 120 feet deep with a static water level at 38 feet below land surface.

2. The Applicant hired Tom Wood of Clearwater Geosciences, LLP to evaluate the local aquifer parameters and the potential hydrologic impacts to nearby wells if ground water were diverted as proposed in the application. Dr. Wood performed some on-site pump testing and prepared a report summarizing his findings. The report, dated August 10, 2011, was included as part of the application for permit.

3. On April 23, 2011, Dr. Wood conducted a pump test using an irrigation well located one mile north of the proposed well. The well was pumped at a rate of 140 gallons per minute (0.31 cfs) for 24 hours. The drawdown occurring in the well was monitored during the pumping period. Dr. Wood used the pump test results to establish a theoretical transmissivity rate for the aquifer near the proposed well. He estimated a transmissivity of 78,000 ft²/day. This calculated transmissivity rate is consistent with another recent pump test conducted by Dr. Wood in the area, which resulted in a transmissivity of 51,000 ft²/day. The area of the proposed well is a productive portion of the local aquifer.

4. Using the calculated transmissivity rate and an assumed storativity value of 0.1, Dr. Wood created a model to predict the drawdown at certain distances from the proposed well. A number of assumptions were incorporated into the model. First, Dr. Wood assumed the proposed well would pump at the full diversion rate listed in the application (3.34 cfs) for six months (180 days). He also assumed no-flow boundaries (aquifer boundaries) 4,000 feet to the west of the proposed well, 46,000 feet to the east of the proposed well, and 2,000 feet south of the proposed well. Applying this set of assumptions, the model estimated 7 feet of drawdown at the existing well and 2 feet of drawdown at a distance of ½ mile from the proposed well.

5. The assumptions incorporated in Dr. Wood's model are conservative and over-estimate the potential drawdown effects. It is unlikely that the proposed ground water well would be pumped at 3.34 cfs for 180 days straight. That level of pumping equates to approximately 1,200 acre-feet per year. All new ground water rights in the Malad River drainage (Basin 15) are limited to 3.5 acre-feet per acre, measured at the field headgate. Therefore, Permit 15-7347 would be inherently limited to an annual diversion volume of 709.5 acre-feet, measured at the field headgate. The no-flow boundaries to the west and east are also conservative assumptions because there will likely be some contribution to the aquifer from those areas.

6. Mr. Hughes owns a domestic well located approximately 1.5 miles north of the proposed well site. He testified that his domestic well was drilled in the 1960s, but was unable to give a specific date of construction. Mr. Hughes did not own the property when the domestic well was drilled. He did not provide evidence regarding the current static water level in his domestic well or the static water level in the well at the time it was drilled.

7. Mr. Clark owns a domestic well located approximately 150 yards from the proposed well site. He testified that his domestic well was drilled in the late 1960s, but was unable to give a specific date of construction. Mr. Clark did not own the property when the domestic well was drilled. He did not provide evidence regarding the current static water level in his domestic well or the static water level in his domestic well at the time it was drilled. Mr. Clark is currently experiencing problems with the well. During the summer the flow from the well diminishes and the water becomes brackish.

8. Mr. Holgate and Mr. Reel own domestic wells located approximately ½ mile from the proposed well site. Mr. Holgate's domestic well was drilled in 1998. Mr. Reel's domestic well was drilled at some point in the 1980s.

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 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 factors set forth in Idaho Code § 42-203A(5).

Injury to Other Water Rights

1. The Applicant has shown by a preponderance of the evidence that the proposed water right will not reduce the quantity of water under existing water rights. Dr. Wood's analysis of potential drawdown impacts is persuasive.

2. Drawdown impacts to the surrounding ground water wells, including domestic wells drilled after 1978, are governed by Idaho Code § 42-226, which sets forth Idaho's reasonable pumping level standard.

3. Section 42-226 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 Malad River drainage (Basin 15). Therefore, the reasonableness of drawdown impacts to neighboring wells caused by a proposed diversion must be evaluated on a case-by-case basis. The local drawdown estimated by Dr. Wood is reasonable given the depth of the aquifer and the static water level at the proposed point of diversion.

4. In a 1982 case, the Idaho Supreme Court determined that the reasonable pumping level standard of Idaho Code § 42-226 does not apply to domestic wells constructed and used prior to 1978. (See *Parker v. Wallentine*, 103 Idaho 506 (1982)) Two pre-1978 domestic wells may be located within ½ mile of the proposed well (the Hughes domestic well and the Clark domestic well). The Idaho Supreme Court held that, if a junior ground water user causes drawdown in a pre-

1978 domestic well, the junior water user may be curtailed or may be required to compensate the owner of the domestic well for the decline in water levels.

5. In order to invoke the protection of steady ground water levels contemplated in *Parker v. Wallentine*, a water user must establish the date when the domestic ground water well was constructed and first used. A water user must also establish the static water levels existing in the well at the time of construction or the current static water levels in the well.

6. There was not sufficient evidence provided at the hearing to make a decision whether the Hughes domestic well and the Clark domestic well are entitled to protection under the *Parker v. Wallentine* decision. Therefore, this Order does not make any determination on the applicability or viability of a *Parker v. Wallentine* argument. The protestants are not precluded from pursuing such an argument in a future civil proceeding.

Sufficiency of Water Supply

7. The Applicant met his burden of showing that the water supply is sufficient for the proposed beneficial use. Dr. Wood's pump test confirms the local aquifer has a good water yield.

Speculation / Financial Resources

8. 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 Balance Sheet provided by Mr. Riches (Applicant's Exhibit #1) demonstrates sufficient financial resources to complete the proposed project.

Local Public Interest

9. 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 did not clearly show how the local public interest in the water resource would be affected beyond potential injury to existing ground water wells. The Applicant presented evidence that the ground water rights would 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

10. 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 application will incorporate sprinkler irrigation, a conservative use of water.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 15-7347 in the name of Lawrence V. (Vic) Riches Jr. is APPROVED and ISSUED with the following elements and conditions:

Priority Date: August 22, 2011

Source: Ground Water

Season of Use: 4/1 – 10/31

Diversion Rate: 3.34 cfs

Point of Diversion: SE1/4 SE1/4, Sec 23, T15S, R35E

Place of Use: Sec 23, T15S, R35E	NESE	1.2 acres
	NWSE	32.0 acres
	SWSE	40.0 acres
	SESE	19.5 acres
Sec 26, T15S, R35E	NENE	40.0 acres
	NWNE	40.0 acres
	SWNE	15.0 acres
	SENE	15.0 acres
	Total	202.7 acres


Conditions

1. Proof of application of water to beneficial use shall be submitted on or before **May 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. The right holder shall make full beneficial use of all surface water rights available to the right holder for irrigation of the lands authorized to be irrigated under this right. The right holder shall limit the diversion of ground water under this right to those times when the surface water supply is not available or the surface water supply is not reasonably sufficient to irrigate the place of use authorized under this right.

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 14th day of September, 2012.


Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September, 2012, a true and correct copy of the documents described below were served by placing in the United States mail, postage prepaid and properly addressed to the following:

Documents Served: FINAL ORDER ISSUING PERMIT, and Explanatory Information to Accompany a Final Order

Lawrence V. (Vic) Riches Jr.
10410 West Loyola Drive
Los Altos, CA 94024

Brent Clark / Two Buck Chuck, LLC
54778 Happy Valley Lane
Mount Vernon, OR 97865

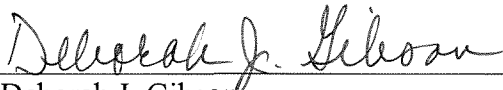
David Reel
5176 South 4400 West
Malad, ID 83252

G. Marlynn Holgate
4016 West Samaria Road
Malad, ID 83252

Brad Warren
5199 South 4600 West
Malad, ID 83252

Dahl U. Hughes et al.
5196 South 4400 West
Malad, ID 83252

Kody Warren
5196 South 4600 West
Malad, ID 83252



Deborah J. Gibson
Administrative Assistant to the Director