

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

IN THE MATTER OF PERMIT	)	
NO. 37-23100 IN THE NAME OF	)	ORDER WITHDRAWING
<u>HEATH-MARSHALL INC.</u>	)	PRELIMINARY ORDER

PROCEDURAL HISTORY

On March 6, 2018, the Idaho Department of Water Resources ("Department") issued a *Preliminary Order Voiding Permit* 37-23100. On March 21, 2018, David Z. Walters and Charlene B. Walters ("Walters"), through their attorney Jerry R. Rigby, filed a timely *Request for Hearing* pursuant to Idaho Code § 42-1701A(3).

The Department conducted an administrative hearing on June 7, 2018 in Idaho Falls. The hearing officer accepted Exhibits 1-14 into the administrative record. Roger Warner, Keith Wilson and James Walters testified at the hearing. After carefully considering the evidence in the record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On July 15, 1996, Heath-Marshall Inc. ("Heath-Marshall") filed Application for Permit 37-8856 with the Department, seeking a permit to divert 1.15 cfs from ground water for industrial use. Ex. 2.

2. Heath-Marshall described the proposed industrial use as follows:

The water will be used for two different industrial purposes. First, approximately 100 gpm (0.23 cfs) will be diverted from one well to be used in an asphalt hot mix plant. This process removes moisture from the aggregate rock and burns hydrocarbon fuel, both of which result in an increase in the amount of water exiting the process over that required for input. Thus, this use is truly non-consumptive. Second, approximately 400 gpm (0.92 cfs) is required for the production of concrete in an adjoining facility. The flow will be provided by the outflow from the asphalt hot mix plant operation and additional diversions from the second well. It is estimated that approximately 30 gallons of water is entirely consumed in the production of one (1) yard of concrete mix. The plan will produce approximately 10,000 yards per year, thus consuming approximately 300,000 gallons of water.

Ex. 2, Addendum at 1.

3. Application for Permit 37-8856 included a mitigation plan to offset the consumptive water use at the proposed project. Ex. 2, Addendum. The mitigation plan proposed to dry up one acre of stacked water rights 37-235A, 37-236 and 37-308, which authorize irrigation from the Big Wood River. *Id.* The mitigation plan proposed to leave the unused portion of water rights 37-235A, 37-236 and 37-308 undiverted in the Big Wood River. *Id.*

4. The Department approved Permit 37-8856 on December 11, 1996. Ex. 10. Permit 37-8856 included the following condition (“Condition 11”):

The use of water under this right is contingent upon the implementation of the following three measures to mitigate potential impacts to prior surface and groundwater rights:

- a. The right holder shall discontinue the irrigation of one acre within the NWSE, S13, T01N, R18E, under Rights 37-00235A, 37-00236, and 37-00308.
- b. The water normally diverted for the irrigation of the one acre, currently estimated by the applicant to be 0.224 cfs, shall be diverted into a gravel pit located in Sec. 13 to compensate for the annual consumption of approximately 2.5 acre feet of water under this right.
- c. Diversion and use of water under this right may occur only as long as the Big Wood River can supply water to Rights 37-00235A, 37-00236, and 37-00308, under their respective priorities.

Ex. 10 at 2.

5. On October 22, 1999, Heath-Marshall filed proof of beneficial use for Permit 37-8856, confirming that it had completed all development that would occur under the permit. Ex. 11.

6. In July 2000, Heath-Marshall conveyed the asphalt plant to Larry and Lexie Anderson dba Anderson Asphalt Paving Company. Around that same time, Heath-Marshall conveyed the concrete plant to David & Charlene Walters dba Walters Ready-Mix Inc.

7. There is no evidence that the mitigation for consumptive use required by Permit 37-8856 was ever performed by Heath-Marshall. Testimony of Roger Warner. From the time Walters acquired the property until 2017, they did not divert any water into the gravel pit located in Section 13 under water rights 37-235A, 37-236 or 37-308. Testimony of James Walters

8. Walters does not own water rights 37-235, 37-236, 37-308 or any of the split portions of those water rights. Testimony of James Walters. The current owners of record for water rights 37-235C, 37-236A and 37-308A (which authorize the irrigation occurring in the NWSE, Section 13, T01N, R18E) are Jimmie & Kathy Walker. Walters does not have a written agreement with Jimmie & Kathy Walker to dry up any acres under water rights 37-235C, 37-236A or 37-308A. *Id.*

9. In July 2017, Walters diverted 2.6 acre-feet of water from the ditch used to deliver water rights 37-235C, 37-236A and 37-308A to their authorized place of use. Ex. 1. The 2.6 acre-feet of water was conveyed across the Walters property and allowed to infiltrate into the ground in a gravel pit on the property. *Id.*

10. In February 2018, the Department split Permit 37-8856 into two parts. Permit 37-8856 represents the water use proposed at the asphalt plant. Permit 37-23100 represents the water use proposed at the concrete plant. The ownership records for both permits continue to list Heath-Marshall as the current owner.

11. Permit 37-8856 authorized two wells to supply water to the asphalt plant and the concrete plant. Ex. 10. The asphalt plant and concrete plant were under single ownership during the permit development period. Ex. 11. Currently, one well, equipped with a 40 hp motor, supplies water to the concrete plant and the asphalt plant. Ex. 6 at 3. A domestic well located at the concrete plant is also used to supply water to some of the industrial uses occurring at the concrete plant. *Id.*

12. On December 20, 2016, Paul Scoresby, a certified field examiner, conducted a beneficial use field exam for Permit 37-8856. Ex. 6. He identified both consumptive use (water added to concrete batches) and non-consumptive use (water remaining in the temper tanks and water used to wash concrete trucks) at the concrete plant. *Id.* at 3.

EVALUATION CRITERIA / ANALYSIS

Idaho Code § 42-219 (8) states in pertinent part:

In the event that the department shall find that the applicant has not fully complied with the law and the conditions of permit, it may issue a license for that portion of the use which is in accordance with the permit, or may refuse issuance of a license and void the permit. Notice of such action shall be forwarded to the permit holder by certified mail. The applicant may contest such action by the department pursuant to section 42-1701A(3), Idaho Code.

There is no evidence that Heath-Marshall ever complied with Condition 11 of Permit 37-8856 during the development period for the permit (December 1996 – October 1999). There is no evidence that Heath-Marshall or its successor in interest, Walters, ever complied with Condition 11 of Permit 37-8856 prior to the 2017 irrigation season. According to James Walters, Walters Ready Mix did not recharge with any water from the Big Wood River prior to 2017.

Prior to the hearing, Walters' consultant, Roger Warner, reviewed aerial photography for the authorized place of use for water rights 37-235C, 37-236A and 37-308A. He concluded that at least one acre was dried up under those water rights every year since Permit 37-8856 was issued. Walters argues that this non-use of water, alone, should be sufficient mitigation for the consumptive uses occurring under Permit 37-8856 during that time period.

Walters' argument that the Department should accept an alternative method of mitigation is not persuasive. Non-use of surface water irrigation rights is generally not sufficient to mitigate for surface water depletions resulting from the diversion of ground water. The depletions to the Big Wood River resulting from consumptive ground water diversions occurring at the concrete plant would extend throughout the entire year. Augmenting the streamflow in the Big Wood River during the irrigation season does not mitigate for any impacts occurring during the non-irrigation season.

The mitigation plan included in Application for Permit 37-8856 proposed to simply hold a portion of the Big Wood River rights unused. This method of mitigation was rejected. Permit 37-8856 required mitigation through aquifer recharge. Recharging 2.5 acre-feet of water into the local aquifer would mitigate for depletions throughout the entire year, including the non-irrigation season.

In addition, there is no evidence in the record confirming that any portion of water rights 37-235C, 37-236A or 37-308A remained undiverted in the Big Wood River. If the full diversion rate authorized by water rights 37-235C, 37-236A and 37-308A were diverted from the Big Wood River and used by Jimmie & Kathy Walker or some other water user on the shared ditch, then no mitigation occurred on the Big Wood River during the irrigation season.

Even though Walters diverted water into its gravel pit during the 2017 irrigation season, there are significant obstacles to accomplishing the mitigation described in Condition 11 in the future. Walters does not have any ownership interest in water rights 37-235C, 37-236A or 37-308A. Testimony of James Walters. Walters does not have a written agreement with the current owners of the rights, Jimmie & Kathy Walker, to hold one acre unused for mitigation purposes. *Id.* The water rights do not list ground water recharge as an authorized beneficial use.

For these reasons, the permit holders failed to comply with Condition 11 of Permit 37-8856. The Department must now determine how the failure to comply with Condition 11 should affect the licensing of Permits 37-8856 and 37-23100. Even though Condition 11 does not link the required mitigation directly to the consumptive uses occurring at the concrete plant, it is clear from the administrative record that Condition 11 was included on Permit 37-8856 specifically to mitigate for the consumptive uses occurring at the concrete plant.

Failure to comply with Condition 11 should result in the consumptive uses at the concrete plant being excluded from any water right license issued in connection with Permit 37-23100. According to Idaho Code § 42-219 (8), the Department may issue a license for the portion of the permit that was accomplished in compliance with the permit conditions. In this case, the non-consumptive water uses occurring at the concrete plant accomplished in compliance with Permit 37-23100 could be reflected in a water right license. The Preliminary Order Voiding Permit 37-23100 was too broad because it voided the entire permit without distinguishing between the consumptive uses, which require mitigation, and the non-consumptive uses occurring at the concrete plant.

CONCLUSIONS OF LAW

Heath-Marshall and its successor in interest, Walters, failed to comply with Condition 11 of Permit 37-8856 prior to the 2017 irrigation season and throughout the development period for the permit. Condition 11 was included on Permit 37-8856 to mitigate for the consumptive uses occurring under the permit. Pursuant to Idaho Code § 42-219 (8), the Department should exclude the consumptive uses from any license issued for Permit 37-8856 or Permit 37-23100. The Department may, however, issue a license for the non-consumptive uses developed under the permits, including any non-consumptive uses occurring at the concrete plant.

The Preliminary Order Voiding Permit 37-23100 was too broad because it voided the non-consumptive uses associated with the concrete plant. The preliminary order should therefore be withdrawn. It is not necessary to issue a separate order voiding the consumptive portions of Permit 37-23100. Rather, the Department should simply exclude the consumptive elements of the industrial use if it issues a license for the non-consumptive uses associated with the concrete plant.

ORDER

IT IS HEREBY ORDERED that the Preliminary Order Voiding Permit 37-23100 is WITHDRAWN.

Dated this 18th day of June, 2018.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of June 2018, a true and correct copy of the document described below was served by placing a copy of the same with the United States Postal Service, certified with return receipt requested, postage prepaid and properly addressed, to the following:

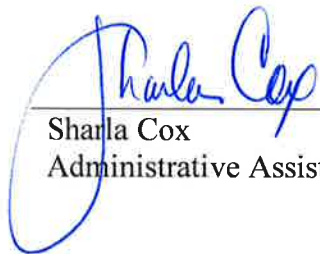
Document Served: Order Withdrawing Preliminary Order (37-23100)

**Heath-Marshall Inc.
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Sharla Cox
Administrative Assistant

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.