

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT)
NO. 37-23100 IN THE NAME OF)
HEATH-MARSHALL, INC.)
_____)

PRELIMINARY ORDER
VOIDING PERMIT

This matter having come before the Department of Water Resources (Department) as a result of an examination by Department staff to determine the extent of beneficial use of water, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On July 15, 1996, Heath-Marshall, Inc. ("HMI") submitted an *Application for Permit to Appropriate the Public Waters of the State of Idaho* ("Application") to the Department. The Application proposed the diversion of 1.15 cubic feet per second ("cfs") of ground water within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, Township 1 North, Range 18 East, B.M., for industrial purposes. HMI 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.

2. The Application was subject to the *Amended Moratorium Order In the Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water Within the Eastern Snake River Plain Area and the Boise River Drainage* ("Moratorium Order"), which stated that "a moratorium is established on the processing approval of presently pending and new applications for permits to appropriate water from a surface and ground water sources within the Eastern Snake River Plain Area and all tributaries thereto." The Moratorium Order also states:

The moratorium does not prevent the Director from reviewing for approval on a case-by-case basis an application with otherwise would not be approved under the

terms of this moratorium if . . . [t]he Director determines that the development and use of water pursuant to an application will have no effect on prior surface and ground water rights because of its location, insignificant consumption of water or mitigation provided by the applicant to offset injury to other rights.

3. To overcome the moratorium, HMI offered to mitigate for the consumption of water in the concrete production plant by discontinuing the irrigation of one acre of land under Big Wood River Water Rights 37-235A, 37-236, and 37-308.
4. On December 11, 1996, the Department approved the Application as *Permit to Appropriate Water No. 37-8856* ("Permit 37-8856") with conditions requiring the proposed mitigation. After corresponding with HMI's attorney, on January 9, 1997, the Department issued an amended version of Permit 37-8856 with the following mitigation requirements:

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 if the right holder has annually diverted 2.5 AF of water to the gravel pit under rights 37-00235A, 37-00236, and 37-00308 as mitigation for the industrial use.

17. The right holder shall cease diversion under this right if the right holder cannot perpetually provide suitable mitigation, as determined by the department.
5. On October 22, 1999, the Department received HMI's *Proof of Beneficial Use* for the Permit 37-8856.
6. On October 15, 2014, a Department staff member examined the water use at the asphalt mix plant and the concrete plant to determine the extent of beneficial use in connection with Permit 37-8856. The Department examiner confirmed the use of water but did not confirm that the required mitigation had occurred. The Department examiner did not complete a *Beneficial Use Field Report*.

7. On March 23, 2015, David Z. Walters and Charlene B. Walters (“Walters”) notified the Department they are the new owners of the concrete plant and sought ownership of a portion of Permit 37-8856. On January 20, 2016, Anderson Asphalt Paving, Inc., notified the Department it is the new owner of the asphalt hot mix plant and sought ownership of a portion of Permit 37-8856. The Department did not process either ownership change notice because permits to appropriate water are personal property and must be assigned from one owner to another.
8. On December 2, 2016, the Department reviewed the records for Rights 37-235A, 37-236, and 37-308 to determine whether the Snake River Basin Adjudication decrees “accounted for, or excluded, the 1 acre of irrigation that was to be dried up for mitigation purposes.” The Department concluded, “There is no indication within the adjudication files 37-235C, 37-236A, and 37-308A that 1 acre of irrigation was identified or singled out for mitigation purposes and then held out of the recommendations.”¹
9. On July 26, 2017, the Department sent HMI a *Notice of Intent to Void Permit* (“Notice”). The Department mailed copies of the Notice to Walters and to Anderson Asphalt Paving, Inc. The Notice explained that the Department did not have information confirming compliance with the mitigation requirements of Permit 37-8856 during its authorized development period. The Department gave HMI thirty days to supply the information.
10. On August 9, 2017, the Department received a *Beneficial Use Field Report* (“Field Report”) from Certified Water Right Examiner Paul H. Scoresby (“Scoresby”) for Permit 37-8856. On December 7, 2017, the Department returned the Field Report to Scoresby because it did not comply with the Beneficial Use Field Examination Rules (IDAPA 37.03.02). In the letter returning the Field Report to Scoresby, the Department stated:

The field report does not include evidence to clearly confirm the permit holder annually diverted 2.5 AF of water to the gravel pit **during the development period of the permit** The field report also does not include evidence confirming the permit holder discontinued the irrigation of one acre with the NWSE, S13, T01N, R18E, under Rights 37-00235C, 37-00236A, and 37-00308A (the splits of the rights originally described in the condition).

11. On January 11, 2018, Scoresby resubmitted the Field Report with an *Addendum* addressing the deficiencies described in the Department’s December 7, 2017, letter. The Field Report and *Addendum* confirm a non-consumptive beneficial use of water at the asphalt mix plant and a consumptive use of water at the concrete plant. In the Field Report, Scoresby stated:

The condition to mitigate 2.5 AFA through recharge into a gravel pit does not appear to have been met during the development period. It is recommended that only the non-consumptive portion for the Asphalt Plant be licensed.

¹ In the Snake River Basin Adjudication, HMI claimed portions of Rights 37-235A, 37-236, and 37-308. Those portions were numbered 37-235C, 37-236a, and 37-308A.

12. In response to the Field Report, the Department administratively split Permit 37-8856 into two parts, one for the concrete plant and one for the asphalt hot mix plant. The portion of Permit 37-8856 for the concrete plant is now numbered 37-23100 ("Permit 37-23100"). The portion of Permit 37-8856 for the asphalt mix plant remains as Permit 37-8856, but in a reduced form. The Department split Permit 37-8856 so it can address the consumptive water use at the concrete plant and the non-consumptive water use at the asphalt hot mix plant separately.

CONCLUSIONS OF LAW

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

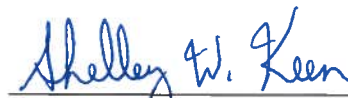
In the event that the Department shall find that the applicant has not fully complied with the law and the conditions of the permit, it may issue a license for that portion of use which is in accordance with the permit, or may refuse issuance of a license and void the permit.

2. Idaho Code § 42-219(8) authorizes the Department to void permits for which the permit holder has not fully complied with the law and the conditions of the permit.
3. Investigation by the Department revealed that HMI did not comply with the conditions of Permit 37-23100 because it did not accomplish the required mitigation during the authorized development period.
4. The Department should void Permit 38-23100 pursuant to Idaho Code § 42-219(8).

ORDER

IT IS HEREBY ORDERED that issuance of a license is **REFUSED** and Permit 37-23100 is **VOIDED**.

Dated this 28th day of February, 2018



Shelley W. Keen, Manager
Water Rights Section



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

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

March 5, 2018

HEATH MARSHALL INC
PO BOX 250
POCATELLO ID 83204-0250

RE: Preliminary Order in the matter of Permit No. **37-23100**

Dear Permit Holder:

The accompanying order is a "**preliminary order**" 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 of the department unless any party petitions for reconsideration within fourteen (14) days after issuance as described in the enclosed information sheet.

If you have any questions regarding this matter, please call me at 208-287-4947.

Sincerely,

A handwritten signature in black ink that reads "Shelley W. Keen". The signature is written in a cursive, flowing style.

Shelley W. Keen
Water Rights Section Manager

Enclosure(s)

c: DAVID AND CHARLENE WALTERS,
LARRY ANDERSON, ANDERSON ASPHALT PAVING INC

CERTIFICATE OF SERVICE

I hereby certify that on **March 6, 2018**, I mailed a true and correct copy, certified, postage prepaid, of the foregoing **(PRELIMINARY ORDER VOIDING PERMIT)** to the person(s) listed below:

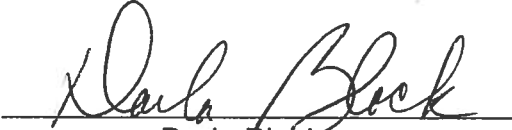
RE: Preliminary Order in the Matter of Permit No. **37-23100**

HEATH MARSHALL INC
PO BOX 250
POCATELLO ID 83204-0250

DAVID WALTERS
PO BOX 390
REXBURG ID 83440

CHARLENE WALTERS
PO BOX 390
REXBURG ID 83440

LARRY ANDERSON
ANDERSON ASPHALT PAVING INC
PO BOX 759
HAILEY ID 83333



Darla Block
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.