

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

**IN THE MATTER OF APPLICATION FOR)
PERMIT NO. 74-16004 IN THE NAME OF)
ALLAN AND/OR BETTY PURCELL)**

**FINAL ORDER APPROVING IN
PART AND REJECTING IN PART
APPLICATION FOR PERMIT**

PROCEDURAL HISTORY

On July 15, 2013, Allan and Betty Purcell (hereinafter referred to as "Purcell") filed Application for Permit No. 74-16004 with the Idaho Department of Water Resources ("Department"). Purcell filed an amended application on September 5, 2013, addressing a number of deficiencies in the original application.

The Department published notice of the application in the Recorder Herald (Lemhi County) on September 19 and 26, 2013. Protests were filed by the Idaho Water Resource Board ("IWRB") and the Idaho Department of Fish & Game ("IDFG"). Deputy Attorney General Ann Vonde represented IWRB and IDFG in the contested case.

The Department scheduled an administrative hearing for the contested case, to be held on December 1, 2015. The *Notice of Hearing* required the parties to disclose all exhibits to be offered at the hearing on or before November 20, 2015. Purcell provided four proposed exhibits prior to the disclosure deadline:

1. A short newspaper article titled "Reclamation slows Palisades flows – Regional irrigators, state water managers urged reductions" (by Nate Sunderland, Post Register, February 8, 2014)
2. A copy of Permit 74-15613 in the name of James and/or Paula Whittaker.
3. A letter from Tim Luke, Water Distribution Section Manager for the Department, to Dan Smith, Watermaster for Water District 74W (Timber Creek), explaining how Permit 74-15613 should be delivered.
4. A letter composed by Purcell setting forth reasons that his application should be approved.

On November 30, 2015, Ann Vonde filed a withdrawal of protest on behalf of IDFG and IWRB. The withdrawal was not the result of a settlement between the parties and did not include any conditions of withdrawal. The Department issued an *Order Vacating Hearing* on November 30, 2015.

After carefully considering the evidence available to the Department at this time, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application for Permit 74-16004 proposes diverting 5.76 cfs from Big Timber Creek for the irrigation of 293 acres during the irrigation season. Application 74-16004 also proposes diverting 0.02 cfs from Big Timber Creek for stockwater use throughout the entire year. The total proposed diversion rate from Big Timber Creek is 5.76 cfs.

2. The proposed point of diversion is the BT-8 headgate, located in the NWSE of Section 8, T15N, R26E. The proposed place of use includes acres in the NE¼, the NW¼, and the NWSW of Section 25, T16N, R25E.

3. The proposed place of use is already identified as a place of use by irrigation water rights 74-398, 74-399, 74-2335 and a portion of 74-1834. The water rights overlapping the proposed place of use are as follows:

Water Right	Priority Date	Source	Headgate	Rate (cfs)	Acres
74-398	9/12/1933	Big Timber Creek	BT-8	5.76	239
74-399	12/7/1946	Big Timber Creek	BT-8	0.48	20
74-1834 (part)	4/1/1951	Big Timber Creek	BT-8	0.82	34
74-2335	8/4/1966	Ground Water	N/A	1.67	293

4. Water rights 74-398, 74-399, 74-2335 and the 34-acre portion of water right 74-1834 when combined authorize the irrigation of 293 acres. The water rights do not limit the combined diversion rates when the water rights are exercised in combination. The water rights also do not limit Purcell to a diversion rate of 0.02 cfs per acre (one miners inch per acre). Purcell's water rights naming Big Timber Creek as a source of water authorize a total diversion of 7.06 cfs for irrigation of 293 acres (0.024 cfs per acre). Purcell could divert water from Big Timber Creek and from ground water at the same time. If Purcell diverted from both ground water and surface water, he could divert 8.73 cfs to irrigate 293 acres (0.03 cfs per acre or 1½ miners inches per acre).

5. Diversion BT-8 from Big Timber Creek is located approximately 4 miles from the proposed place of use. Purcell's Big Timber Creek water rights, listed above, are the only water rights associated with the BT-8 diversion.

6. The authorized point of diversion for ground water right 74-2335 is located in the NWSW of Section 25, T16N, R25E, immediately adjacent to the proposed place of use.

7. On April 3, 2012, the Snake River Basin Adjudication court issued an order decreeing the general provisions for Administrative Basin 74 (which includes Big Timber Creek). The order included the following provision:

The practice of diverting high flows in the Lemhi Basin, in addition to diverting decreed and future water rights that may be established pursuant to statutory procedures of the State of Idaho, is allowed provided:

(a) the waters so diverted are applied to beneficial use.

(b) existing decreed rights and future appropriations of water are first satisfied.

8. In his pre-hearing disclosures, Purcell included a written statement in support of the Application. Purcell set forth the reasons why he believes the application should be approved.

- 1) I cannot make a decent hay crop without the use of the high water for the [two] or three weeks that it is available when the snowpack is normal.
- 2) I need the high water to raise the sub in my field to have stockwater for my cattle.
- 3) This additional water helps the [aquifer] and springs downstream and the Lemhi River System.

EVALUATION CRITERIA

1. Idaho Code § 42-202(6) states in pertinent part:

[N]o one shall be authorized to divert for irrigation purposes more than one (1) cubic foot of water per second of the normal flow for each fifty (50) acres of land to be so irrigated, or more than five (5) acre feet of stored water per annum for each acre of land to be so irrigated, unless it can be shown to the satisfaction of the department of water resources that a greater amount is necessary.

2. 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.

3. The applicant bears the burden of proof regarding all factors set forth in Idaho Code § 42-203A(5). *See* IDAPA 37.03.08.040.04.

ANALYSIS

1. Idaho Code § 42-202(6) prohibits the Director from approving an application for permit for irrigation that seeks more than 0.02 cfs per acre “unless it can be shown to the satisfaction of the department of water resources that a greater amount is necessary.”

2. The records of the Department establish that Purcell already has a full irrigation water supply at the proposed place of use. Purcell's existing water rights, in combination, authorize the diversion of 8.73 cfs for the irrigation of the 293-acre proposed place of use (0.03 cfs per acre).

3. In his pre-hearing disclosures, Purcell did not submit sufficient documentation establishing that a diversion rate of more than 0.03 cfs per acre is needed to accomplish the beneficial use of irrigation at the proposed place of use.

4. Purcell has not demonstrated that a "greater amount of water" from Big Timber Creek is necessary for irrigation of the places of use identified by his existing water rights. To demonstrate that a greater amount of water is necessary, Purcell would need to submit a technical evaluation of the soil types, crop types, irrigation methods, and the amount of water available under existing rights at Purcell's field headgate.

Local Public Interest

5. 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).

6. It is not in the local public interest to approve an application for permit that is contrary to Idaho Code § 42-202(6)'s irrigation limitation where there has been no showing of an irrigation necessity for more water.

7. Moreover, in 2004, the State of Idaho, United States of America ("United States"), and other interested parties signed a stipulation for settlement of objections to instream federal reserved water rights claimed by the United States in the Snake River Basin Adjudication. The stipulated agreement is referred to as the Wild & Scenic Agreement. The parties to the Wild & Scenic Agreement agreed to recognize federal reserved instream water rights on certain water ways. In return, the parties agreed that the federal reserved instream water rights would be subordinate to certain existing and future water uses. Relevant to this matter, the Wild & Scenic Agreement set aside 150 cfs for future development in the Main Salmon River and its tributaries. Approval of the irrigation component of this application for permit, if unsubordinated as sought by Purcell, would count against the 150 cfs of water set aside for future development. It is not in the local public interest to allocate the limited water reserved for future development in the Wild & Scenic Agreement for supplemental irrigation uses that do not result in actual new development of irrigation projects or other new beneficial uses in the basin.

8. Purcell also proposes diverting 0.02 cfs from Big Timber Creek for stockwater use throughout the entire year. A new application for permit for de minimis stockwater as defined by Idaho Code § 42-1401A(11) is not subordinate to the federal reserved instream water rights and thus does not count against the 150 cfs limit in the Wild & Scenic Agreement. Thus, a new application for permit for de minimis stockwater use during the irrigation season is consistent with the local public interest.

Conservation of Water Resources

9. The irrigation component of the proposed permit is also inconsistent with the conservation of water resources within the state of Idaho. It is not consistent with the conservation of water resources in Idaho to approve irrigation water rights exceeding 0.02 cfs per acre without substantial justification based on soil types, crop types and irrigation methods. Furthermore, it is contrary to the conservation of water resources to appropriate the limited supply of water available for new development from the Main Salmon River and its tributaries for the supplemental irrigation use sought by Purcell especially when existing irrigation rights already exceed 0.02 cfs per acre and such supplemental irrigation use is already authorized by a general provision. Proposals seeking an unsubordinated application for permit for increased beneficial use on existing acres must first demonstrate efficient use of water through modern irrigation practices before they can be approved.

10. Purcell also proposes diverting 0.02 cfs from Big Timber Creek for stockwater use throughout the entire year. When Purcell's ditch is carrying irrigation water, 0.02 cfs of stockwater can be delivered to Purcell's place of use. Approving an application for permit for de minimis stockwater as defined by Idaho Code § 42-1401A(11) during the irrigation season is consistent with the conservation of water resources within the state of Idaho. Because Purcell's diversion is an open ditch, 4 miles long across rocky soil, there is no way that 0.02 cfs will reach his property during times when the ditch isn't also carrying irrigation water. Purcell has not explained how he will convey 0.02 cfs of stockwater to the proposed place of use during the non-irrigation season. Approving an application for permit when it is clear that beneficial use cannot be made of the quantity of water sought is inconsistent with the conservation of water resources within the state of Idaho.

CONCLUSIONS OF LAW

1. Purcell did not adequately demonstrate the need for irrigation water above and beyond the amounts authorized under his existing rights. As a result, the irrigation portion of his application must be rejected pursuant to Idaho Code § 42-202(6). Furthermore, with respect to the irrigation portion, Purcell has not satisfied his burden of proof under the local public interest and conservation of water criteria. However, with respect to the stockwater component of Purcell's application for permit, the application should be approved for de minimis stockwater during the irrigation season as this is in the local public interest and is consistent with the conservation of water resources within the state of Idaho. Therefore, Application 74-16004 should be approved in part and rejected in part.

2. The rejection of the irrigation portion of Application 74-16004 in no way affects the ability of Purcell or others to continue to divert and use water consistent with the decreed general provision authorizing the practice of diverting high flows in the Lemhi basin.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 74-16004 in the name of Allan and/or Betty Purcell is APPROVED IN PART and REJECTED IN PART. The application is approved as follows:

Priority Date: 9/11/2013
Source: Big Timber Creek Tributary: Lemhi River
Season of Use: 03/15 to 11/15
Diversion Rate: 0.02 cfs
Point of Diversion: NWSE, Sec. 8, T15N, R26E, Lemhi County
Place of Use: NENE, NWNE, SWNE, NENW, NWNW, SWNW, SENW,
NWSW, Sec. 25, T16N, R25E

Permit Conditions

1. Proof of application of water to beneficial use shall be submitted on or before January 01, 2017.
2. Subject to all prior water rights.
3. 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. 74W.
4. Upon specific notification by the Department, the right holder shall install a lockable device of a type acceptable to the Department in a manner that will provide the watermaster suitable control of the diversion.
5. The quantity of water under this right for stockwater use shall not exceed 13,000 gallons per day.
6. Stockwater use is for 100 range cattle.

Dated this 31st day of December, 2015.



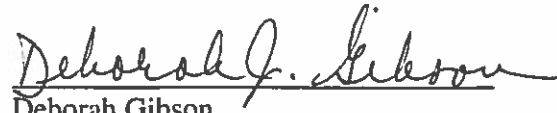
Gary Spackman
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of December 2015, 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: Final Order Approving in Part and Rejecting in Part
Application for Permit (74-16004)
Explanatory Information to Accompany a Final Order**

Allan and Betty Purcell
98 Purcell Road
Leadore, ID 83464


Deborah Gibson
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department 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 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.