

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

IN THE MATTER OF WATER RIGHT NOS.)
2-2172, 63-3142, AND 63-7083 IN THE NAME)
OF DRY LAKE DAIRY, LLC)

**PRELIMINARY ORDER
GRANTING EXTENSIONS OF
TIME TO AVOID FORFEITURE**

This matter having come before the Idaho Department of Water Resources ("Department") as requests for extensions of time to avoid forfeiture, the Department finds, concludes and orders as follows:

FINDINGS OF FACT

1. Water right nos. 2-2172, 63-3142, and 63-7083 ("Water Rights") authorize the irrigation of a combined total of 219 acres in Canyon County, Idaho. Water right no. 63-3142 also authorizes the diversion of water for commercial and stockwater purposes in Canyon County.
2. Water right nos. 63-3142 and 63-7083 were decreed on February 6, 2009.
3. Water right no. 2-2172 was decreed on June 15, 2009.
4. On December 31, 2019, Dry Lake Dairy, LLC, ("Applicant") submitted three *Applications for Extension of Time to Avoid Forfeiture of a Water Right* ("Applications"), one for each of the Water Rights. In the Applications, the Applicant specifies that the requests to avoid forfeiture are only for the authorized irrigation uses and only for the portions of the Water Rights used in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M. The Applicant further states that the land in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M., "is currently used for non-irrigation purposes."
5. Each of the Water Rights authorizes the irrigation of 40 acres within the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M.
6. Satellite imagery shows that the land in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M., was irrigated in 2016.
7. Satellite imagery shows that portions of the irrigation place of use for water right no. 2-2172 -- specifically the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M. -- ceased to be irrigated in 2004. By 2006, the dairy expanded into the SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M., and irrigation ceased there.
8. On September 3 and 10, 2020, the *Idaho Statesman* and the *Idaho Press-Tribune* published notice of the Applications. The Department did not receive any protests against the applications.

APPLICABLE STATUTES

Idaho Code § 42-222(2) states, in pertinent part:

All water rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated . . .

Idaho Code § 42-222(3) states:

Upon proper showing before the director of the department of water resources of good and sufficient reason for nonapplication to beneficial use of such water for such term of five (5) years, the director of the department of water resources is hereby authorized to grant an extension of time extending the time for forfeiture of title for nonuse thereof, to such waters for a period of not to exceed five (5) additional years.

Idaho Code § 42-222(4) states, in pertinent part:

Application for an extension shall be made before the end of the five (5) year period [of nonuse] . . .

ANALYSIS

Because the portions of water right no. 2-2172 authorizing irrigation in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, and NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M., may not have been irrigated within the past five years, they may not meet the statutory requirements for an extension of time to avoid forfeiture. However, the Applications seek forfeiture protection only for those parts of the Water Rights used for irrigation in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M. The Department should limit its approval of the Applications to those parts of the Water Rights used for irrigation in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M.

CONCLUSIONS OF LAW

1. The Applicant filed the Applications before the end of the fifth year of non-use of the portions of the Water Rights authorizing irrigation in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M.
2. Idaho Code § 42-222(3) authorizes the Department to grant a five-year extension of time to avoid forfeiture for the valid portions of a water right.
3. Use of land in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M., for non-irrigation purposes is good and sufficient reason to grant extensions of time to avoid forfeiture for the portions of the Water Rights authorizing irrigation of the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M.
4. Other water rights will not be impaired by approval of the Applications.

5. The Department should approve the Applications only for irrigation of the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M.

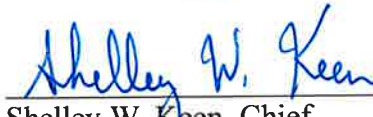
ORDER

IT IS, HEREBY ORDERED that the Applications are APPROVED and extensions of time to avoid forfeiture are GRANTED for the portions of the Water Rights used to irrigate the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M.

IT IS FURTHER HEREBY ORDERED that this approval does not apply to the portions of the Water Rights not for irrigation purposes within the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M.

IT IS FURTHER HEREBY ORDERED that use of the Water Rights for irrigation in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 1 North, Range 3 West, B.M., shall resume by July 1, 2026.

DATED this 25th day of October, 2021.



Shelley W. Keen, Chief
Water Allocation Bureau



IDAHO DEPARTMENT OF

WATER RESOURCES

322 E Front Street, Suite 648, Boise ID 83702 • PO Box 83720, Boise ID 83720-0098
Phone: 208-287-4800 • Fax: 208-287-6700 • Email: idwrinfo@idwr.idaho.gov • Website: idwr.idaho.gov

Governor Brad Little

Director Gary Spackman

October 27, 2021

DRY LAKE DAIRY LLC
12492 BIG FOOT RD
NAMPA ID 83686-9138

RE: Extension of Time to Avoid Forfeiture Water Rights: 2-2172, 63-3142, and 63-7083

Dear Water Right Holders:

Enclosed is a copy of the *Preliminary Order Granting Extensions of Time to Avoid Forfeiture* for water rights **2-2172, 63-3142, and 63-7083**. Please note that resumption of beneficial use of water for these rights shall occur on or before July 1, 2026.

Please notify the Department as soon as you resume use of the water. If you have not notified the Department sixty (60) days prior to the resumption deadline, the Department will send you a Resumption of Use Notice by certified mail.

Please be advised that Idaho Code § 42-248 requires you or the owner of this water right maintain current ownership and address records on file with the Department. Please contact any office of the Department for the proper form to file a change of ownership of a water right and/or a change in the address of the owner. These forms are also available by accessing the Department's website at: www.idwr.idaho.gov.

Please contact this office if you have any questions regarding this matter at 287-4826.

Sincerely,

David Betts
Sr. Water Rights Agent

Enclosure

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 GRANTING EXTENSIONS OF TIME TO AVOID FORFEITURE**) to the person listed below:

RE: Preliminary Order in the Matter of Permit No. **2-2172**

**DRY LAKE DAIRY LLC
12492 BIG FOOT RD
NAMPA ID 83686-9138**



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.