

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

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

**ORDER DENYING PETITION
FOR RECONSIDERATION**

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 permit for irrigation use near Samaria. The application was protested by a number of individuals, including Brent Clark and Two Buck Chuck, LLC (represented by Brent and Shawna Clark), and resulted in an administrative hearing held on March 19, 2012. The hearing officer designated by the Department reviewed the administrative record and issued an Preliminary Order Issuing Permit. The date of service for the Preliminary Order was April 9, 2012.

On April 19, 2012, the Department received a Petition for Reconsideration (“Petition”) filed by Brent Clark, Shawna Clark, and Two Buck Chuck, LLC (“Petitioners”). Because the Petition was received within 14 days of the date of service of the Preliminary Order, the Petition is timely. The Petition identified certain topics and issues the Petitioners argue were not adequately addressed in the Preliminary Order.

ANALYSIS OF ARGUMENTS RAISED IN THE PETITION

The Petition asserts that the pump test conducted by Dr. Wood did not reflect the actual proposed diversion rate and “cannot be generalized to accurately or theoretically establish a negligible effect on surrounding water supply.” (Petition, page 2) This is a misunderstanding about the purpose of the pump test. Dr. Wood testified that the pump test was not intended to mirror the proposed pumping conditions. Rather, the test was a mechanism for collecting information related to the characteristics of the local aquifer. Through the pump test, Dr. Wood was able to estimate the transmissivity of the local aquifer. Therefore, the fact that the pump test diversion rate and duration did not match the proposed diversion rate and duration does not invalidate the conclusions reached by Dr. Wood in his report.

The Petition notes that the Malad River drainage (Basin 15) is located between two basins that have been identified by the Department as ground water management areas (the Bear River Ground Water Management Area and the Curlew Valley Critical Ground Water Area). Proximity to other critical ground water areas, by itself, is not a justification for the denial of Application 15-7347. The Bear River and Curlew Valley management areas represent unique hydrologic systems. The factors that led to the creation of those ground water management areas may or may not exist in the Malad River drainage. The Oneida County Commissioners have notified the Department of its

concerns about ground water levels in the area. (See Exhibit P3) The decision to restrict future ground water development within the Malad River drainage must ultimately be based on local ground water data and local public input. This contested case is not the appropriate forum for resolving basin-wide aquifer concerns.

The Petition identifies two ground water wells which are periodically monitored by the United States Geologic Survey ("USGS") as proof of declining aquifer levels within the basin. (15S35E22AAB1 and 15S35E01DAA1) The data from these wells was not part of the administrative record for this contested case. It was not presented as evidence at the hearing or referred to in any of the documents filed by the protestants. Even if the data from these two wells were allowed into the administrative record, the data does not conclusively demonstrate a decline in aquifer levels. In fact, the closest well to the proposed well (15S35E22AAB1) shows the water level in the lower aquifer layer was higher in 2009 than at any point between 1963 and 1972. As stated above, this contested case is not the proper venue for determining whether a basin-wide restriction on new ground water permits is warranted.

The Petition states that Two Buck Chuck, LLC has a water right (15-7341) in a nearby spring, Aldrich Spring, which the Petitioners assert will be affected by the proposed diversion. Water right 15-7341 is a statutory claim filed pursuant to Idaho Code § 42-243, meaning the priority date associated with the right and the beneficial uses occurring under the right have never been verified by the Department or a court. It is unknown whether Statutory Claim 15-7341 would be found to be a valid water right in an adjudication. However, even if 15-7341 constitutes a valid water right, any drawdown impact to Aldrich Spring caused by the proposed diversion would be remote. Department records for 15-7341 indicate Aldrich Spring is over one mile to the south of the proposed well and 300 feet higher in elevation than the ground surface at the proposed well. Dr. Wood testified that many of the springs in the area arise in a shallow aquifer layer, separated from the deeper aquifer layer to be diverted by the proposed well.

The Petition argues that the proposed place of use includes poor or marginal ground. There is no legal requirement that irrigated acres be used to grow certain crops. Irrigation rights may be used to grow pasture grasses on ground that would not be ideal for growing commodity crops such as corn or alfalfa. Mr. Simpson testified that all of the ground can be irrigated and that some of the ground may be put into pasture depending on the suitability of the soil. Mr. Simpson's testimony is sufficient to meet the burden of proof relating to good faith and no speculation. If, as the Petition asserts, Mr. Riches attempts to move the water to a different ground water well in the future, the required transfer application would be advertised to the public and would be evaluated for any adverse impacts to local water rights at that time.

Finally, the Petition asserts that flow from certain springs and seeps on the Petitioners' property will be dried up or diminished as a result of the proposed ground water diversion. There are no recorded water rights associated with the springs and seeps arising on the Petitioners' property. The only evidence presented at hearing on this topic was offered by Dr. Wood. He stated that it is unlikely that the local springs and seeps are directly connected to the deeper aquifer layer proposed to be diverted in Application 15-7347. Dr. Wood's testimony on this subject was persuasive. In the absence of any substantial evidence to contradict Dr. Wood's testimony, the

hearing officer found that the proposed diversion would not reduce the quantity of water under existing water rights.

The remaining arguments raised in the Petition were addressed in the Preliminary Order Issuing Permit or do not contain sufficient detail to justify a response in this Order. Therefore, having reviewed the Petition, and finding no new issues of fact or law sufficient to warrant a change to the Preliminary Order, the Petition should be denied.

ORDER

IT IS HEREBY ORDERED that the Petition for Reconsideration filed by Brent and Shawna Clark and Two Buck Chuck, LLC is DENIED.

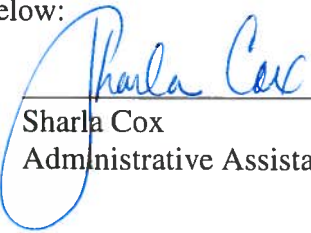
Dated this 30th day of April, 2012.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of April 2012, I mailed a true and correct copy of the foregoing ORDER DENYING PETITION FOR RECONSIDERATION, 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: ORDER DENYING PETITION FOR RECONSIDERATION

**Lawrence V. (Vic) Riches Jr.
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**Dahrl U. Hughes et al.
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**Kody Warren
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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.