

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	PRELIMINARY ORDER
FOR PERMIT NO. 36-7999 IN THE)	DISMISSING APPLICATION
NAME OF DEVIL'S CORRAL LLC)	AND VACATING HEARING
_____)	

On August 31, 1981, Robert A. and Bernardine M. Erkins (Erkins) filed Application for Permit No. 36-7999 (Application) with the Idaho Department of Water Resources (Department). The Department published notice of the Application in September 1981 and in 1990. The Application was assigned to Devil's Corral LLC (DC).

The Committee for Idaho's High Desert and the Idaho Department of Fish & Game filed protests to the Application. The Idaho Conservation League and Idaho Ground Water Appropriators were granted petitions to intervene.

After lengthy administrative delays, processing of the contested case was resumed at DC's request in 2017. On June 20, 2019 the Department issued an *Amended Notice of Hearing and Amended Scheduling Order* which established hearing dates of February 12-14, 2020.

On December 10, 2019 applicant DC, through its agent George Panagiotou (collectively, DC), sent an email to the Hearing Officer requesting an extension of the contested case proceedings for twelve months. DC sent subsequent emails requesting that "all Notices, Depositions and Hearings be canceled till a later time" (email 12/23/2019) and stating that DC will not "participate in any conference calls or depositions regarding IDWR Application for Permit # 36-7999 for the next twelve months" (email 12/30/2019). On January 7, 2020, the Department issued an *Order Denying Request for Delay, Denying Motion to Dismiss, and Denying Motion for Conference*, which denied DC's request for extension and request to cancel the hearing.

On January 15, 2020, DC sent an email to the Hearing Officer which stated "...I am withdrawing the Erkins application without prejudiced (*sic*)..." On January 22, 2020, DC sent an email which stated "No one from my team will show up at the hearing."

DC has indicated in writing that DC will not appear at hearing. Failure to appear at hearing would be grounds for the Department to initiate a default action against DC. *See* IDAPA 37.01.01.700. Rather than waiting until the hearing date to initiate a default action, the Department should simply dismiss the application as requested by DC. Because the contested case never resulted in an evaluation of the merits of the application, the application should be dismissed without prejudice. The hearing on February 12-14, 2020 should be vacated.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 36-7999 in the name of Devil's Corral LLC is DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that the hearing in this matter scheduled to begin February 12, 2020 is VACATED.

Dated this 23rd day of January, 2020



Cindy Yenter
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of Jan 2020 true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, with return receipt requested, postage prepaid and properly addressed to the following:

Document Served: Preliminary Order Dismissing Application and Vacating Hearing

Application for Permit No. 36-7999

DEVILS CORRAL LLC
148 SEMINOLE CIR
JEROME ID 83338

STATE OF IDAHO
DEPT OF FISH & GAME
324 S 417 E STE 1
JEROME ID 83338

ANN VONDE
DEPUTY ATTORNEY GENERAL
PO BOX 83720
BOISE, ID 83720


COMMITTEE FOR IDAHO'S HIGH DESERT
STEVEN JAKUBOWICS
908 N 21ST ST
BOISE ID 83702

ADVOCATES FOR THE WEST
BRIAN HURLBUTT or LAIRD LUCAS
PO BOX 1612
BOISE, ID 83701

IDAHO CONSERVATION LEAGUE
MARIE CALLAWAY KELLNER
PO BOX 844
BOISE, ID 83701

IDAHO CONSERVATION LEAGUE
MATT NYKIEL
PO BOX 2308
SANDPOINT, ID 83864

IDAHO GROUND WATER APPROPRIATORS
ROBERT HARRIS
HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS, ID 83405


Christina Henman
Administrative Assistant

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.