

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION                     )  
FOR PERMIT NO. 15-7330 IN THE                     )  
NAME OF M.J. DAVIS MEMORIAL                     )  
LIMITED PARTNERSHIP                                     )

**PRELIMINARY ORDER  
ISSUING PERMIT**

On April 10, 2009, Jeff Davis, on behalf of M.J. Davis Memorial Limited Partnership (“Applicant”), filed Application for Permit 15-7330 with the Idaho Department of Water Resources (“Department”), seeking a ground water right for the irrigation of 132 acres near Samaria. The proposed point of diversion is an existing 6-inch stockwater well on the Applicant’s property. The application was advertised to the public beginning on March 18, 2010, and was protested by Samaria Water and Irrigation Company (“SWIC”).

The Parties engaged in informal negotiations to resolve the protest. On July 19, 2010, SWIC submitted a letter to the Department, withdrawing its protest on the condition that the Applicant would be limited to diverting from the existing six-inch stockwater well. The Department notified Mr. Davis of the conditional withdrawal. Mr. Davis declined the conditional withdrawal and requested a hearing. SWIC agreed to participate in a hearing to resolve the contested case.

On January 27, 2012, a hearing was held at the Oneida County Road & Bridge building in Malad, Idaho. The Parties offered testimonial and documentary evidence into the record. After considering the evidence in the administrative record for this case, the Department finds, concludes, and orders as follows:

**FINDINGS OF FACT**

1. Application for Permit 15-7330 proposes diverting ground water to irrigate 132 acres in the NE1/4 of Section 22, Township 15 South, Range 35 East. The proposed point of diversion is an existing six-inch ground water well (“existing well”) located in the NE1/4NE1/4 of Section 22. The existing well was drilled in 1989 and is used for stockwater. (Well Drillers Report, Joe Davis Well, Attachment 2, Wood Report, Applicant’s Exhibit 1) The well log for the existing well indicates the well is 162 feet deep and had a static water level at 100 feet below land surface at the time the well was drilled. (Id.) Mr. Davis testified that the proposed irrigation will take place using sprinklers and drip lines.

2. The application identifies the proposed diversion works as the “existing 6[inch] well with a submersible pump of 5-10 hp, depending on available water.” The application also states:

“A well currently exists at the proposed point of diversion, having been drilled in the 1980s and utilized for stockwater. [The Applicant] propose[s] using this well to supplement any water from [other sources] . . . .”

3. On September 17, 2009, Mr. Davis sent a letter to the Department describing his proposed development in greater detail. The letter was scanned to the application file and was made available to the public on January 28, 2010. The letter contained the following statements:

[M]y intent is to appropriate water from an existing 6 inch well that was drilled in the 1980s to a depth of somewhat over 100 feet and used since then until the present for stock watering purposes. . . . In all honesty, I have no idea as to the volume of water available for appropriation from this POD. The existing well is small and relatively shallow and has never been tested relative to its volume capacity. Realistic estimates for this well’s production capacity are probably in the 50-150 gpm range, but based on the acreage that possibly could be irrigated from this POD, I listed 2.0 cfs as the requested appropriation. However, it is highly unlikely that such a volume of water could be obtained from this existing well . . . . and I have no intention whatsoever of deepening this well or drilling another larger/deeper well to match this requested appropriation.

4. The 132 acres proposed to be irrigated are covered by an existing surface water right. Permit 15-7275 authorizes the diversion of 1.00 cfs from Thomas Davis Springs and may be used to irrigate 522 acres, including the 132 acres identified in the current application. Permit 15-7275 carries a priority date of December 16, 2005 and includes the following condition:

The water right holder may only divert water from Thomas Davis Creek when: (a) the flow of Thomas Davis Creek exceeds the flow rate claimed in [SWIC] amended claim no. 15-4066 at [SWIC’s] point of diversion; or (b) at any time [SWIC] is not diverting its full flow rate under amended claim no. 15-4066 and excess water is flowing past [SWIC’s] point of diversion; or (c) at any time [SWIC] cannot divert water at its point of diversion and the water right holder can divert and beneficially use the water in Thomas Davis Creek.

5. Statutory Claim 15-4066 was filed by SWIC pursuant to Idaho Code § 42-243. The claim carries a priority date of July 3, 1893 and describes the diversion of 3.00 cfs from Thomas Davis Creek for irrigation use within the SWIC service area.

6. Mr. Davis completed a pipeline system in July 2011 to bring water from Thomas Davis Springs to a portion of the 132 acres described in Application for Permit 15-7330. He diverted water from Thomas Davis Springs in 2011 and was able to irrigate approximately 20 acres. Mr. Davis was only able to divert about 250 gallons per minute from Thomas Davis Springs in 2011 due to limited flow from the springs.

7. Given SWIC’s senior right to Thomas Davis Creek, the subordination language of Permit 15-7275, and the limited amount of flow available from the Thomas Davis Springs, it is



unlikely that the Applicant will be able to rely on existing Permit 15-7275 to supply sufficient water to irrigate all or even a significant portion of the 132 acres described in the current application.

8. At the beginning of the hearing, the hearing officer took official notice of the Department's water right records, including specific water rights described below. A ground water well owned by Samaria Cemetery District ("cemetery well") is located less than 1,000 feet from the existing well. The water right associated with the cemetery well, statutory claim 15-4004, was filed by the Samaria Cemetery District in 1975 pursuant to Idaho Code § 42-243. The claim lists a priority date of March 1, 1963, a diversion rate of 0.18 cfs, and the irrigation of nine acres.

9. No evidence supporting the claimed priority date of March 1, 1963 was filed with statutory claim 15-4004. Without additional evidence regarding the priority date and historic beneficial use, the department is unable to determine whether claim 15-4004 may constitute a valid water right. No evidence was presented at the hearing regarding the size, depth, or static water level of the cemetery well. Samaria Cemetery District did not protest the application.

10. Two spring-fed water rights (15-4187 and 15-4139) are located approximately one mile to the east of the proposed point of diversion. These two water rights are also statutory claims filed pursuant to Idaho Code § 42-243, meaning the priority dates associated with the rights and the beneficial uses occurring under the rights have not been verified by the Department or a court.

11. Another statutory claim, 15-7277, is located approximately 1.5 miles east of the proposed point of diversion. This claim, in the name of Samaria Lake Irrigating Company, lists a priority date of February 15, 1875 and a diversion rate of 111.80 cfs. The claim also lists two sources of water: Samaria Creek and a spring. No evidence was presented at the hearing regarding the portion of the listed water supply coming from the spring source. Samaria Lake Irrigating Company did not protest the application.

12. SWIC has three statutory claims (15-2023, 15-2024 and 15-4009) for Warm Springs, located approximately three miles north of the proposed point of diversion. The statutory claims in combination describe the year-round diversion of 6.5 cfs and list priority dates ranging from 1925 to 1940. Flows from Warm Springs have declined in recent years, reducing the amount of water that SWIC can deliver to its shareholders. (See Protestants Exhibit A)

13. The decline in Warm Springs can be partly attributed to ground water pumping in the immediate area. Mark Ipsen, who testified on behalf of SWIC, stated that two irrigation wells are located within one mile of the spring. These wells are owned by Dale Price and Seth Seamons. Mr. Price and Mr. Seamons are both shareholders within SWIC. At one time, Mr. Price was on the SWIC board. Mr. Ipsen testified that the Seamons irrigation well is located very close to Warm Springs and that a portion of the springs dries up when the Seamons well is diverting water.

14. SWIC did not protest the Price or Seamons ground water rights when they were filed. SWIC has never initiated any curtailment action against Mr. Seamons or Mr. Price relating to their impact on the Warm Springs.

15. Mr. Davis hired Tom Wood of Clearwater Geosciences, LLP to conduct an evaluation of the potential hydrologic impacts to nearby springs and wells if ground water were diverted as proposed in the application. Dr. Wood performed some on-site pump testing and prepared an evaluation report. (Applicant's Exhibit 1)

16. On October 30, 2010, Dr. Wood conducted a pump test using the existing well as a diversion well. The existing well was pumped at a rate of 60 gallons per minute (0.13 cfs) for four hours. The depth of water was monitored in the existing well and at a domestic well owned by Jeff Davis ("Davis house well"), located 2200 feet east of the proposed well. 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 51,430 ft<sup>2</sup>/day.

17. Using the calculated transmissivity and an assumed storativity value of  $1 \times 10^{-5}$ , Dr. Wood created a model to predict the possible drawdown at certain distances from the existing well. A number of assumptions were incorporated into the model. First, Dr. Wood assumed the proposed well would pump at the full rate listed in the application (2.00 cfs) for six months (180 days). He also assumed no-flow boundaries (aquifer boundaries) 2000 feet west of and 4000 feet south of the proposed well. The western boundary represents an area where the aquifer interfaces with a less permeable geologic formation. The southern boundary represents a distance down-gradient in the aquifer where the aquifer no longer contributes to the proposed well. Under this set of assumptions, the model estimated 20 feet of drawdown at the existing well, 17 feet of drawdown at the cemetery well, and 11 feet of drawdown at the Davis house well (one-half mile from the existing well).

18. The assumptions incorporated in the first model run are very conservative and over-estimate the potential drawdown effects. Because it is unlikely that the proposed water right would be diverted at 2.00 cfs for 180 days straight, Dr. Wood conducted a second model run, assuming a diversion rate of 1.0 cfs for 180 days. The other assumptions described above remained the same. Under this revised set of assumptions, the model showed 10 feet of drawdown at the existing well, 8 feet of drawdown at the cemetery well, and 6 feet of drawdown at the Davis house well.

19. The second model is a more accurate representation of actual pumping conditions. All new ground water rights approved in administrative basin 15 are limited to a maximum diversion volume of 3.5 acre-feet per acre. Therefore, the 132 acres identified in application 15-7330 would be limited to a total annual diversion volume of 462 acre-feet. Some portion of this annual volume would be supplied by existing Permit 15-7275.

20. Dr. Wood's first model, incorporating a diversion rate of 2.00 cfs, equates to an annual diversion volume of 713 acre-feet. Dr. Wood's second model, incorporating a diversion rate of 1.00 cfs, equates to an annual diversion volume of 356 acre-feet. Therefore, the second model better represents the diversion volume expected under the proposed water right.

21. Dr. Wood testified that, although there are springs near the proposed point of diversion, it is unlikely that the springs are hydraulically connected to the aquifer layer diverted by the existing well. The springs in the area are warm, mineralized, and are much higher in



elevation than the aquifer layer penetrated by the existing well. The water extracted by the existing well is cold and clear.

22. It would be very difficult to divert 2.00 cfs from the 6-inch well, without causing damage to the well. In his September 2009 letter, Mr. Davis confirms that the realistic capacity of the existing well is 50-150 gpm. Dr. Wood testified that, without specialized pumping equipment, it would not be possible to divert 2.00 cfs from the existing well without damaging the well. Because of the physical capacity limitations of the 6-inch well, Mr. Davis's declaration that the existing well will not be deepened or re-drilled serves as a voluntarily-imposed limit on the application and must be incorporated into the permit.

23. The September 2009 letter from Mr. Davis which asserts that he has "no intention whatsoever of deepening this well or drilling another larger/deeper well" was scanned to the application file on January 28, 2010, meaning the letter was available to the public at the time the application was advertised (March 18, 2010). It is possible that local water users, who would have opposed a new ground water well diverting 2.00 cfs, did not oppose the current application because of Mr. Davis's statements and the inherent capacity limitations of the existing well.

## **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. Possible impacts to SWIC's Warm Springs water rights are remote. Any slight impact to the Warm Springs would be negligible when compared to impacts from ground water wells located much closer to the springs.

2. Because there was no evidence presented at the hearing regarding the validity of statutory claim 15-4004, in the name of Samaria Cemetery District, potential impacts to the cemetery well will not be addressed in this order. Even if statutory claim 15-4004 constitutes a valid water right, any drawdown impact to the cemetery well caused by this permit would be 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 water use must be evaluated on a case-by-case basis. Without evidence regarding the depth and static water levels of the cemetery well, it is impossible to determine whether the drawdown caused by pumping under Permit 15-7330 would be unreasonable under Section 42-226.

4. The reasonable pumping level standard described in Section 42-226 does not apply to surface water sources such as springs. Potential drawdown at the three spring-fed water rights located to the east of the proposed point of diversion is not governed by the reasonable pumping level standard. These statutory claims suffer from the same evidentiary deficiencies as the cemetery well. There is no evidence in the administrative record supporting the priority dates or ongoing beneficial uses listed in the statutory claims. Even if these claims constitute valid water rights, the evidence suggests that the spring flows are derived from a different source than the aquifer diverted by the existing well.

### **Sufficiency of Water Supply**

5. The Applicant met its 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**

6. The Applicant met its burden of showing that the application was made in good faith and that Mr. Davis has sufficient financial resources to complete the proposed irrigation project. Because an existing ground water well will be used, the cost of completing the proposed beneficial use is reduced significantly. Further, Mr. Davis's recent efforts to pipe water from Thomas Davis Springs to the proposed place of use are evidence of his intent to irrigate the proposed place of use.

### **Local Public Interest**

7. The local public interest analysis under Section 42-222 is meant to be separate and distinct from the injury analysis. 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 water rights. 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 its burden of proof for this element.

### **Conservation of Water Resources**

8. The Applicant met its 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 and drip lines, a conservative use of water.

## **ORDER**

IT IS HEREBY ORDERED that Application for Permit No. 15-7330 in the name of M.J. Davis Memorial Limited Partnership is APPROVED and ISSUED with the following elements and conditions:

Priority Date: April 10, 2009

Source: Ground Water

Season of Use: 4/1 – 10/31

Diversion Rate: 2.00 cfs

Point of Diversion: NE1/4 NE1/4 NE1/4, Section 22, T15S, R35E (existing well)

Place of Use: Section 22, T15S, R35E	NENE	30 acres
	NWNE	40 acres
	SWNE	40 acres
	SENE	22 acres
	<b>Total</b>	<b>132 acres</b>

### **Conditions**

1. Proof of application of water to beneficial use shall be submitted on or before **April 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. This permit does not authorize the construction of any new well or the deepening or enlargement of any existing well.

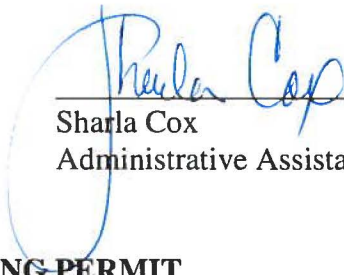
7. The point of diversion for this permit is an existing ground water well located in the NENENE of Sec. 22, T15S, R35E, which was drilled in May 1989. The point of diversion under this permit may not be changed until a license is issued for this right. If the described ground water well is re-drilled or deepened before a license is issued, this permit may be reduced or cancelled by the Director.

Dated this 27<sup>th</sup> day of March, 2012.

  
James Cefalo  
Water Resources Program Manager

#### CERTIFICATE OF MAILING

I hereby certify that on the 27<sup>th</sup> day of March 2012, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER ISSUING PERMIT, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:

  
Sharla Cox  
Administrative Assistant

#### US MAIL

**RE: PRELIMINARY ORDER ISSUING PERMIT**

**M.J. Davis Memorial Limited Partnership**  
1970 La Bellezza Grove  
Colorado Springs, CO 80919

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



## **Statement of Available Procedures and Applicable Time Limits**

### **RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES**

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 within fourteen (14) days after service 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 issuance 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.