

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

IN THE MATTER OF APPLICATION	)	
FOR PERMIT NO. 95-17241 IN THE	)	
<u>NAME OF STEVE BARNHART</u>	)	PRELIMINARY ORDER GRANTING PERMIT

PROCEDURAL HISTORY

On December 8, 2016, Steve Barnhart ("Barnhart") filed Application for Permit No. 95-17241 with the Idaho Department of Water Resources ("Department"). The Department published notice of the application on January 5 and 12, 2017. Charlotte Felts ("Felts"), Joan & Tim Tope ("Tope"), and Scott Spray ("Spray") filed protests.

The parties were unable to reach an informal resolution of the issues of protest and requested that a hearing be held to decide the contested case. The Department conducted an administrative hearing on September 19, 2017, at the Department's regional office in Coeur d'Alene. All parties were self-represented. No exhibits were offered at the hearing. After carefully considering the evidence in the record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application 95-17241 proposes to divert water from a spring tributary to Careywood Creek for the following uses:

Purpose of Use	Rate or Volume	Period of Use
Domestic	0.04 cfs	1/1 – 12/31
Stockwater	0.02 cfs	1/1 – 12/31
Diversion to Storage	0.14 cfs	1/1 – 12/31
Fire Protection Storage	6.7 acre-feet	1/1 – 12/31
Wildlife Storage	6.7 acre-feet	1/1 – 12/31
Power Storage	10.4 acre-feet	1/1 – 12/31
Power from Storage	10.4 acre-feet	11/1 – 5/1
Totals:	0.20 cfs, 17.2 acre-feet	

2. The proposed point of diversion is located in the SENWSE, Section 15, T54N, R02W, on property owned by Philip and Patsy Barnhart. The proposed storage facility (a small pond) will also be located on the Philip and Patsy Barnhart property. Barnhart provided a letter from Philip and Patsy Barnhart consenting to the development of the spring and construction of the pond.

3. Barnhart has claimed water right 95-9983 in the Coeur d'Alene – Spokane River Basin Adjudication ("CSRBA"). The Department has prepared a recommendation for water right 95-9983, which includes the following elements:

<u>Water Right</u>	<u>Priority Date</u>	<u>Rate</u>	<u>Purpose of Use</u>	<u>Source</u>
95-9983	12/31/1964	0.05 cfs	Irrigation (4 acres)	Careywood Cr.

4. Barnhart has also claimed water right 95-9455 in the CSRBA. The Department has prepared a recommendation for water right 95-9455, which includes the following elements:

<u>Water Right</u>	<u>Priority Date</u>	<u>Rate</u>	<u>Purpose of Use</u>	<u>Sources</u>
95-9455	9/12/2005	0.02 cfs	Domestic/Stockwater	Careywood Cr. Spring

5. Water right 95-9455 authorizes domestic use at one home with ½ acre of domestic irrigation and stockwater for 10 head of mixed stock. Application 95-17241 describes domestic use at one home with ½ acre of domestic irrigation and stockwater for 20 head of mixed stock.

6. The home described in Application 95-17241 is the same home covered by water right 95-9455. If Barnhart is authorized to divert domestic and stockwater from the proposed spring source under Permit 95-17241, he will no longer divert water right 95-9455 from Careywood Creek or the spring identified on the water right. Testimony of Barnhart.

7. Felts has claimed water right 95-9688 in the CSRBA. The Department has prepared a recommendation for water right 95-9688, which includes the following elements:

<u>Water Right</u>	<u>Priority Date</u>	<u>Rate</u>	<u>Purpose of Use</u>	<u>Source</u>
95-9688	5/2/1945	0.09 cfs	Irrigation (3 acres)	Careywood Cr.

8. Felts' point of diversion is located approximately 2.5 miles downstream of Barnhart's proposed point of diversion.

9. Tope has claimed water right 95-17253 in the CSRBA. The Department has prepared a recommendation for water right 95-17253, which includes the following elements:

<u>Water Right</u>	<u>Priority Date</u>	<u>Rate</u>	<u>Purpose of Use</u>	<u>Source</u>
95-17253	7/13/1905	0.02 cfs	Stockwater	Careywood Cr.

10. Tope has also claimed water right 95-9910 in the CSRBA. The Department has prepared a recommendation for water right 95-9910, which includes the following elements.

<u>Water Right</u>	<u>Priority Date</u>	<u>Rate</u>	<u>Purpose of Use</u>	<u>Sources</u>
95-9910	6/24/1983	0.02 cfs	Stockwater	Careywood Cr. Beaver Cr.

11. On August 3, 2009, Tope filed Application for Permit 95-10939 proposing to divert 1.00 cfs from Careywood Creek for irrigation and for storage in a pond (used for fire protection, irrigation, recreation and wildlife purposes). The Department approved the application and issued Permit 95-10939 on November 23, 2009. Tope has not yet filed proof of beneficial use for Permit 95-10939.

12. Tope's points of diversion for water rights 95-17253, 95-9910 and Permit 95-10939 are located approximately four miles downstream of Barnhart's proposed point of diversion.

13. Spray owns water right 95-16327 which bears a priority date of November 21, 2011 and authorizes the diversion of 0.02 cfs from Careywood Creek for the irrigation of 0.8 acres. Spray's point of diversion on Careywood Creek is located approximately two miles downstream of Barnhart's proposed point of diversion.

14. Water from the proposed spring source flows into a natural drainage, which connects to the Careywood Creek channel. Testimony of Barnhart. The spring is located approximately 1,300 feet from the confluence with Careywood Creek. *Id.* During the snowmelt runoff period, water in the natural drainage, including water from the spring, flows into Careywood Creek. *Id.* During the rest of the year, water from the spring seeps into the ground before reaching Careywood Creek. *Id.*

15. In the summer of 2017, the proposed spring source produced a flow of eight gallons per minute. Testimony of Barnhart. All of the flow seeped into the natural channel before reaching Careywood Creek. *Id.* Barnhart did not provide any evidence about whether the spring water seeping into the ground contributes to the flows in Careywood Creek.

16. Barnhart will use a pipeline to convey water from the proposed spring source to his home for domestic and stockwater use. Testimony of Barnhart. Barnhart will also use a pipeline to convey water from the spring to the proposed pond. *Id.* Because water will be conveyed in a pipeline, no water will be lost due to seepage or evaporation between the spring and the proposed pond.

17. Water used for power production will be conveyed in a pipeline from the proposed pond to a small generator to be installed near Barnhart's home. Testimony of Barnhart. The water will then be piped to and released into the same natural drainage between the spring and Careywood Creek. *Id.*

18. The proposed pond will lose 0.6 acre-feet of water per year to evaporation and 3.6 acre-feet of water per year to seepage. Application 95-17241, Attachments.

19. Currently, Barnhart diverts water from Careywood Creek, under water right 95-9455, for domestic use, including culinary use at his home. Testimony of Barnhart. The creek has tested positive for e coli bacteria. *Id.* Diverting domestic water from the proposed spring will help Barnhart avoid contamination of his drinking water system. *Id.*

20. During the late summer months, there is not enough water in Careywood Creek to satisfy all of the water rights on the creek. Testimony of Barnhart, Felts, and Joan Tope. In late

August 2017, Careywood Creek did not even reach the Tope property. Testimony of Joan Tope. One week prior to the hearing, Barnhart observed that Careywood Creek was not reaching the Tope property. Testimony of Barnhart.

21. In 2016 and 2017, water from Careywood Creek did not reach the Tope property by late summer. Testimony of Joan Tope. In previous years, Careywood Creek would reach the Tope property all year long, even in severe drought years. *Id.* Water rights on Careywood Creek are generally satisfied during the snowmelt runoff period. *Id.*

EVALUATION CRITERIA / ANALYSIS

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.

The applicant bears the burden of proof for all elements set forth in Idaho Code § 42-203A(5). *See* IDAPA 37.03.08.40.04.

Reduction to Existing Water Rights

Rule 45.01.a of the Department's Water Appropriation Rules sets forth the criteria used for determining whether a proposed use of water will reduce the quantity of water under an existing water right:

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

IDAPA 37.03.08.45.01.a

If the domestic and stockwater elements of Application 95-17241 are approved, Barnhart will cease diversion from Careywood Creek and a spring tributary to Careywood Creek under water right 95-9455. Even though Application 95-17241 proposes a higher diversion rate than water right 95-9455, the total beneficial use of water is essentially the same. If the permit includes the following condition, the domestic and stockwater elements of Application 95-17241 will not reduce the quantity of water under existing water rights on Careywood Creek: "Water rights 95-9455 and 95-17241, when combined shall provide no more than 0.04 cfs for domestic use at one home and no more than 0.02 cfs for stockwater use. During times when water is diverted for domestic or stockwater use under this right, the right holder shall cease diverting water under water right 95-9455."

Except for the snowmelt runoff period, all of the water from the proposed spring source seeps into the natural channel before reaching Careywood Creek. Testimony of Barnhart. Therefore, the seepage from the proposed pond should not affect Careywood Creek. In other words, the storage pond will not increase the amount of spring water lost to seepage.

In contrast, evaporation from the pond represents a new depletion to the existing hydrologic system. Barnhart did not demonstrate that there is no hydrologic connection between the proposed spring source and Careywood Creek. It is possible that the spring water lost to seepage could contribute to flows in Careywood Creek. If so, then a new depletion to the spring source (evaporation from the proposed pond) could result in a reduction in the quantity of water available to existing water rights on Careywood Creek. Water users on Careywood Creek already experience water shortages during the summer and fall months. Testimony of Joan Tope. Barnhart has not demonstrated that evaporation from the proposed pond will not reduce the quantity of water under existing water rights.

Barnhart testified that the spring does not supply enough water during the summer and early fall to cover any other uses besides domestic and stockwater. Barnhart only proposes to use the spring water for power production between November 1 and May 1.

Barnhart proposes storing water in the pond all year for power, wildlife and fire protection uses. Because Barnhart has not sufficiently demonstrated that evaporation from the pond will not injure existing water rights, water cannot be stored in the pond during the summer and early fall months. The storage seasons of use for all uses should be changed to match the "power from storage" season of use (November 1 to May 1). Evaporation from the pond during the winter and early spring will be minimal. Water rights from Careywood Creek are generally satisfied during the snowmelt runoff period. Testimony of Tope.

In 2016 and 2017, water from Careywood Creek did not make it to the Tope property by late summer. In previous years, water would flow to the Tope property, even in severe drought years. Tope suspects there may be people diverting water from Careywood Creek without a water right.

The Applicant bears the burden of establishing that the proposed water use will not injure other water rights. In this case, if Barnhart wanted to argue that the 2016 and 2017 water years were not representative of normal conditions on Careywood Creek because of unauthorized diversions

from the Creek, he would need to provide evidence of unauthorized water uses causing the water shortage. No such evidence was provided. Therefore, the Department must assume that the 2016 and 2017 seasons are representative of the normal hydrology and water use on Careywood Creek.

Sufficiency of Water Supply

Rule 45.01.b of the Department's Water Appropriation Rules sets forth the criteria for determining whether the water supply is sufficient for a proposed project: "The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible" IDAPA 37.03.08.45.01.b.

In total, Barnhart proposes to divert 0.20 cfs from the spring. The Department does not have any measurement data for the spring. Barnhart conducted a measurement of the spring flow in the summer of 2017. The spring produced 8 gallons per minute (0.02 cfs) at the time of the measurement, which would represent the lowest spring flow of the year. Application 95-17241 included specification for the micro-hydro system, indicating the system can operate at 12 gallons per minute (0.027 cfs). Barnhart has sufficiently demonstrated that the spring will likely produce enough water for the proposed beneficial uses.

Lack of Good Faith / Speculation

Rule 45.01.c of the Department's Water Appropriation Rules sets forth the criteria for determining whether an application is filed in good faith and not for speculative purposes. An applicant must have "legal access to the property necessary to construct and operate the proposed project." IDAPA 37.03.08.45.01.c.i. An applicant must also demonstrate that it is "in the process of obtaining other permits needed to construct and operate the project" and that there are no obvious legal impediments to prevent successful completion of the project. IDAPA 37.03.08.45.01.c.ii-iii.

Prior to the hearing, the protestants stipulated that this element is not at issue in this contested case. Barnhart owns the property at the proposed place of use. Philip and Patsy Barnhart own the property at the proposed point of diversion and the location of the proposed pond. Barnhart provided a written statement from Philip and Patsy Barnhart granting him access to their property to develop the proposed permit. No other permits are needed to complete the project. There are no obvious legal impediments to completing the proposed project. Barnhart has demonstrated that Application 95-17241 was filed in good faith and not for delay or speculative purposes.

Sufficient Financial Resources

Rule 45.01.d of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria for determining whether an applicant has sufficient financial resources to complete a project. "An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director." IDAPA 37.03.08.45.01.d.ii.

Prior to the hearing, the protestants stipulated that this element is not at issue in this contested case. There is no evidence in the record suggesting that Barnhart lacks sufficient financial resources to complete the proposed project.

Conservation of Water Resources

There is no evidence in the record that the proposed permit is inconsistent with the conservation of water resources within the state of Idaho.

Local Public Interest

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). There is no evidence in the record that the proposed permit will conflict with the local public interest. Although there was testimony offered about previous contamination of Careywood Creek with raw sewage and diesel fuel, the evidence did not suggest that the proposed permit would result in additional contamination.

CONCLUSIONS OF LAW

Barnhart has satisfied his burden of proof for all but one of the elements of review set forth in Idaho Code § 42-203A(5). Specifically, Barnhart did not demonstrate that evaporation from the proposed pond would not reduce flows in Careywood Creek during the irrigation season, after the snowmelt runoff. In order to prevent injury to existing water rights on Careywood Creek, the permit must be conditioned to limit the storage season of use to the non-irrigation season and the snowmelt runoff period (November 1 – May 1).

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 95-17241 in the name of Steve Barnhart is GRANTED with the following elements and conditions:

Priority Date: December 8, 2016

Source: Spring tributary to Careywood Creek

<u>Beneficial Uses</u>	<u>Diversion Rate / Storage Volume</u>	<u>Season of Use</u>
Domestic	0.04 cfs	January 1 – December 31
Stockwater	0.02 cfs	January 1 – December 31
Diversion to Storage	0.14 cfs	November 1 – May 1
Power Storage	10.4 acre-feet	November 1 – May 1
Wildlife Storage	6.7 acre-feet	November 1 – May 1
Fire Protection Storage	6.7 acre-feet	November 1 – May 1
Power from Storage	10.4 acre-feet	November 1 – May 1

Total Diversion Limits: 0.20 cfs / 17.2 acre-feet

Point of Diversion: SENWSE, Sec. 15, T54N, R02W

Place of Use:

NESW, Sec. 15, T54N, R02W Storage (Fire Protection, Wildlife, Power)

Lot 3 (NWSW), Sec. 15, T54N, R02W Domestic, Stockwater, Power from Storage

Permit Conditions

1. Proof of application of water to beneficial use shall be submitted on or before **November 01, 2022**.

2. Subject to all prior water rights.

3. Rights 95-9455 and 95-17241 when combined shall provide no more than 0.04 cfs for domestic use at one home and no more than 0.02 cfs for stockwater use. During times when water is diverted for domestic or stockwater use under this right, the right holder shall cease diverting water under water right 95-9455.

4. Domestic use is for 1 home.

5. The irrigation occurring under this domestic use shall not exceed 1/2 acre.

6. Stockwater use is for 20 head of mixed stock.

7. The quantity of water under this right for domestic and stockwater use shall not exceed 13,000 gallons per day.

8. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.

9. The term of this permit for power use shall extend to November 01, 2042. Prior to the expiration of the term, the Director may issue an order canceling all or any part of the power use authorized herein, may establish a new term, or may revise, delete, or add conditions under which the water right permit or subsequent water right license may be exercised. The order shall take effect on the date the current term expires. If the Director does not issue such an order, the term shall automatically extend to a length equal to the project's prior term and any prior conditions on the water right permit or subsequent water right license shall remain in effect.

10. The rights for the use of water for power purposes acquired under this right shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the State of Idaho that are initiated later in time than the priority of this right and shall not give rise to any claim against any future rights for the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this permit.

11. This right is subject to the provisions of Sections 42-205 through 42-210, Idaho Code, restricting the sale, transfer, assignment, or mortgage of this right. Failure to comply with these provisions is cause for immediate cancellation of this right.

12. Water shall not be diverted from fire protection storage except to fight or repel an existing fire.

13. This right does not grant any right-of-way or easement across the land of another.

14. 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 20th day of October, 2017.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October 2017, a true and correct copy of the document described below was served by placing a copy of the same with the United States Postal Service, certified with return receipt requested, postage prepaid and properly addressed, to the following:

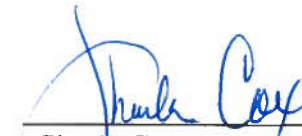
Document Served: Preliminary Order Granting Permit (95-17241)

Steve Barnhart
485 Kripple Creek Road
Athol, ID 83801

Charlotte Felts
1470 Sunset Road
Athol, ID 83801

Scott Spray
2272 Sunset Road
Athol, ID 83801

Joan and Tim Tope
132 Sunset Road
Athol, ID 83801



Sharla Cox
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

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 or files an exception and brief 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 service date 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.