BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT TO APPROPRIATE WATER NO. 95-18146	))))	**PRELIMINARY ORDER WITHDRAWING AN ORDER**

This matter having come before the Idaho Department of Water Resources ("Department") as a result of affidavit of publication review, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On August 12, 2021, the Idaho Department of Water Resources ("Department") received a complete Application for Permit in the name of Bruce and/or Sandra Christensen which was assigned Water Right No. 95-18146 ("Application"). The point of diversion proposed is within Kootenai County.

2. On August 26, 2021, the Department mailed you notice of advertisement which stated your application was scheduled for publication in the Coeur d Alene Press on 9/2/2021 and 9/9/2021. The Coeur d Alene Press is a publication within Kootenai County.

3. On September 13, 2021, the Department received an affidavit of publication of Application for Permit No. 95-18146 from the Bonner County Daily Bee. The Bonner County Daily Bee is a publication within Bonner County.

4. On September 28, 2021, the Department issued a preliminary order ("Preliminary Order") approving Permit to Appropriate Water No. 95-18146 ("Permit").

5. On October 5, 2021, Department staff found an error in the affidavit of publication. The legal notice was published in the Bonner County Daily Bee instead of the Coeur d Alene Press.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A (2) provides in pertinent part:

> The director of the department of water resources shall cause the notice to be published in a newspaper printed within the county wherein the point of diversion lies or, in the event no newspaper is printed in said county, then in a newspaper of general circulation therein.

2. The Department has an obligation to publish notice within the county wherein the point of diversion lies and not an adjacent county.

3. Rule 760 of the Department's Rules of Procedure (IDAPA 37.01.01.760), in pertinent part, authorizes the Department to withdraw an order and substitute a new order, as follows:

> A hearing officer [Department employee] issuing a recommended or preliminary order may modify the recommended or preliminary order on the hearing officer's own motion within fourteen (14) days after issuance of the recommended or preliminary order by withdrawing the recommended or preliminary order and issuing a substitute recommended or preliminary order.

4. The Department should withdraw the Preliminary Order approving the Permit, because processing of the Application did not comply with statutory requirements.

5. The Department should not substitute the Preliminary Order with another until after the Application is published in accordance with statutory requirements.

ORDER

IT IS HEREBY ORDERED that the Preliminary Order is **WITHDRAWN**.

Dated this 6th day of October, 2021

Adam Frederick
Water Rights Supervisor

CERTIFICATE OF SERVICE

I hereby certify that on October 06, 2021, I served a true and correct copy of Permit to Appropriate Water No. 95-18146 by U.S. Mail, postage prepaid, to the following:

SANDRA CHRISTENSEN (Current Owner)
8655 E CHALLENGE RD
HAYDEN LAKE, ID 83835-7323

BRUCE CHRISTENSEN (Current Owner)
8655 E CHALLENGE RD
HAYDEN LAKE, ID 83835-7323

Tammy Alleman
Administrative Assistant 1

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.