

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

IN THE MATTER OF PERMIT NO. 95-11500)
IN THE NAME OF MICHAEL J. LIVINGSTON)
OR SUSAN K. LIVINGSTON)
_____)

**PRELIMINARY ORDER DENYING
REQUEST FOR EXTENSION
OF TIME**

This matter having come before the Idaho Department of Water Resources ("Department") as a request for additional time to submit proof of beneficial use, the Department finds, concludes and orders:

FINDINGS OF FACT

1. On April 8, 2010, the Department issued Permit No. 95-11500 ("Permit") in the name of Michael J. Livingston or Susan K. Livingston ("Permit Holders") authorizing the diversion of 0.04 cubic feet per second (cfs) of water from Hayden Lake for domestic use in Government Lot 6 (SE¼SE¼) of Section 10, Township 51 North, Range 03 West, B.M., Kootenai County. A condition of permit approval required the Permit Holder to submit proof of beneficial use of water to the Department on or before April 1, 2015.
2. On January 30, 2015, the Department notified the Permit Holders by certified mail that proof of beneficial use was due and instructed the Permit Holders 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 March 30, 2015, the Permit Holders filed an Extension Request for an additional five years to submit Proof. The Department approved this Extension Request based on due diligence and good cause. The approved Extension Request established a new proof of beneficial use due date of April 1, 2020.
4. On January 31, 2020, the Department notified the Permit Holders by certified mail that proof of beneficial use was due and instructed the Permit Holders of the steps to be taken to submit a Proof or an Extension Request.
5. On April 1, 2020, the Permit Holders filed an Extension Request with the Department, describing the work that had been done as, "None."

APPLICABLE STATUTES

Idaho Code § 42-204 states, in pertinent part:

Every holder of a permit which shall be issued under the terms and conditions of an application filed hereafter appropriating twenty-five (25) cubic feet or less per second must, within (1) year from the date upon which said permit issues from the office of the department of water resources, commence the excavation or construction of the works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted through no fault of the holder of such permit by circumstances, over which he had no control.

Idaho Code § 42-204(6) states, in pertinent part:

In all other situations . . . the department may grant one (1) extension of time, not exceeding five (5) years beyond the date originally set for completion of works and application of the water to full beneficial use . . . provided good cause appears therefor.

. . . The holder of any permit who shall fail to comply with the provisions of this section within the time or times specified shall be deemed to have abandoned all rights under his permit.

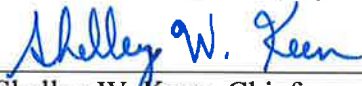
CONCLUSIONS OF LAW

1. The Permit Holders have received the maximum extension for good cause pursuant to Idaho Code § 42-204(6).
2. Pursuant to Idaho Code § 42-204(6), the Department cannot grant an additional extension request based on good cause.
3. The Department should deny the Extension Request.

ORDER

IT IS HEREBY ORDERED that the Extension Request filed on April 1, 2020, for Permit No. 95-11500 in the name of Michael J. Livingston or Susan K. Livingston is **DENIED**.

DATED this 14th day of April, 2020.



Shelley W. Keen, Chief
Water Allocation Bureau

CERTIFICATE OF SERVICE

I hereby certify that on **April 16, 2020** I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER (**PRELIMINARY ORDER DENYING REQUEST FOR EXTENSION OF TIME**) to the persons listed below:

RE: Preliminary Order in the Matter of Permit No. **95-11500**

**MICHAEL J LIVINGSTON
SUSAN K LIVINGSTON
3259 S JEFFERSON
SPOKANE WA 99203**



**Jean Hersley
Technical Records Specialist II**



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

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BRAD LITTLE
Governor

GARY SPACKMAN
Director

April 15, 2020

MICHAEL J LIVINGSTON
SUSAN K LIVINGSTON
3259 S JEFFERSON
SPOKANE WA 99203

RE: Permit No. 95-11500

Dear Permit Holders:

The Department acknowledges receipt of your request for extension of time (extension request) for the permit referenced above. The Department will not grant an additional extension for this permit based on good cause or due diligence according to Idaho Code § 42-204(6).

Enclosed is a copy of an Order Denying Request for Extension of Time issued in response to the extension request you filed with the Department for this permit. The accompanying order is a **preliminary order** issued by the Department pursuant to Idaho Code § 67-5243. It can and will become a final order without further action of the Department unless a party (1) petitions for reconsideration within fourteen days after the service date of the preliminary order, or (2) requests a hearing within fifteen days after the service date of the preliminary order. These remedies are further described in the attached information sheet.

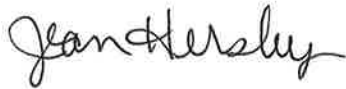
LAPSE NOTICE

You are hereby notified that under the provision of Idaho Code § 42-218a, the above referenced **permit has lapsed and is of no further force nor effect**. The permit may be reinstated according to Idaho Code § 42-218a (1) if you submit an acceptable proof of beneficial use (proof statement) to the department within sixty days of the mailing of this lapse notice. An acceptable proof statement submittal must include the examination fee or a completed field examination report prepared by a certified water right examiner. **A proof statement may be submitted for all or any portion of the permitted use which has been established during the development period from April 8, 2010 to April 01, 2020.**

After 60 days of this lapse notice the permit may only be reinstated according to Idaho Code § 42-218a (2) including a reasonable cause for the delay, a reinstatement fee of \$250.00 and a report prepared by a certified water right examiner clearly confirming the extent of beneficial use of water during the development period of the permit. The permit priority date will be advanced to the date an acceptable proof statement is received.

If you cannot meet the requirements explained above to reinstate this permit, you may be able to apply for a new water right permit or seek other remedies. Please contact our regional office in your area for information related to new appropriations or other options. Department forms are available from any Department office or at the Department's website at www.idwr.idaho.gov.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jean Hershey".

for Shelley Keen, Chief
Water Allocation Bureau

Enclosures

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.