

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

IN THE MATTER OF PERMIT TO	)	ORDER DENYING PETITION
APPROPRIATE WATER NO. 63-33141	)	FOR RECONSIDERATION
IN THE NAME OF MELLIN	)	
PROPERTIES LTD. PARTNERSHIP	)	
_____	)	

This matter having come before the Department of Water Resources (“Department”) as a petition to reconsider the term of an approved extension of time to submit proof of beneficial use, the Department finds, concludes, and orders as follows:

FINDING OF FACTS

1. On March 10, 2010, the Department issued Permit No. 63-33141 (“Permit”) authorizing Mellin Properties Ltd. Partnership (“Permit Holder”) to divert 1.60 cfs of ground water to irrigate 80 acres in Ada County. The Permit included an approval condition requiring the Permit Holder to submit proof of beneficial use by March 1, 2015. On November 12, 2015, the Department issued Permit No. 63-34046 authorizing the Permit Holder to divert 1.60 cfs of ground water to irrigate 80 acres in Ada County. The places of use for the Permit and Permit No. 63-34046 are adjacent to each other in the SE¼ of Section 24, Township 1 North, Range 1 East, B.M.
2. On March 27, 2015, the Department approved the Permit Holder’s request to extend the time for submitting proof of beneficial use for the Permit to March 1, 2020, pursuant to Idaho Code § 42-204(6).
3. On December 16, 2019, the Permit Holder applied to the Department for an extension of time to submit proof of beneficial use for the Permit (“2019 Extension Request”). In the 2019 Extension Request, the Permit holder sought an extension of five years. The 2019 Extension Request states:

I realize the regulations only allow one extension for a property under 100 acres. However, even though under two water permits, my project is 160 acres and an economic unit now because of the actions completed under whichthe (sic) previous extension was granted. I, therefore, request that this project be viewed as a single 160 acre project governed by two water permits and that this extension be granted.

4. On March 16, 2020, the Department approved the 2019 Extension Request to April 8, 2020, pursuant to Idaho Code § 42-204(1), which allows for extensions caused by government delay.¹

¹ Although the Permit Holder requested a five year extension pursuant to Idaho Code § 42-204(4), the Permit Holder also showed that development of the Permit was delayed 39 days by the U.S. Bureau of Land Management’s right-of-way application process.

5. On April 3, 2020, the Department received the Permit Holder's request that the Department reconsider its approval of the 2019 Extension Request and grant "a full five year extension of time." The Department did not issue an order in response to the Permit Holder's request for reconsideration because the request was not filed timely. However, on April 16, 2020, the Department sent the Permit Holder a letter explaining that the Department did not grant the 2019 Extension Request for five years because the Permit does not meet the qualifying criterion in Idaho Code § 42-204(4), which is "any **permit** involving the diversion of two (2) or more cubic feet per second or the development or cultivation of one hundred (100) or more acres of land." [Emphasis copied.]
6. On May 14, 2020, the Permit Holder applied to the Department for an extension of time to submit proof of beneficial use for the Permit ("2020 Extension Request"). In the 2020 Extension Request, the Permit holder sought an extension of five years. On May 19, 2020, the Department granted the 2020 Extension Request until June 25, 2020, pursuant to Idaho Code § 42-204(1).
7. On June 2, 2020, the Department received the Permit Holder's petition for reconsideration ("Petition") of the 2020 Extension Request approval. The Petition asserts that the Department's interpretation of Idaho Code § 42-204(4) too narrowly focuses on the permit as a singular noun. The Petition asserts that the Department should give weight to the word "involving" in the modifying clause "involving the diversion of two (2) or more cubic feet per second or the development or cultivation of one hundred (100) or more acres of land." The Petition relies on dictionary definitions of "involving" to assert that the Permit qualifies for an extension to time pursuant to Idaho Code § 42-204(4) if it connects to, or relates closely to, "the diversion of two (2) or more cubic feet per second or the development or cultivation of one hundred (100) or more acres of land." The Petition asserts that because the Permit will be served by a common irrigation system with Permit No. 63-34046, which together with the Permit sums to a total authorized diversion of 3.20 cfs and 160 acres of irrigation, the Permit involves "the diversion of two (2) or more cubic feet per second or the development or cultivation of one hundred (100) or more acres of land."

ANALYSIS

When applying the law, the Department employs the plain meaning of the statutory language and only delves further when the statutory language is ambiguous. The use of "permit" in Idaho Code § 42-204(4) is plain and not ambiguous. The statute requires the Department to rely on the elements of a single "permit", not the sum of elements from multiple permits, when applying the statutory minimum thresholds. If the Legislature had intended the Department to evaluate multiple permits when applying Idaho Code § 42-204(4), it would have used the plural form "permits."

Within the four corners of the Permit, the total authorized diversion is less than the statutory minimum threshold of 2.0 cfs, and the total authorized development of land is less than the statutory minimum threshold of 100 acres. Because the 2.0 cfs and 100 acre thresholds are not achieved by the Permit, it does not qualify for an extension pursuant to Idaho Code § 42-204(4).

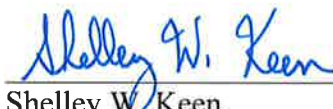
CONCLUSIONS OF LAW

1. Pursuant to IDAPA 37.01.01.730.02.a, the Petition was timely.
2. The Department cannot approve the 2020 Extension Request pursuant to Idaho Code § 42-204(4) because the diversion rate and acreage development authorized by the Permit do not meet the minimum thresholds established in the statute.
3. The Department should deny the Petition.

ORDER

IT IS HEREBY ORDERED that the Petition is **DENIED**.

Dated this 15th day of June, 2020.



Shelley W. Keen
Water Allocation Bureau Chief

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2020, I served a true and correct copy of the foregoing **ORDER DENYING PETITION FOR RECONSIDERATION** by U.S. Mail, postage prepaid and properly addressed to the persons listed below:

RE: Water Right Permit No. 63-33141

**MELLIN PROPERTIES LTD PARTNERSHIP
10100 W FRANKLIN RD
BOISE ID 83709-0333**



Jean Hersley
Technical Records Specialist II

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

The accompanying order is an **Order Denying Petition for Reconsideration** of the "preliminary order" issued previously in this proceeding by the department pursuant to section 67-5243, Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after the service date of this denial of petition for reconsideration of the preliminary order, any party may in writing file exceptions to any part of the preliminary order and file a brief in support of the party's position on any issue in the proceeding with the Director. Otherwise, the preliminary order will become a final order of the agency.

If any party files an exception and/or brief, opposing parties shall have fourteen (14) days to respond to the exception and/or brief. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

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 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.