

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

IN THE MATTER OF PERMIT )  
NO. 63-10327 IN THE NAME OF )  
LAKEHARBOR MASTER ASSN., INC. )  
\_\_\_\_\_ )

**PRELIMINARY ORDER  
VOIDING PERMIT**

This matter having come before the Department of Water Resources ("Department") as a result of an investigation by Department staff to determine the extent of beneficial use of water, the Department finds, concludes, and orders as follows:

**FINDINGS OF FACT**

1. On January 7, 1986, the Department issued Permit No. 63-10327 ("Permit") in the name of Lakeharbor Partners, Ltd. This permit authorized the diversion of 2.0 cubic feet per second or 1030 acre-feet of water from an unnamed spring for the following uses: irrigation, irrigation storage, irrigation from storage, recreation, recreation storage, aesthetics, aesthetics storage, and diversion to storage, in the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 29; SW $\frac{1}{4}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ , E $\frac{1}{2}$ SW $\frac{1}{4}$ , and SE $\frac{1}{4}$  of Section 30, and; the N $\frac{1}{2}$ NE $\frac{1}{4}$  of Section 31 in Township 04 North, Range 02 East, Ada County. A condition of permit approval required the permit holder to submit proof of beneficial use of water ("Proof") to the Department on or before January 1, 1991.
2. On August 25, 1987, the Department received an assignment of permit from Lakeharbor Partners, Ltd. assigning ownership of the Permit to Lakeharbor Master Association, Inc. ("Permit Holder").
3. On October 31, 1990, the Department notified the Permit Holder that Proof was due and instructed the Permit Holder of the steps to be taken to either submit Proof or request an extension of time to submit Proof ("Extension").
4. On January 15, 1991, the Department granted an Extension to the Permit Holder based on due diligence until January 1, 1994.
5. On October 31, 1993, the Department notified the Permit Holder that Proof was due and instructed the Permit Holder of the steps to be taken to submit either Proof or an Extension request.
6. On January 6, 1994, the Department sent the Permit Holder a lapse notice since the Department had not received an acceptable Proof or Extension request.
7. On June 30, 2006, the Permit Holder filed Proof with the Department, which included evidence of the development and uses of the Permit. Evidence provided by the Permit Holder, and the records of the Department, suggested that beneficial use had occurred

before this Permit. The beneficial use field examination submitted on June 30, 2006 did not confirm the location of point of diversion from the unnamed spring source not the amount of water diverted from the spring under this Permit.

8. On July 28<sup>th</sup>, 2006, the Department reinstated the Permit with the priority date advanced to June 30, 2006.
9. On April 2, 2013, the Department sent the Permit Holder a request to schedule a field examination to confirm the extent of beneficial use in order to issue a water right license.
10. From October 11, 2013 to November 25, 2013, the Department communicated with the representative of the Permit Holder, J. Steven Fender, to determine the location of the unnamed spring that is the source of the Permit. Staff suggested that the Permit Holder acquire the original development plats to find the actual location of the unnamed spring.
11. On November 26, 2013, Department staff met with J. Steven Fender, and they were unable to locate the unnamed spring.
12. On September 13, 2019, the Department performed a field examination. Department staff met with Orland Bradley of Cutting Edge Landscaping, who operates the irrigation system for the property. Mr. Bradley and Department staff were unable to find a spring or spring inlet into the lake.
13. September 17, 2019, the Department sent a *Notice of Intent to Void Permit* ("Notice") to the Permit Holder requesting the Permit Holder provide information within thirty days demonstrating the amount of water beneficially used and the location of the unnamed spring developed under the Permit.
14. On September 20, 2019, the Department spoke with the Permit Holder's new representative, Rob Felix, to discuss the Notice and what additional information would be needed to complete the beneficial use examination and license the Permit.
15. On October 14, 2019, Mr. Felix requested additional time to provide the information required by the Notice, because he had to present this information to the Permit Holder's Board of Directors.
16. On October 15, 2019, the Department extended the deadline to provide the requested information to April 30, 2020.
17. On July 14, 2020, the Department sent the Permit Holder a letter and an email requesting the necessary information be submitted before August 13, 2020.
18. On July 14, 2020, Mr. Felix responded by email. The email contained a letter from Mr. Felix stating that Permit Holder's Board of Directors had reviewed the Notice and could not find a clear path to provide the information requested. The Permit Holder's Board of

Directors stated it was their intent to vacate the request for this permit as long as it did not interfere with or jeopardize other water rights held by the Permit Holder.

### CONCLUSIONS OF LAW

1. Idaho Code § 42-219(1) states, in pertinent part:  
Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license corresponding to the beneficial use.
2. Idaho Code § 42-219(8) states, in pertinent part:  
In the event that the department shall find that the applicant has not fully complied with the law and the conditions of permit, it may issue a license for that portion of the use that is in accordance with the permit or may refuse issuance of a license and void the permit.
3. The provisions of Idaho Code § 42-219 authorize the Department to void permits for which the permit holder has not fully complied with the law and the conditions of the permit.
4. Confirmation of the location of the point of diversion and the amount of water diverted from the unnamed spring source is necessary to verify that the beneficial use of water developed is in accordance with the law. When the Department cannot determine the extent of beneficial use developed, the Department must conclude that the proposed project was not developed and that a water right was not established.
5. The Department should void the Permit pursuant to Idaho Code § 42-219.

### ORDER

IT IS HEREBY ORDERED that Permit No. 63-10327 is **VOIDED** and issuance of a license is **REFUSED**.

Dated this 16<sup>th</sup> day of NOVEMBER, 2020.

  
Angela Grimm  
Water Rights Section Manager



State of Idaho

**DEPARTMENT OF WATER RESOURCES**

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C.L. "BUTCH" OTTER  
Governor

GARY SPACKMAN  
Director

November 6, 2020

LAKE HARBOR MASTER ASSN INC  
3775 CASSIA ST  
BOISE ID 83705

RE: Permit No. 63-10327

Dear Permit Holder(s):

The accompanying order 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 of the department unless any party petitions for reconsideration within fourteen (14) days after issuance as described in the enclosed information sheet.

If you have any questions regarding this matter, please call me at 208-287-4951.

Sincerely,

*for* Angela M Grimm  
Water Rights Section Manager

Enclosure(s)

## CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2020 I mailed a true and correct copy, certified, postage prepaid, of the foregoing **(PRELIMINARY ORDER VOIDING PERMIT)** to the person(s) listed below:

RE: Preliminary Order in the Matter of Permit No.      **63-10327**

**LAKE HARBOR MASTER ASSN INC  
3775 CASSIA ST  
BOISE ID 83705**

  
\_\_\_\_\_  
Jean Hersley  
Technical Records Specialist II

## **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.