

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

IN THE MATTER OF APPLICATIONS
FOR PERMIT NOS. 96-9683, 96-9685, AND
96-9686

**PRELIMINARY ORDER APPROVING
APPLICATIONS FOR PERMIT NOS.
96-9685 AND 96-9686 AND
REJECTING APPLICATION FOR
PERMIT NO. 96-9683**

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

On October 25, 2017, Marc Brinkmeyer (“Brinkmeyer”) filed Application for Permit No. 96-9683, Priest River Land Company filed Application for Permit No. 96-9685, and Riley Creek Lumber Company filed Application for Permit 96-9686 (collectively the “Applications”) with the Idaho Department of Water Resources (“IDWR”). Brinkmeyer, Riley Creek Lumber Company, and Priest River Land Company are collectively referred to in this order as the “Applicants”

IDWR published notice of the Applications as required by Idaho Code § 42-203A. Paul Curless (“Curless”), Marse Shobe and Charles W. Shobe (“Shobes”), Robert Becker (“Becker”), Brett Evans (“Evans”), and Mark Kubiak (“Kubiak”) protested each of the Applications. Collectively, Curless, Shobes, Becker, Evans, and Kubiak are the Protestants (“Protestants”). The Applicants and the Protestants are collectively the “Parties.”

After informally exploring options for resolving the protest, the Parties determined they could not reach an agreement. On April 9, 2019, IDWR issued a *Consolidation Order, Notice of Hearing and Disclosure Order*. On June 19, 2019, IDWR conducted a hearing in Bonner County to take testimony and evidence in connection with the Applications.

At the hearing, all Parties represented themselves. Brinkmeyer and Ryan Fobes (“Fobes”), Licensed Professional Engineer with Foresite Engineering, PLLC, testified for the Applicants. Each of the Protestants also testified at the hearing.

The Protestants agreed in the hearing that the protests are based on two of the review criteria stated in Idaho Code § 42-203A(5):

- Whether the proposed appropriation will reduce the quantity of water under existing rights.
- Whether the water supply is insufficient for the intended purpose.

Based on careful consideration of the administrative record, including the application file and evidence and testimony presented at the hearing, the Hearing Officer finds, concludes, and orders as follows:

FINDINGS OF FACT

The Applications

1. Riley Creek Lumber Company is a holding company. Brinkmeyer owns Riley Creek Lumber Company. Priest River Land Company is a subsidiary of Riley Creek Lumber Company. Brinkmeyer testimony.
2. The Applicants each own land in Section 24 of Township 57 North, Range 03 West, B.M. Hornby Creek, a tributary of the Pend Oreille River, flows across Applicants' parcels of land in a general north to south direction. The three Applicants have each filed an application for water use on their respective land parcels.
3. Application No. 96-9683 seeks authorization to impound the flow of Hornby Creek in an existing on-stream reservoir on Brinkmeyer's land in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 24, Township 57 North, Range 03 West, B.M., for irrigation storage, irrigation from storage, wildlife storage, fire protection storage, and aesthetic storage purposes. The proposed season of use for the storage uses is January 1 to December 31 and the proposed season of use for the irrigation from storage use is April 1 to October 31. The volume of water requested for irrigation storage and irrigation from storage uses is 10.5 acre-feet annually to irrigate a 3.5 acre place of use. The proposed volume for the other uses is 12.9 acre-feet annually. The application proposes an appropriation totaling 23.3 acre-feet annually for all uses. The existing reservoir is an excavated basin that drains shallow ground water from the adjacent land. Brinkmeyer testimony. The elevation of the Hornby Creek water coming into and exiting from the reservoir is the same. Fobes testimony. The excavated basin remains full of water regardless of the flow of water in Hornby Creek, which runs into and out of the excavated basin. Fobes testimony. Hornby Creek water passes through the excavated basin with insignificant losses. Fobes testimony. The fact that the excavated basin drains water from the adjacent land and stays full regardless of the flow of water in Hornby Creek establishes that the excavated basin stores ground water and does not store Hornby Creek water.
4. Brinkmeyer owns Claim No. 96-4431 for the diversion of 0.02 cfs of water from Hornby Creek and a spring, tributary to Hornby Creek, for stockwatering, domestic use, and irrigation of seven acres. The land irrigated with water diverted as described in Claim No. 96-4431 includes the entire irrigation-from-storage place of use proposed in Application No. 96-9683. Brinkmeyer also diverts ground water from wells for irrigation of the seven acres of land. Brinkmeyer testimony. Because the supply of natural flow from the sources for Claim No. 96-4431 and from ground water is always sufficient for Brinkmeyer's irrigation needs, Brinkmeyer does not intend to use stored water for irrigation purposes. Brinkmeyer testimony and Fobes testimony.
5. Application No. 96-9685 seeks authorization to impound the flow of Hornby Creek in an existing on-stream reservoir on Priest River Land Company's land in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 24, Township 57 North, Range 03 West, B.M., for wildlife storage, fire protection storage, and aesthetic storage purposes. The proposed season of use for the storage uses is January 1 to December 31. The total proposed volume for all the uses is 4.1 acre-feet annually. The existing reservoir fills with water flowing in Hornby Creek during the winter

and spring months. When the reservoir is full, water flowing in Hornby Creek passes through and over the dam. Brinkmeyer testimony and Fobes testimony. Seepage and evaporation losses from the reservoir occur throughout the year, but they are an insignificant portion of the flow through the reservoir at any moment. Fobes testimony. When water is not flowing into the reservoir, the reservoir will empty due to water flowing through the permeable dam. Brinkmeyer Testimony and Fobes testimony. Priest River Land Company has not proposed specific modifications to the dam or reservoir but is willing to consider a “recommendation.” Brinkmeyer testimony.

6. Application No. 96-9686 seeks authorization to impound the flow of an unnamed tributary of Hornby Creek in an existing on-stream reservoir on Riley Creek Lumber Company’s land in the SE¼SE¼ of Section 24, Township 57 North, Range 03 West, B.M., for wildlife storage, fire protection storage, and aesthetic storage purposes. The proposed season of use for the storage uses is January 1 to December 31. The total proposed volume for all the uses is 6.7 acre-feet annually. There is no apparent stream feeding the reservoir described in Application No. 96-9686. The source of water is listed on Application No. 96-9686 as “unnamed stream.” The source of water is better characterized as “springs.” Fobes testimony. The map submitted with Application No. 96-9686 shows the point of diversion in the SE¼SE¼SE¼ of Section 24, Township 57 North, Range 03 West, B.M. Any water spilling from the reservoir flows into Hornby Creek upstream from the Protestants’ point of diversion. Fobes testimony. Fobes did not measure the flow of water into this reservoir because it was not practical, and the outflow was not substantial enough to measure. Fobes testimony.
7. For the three reservoirs proposed in the Applications, Fobes calculated a total surface area, storage capacity, seepage losses, and evaporation losses as follows:

Application No.	Surface Area (acres)	Total Storage Capacity (acre-feet)	Annual Seepage Losses (acre-feet)	Annual Evaporative Losses (acre-feet)
96-9683	1.58	11.1	0	1.8
96-9685	0.51	3.6	0	0.6
96-9686	0.73	5.1	0.8	0.8
Total	2.82	19.8	0.8	3.2

8. The three storage reservoirs proposed in the Applications have been in place for many years. Brinkmeyer intends to keep all three reservoirs full year-round. No modification of the dams or reservoirs is planned. Brinkmeyer testimony.
9. The Applicants do not intend to store water Carr Creek water injected into Hornby Creek. Brinkmeyer testimony.

The Protestants’ Water Use

10. IDWR’s database of water right filings shows that four of the Protestants – Curless, Evans, Becker, and Kubiak – claim water uses recorded as claims filed pursuant to Idaho Code § 42-243. Key elements of their claims are as follows:

Claim No.	Owner	Date of Claim	Priority Date Claimed	Diversion Rate Claimed (cfs)	Source Claimed
96-4216	Evans	6/26/1978	6/7/1899	0.02	CARR CREEK, HORNBY CREEK
96-4219	Becker	6/29/1978	6/7/1899	0.05	CARR CREEK, HORNBY CREEK
96-9102	Curless	6/5/1978	6/7/1899	2.07	CARR CREEK, HORNBY CREEK
96-9103	Kubiak	6/5/1978	6/7/1899	0.93	CARR CREEK, HORNBY CREEK

11. Hornby Creek drains a small basin, and its flows diminish as the summer progresses each year. Carr Creek, a tributary of the Pend Oreille River, drains a much larger basin to the immediate west of Hornby Creek. Carr Creek flows year-round. Curless, Evans, Becker, and Kubiak divert Carr Creek water and inject it into Hornby Creek through a constructed diversion so they can have water later in the summer and in the fall at their point of diversion on lower Hornby Creek. The injection point from Carr Creek into Hornby Creek is upstream from the Hornby Creek points of diversion proposed in the Applications. Fobes testimony.
12. Becker owns Claim No. 96-4219 and uses water diverted from Carr Creek and Hornby Creek to irrigate less than one acre. Becker testimony.
13. Curless owns Claim No. 96-9102 and diverts water from Carr Creek and Hornby Creek. Curless delivers 2.0 cfs of water to multiple ditches on his property to irrigate roughly 40 acres. Curless rotates his water use between irrigating his property and irrigating hay on Mark Kubiak's property. Curless also uses water for stockwatering. Hornby Creek supplies some water for Curless, especially in the springtime, but Curless relies on the injection of water from Carr Creek into Hornby Creek for his fall needs. Curless testimony.
14. Evans owns Claim No. 96-4216 and diverts water from Carr Creek and Hornby Creek to irrigate three acres of pasture and a 2,000 square foot garden and to water stock. For Evans' water use, the injection of water from Carr Creek into Hornby Creek is essential in the month of August. Evans testimony.
15. Kubiak owns Claim No. 96-9103 and diverts water from Carr Creek and Hornby Creek into a reservoir on his property so he can irrigate a ½ acre vineyard. Kubiak testimony.
16. IDWR also has record of Claim No. 96-4221 filed by Gary Hall and Barbara Hall ("Halls") for the use of 0.16 cfs of water from Carr Creek and Hornby Creek. The claimed place of use for Claim No. 96-4221 is on land owned by Northern Lights Property, and there is no water diverted from Carr Creek or Hornby Creek for use on that property anymore. Marse Shobe testimony.
17. Water Right License No. 96-9138 authorizes Shobes to divert 0.03 cfs of water from Hornby Creek with a June 9, 2003, priority date to irrigate three acres. Shobes divert Hornby Creek water to irrigate eight acres and a garden and to water stock. Marse Shobe testimony.

18. All the Protestants divert water from the same point of diversion on Hornby Creek where water enters into a distribution ditch and flows towards the Protestants' properties. Curless testimony. Evans testimony. Becker testimony. Marse Shobe testimony. Kubiak testimony.
19. The claims of Curless, Evans, Becker, Kubiak, Brinkmeyer, and Halls, and the Shobes' water right license, represent all the claims or water rights with a point of diversion from Hornby Creek, according to the water rights database maintained by IDWR. They represent the diversion of a collective total of 3.46 cfs of water.

Water Supply

20. The Protestants' Carr Creek diversion was historically a raised channel prone to failure. Fobes testimony. Water would topple the channel bank and flow back into Carr Creek. Fobes testimony. The Protestants' Carr Creek diversion also has been regularly vandalized, which affected the availability of water diverted from Carr Creek into Hornby Creek. Fobes testimony and Marse Shobe testimony. Fobes designed a buried pipeline diversion that could deliver up to 6.5 cfs from Carr Creek into Hornby Creek, depending on the head pressure in Carr Creek. Fobes testimony. In December 2018, Brinkmeyer replaced the raised diversion channel with the pipeline Fobes designed. Brinkmeyer testimony.
21. In the past, difficulty maintaining the Carr Creek and Hornby Creek diversions have impacted the Protestants' ability to divert and use water. Shobe testimony and Fobes testimony.
22. Hornby Creek gains flow as it crosses the Applicants' properties. In September of 2018 and in June of 2019, flows in Hornby Creek were greater downstream from the on-stream reservoirs proposed in Application Nos. 96-9683 and 96-9685 than they were at the head of Hornby Creek. Fobes testimony. In both September of 2018 and June of 2019, the combination of Hornby Creek water and Carr Creek water in the Hornby Creek channel near where it leaves the Applicants' properties and upstream from the Protestants' point of diversion was sufficient for the Protestants' water uses. Fobes testimony.
23. The flow of Carr Creek is sufficient to supply the water uses of Curless, Evans, Becker, and Kubiak. Fobes testimony.

CONCLUSIONS OF LAW

Governing Statutes and Rules

1. Idaho Code § 42-203A(5) directs IDWR to evaluate certain criteria in connection with each application for permit to appropriate water:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete

the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. Rule 35 of the Department's Water Appropriation Rules (IDAPA 37.03.08) establishes the criteria for determining whether an application to appropriate water is acceptable for processing by the Department.
3. Rule 45 of the Department's Water Appropriation Rules (IDAPA 37.03.08) further interprets the review criteria established in Idaho Code § 42-203A(5).
4. Rule 50.01 of the Department's Water Appropriation Rules (IDAPA 37.03.08) states that the Director may issue permits with conditions to insure compliance to meet the criteria of Idaho Code § 42-203A.

Application No. 96-9683

5. The reservoir associated with Application No. 96-9683 is an excavated basin that drains shallow ground water from the adjacent land. Brinkmeyer has no plans to modify the excavated basin. The source of the water in the reservoir is not Hornby Creek, as proposed by Application No. 96-9683. IDAPA 35.04.b states, "An application can be amended to clarify the name of the source of water but may not be amended to change the source of water." Application No. 96-9683 should be rejected because Brinkmeyer does not intend to accomplish the proposed use of Hornby Creek water.¹

Application Nos. 96-9685 and 96-9686 – Potential for Injury to Existing Water Users

6. Rule 45.01.a.i of the Water Appropriation Rules establishes the relevant criterion for determining whether the proposed use will reduce the quantity of water under existing water rights. An application will be found to cause injury to another water user if:

The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

7. Pursuant to Idaho Code § 42-607, claims of water use that have not been adjudicated get water delivered after decreed, licensed, or permitted water rights are filled. However, if Application Nos. 96-9685 and 96-9686 are approved and the senior claims of the Protestants' are ultimately adjudicated and decreed, distribution of water will be consistent with the prior

¹ The applicant could file a different application proposing the appropriation of ground water.

appropriation doctrine. Idaho Code § 42-602. Distribution consistent with the prior appropriation doctrine will ensure newer water uses do not interfere with the rights of prior appropriators.

8. Because Curless, Evans, Becker, and Kubiak use Hornby Creek water and Carr Creek water, the quantity of water available to them is not reduced if water from either source is available to them in sufficient quantity for their uses.
9. Regarding the reservoir described in Application No. 96-9685, because the flow of Hornby Creek diminishes in the late summer and fall, it is likely that the stored volume of water in the reservoir would decline during that time due to evaporation and seepage without the Protestants' injection of water from Carr Creek into Hornby Creek. Application No. 96-9685 does not propose the storage of Carr Creek water. Priest River Land Company could ensure Carr Creek water injected into Hornby Creek passes through the reservoir without impoundment by installing properly designed controlling structures and one or more measuring devices. Brinkmeyer stated Priest River Land Company is willing to consider modifications to the reservoir. Because measuring and controlling the flow of water through the reservoir can prevent appropriation of Carr Creek water, and because Priest River Land Company is willing to consider installing measuring devices and controlling works, the Priest River Land Company has met its burden of persuasion for the potential of its proposal to injure prior appropriators.
10. The reservoir associated with Application No. 96-9686 is not on Hornby Creek. Any Carr Creek water flowing in Hornby Creek is not influenced by the reservoir associated with Application No. 96-9686. When the conveyance of water from Carr Creek into Hornby Creek is functioning properly, all Protestants, except for Shobes, have an adequate supply of water from Carr Creek when it is needed. The supply of water available to the Protestants who use Carr Creek water injected into Hornby Creek will not be reduced by the storage of water proposed in Application No. 96-9686. As for Shobes, the natural flow of Hornby Creek is adequate to supply their water use while the other Protestants are relying on water injected into Hornby Creek from Carr Creek. Riley Creek Lumber Company has met its burden of persuasion for the potential of its proposed water use to injure prior appropriators.

Application Nos. 96-9685 and 96-9686 – Sufficiency of the Water Supply

11. Rule 45.01.b of the Water Appropriation Rules establishes:

[T]he water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant), unless there are noneconomic factors that justify application approval.

12. During the winter and spring, there is sufficient water flowing in Hornby Creek to fill the reservoir proposed in Application No. 96-9685. Water is stored throughout the remainder of the year and only small contributions are taken to overcome losses and keep the reservoir as full as possible. While the natural flow of Hornby Creek diminishes through the summer, the demand from other users also diminishes because they begin relying on water injected into

Hornby Creek from Carr Creek. Therefore, the natural flow of Hornby Creek is adequate to supply water to replace the losses from the reservoir. Priest River Land Company has met its burden has met its burden of persuasion for the sufficiency of the water supply for Application No. 96-9685.

13. The spring or springs supplying water to the use proposed in Application 96-9686 are sufficient to fill the existing reservoir, as evidenced by its existence for many years. Pursuant to Water Appropriation Rule 35.04.b (IDAPA 37.03.08.035.04.b) the name of the water source can be clarified as "springs." Consistent with Water Appropriation Rule 35.03.b.iii (IDAPA 37.03.08.035.03.b.iii), the point of diversion location for spring sources shall be described to the nearest 10-acre tract, which is the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24, Township 57 North, Range 03 West, B.M., for Application No. 96-9686. Riley Creek Lumber Company has met its burden of persuasion for the sufficiency of the water supply for Application No. 96-9686.

Application Nos. 96-9685 and 96-9686 – Whether Applications are Made in Good Faith and not for Delay or Speculative Purposes

14. Rule 45.01.c.i of the Water Appropriation Rules establishes the relevant criterion for determining whether the application was made in good faith:

The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and

15. Protestants are not disputing the good faith nature of the Applications.
16. Applicants have already developed the reservoirs that are the subject of the Applications.
17. Applicants have met the burden of persuasion for Applications made in good faith.

Application Nos. 96-9685 and 96-9686 – Sufficiency of the Applicants' Financial Resources

18. Rule 45.01.d.i of the Water Appropriation Rules establishes the relevant criterion for determining whether the applicant has sufficient financial resources to complete the project:

An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director.

19. Protestants are not disputing the sufficiency of Applicants' financial resources.
20. Applicants have already completed the reservoirs subject to the Applications.

21. Applicants have met the burden of persuasion regarding its financial ability to complete the projects.

Application Nos. 96-9685 and 96-9686 – Local Public Interest

22. Idaho Code § 42-202B(3) defines “local public interest” as “the interests that the people in the area directly affected by a proposed water use have in the effects of such water use on the public water resource.” The current definition of local public interest was adopted in 2003 and supersedes the evaluation criteria set forth in Rule 45.01.e of the Water Appropriation Rules which dates from 1993.
23. The current definition of local public interest requires an analysis of the effects of the proposed use on the public water resource itself. In other words, will the proposed uses impact the public water resource in a way that renders it unable to accomplish other compelling public needs, such as important alternative uses or instream values? No part of the record presents an alternative for the use of the water in Hornby Creek.
24. Applicants have met their burden of persuasion for the local public interest in connection with Application Nos. 96-9685 and 96-9686.

Application Nos. 96-9685 and 96-9686 – Conservation of Water Resources in Idaho

25. In 1990 the Idaho legislature implemented the conservation of water resources requirement for water appropriations. The Department’s Application Processing Memorandum No. 48, which addressed the requirement, states:

The term “conservation” is not defined in the legislative intent or in the amendment. . . . Due to lack of stated legislative intent, the department will apply the criterion in terms of efficiency as is generally suggested by the term.

The requirement has been interpreted by the Department to require standards of water use efficiency so that the proposed beneficial use is accomplished while preserving as much water as possible for other benefits.

26. The Applicants’ proposed storage uses for wildlife, aesthetic, and fire protection purposes are common practices in Idaho.
27. Applicants have met their burden of persuasion for the conservation of water resources in Idaho.

Application Nos. 96-9685 and 96-9686 – Effects on the Local Economy

28. This criterion applies only to “out-of-basin” appropriations. It does not apply to the Applications.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 96-9683 is **REJECTED** and issuance of a permit is **REFUSED** pursuant to Idaho Code § 42-203A(5).

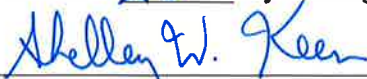
IT IS FURTHER HEREBY ORDERED that Application for Permit No. 96-9685 is **APPROVED** as follows:

- Owner: Priest River Land Company
- Priority Date: October 25, 2017
- Source: Hornby Creek tributary to Pend Oreille River
- Point of Diversion: NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 24, Township 57 North, Range 3 West, B.M., Bonner County
- Water Uses, Seasons of Use, and Quantities:
 - Wildlife Storage 1/1 to 12/31 4.1 AF
 - Fire Protection Storage 1/1 to 12/31 4.1 AF
 - Aesthetic Storage 1/1 to 12/31 4.1 AF
- Total Quantity: 4.1 AF
- Place of Use: NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 24, Township 57 North, Range 3 West, B.M
- Conditions of Approval:
 1. Proof of application of water to beneficial use shall be submitted on or before September 1, 2020.
 2. Subject to all prior rights.
 3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.
 4. Prior to diversion of water under this right, the right holder shall permanently install and maintain a staff gage or other measuring device(s) acceptable to the Department to determine the rate of reservoir fill.
 5. Prior to diversion of water under this right, the right holder shall install a lockable device, subject to the approval of the Department, in a manner that will ensure passage of water through the reservoir when this right is not in priority.
 6. Right 96-9685 authorizes a total annual storage volume of 4.1 acre-feet, consisting of 3.6 acre-feet to be used for the initial filling or carryover storage of the pond and 0.6 acre-feet for the replacement of losses caused by seepage and evaporation.
 7. Water shall not be diverted from fire protection storage except to fight or repel an existing fire.

IT IS FURTHER HEREBY ORDERED that Application for Permit No. 96-9686 is **APPROVED** as follows:

- Owner: Riley Creek Lumber Company
- Priority Date: October 25, 2017
- Source: Springs tributary to Hornby Creek
- Point of Diversion: SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24, Township 57 North, Range 3 West, B.M., Bonner County
- Water Uses, Seasons of Use, and Quantities:
 - Wildlife Storage 1/1 to 12/31 6.7 AF
 - Fire Protection Storage 1/1 to 12/31 6.7 AF
 - Aesthetic Storage 1/1 to 12/31 6.7AF
- Total Quantity: 6.7 AF
- Place of Use: SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24, Township 57 North, Range 3 West, B.M
- Conditions of Approval:
 1. Proof of application of water to beneficial use shall be submitted on or before September 1, 2020.
 2. Subject to all prior rights.
 3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.
 4. Upon notification by the Department, the right holder shall permanently install and maintain a staff gage or other measuring device(s) acceptable to the Department to determine the rate of reservoir fill.
 5. Upon notification by the Department, the right holder shall install a lockable device, subject to the approval of the Department, in a manner that will ensure passage of water through the reservoir when this right is not in priority.
 6. Right authorizes a total annual storage volume of 6.7 acre-feet, consisting of 5.1 acre-feet to be used for the initial filling or carryover storage of the pond and 1.6 acre-feet for the replacement of losses caused by seepage and evaporation.
 7. Water shall not be diverted from fire protection storage except to fight or repel an existing fire.

Dated this 23rd day of August, 2019.



Shelley W. Keen
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2019, I mailed a true and correct copy, postage prepaid, of the foregoing **PRELIMINARY ORDER APPROVING APPLICATIONS FOR PERMIT NOS. 96-9685 AND 96-9686 AND REJECTING APPLICATION FOR PERMIT NO. 96-9683** to the person(s) listed below:

RE: APPLICATIONS FOR PERMIT NO. 96-9685, 96-9686 & 96-9683

**MARC BRINKMEYER
PRIEST RIVER LAND CO
RILEY CREEK LUMBER CO
PO BOX 220
LA CLEDE ID 83841**

**PAUL CURLESS
278 HORSESHOE LN
SANDPOINT ID 83864**

**MARSE SHOBE
CHARLES SHOBE
13874 W PINE ST
SANDPOINT ID 83864**

**ROBERT BECKER
13717 W PINE ST
SANDPOINT ID 83864**

**RYAN FOBES
FORESITE ENGINEERING
418 E COEUR D'ALENE ID 83814**

**BRETT EVANS
PO BOX 111
DOVER ID 83825**

**MARK KUBIAK
PO BOX 142
DOVER ID 83825**



Jean Hersley

Technical Records Specialist II

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. 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, request 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 Department 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.