

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT NO. 63-33141
IN THE NAME OF MELLIN PROPERTIES
LTD PARTNERSHIP

PRELIMINARY ORDER REINSTATING
A PERMIT AND GRANTING A
REQUEST FOR EXTENSION OF TIME

BACKGROUND AND FINDINGS OF FACT

The Department issued Permit No. 63-33141 (“Permit 1”) in the name of Mellin Properties LTD Partnership (“Mellin”) on March 10, 2010. Permit 1 authorizes the diversion of 1.60 cubic feet per second of ground water for irrigation of 40 acres in the SW¼SE¼ and 40 acres in the SE¼SE¼ of Section 24 Township 01 North, Range 01E East, B.M., Ada County.

On November 12, 2015, the Department issued Permit No. 63-34046 (“Permit 2”) in the name of Mellin Properties LTD Partnership authorizing the diversion of 1.60 cubic feet per second of ground water for irrigation of a separate 80 acres on property directly adjacent to Permit 1.

On March 27, 2015, the Department granted Mellin’s *Request for Extension of Time to Submit Beneficial Use* (“First Request”), related to Permit 1, which allowed five years additional time beyond the initial development period to demonstrate full beneficial use under the Permit.¹ The Department concluded good cause existed to extend the deadline to prove beneficial use because Mellin needed more time to construct a ground water well and install a center pivot irrigation system.

On December 16, 2019, the Department received another *Request for Extension of Time to Submit Beneficial Use* (“Second Request”). Mellin’s Second Request asked the Department for an additional five years to develop Permit 1. Mellin’s Second Request argued the development of the 80 acres authorized by Permit 1, together with the 80 acres authorized by Permit 2, is one project totaling 160 acres. As a result, Mellin asserted the combined 160-acre project should qualify for an additional extension of time to show proof of beneficial use under the criteria for additional time established in Idaho Code § 42-204(4).²

Mellin claimed completion of the project was prevented because Idaho Power must install power supply lines across land managed by the Bureau of Land Management (“BLM”). Mellin claimed the right of way application process required before the power lines can be constructed was causing delays in development of the project. The Department granted the Second Request on March 16, 2020, which extended the deadline to submit proof of beneficial use by an additional 39 days.³

¹ The Department granted the First Request pursuant to former Idaho Code § 42-204(6). Idaho Code § 42-204 was amended by the 2021 Idaho Legislature, as discussed below.

² The Idaho Legislature amended Idaho Code § 42-204(4) during the 2021 legislative session and renumbered as Idaho Code § 42-204(3)(a).

³ 39 days represents the actual delay caused by Idaho Power’s pending application, calculated as the number of days between the day the right of way application was filed with the BLM on January 21, 2020, to the proof of beneficial use deadline established by the grant of the First Request, or April 8, 2020.

On April 3, 2020, Mellin filed a *Petition for Reconsideration* which challenged the Department's decision to grant an extension of 39 days. The *Petition for Reconsideration* was not filed timely, therefore, the Department did not issue an order in response. See IDAPA 37.01.01.730.02.a (petitions for reconsideration must be filed within 14 days of the service date of a preliminary order).

On April 6, 2020, the Department received another *Request for Extension of Time to Submit Beneficial Use* ("Third Request") requesting an additional "five (5) years from March 1, 2020" to develop beneficial use under Permit 1. Mellin's Third Request was identical to the Second Request. The Department approved the Third Request on May 5, 2020, due to the continued delay associated with Idaho Power's still-pending application for right of way.

On May 14, 2020, the Department received another *Request for Extension of Time to Submit Beneficial Use* ("Fourth Request") requesting an additional five years to develop beneficial use under Permit 1 for the same reasoning included in the Second and Third Requests. On May 20, 2020, the Department approved the Fourth Request due to the same ongoing governmental delay.

On June 2, 2020, the Department received a *Petition for Reconsideration of the Fourth Request* ("Petition to Reconsider the Fourth Request"). The *Petition to Reconsider the Fourth Request* argued Permit Nos. 63-33141 and 63-34046 should be considered one project. If Permit 1 and 2 were considered one project, the project would involve more than one hundred acres, and Permit 1 and Permit 2 together would then meet the criteria for additional time to develop beneficial use pursuant to Idaho Code § 42-204(4).

The Department denied the petition on June 15, 2020, issuing the *Order Denying Petition for Reconsideration*, which stated, in relevant part:

Within the four corners of the Permit, the total authorized diversion is less than the statutory minimum threshold of 2.0 cfs, and the total authorized development of land is less than the statutory minimum threshold of 100 acres. Because the 2.0 cfs and 100 acre thresholds are not achieved by the Permit, it does not qualify for an extension pursuant to Idaho Code § 42-204(4).

Between June 2020 and June 2021 nine more *Requests for Extension of Time to Submit Beneficial Use* were received by the Department. All these requests were granted, extending the time to submit proof of beneficial use by 39 days pursuant to Idaho Code § 42-204(3)(a). The most recent deadline to submit proof of beneficial use was extended to July 20, 2021.

On July 20, 2021, the Permit lapsed because an acceptable *Proof of Beneficial Use Statement* or *Request for an Extension of Time to Submit Proof of Beneficial Use* had not been received by the Department.

On August 3, 2021, the Department received another *Request for an Extension of Time to Submit Proof of Beneficial Use* ("Thirteenth Request") requesting an additional "five (5) years from March 1, 2020" to develop the Permit. The Permit Holder repeated the same reasoning from all previous requests.

CONCLUSIONS OF LAW

At issue is whether to grant or deny Mellin's Thirteenth Request to extend the time to submit proof of beneficial use for Permit 1. Idaho Code § 42-204 controls whether or not the Department may extend the timeframe for submission of proof of beneficial use on water permits. The Idaho Legislature amended Idaho Code § 42-204 during the 2021 legislative session in House Bill 268, Session law 162 (effective July 1, 2021). House Bill 268 amended the criteria the Department must use to evaluate requests for extensions of time to submit proof of beneficial use.

Idaho Code § 42-204(3), as amended, states in relevant part:

The department may approve a timely request for an extension of time in the following circumstances:

(a) In cases where the permit holder is prevented from proceeding with ... application of water to full beneficial use by the permit holder's failure to obtain necessary consent or final approval ... from the federal government ... state, county, city or other local government permitting or administrative action ... or by litigation related to the permit holder's land or water development, the department of water resources ... shall extend the time so that the amount of time lost by such delays shall be added to the time given in the original permit...

(d) The time for ... application of the water to full beneficial use: (i) under any permit authorizing the diversion of two (2) or more cubic feet per second of water or the development or cultivation of one hundred (100) or more acres of land or (ii) under any permit that, when combined with another permit, authorizes the diversion of two (2) or more cubic feet per second of water or the development or cultivation of one hundred (100) or more acres of land, provided the permits have a common or combined diversion and distribution system, are owned by the same permit holder, and are approved within five (5) years of each other may be extended by the director of the department of water resources... for an additional ten (10) years beyond the initial development contained in the permit...

In this case, Permit 1 lapsed prior to Mellin's submission of the Thirteenth Request. Therefore, the Department must also analyze both whether Permit 1 should be re-instated and whether the Thirteenth Request can be granted. Idaho Code § 42-218a(1) states, in relevant part:

A permit upon which the proof of beneficial use . . . has not been submitted, or a request for extension of time has not been received on or before the date set for such proof ... shall lapse and be of no further force nor effect...

Idaho Code § 42-218a(2) states, in pertinent part:

... [T]he department may, upon a showing of reasonable cause, reinstate the permit with the priority date advanced a time equal to the number of days that said showing is subsequent to the date set for proof.

Since the Thirteenth Request was received 14 days late, Permit 1 is currently lapsed. However, the Thirteenth Request demonstrates the existence of an on-going delay based on BLM's pending approval of Idaho Power's right of way application. The Permit Holder does not have control over approval of the right of way application, therefore it is reasonable to reinstate the Permit.

Permit 1 qualifies for an extension under Idaho Code § 42-204(3)(a) because Mellin is currently prevented from constructing necessary diversion works as a result of the pending right of way application before BLM. The right of way application was submitted to the BLM 39 days prior to the initial deadline to submit proof of beneficial use. Therefore, the deadline to submit proof of beneficial use may be extended 39 days.

Permit 1 does not qualify for an extension under the provisions of Idaho Code § 42-204(3)(b)-(f). Permit 1 does not authorize more than 25,000 acre-feet or the construction of a reservoir, is not held by the United States or the Idaho Water Resource Board, and a grant of additional time pursuant to subsection (f) has already been granted. When considered together Permit 1 and Permit 2 would meet all the other statutory requirements of subsection (d) except that Permit 2 was approved more than five years after the approval for Permit 1 was issued. Therefore, Permit 1 does not qualify for an extension under Idaho Code § 42-204(3), as amended.

Until such time the right of way application is approved or concluded, the delay will be on-going and Permit 1 will qualify for extensions pursuant to Idaho Code § 42-204(3)(a). In this case, rather than extending the time frame for the submission of proof of beneficial use from the prior deadline, Mellin's authorized 39-day extension for submission of proof of beneficial use will begin from the date of this order.

ORDER

IT IS HEREBY ORDERED that Permit No. 63-33141 is **REINSTATED** and the Permit's priority date is advanced to January 10, 2009.

IT IS FURTHER ORDERED that the August 3, 2021, *Request for an Extension of Time to Submit Beneficial Use* is **GRANTED** and the time within which to submit proof of beneficial use is extended to December 4, 2021.

DATED this 26th day of October, 2021.



Shelley W. Keen, Chief
Water Allocation Bureau

RECEIVED

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

\$50 fee

Received by KURecpt No. C40692Date 8/3/21

AUG 03 2021 REQUEST FOR EXTENSION OF TIME

DEPARTMENT OF
WATER RESOURCES

To provide additional time in which to submit proof of beneficial use for a water right permit

The Idaho Department of Water Resources will consider this form a request that the permit holder(s) be granted an additional period of time under the provisions of Section 42-204, Idaho Code, in which to complete development of a water right and file proof of beneficial use of water. There is a FILING FEE of \$50.00 to be included with this form when filed with IDWR.

Permit no. 63-33141 Date proof is due July 20, 2021
 Name(s) of permit holder(s) Mellin Properties Limited Partnership
 Mailing address 10100 W Franklin Rd City Boise State ID Zip 83709-0333
 Telephone no. 208-250-2963 Email rmellimla@msn.com

Describe what work has been completed toward the development of this water right:

If no work has been completed, show "none".

Purchased the long-side adjoining 80 acres for \$40,000 to make an economic unit with this 80-acre property so as to use a full-circle pivot and a single well. Also constructed an 8-inch guide well to 370 feet, the bottom of the rock with 100 ft of static water for \$32,000 and pivot point buried electric line for \$12,000.
Costing \$84,000 This permit is associated with Permit No, 63-34045.

The permit holder(s) has been unable to complete the remainder of the work for the following reasons:

I am not able to soon economically farm the land because of the delay in getting an electric powerline constructed across BLM land until BLM's expected approval in about two years from Jan 22, 2020 - now delayed some - plus two months to construct. Also see my letter of April 2, 2020, to IDWR, for justification for an Extension of Time of five years.

Permit holder(s) request an extension for five year(s) from March 1, 2020.

Ralph Mellin
 Signature (If other than permit holder, Power of Attorney must be supplied)

July 29, 2021
 Date

ACTION OF THE DEPARTMENT OF WATER RESOURCES

The Department has reviewed the explanation for delay and concludes the reason(s) for delay meets the requirements for approval of the Request for Extension of Time as provided by Section(s) 42-204 and/or 42-218, Idaho Code.

☐ IT IS HEREBY ORDERED that the permit is REINSTATED with the priority date advanced to _____, 20____.

☐ IT IS HEREBY ORDERED that the above request for extension of time is APPROVED, and the time within which to submit proof of beneficial use is extended to _____, 20____.

Signed this _____ day of _____, 20____

Shelley W. Keen, Chief
 Water Allocation Bureau

Governor Brad Little
October 27, 2021

Director Gary Spackman

MELLIN PROPERTIES LTD PARTNERSHIP
10100 W FRANKLIN RD
BOISE ID 83709-0333

REQUEST FOR EXTENSION OF TIME LETTER

RE: Permit No. 63-33141

Dear Permit Holder:

Enclosed is a copy of the *Preliminary Order Reinstating a Permit and Granting a Request for Extension of Time* regarding the request for extension of time submitted in connection with the above referenced permit which extends the proof due date to **December 4, 2021**.

This approved extension also reinstates the permit and advances the priority date since the request and the filing fee was submitted after the permit proof due date. The priority date of this permit is advanced to **January 10, 2009**, pursuant to Idaho Code § 42-218a(2).

The extension is a PRELIMINARY ORDER issued by the Department pursuant to Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01). It can and will become a final order without further action by the Department unless a party petitions for reconsideration or files an exception and/or brief within fourteen (14) days of the service date as described in the enclosed information sheet.

Please be advised that Idaho Code § 42-248, requires you or the owner of this water right to maintain current ownership and address records on file with the Department. Forms to file a change of ownership of a water right and/or a change in the address of the water right owner are available from any Department office or at the Department's website at www.idwr.idaho.gov.

If you have any questions concerning this permit, please contact the State Office of the Department located in Boise at (208) 287-4800.

Sincerely,



Debbi Judd
Technical Records Specialist

Enclosures

CERTIFICATE OF SERVICE

I hereby certify that on **October 27, 2021** I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER (**PRELIMINARY ORDER REINSTATING A PERMIT AND GRANTING A REQUEST FOR EXTENSION OF TIME**) to the person listed below:

RE: Preliminary Order in the Matter of Permit No. **63-33141**

**MELLIN PROPERTIES LTD PARTNERSHIP
10100 W FRANKLIN RD
BOISE ID 83709-0333**



Debbi Judd
Technical Records Specialist

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

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

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **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 67-5243(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 with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

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, requests 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 IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director 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.