

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

IN THE MATTER OF PERMIT)
NO. 2-10410 IN THE NAME OF)
PATRICIA RUSSELL)
_____)

**PRELIMINARY ORDER
VOIDING A 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 May 15, 2009, the Department issued Permit No. 2-10410 ("Permit") in the names of Stanley L. Capouch and/or Sylvia M. Capouch ("the Capouchs") authorizing the diversion of 0.20 cubic feet per second of water from the Snake River for irrigation use in Government Lot 3 (NE¼ SW¼) of Section 26, Township 2 North, Range 4 West, B.M., Owyhee County. A condition of permit approval required the Capouchs to submit proof of beneficial use of water to the Department on or before May 31, 2014.
2. On February 28, 2014, the Department notified by certified mail that proof of beneficial use was due and instructed the Capouchs of the steps to be taken to submit a *Statement of Completion for Submitting Proof of Beneficial Use* ("Proof") or a *Request for Extension of Time* ("Extension Request").
3. On May 27, 2014, the Capouchs assigned the Permit to Patricia Russell ("Permit Holder"). Also on this date the Department received an Extension Request from the Permit Holder, which was subsequently approved on June 19, 2014, extending the date to submit proof of beneficial use to May 1, 2019.
4. On June 27, 2019, the Permit Holder submitted Proof. On July 15, 2019, the Department received corrections to the Proof.
5. On July 18, 2019, the Department reinstated the permit based on the June 27, 2019 filing date. The Department advanced the priority date to October 24, 2008, because the Department received the Proof late.
6. On October 3, 2019, the Department's field examiner contacted the Permit Holder by email to schedule a field exam. The Permit Holder responded by email on October 7, 2019. The Permit Holder informed the field examiner that the property had been sold to George and Margaret Wilson.

7. On October 7, 2019, the field examiner contacted George and Margaret Wilson by email to schedule a field exam. George Wilson responded by saying they were not aware of any water system capable of diverting and delivering Snake River water to the property.
8. October 17, 2019, the Department sent a Notice of Intent to Void ("Notice") to the Permit Holder and a copy to George and Margaret Wilson notifying them that the Department intends to void the Permit, because the beneficial use had not been developed. The Notice informed them that they could pursue the Permit by providing evidence within 30 (thirty) days demonstrating diversion works were constructed and utilized during the development period.
9. The Department has not received a response to the Notice.

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 confirming such 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 which 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(1) require that the Department review all evidence that water is being used at the place of use claimed and for the purposes for which it was originally intended.
4. The provisions of Idaho Code § 42-219(8) authorize the Department to refuse issuance of a license and void permits for which the permit holder has not fully complied with the law and the conditions of the permit.
5. Examination of the diversion works is necessary to verify that the beneficial use of water developed is in accordance with the law. When Department staff cannot determine the extent of beneficial use developed and the permit holder does not make the project site available for examination, the Department must conclude that the proposed project was not developed and that a water right was not established.
6. The permit holder has not provided evidence to demonstrate that beneficial use has been developed and that the permit holder has fully complied with the law and conditions of the permit.

7. The Department should refuse issuance of a license and void the Permit pursuant to Idaho Code § 42-219(8).

ORDER

IT IS HEREBY ORDERED that Permit No. 2-10410 is **VOIDED** and issuance of a license is **REFUSED**.

Dated this 30th day of JUNE, 2020.



Angela Grimm

Water Rights Section Manager

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 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. **2-10410**

**PATRICIA RUSSELL
PO BOX 669
MARSING ID 83639**



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.



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

July 1, 2020

PATRICIA RUSSELL
PO BOX 669
MARSING ID 83639

RE: Permit No. 2-10410

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 Angela Grimm at 208-287-4951.

Sincerely,

Jean Hersley
Technical Records Specialist II

Enclosure(s)