

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)

**PRELIMINARY ORDER
ISSUING PERMIT**

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 right for the irrigation of 215 acres south of Samaria. On September 15, 2011, the Applicant filed an amended application for permit, reducing the proposed irrigation place of use to 202.7 acres. The amended application described a diversion rate of 3.34 cfs and an annual diversion volume of 1,193 acre-feet.

The application was advertised to the public beginning on October 6, 2011, and was protested by David Reel, Brad Warren, Kody Warren, G. Marlynn Holgate, and Brent Clark on behalf of himself and Two Buck Chuck, LLC. A single protest was also filed by Darhl Hughes, Jeff Waldron, Matthew Winn, Doyle Waldron, Ramona Hughes, Randy Higly, and Dan Coleman. Mr. Hughes was the representative and spokesperson for this group during all of the proceedings. The protests generally stated concerns that the proposed ground water well would impact domestic wells in the area. A pre-hearing conference was held on January 10, 2012. The parties were unable to resolve the protests at that time and requested a hearing to decide the contested case.

On March 19, 2012, a hearing was held at the Oneida County Road & Bridge building in Malad, Idaho. Brad Warren and Kody Warren were not present at the hearing and did not contact the Department prior to the hearing regarding their inability to attend. By failing to attend the hearing, Brad Warren and Kody Warren waived their right to present evidence, to cross-examine witnesses, and to object to the admission of evidence. The Parties in attendance 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 15-7347 proposes diverting ground water to irrigate 202.7 acres in the SE1/4 of Section 23 and the NE1/4 of Section 26, Township 15 South, Range 35 East. The proposed point of diversion, a new ground water well would be located in the SE1/4SE1/4 of Section 23. The Applicant recently drilled a stockwater well near the proposed well site. The stockwater well is 120 feet deep with a static water level at 38 feet below land surface.

2. The Applicant hired Tom Wood of Clearwater Geosciences, LLP to evaluate the local aquifer parameters and the potential hydrologic impacts to nearby wells if ground water were diverted as proposed in the application. Dr. Wood performed some on-site pump testing and prepared a report summarizing his findings. The report, dated August 10, 2011, was included as part of the application for permit.

3. On April 23, 2011, Dr. Wood conducted a pump test using an irrigation well located one mile north of the proposed well. The well was pumped at a rate of 140 gallons per minute (0.31 cfs) for 24 hours. The drawdown occurring in the well was monitored during the pumping period. 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 78,000 ft²/day. This calculated transmissivity rate is consistent with another recent pump test conducted by Dr. Wood in the area, which resulted in a transmissivity of 51,000 ft²/day. The area of the proposed well is a productive portion of the local aquifer.

4. Using the calculated transmissivity rate and an assumed storativity value of 0.1, Dr. Wood created a model to predict the drawdown at certain distances from the proposed well. A number of assumptions were incorporated into the model. First, Dr. Wood assumed the proposed well would pump at the full diversion rate listed in the application (3.34 cfs) for six months (180 days). He also assumed no-flow boundaries (aquifer boundaries) 4,000 feet to the west of the proposed well, 46,000 feet to the east of the proposed well, and 2,000 feet south of the proposed well. Applying this set of assumptions, the model estimated 7 feet of drawdown at the existing well and 2 feet of drawdown at a distance of ½ mile from the proposed well.

5. The assumptions incorporated in Dr. Wood's model are conservative and over-estimate the potential drawdown effects. It is unlikely that the proposed ground water well would be pumped at 3.34 cfs for 180 days straight. That level of pumping equates to approximately 1,200 acre-feet per year. All new ground water rights in the Malad River drainage (Basin 15) are limited to 3.5 acre-feet per acre, measured at the field headgate. Therefore, Permit 15-7347 would be inherently limited to an annual diversion volume of 709.5 acre-feet, measured at the field headgate. The no-flow boundaries to the west and east are also conservative assumptions because there will likely be some contribution to the aquifer from those areas.

6. Mr. Hughes owns a domestic well located approximately 1.5 miles north of the proposed well site. He testified that his domestic well was drilled in the 1960s, but was unable to give a specific date of construction. Mr. Hughes did not own the property when the domestic well was drilled. He did not provide evidence regarding the current static water level in his domestic well or the static water level in the well at the time it was drilled.

7. Mr. Clark owns a domestic well located approximately 150 yards from the proposed well site. He testified that his domestic well was drilled in the late 1960s, but was unable to give a specific date of construction. Mr. Clark did not own the property when the domestic well was drilled. He did not provide evidence regarding the current static water level in his domestic well or the static water level in his domestic well at the time it was drilled. Mr. Clark is currently

experiencing problems with the well. During the summer the flow from the well diminishes and the water becomes brackish.

8. Mr. Holgate and Mr. Reel own domestic wells located approximately ½ mile from the proposed well site. Mr. Holgate's domestic well was drilled in 1998. Mr. Reel's domestic well was drilled at some point in the 1980s.

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. Dr. Wood's analysis of potential drawdown impacts is persuasive.

2. Drawdown impacts to the surrounding ground water wells, including domestic wells drilled after 1978, are 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 diversion must be evaluated on a case-by-case basis. The local drawdown estimated by Dr. Wood is reasonable given the depth of the aquifer and the static water level at the proposed point of diversion.

4. In a 1982 case, the Idaho Supreme Court determined that the reasonable pumping level standard of Idaho Code § 42-226 does not apply to domestic wells constructed and used prior to 1978. (See *Parker v. Wallentine*, 103 Idaho 506 (1982)) Two pre-1978 domestic wells may be located within ½ mile of the proposed well (the Hughes domestic well and the Clark domestic well). The Idaho Supreme Court held that, if a junior ground water user causes drawdown in a pre-1978 domestic well, the junior water user may be curtailed or may be required to compensate the owner of the domestic well for the decline in water levels.

5. In order to invoke the protection of steady ground water levels contemplated in *Parker v. Wallentine*, a water user must establish the date when the domestic ground water well was constructed and first used. A water user must also establish the static water levels existing in the well at the time of construction or the current static water levels in the well.

6. There was not sufficient evidence provided at the hearing to make a decision whether the Hughes domestic well and the Clark domestic well are entitled to protection under the *Parker v. Wallentine* decision. Therefore, this Order does not make any determination on the applicability or viability of a *Parker v. Wallentine* argument. The protestants are not precluded from pursuing such an argument in a future civil proceeding.

Sufficiency of Water Supply

7. The Applicant met his 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

8. The Applicant met his burden of showing that the application was made in good faith and that he sufficient financial resources to complete the proposed irrigation project. The Balance Sheet provided by Mr. Riches (Applicant's Exhibit #1) demonstrates sufficient financial resources to complete the proposed project.

Local Public Interest

9. 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)) 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 ground water wells. 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 his burden of proof for this element.

Conservation of Water Resources

10. The Applicant met his 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, a conservative use of water.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 15-7347 in the name of Lawrence V. (Vic) Riches Jr. is APPROVED and ISSUED with the following elements and conditions:

Priority Date: August 22, 2011

Source: Ground Water

Season of Use: 4/1 – 10/31

Diversion Rate: 3.34 cfs

Point of Diversion: SE1/4 SE1/4, Sec 23, T15S, R35E

Place of Use: Sec 23, T15S, R35E	NESE	1.2 acres
	NWSE	32.0 acres
	SWSE	40.0 acres
	SESE	19.5 acres
Sec 26, T15S, R35E	NENE	40.0 acres
	NWNE	40.0 acres
	SWNE	15.0 acres
	SENE	15.0 acres
	Total	202.7 acres

Conditions

1. Proof of application of water to beneficial use shall be submitted on or before **May 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. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.

7. 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 9th day of April, 2012.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of April 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

**Lawrence V. (Vic) Riches Jr.
10410 West Loyola Drive
Los Altos, CA 94024**

**Brent Clark / Two Buck Chuck, LLC
54778 Happy Valley Lane
Mount Vernon, OR 97865**

**David Reel
5176 South 4400 West
Malad, ID 83252**

**G. Marlynn Holgate
4016 West Samaria Road
Malad, ID 83252**

**Brad Warren
5199 South 4600 West
Malad, ID 83252**

**Dahrl U. Hughes et al.
5196 South 4400 West
Malad, ID 83252**

**Kody Warren
5196 South 4600 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.