

STATE OF IDAHO

**PRELIMINARY ORDER
VOIDING PERMIT**

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

FINDINGS OF FACT

1. On August 30, 2005, State of Idaho, Idaho Fish and Game Commission, applied to the Department of Water Resources for a permit to appropriate 0.23 cubic feet per second of water from springs, a tributary of sinks, within the SE¼NW¼SE¼ of Section 1; and SW¼SW¼NE¼, Section 2; Township 16N, Rge. 5W; and NE¼NW¼SE¼ of Section 35, Township 17 North, Range 5 West, B. M., Washington County, for stockwater purposes.
2. On January 26, 2006, the Department approved the application as Permit 69-11502 (permit).
3. On May 4, 2006, the Department received the permit holder's proof of beneficial statement for the permit.
4. On June 17, 2013, a Fish and Game employee submitted documents to verify the beneficial use of water established in connection with the permit. The employee reported water was being diverted from two springs within the NE¼NW¼SE¼, Section 1, Township 16N, Range 5W; and NE¼NW¼SE¼, Section 35, Township 17 North, Range 5 West, B. M., for stockwater purposes.
5. On June 28, 2013, the Department sent notice to the permit holder that the point of diversion in the NE¼NW¼SW¼, Section 1, Township 16 North, Range 5 West, B. M., was not authorized by the permit and that the permit had to be amended to accurately portray the points of diversion and place of use before a water right license could be issued. An Application for Amendment of Permit form was enclosed with the notice.
6. On August 9, 2013, the Department sent the permit holder a second notice reminding him that the permit would have to be amended before a license could be issued.

7. The permit holder has not filed an application to amend the permit to conform with the findings of the field examiner.
8. Idaho Code § 42-219(8) provides in pertinent part as follows:

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.

CONCLUSIONS OF LAW

1. When a permit holder has not fully complied with the law and the conditions of the permit, the provisions of Idaho Code § 42-219(8) grant the Department of Water Resources discretion to issue a license for the portion of the development which complies with the permit or to void the permit altogether.
2. The development of the water described by the field examiner did not comply with the permit because one of the points of diversion established by the permit holder was not in the location authorized by the permit.
3. The Department made reasonable efforts to notify the permit holder of their obligation to apply to amend the permit.
4. The permit holder could have applied to amend the permit to cover the points of diversion and place of use as he established them, but the permit holder has not filed the appropriate Application for Amendment of Permit.
5. A license should not be issued on this permit and the permit should be voided pursuant to Idaho Code § 42-219(8).

ORDER

IT IS HEREBY ORDERED that issuance of a license is **REFUSED** and Permit No. 69-11502 is **VOIDED**.

Dated this 23rd day of September, 2013.



JOHN WESTRA
Western Regional Manager



State of Idaho

DEPARTMENT OF WATER RESOURCES

Western Region, 2735 Airport Way • Boise, Idaho 83705-5082

Phone: (208) 334-2190 • Fax: (208) 334-2348 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

September 23, 2013

STATE OF IDAHO
IDAHO FISH & GAME COMMISSION
PO BOX 25
BOISE ID 83707-0025

Re: Preliminary Order in the matter of Permit No. 69-11502

Dear Interested Parties:

The accompanying order is a "**preliminary order**" issued by the Department. It can and will become a final order without further action of the department unless a 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 208-334-2190.

Sincerely,

Rachel Sommer
for:

John Westra, Manager
Western Regional Office

Enclosures

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2013, I mailed a true and correct copy, postage prepaid of the foregoing **PRELIMINARY ORDER** to the person listed below:



Rachel Sommer
Administrative Assistant I

Documents #69-11502 - Preliminary Order, Order Explanatory

STATE OF IDAHO
IDAHO FISH & GAME COMMISSION
PO BOX 25
BOISE ID 83707-0025

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.