

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

IN THE MATTER OF PERMIT	)	
NO. 13-7649 IN THE NAME OF	)	PRELIMINARY ORDER
<u>G & H DAIRY, LLC</u>	)	VOIDING PERMIT

This matter having come before the Idaho Department of Water Resources (“Department”) as a result of an investigation by the Department to determine the extent of beneficial use occurring under a permit, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On February 20, 2004, J7, LLC filed Application 13-7649 with the Department, seeking a permit to divert 1.00 cfs from ground water for the irrigation of 73.9 acres in the NE¼ and NW¼ of Section 11, T15S, R38E.

2. Application 13-7649 included a mitigation plan proposing to hold existing water right 13-2164 and 20 shares in West Cache Irrigation Company (“West Cache”) unused to mitigate for the depletions resulting from the proposed irrigation. Application 13-7649 also included a copy of a Settlement Agreement between J7, LLC and PacifiCorp where J7, LLC agreed to hold water right 13-2164 and 20 shares in West Cache unused to mitigate for the depletions resulting from the proposed irrigation.

3. The Department issued Permit 13-7649 on May 26, 2005. The permit included eleven conditions of approval. The following conditions are relevant to this order:

Condition 3: To mitigate for the depletion of water resulting from the use of water under this right and to prevent injury to senior water right holders, the right holder shall cease diverting and using water as authorized by the following water right for the purposes and amounts specified below. Moreover, the official record for the following water right will be changed to show that diversion and use of water is not authorized because the rights, or portions thereof, are being dedicated to mitigation purposes.

<u>Right No.</u>	<u>Use Changed to Mitigation</u>	<u>Mitigation Rate</u>	<u>Mitigation Volume</u>	<u>Mitigation Acres</u>
13-2164	Irrigation	0.76 cfs	280.0	80

The land that will no longer be irrigated under this right is located within the W1/2NE1/4; SE1/4NE1/4, Section 1, Township 15 South, Range 38 East, B.M.

If the specified mitigation rights, or portions thereof, are sold, transferred, leased, used on any place of use, or are not deliverable due to a shortage of water or a priority call, then the amount of water authorized for diversion under this permit approval shall be reduced by the same proportion as the reduction to the mitigation rights.

Condition 4: Failure to comply with these conditions of approval is cause for the Director to void the right.

Condition 6: The right holder shall maintain control of 20 shares of water in the West Cache Irrigation Company for mitigation purposes and shall comply with the terms of mitigation as the terms may be determined in the future by the department.

Condition 10: The right holder shall maintain a totalizing measuring device of a type approved by the Department as a part of the diverting works.

4. On April 22, 2005, J7, LLC conveyed certain property to Checketts Oxford Mountain Farm, LLC ("Checketts") through a warranty deed. The deed included the place of use for Permit 13-7649 in Section 11, T15S, R38E. It also included the place of use for water right 13-2164, located in Section 1, T15S, R38E. The deed also specifically included 20 shares in West Cache. On January 30, 2006, J7 LLC assigned Permit 13-7649 to Checketts.

5. On October 27, 2008, Checketts conveyed the place of use for Permit 13-7649 to G & H Dairy, LLC ("G & H") through a warranty deed. The deed from Checketts to G & H specifically included Permit 13-7649.

6. The deed from Checketts to G & H did not include the place of use for water right 13-2164 or the 20 shares in West Cache. According to Franklin County taxlot records, the place of use for water right 13-2164 is currently owned by the Presiding Bishopric of the Church of Jesus Christ of Latter-Day Saints ("LDS Church").

7. The Department conducted a licensing review of Permit 13-7649 in 2017. The examiner found that the current permit holder, G & H, no longer owned the property at the place of use for mitigation water right 13-2164. Further, the examiner reported that the authorized point of diversion for Permit 13-7649, a ground water well located in the NWNW of Section 11, T15S, R38E, was not equipped with a department-approved measuring device.

8. On May 24, 2017, the Department sent a letter to G & H notifying the company of the concerns with Permit 13-7649. The letter asked G & H to provide evidence that G & H maintained an ownership interest in the mitigation rights (13-2164 and 20 shares in West Cache) and asked G & H to confirm that a measuring device was installed on the irrigation system for Permit 13-7649.

9. G & H retained an attorney, Adam McKenzie, to help the company work through the water right ownership issues. On November 17, 2017, McKenzie notified the Department that he was working with the LDS Church to acquire title to water right 13-2164 and the 20 shares in West Cache. On March 5, 2018, McKenzie notified the Department that the negotiations to obtain the water rights and canal company shares from the LDS Church were ongoing.

10. In February 2019, the Department contacted McKenzie, seeking a status update, and was informed that McKenzie no longer represented G & H.

11. On February 15, 2019, the Department sent a Notice of Intent to Void Permit 13-7649 to G & H. The Notice required G & H to provide proof of ownership for the mitigation rights and proof of installation of a flow meter on the authorized point of diversion for Permit 13-7649 on or before March 29, 2019. G & H did not respond to the Notice.

CONCLUSIONS OF LAW

1. Idaho Code § 42-219 states: "In the event that the Department shall find that the applicant has not fully complied with the law and conditions of the permit, it may . . . refuse issuance of a license and void the permit."

2. G & H did not comply with the conditions of permit. First, G & H has not maintained an ownership interest in the water rights used to mitigate Permit 13-7649 (water right 13-2164 and 20 shares in West Cache) as required by Conditions 3 and 6. Second, neither G & H nor its predecessors in interest installed a measuring device at the authorized point of diversion for Permit 13-7649 as required by Condition 10.

3. The Department should void Permit 21-13038 pursuant to Idaho Code § 42-219 for failure to comply with permit conditions.

ORDER

IT IS HEREBY ORDERED that issuance of a license is REFUSED and Permit 13-7649 is VOIDED.

Dated this 4th day of April, 2019.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of April 2019, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER VOIDING PERMIT, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:

G & H Dairy, LLC
299 Addison Avenue W
Twin Falls, ID 83301

Courtesy copy sent via regular mail to:

Adam McKenzie
102 N State Street, Suite 1
Preston, ID 83263

Buffi Morris
Senior Property Agent
PacifiCorp
1407 W North Temple, Suite 110
Salt Lake City, UT 84116



Sharla Cox
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.