

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

| | |
|---------------------------------------|----------------------------------|
| IN THE MATTER OF APPLICATION) | |
| FOR PERMIT NO. 23-7159) | PRELIMINARY ORDER VOIDING |
| IN THE NAME OF) | APPLICATION FOR PERMIT |
| <u>WADE R. FLEMING</u>) | |

This matter having come before the Idaho Department of Water Resources ("Department") as a result of an application for permit to appropriate the public waters of the state of Idaho, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On July 7, 1992, Wade R. Fleming ("Fleming") filed Application for Permit No. 23-7159 with the Department, seeking a permit to divert 2.46 cubic feet per second from ground water for irrigation use. The proposed point of diversion and place of use are located in Section 2, T01N, R43E and Section 35, T02N, R43E. The application stated that Fleming owned the property at the proposed point of diversion and place of use.
2. According to parcel ownership records from Bonneville County, Fleming no longer owns the property at the proposed point of diversion or place of use.
3. On August 19, 2020, the Department sent a letter to Fleming, to the address of record for Fleming, asking him to demonstrate a continuing interest in the application. The letter set a response deadline of September 20, 2020. The letter was returned to the Department and marked as "Vacant – Unable to Forward" by the U.S. Postal Service.

CONCLUSIONS OF LAW

1. Rule 35.04.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) requires an application to be amended whenever there are "substantial changes" to the information listed on the original application. Stated differently, an applicant has an ongoing responsibility to ensure the information contained in its application remains accurate and current throughout the life span of the application, including contact and property ownership information.
2. In Application 23-7159, Fleming claimed to own the property at the proposed point of diversion and place of use. Ownership of or legal access to the proposed point of diversion and place of use is a critical component of an application for permit. *See* Idaho Code § 42-203A(5)(c) and IDAPA 37.03.08.45.01.c.i. Any change to the ownership of or legal access to the proposed point of diversion and place of use qualifies as a "substantial change" and must be reflected in an application amendment.

3. The Department has the authority to request documents or other information to clarify statements made in an application. *See* IDAPA 37.03.08.35.01.e. The Department's August 19, 2020 letter was an appropriate request for additional or corrected information.

4. Fleming's failure to respond to the August 19, 2020 letter is grounds to void the application. IDAPA 37.03.08.35.01.f. The evidence available to the Department at this time indicates that Fleming no longer owns the property at the proposed point of diversion or place of use. Because Fleming has not responded or cannot respond to the Department's requests relating to Application 23-7159, it should be voided.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 23-7159 in the name of Wade R. Fleming is VOIDED.

Dated this 21st day of October, 2020.



James Cefalo
Regional Manager

CERTIFICATE OF MAILING

I hereby certify that on the 21st day of October 2020, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER VOIDING APPLICATION FOR PERMIT through the United States Postal Service, return receipt requested, postage prepaid and properly addressed to the person(s) listed below:

US MAIL

RE: APPLICATION FOR PERMIT NO. 23-7159

**WADE R. FLEMING
4319 N 55TH E
IDAHO FALLS, ID 83401**



Christina Henman
Administrative Assistant

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.