

Water Resources Field Services

1571 N. 1100 E.
Terreton, ID 83450
208-663-4667

September 27, 2003

Don and Peggy Purcell
4478 N 15th E
Idaho Falls ID 83401

John and Shellie Herbst
4382 N 15th E
Idaho Falls ID 83401

Re: Snake River Basin Adjudication Water Right Claim A25-04065

Dear Water Users:

Yesterday I met with Mr. Purcell and looked at the well and the irrigated place of use. Idaho Department of Water Resources had asked me to do this to aid them in making Adjudication recommendations to the court. Mr. Purcell and I reviewed some of the water-rights issues with this claim. This letter is to summarize these and outline some things you may wish to do.

Water Right Background

Under Idaho water law, any single-home domestic user may have a ground-water right for household use, livestock, and lawn and garden irrigation. The maximum limit is one-half acre of irrigation and 13,000 gallons per day total water use. This water right may be recorded with the state but it does not need to be.

Up until March 25, 1963, a larger water right could also be developed from ground water without filing a permit. While these water rights were valid, no record of them ever existed. Since 1963 a water right permit has been required, but this fact was never advertised nor really even enforced.

In the early 1980's the state made available a process for users who had developed a larger water right before March 25, 1963 to record these with a "beneficial use claim." This was an optional program. Your predecessors Jim Solecki and Harry Messenger filed claim 25-4065 in 1980, representing that your water right had been developed in 1962. The state never investigated any of these 1980's claims, which are called "statutory claims," "beneficial use claims," "243 claims," or "4000 claims." Because these were accepted without any investigation, the state does not acknowledge these as proof of a water right.

In 1987 the state started the Snake River Basin Adjudication. This was a mandatory program and all water users¹ were required to file. In 1989 James Solecki and Don Purcell signed claim A25-04065 for your water right. The state is in the process of investigating these claims and contracted with me to look at your water right. Next spring, the state will make a recommendation to the court based on my field investigation and office review by IDWR personnel.

About 1989 or 1990, the state imposed a moratorium on all new water rights from ground water. This is still in effect. Because the mandatory permit requirement of 1963 was never well-known, in some cases the state has allowed users who can document that their water use was in place before the adjudication (1987) but after 1963 to file for a permit based on a "moratorium exemption" for "pre-moratorium development." This is sometimes difficult; the state seems to have a higher standard of documentation of this development than the standard of "reasonableness" applied to adjudication claims.

Field Inspection

Mr. Purcell showed me the irrigated place of use, and based on a quick sketch and stepping off some dimensions I calculate that the Purcells are irrigating about 0.7 acre and the Herbsts are irrigating about 1.1 acre.

Options

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Your best opportunity is to document that your water right was developed prior to March 25, 1963. This will be difficult because the evidence you present will have to overcome the affidavit in the file from Mr. Bybee and Mrs. Solecki indicating one home was built in 1965 and the other in 1967. I suggested to Mr. Purcell that the county may still have a record of the building permits, or the tax appraisal that added the homes to the tax assessment.

Another opportunity that I would suggest is for one of you to file a small domestic adjudication claim for the minimum household/livestock/one-half acre irrigation water right. If you do that, I will propose to IDWR that if you don't find documentation of pre-1963 development, they still recommend A25-04065 as a small domestic for the other claimant. They can only recommend one-half acre of irrigation without the documentation. By filing a second claim, you may each have one-half acre, instead of sharing it. Whether you

¹ Except small domestic (single home, less than 1/2 acre irrigation). Domestic users have the option to file if they wish

follow this suggestion or not, you each do have a water right for the home and half acre of irrigation. Filing just gets the right documented and recorded. I gave Mr. Purcell a copy of the form for this claim.

If you cannot come up with documentation of pre-1963 development, your best option is to file for a new permit based on pre-moratorium development. I also gave Mr. Purcell a copy of this form.

In my mind the affidavit and well-use agreement in the file adequately document the pre-moratorium development, but the state's standard may be higher. However, the state needs to understand that part of the reason for your current difficulty is their lack of assistance. Had the 1963 permit statute been well advertised, your predecessors would have gotten a permit. In 1980, when your predecessors filed beneficial use claim 25-4065, they could have filed for a permit if IDWR had given them appropriate guidance. When you filed your adjudication claim in 1989, the moratorium may not yet have been in place, and with proper guidance you may have had an opportunity then to apply for a permit. In 1991, when the affidavit was submitted to IDWR indicating 1965 development, IDWR again had an opportunity to provide help and guidance. Finally, Mr. Purcell told me that you attended a recent meeting and asked specifically about the condition of your water right and were basically told "not to worry." Because IDWR has missed numerous opportunities to help you resolve these questions, I would hope that now they would be receptive to accepting the documentation in the adjudication file as evidence of pre-moratorium development.

As a last resort, you may purchase a ground water right from another user and file a transfer to move it to your land. This will be more difficult and costly than the other options. You may also want to investigate ways to irrigate your lawns by purchasing canal shares and a ditch pump.

Second Well

Mr. Purcell asked about the possibility of drilling a second well, so that you may each have your own well. This is an easier question. A licensed driller can get a permit to drill a single-home domestic well without any water right considerations. If your adjudication claim is successful, you may file a transfer to add a second well, or "point of diversion," to that water right. If you have to apply for a permit, you may apply for a second well as part of the permit application. You may also submit the permit application for the current single-well condition, then later file a transfer to add a point of diversion to the water right.

A copy of this letter will be placed in your adjudication claim file. Please feel free to call me if you have questions. If you come up with additional documentation, you may send it to me or directly to IDWR. Be sure to identify that it is for claim A25-04065. IDWR's address is:

IDWR
Attention: Michael Holliday
900 N Skyline Ste A
Idaho Falls ID 83402
525-7161

You will need to work with IDWR directly to file an additional domestic claim or permit application.

Sincerely,

Bryce A. Contor