

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

| | | |
|-------------------------|---|------------------------------------------------|
| IN THE MATTER OF |) | ORDER GRANTING PETITION |
| PERMIT NO. 25-14419 |) | FOR RECONSIDERATION, RESCINDING A |
| IN THE NAME OF NEST EGG |) | PRELIMINARY ORDER, REINSTATING A LAPSED |
| INVESTMENTS, LLC |) | PERMIT, AND GRANTING A REQUEST FOR |
| _____ |) | EXTENSION OF TIME |

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

FINDINGS OF FACT

1. On December 31, 2014, the Department issued permit no. 25-14419 ("Permit") in the name of Nest Egg Investments, LLC ("Permit Holder") authorizing the diversion of 0.25 cubic feet per second (cfs) of ground water for irrigation and domestic use in SE¼NE¼ of Section 35, Township 04 North, Range 38 East, B.M., Jefferson County. A condition of the Permit required the Permit Holder to submit proof of beneficial use of water to the Department on or before January 1, 2020.
2. The Permit Holder's primary business location is in Bonneville County. The Permit is for water use at a proposed second business location in Jefferson County.
3. On November 18, 2019, the Permit Holder filed a request for extension of time to submit proof of beneficial use ("Extension Request").
4. On February 13, 2020, the Department issued a *Preliminary Order Denying Request for Extension of Time* ("Preliminary Order") because the Permit Holder had not demonstrated good cause for an extension, as required by Idaho Code § 42-204(6). The Department mailed a copy of the Preliminary Order to the Permit Holder on February 14, 2020. Because the Department had not received an acceptable proof of beneficial use or an acceptable request for extension of time on or before the due date of January 1, 2020, the Department also notified the Permit Holder that the Permit had lapsed pursuant to Idaho Code § 42-218a,.
5. On February 27, 2020, the Permit Holder submitted a *Petition for Reconsideration* ("Petition") of the Preliminary Order. The Petition requests that the Department reconsider the denial of the Extension Request and that the Department find good cause for an extension of the time to submit proof of beneficial use. In the Petition, the Permit Holder explains that during the development period for the Permit the Permit Holder's "primary business location lost its lease when the property was sold which required finding another location and constructing new infrastructure and moving." Furthermore, "Time and money allocated to the Jefferson County location was required that it be set aside temporarily until the main nursery location was re-established." [Sic] The Permit Holder also submitted evidence demonstrating that it moved its primary business location within Bonneville County during the development period for the Permit.

APPLICABLE RULES AND STATUTES

Rule 730.02.a. of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a.) authorizes a party to petition the Department to reconsider a preliminary order, as follows:

Any party may file a petition for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.

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 one (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 has no control.

Idaho Code § 42-218a(1) states, in pertinent part:

Within sixty (60) days after such notice of lapsing the department may, upon a showing of reasonable cause, reinstate the permit with the priority date advanced a time equal to the number of days that said showing is subsequent to the date set for proof.

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

In all other situations not governed by these provisions 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, or beyond any grant of extension pursuant to the provisions of subsection (1) of this section, upon request for extension received on or before the date set for completion, provided good cause appears therefor.

CONCLUSIONS OF LAW

1. The Petition was timely, and the Department should grant the Petition pursuant to Rule 730.02.a. of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a).
2. Circumstances beyond the Permit Holder's control interrupted progress toward development of the water use authorized by the Permit. Idaho Code § 42-204 exempts the Permit Holder from developing the permitted water use "diligently and uninterruptedly to completion" when the interruption is due to circumstances over which the Permit Holder had no control. The Department should rescind the Preliminary Order.

3. Pursuant to Idaho Code § 42-218a(1), the Department should reinstate the Permit because the Permit Holder has shown reasonable cause by submitting evidence to support the Extension Request.
4. The Permit Holder submitted evidence of good cause for an extension 66 days after proof of beneficial use was due, but within 60 days of being notified that the Permit had lapsed. Pursuant to Idaho Code § 42-218a(1), the Department should advance the Permit's priority date 66 days to December 27, 2014.
5. The Permit Holder has shown good cause for an extension of time to submit proof of beneficial use. The Department should grant the Extension Request for five years pursuant to Idaho Code § 42-204(6).

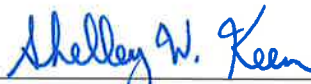
ORDER

IT IS HEREBY ORDERED that the petition is **GRANTED** and the Preliminary Order is **RESCINDED**.

IT IS FURTHER ORDERED that the Permit is **REINSTATED** with its priority date **ADVANCED** to December 27, 2014.

IT IS FURTHER ORDERED that the Extension Request is **GRANTED**, and the time within which to submit proof of beneficial use is **EXTENDED** to January 1, 2025.

Dated this 17th day of March, 2020.



Shelley W. Keen, Chief
Water Allocation Bureau

CERTIFICATE OF SERVICE

I hereby certify that on **March 18, 2020** I mailed a true and correct copy, postage prepaid, of the foregoing **AMENDED PRELIMINARY ORDER (ORDER GRANTING PETITION FOR RECONSIDERATION, RESCINDING A PRELIMINARY ORDER, REINSTATING A LAPSED PERMIT, AND GRANTING A REQUEST FOR EXTENSION OF TIME)** to the persons listed below:

RE: Preliminary Order in the Matter of Permit No. **25-14419**

**NEST EGG INVESTMENTS LLC
C/O AARON MC CRACKEN
1665 DELMAR DR IDAHO FALLS ID 83404**

**JERRY RIGBY – *via email*
RIGBY ANDRUS & RIGBY**

**ROGER WARNER – *via email*
ROCKY MOUNTAIN ENVIRONMENTAL**



**Debbi Judd
Technical Records Specialist**

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

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

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

GARY SPACKMAN
Director

March 18, 2020

NEST EGG INVESTMENTS LLC
C/O AARON MC CRACKEN
1665 DELMAR DR
IDAHO FALLS ID 83404

REQUEST FOR EXTENSION OF TIME LETTER

RE: Permit No. 25-14419

Dear Permit Holder:

Enclosed is a copy of the *Amended* Preliminary Order regarding your request for extension of time submitted in connection with the above referenced permit which extends the proof due date to **January 01, 2020**.

The Department granted this extension based on evidence of good cause. It is important that you work diligently toward the completion of the project during the development period allowed because the department **will not** grant an additional extension based on good cause, according to Idaho Code § 42-204(6).

This approved extension also reinstates the permit and advances the priority date since evidence of good cause was submitted after the permit proof due date. The priority date of this permit is advanced to **October 23, 2014**, according to Idaho Code Section 42-218a(1).

The *AMENDED* PRELIMINARY ORDER is 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 by the Department unless a party petitions for reconsideration or files an exception and/or brief within fourteen (14) days of the service date as described in the enclosed information sheet.

Please be advised that Idaho Code § 42-248, requires you or the owner of this water right to maintain current ownership and address records on file with the Department. Forms to file a change of ownership of a water right and/or a change in the address of the water right owner are available from any Department office or at the Department's website at www.idwr.idaho.gov.

If you have any questions concerning this permit, please contact the State Office of the Department located in Boise at (208) 287-4800.

Sincerely,

Debbi Judd

Technical Records Specialist

Enclosures