

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT)
NO. 23-11238 IN THE NAME OF)
BERT AND/OR LORNA HOLLAND)

ORDER WITHDRAWING
PRELIMINARY ORDER
VOIDING PERMIT

1. On February 4, 2013, the Idaho Department of Water Resources (Department) issued a Preliminary Order Voiding Permit 23-11238. Evidence available to the Department at that time showed that the permit holders, Bert and Lorna Holland, had not complied with the mitigation condition listed on the permit.

2. On February 14, 2013, Robert Harris, an attorney representing the Hollands, filed a Petition for Reconsideration with the Department and provided additional evidence regarding the mitigation for the permit. Mr. Harris provided a receipt showing that the Hollands have applied to rent 18 acre-feet of water through the Water District 01 Rental Pool for the 2013 irrigation season. 18 acre-feet represents 9 years of back mitigation for the permit.

3. The mitigation condition listed in the permit required the Hollands to rent 2.0 acre-feet each year through the Water District 01 Rental Pool. The storage water would then be released into the Irwin to Heise reach of the Snake River by the watermaster for Water District 01 to offset any depletions caused by the ponds created under the permit.

4. Presently, Water District 01 does not have a mechanism in place to deliver storage water to the Irwin to Heise reach of the Snake River. Therefore, any water rented by the Hollands would remain in the reservoir system undelivered. The mitigation requirement amounts to nothing more than a monetary payment to the Water District 01 Rental Pool.

5. The three ponds on the Holland property cover a surface area of about 0.5 acres. Data obtained from ET Idaho shows that the highest expected instantaneous evaporation from the ponds is 3.4 mm/day. Given the surface area of the ponds, this equates to an instantaneous evaporation rate of 1,800 gallons per day. This level of consumptive use falls within the parameters of Idaho Code § 42-111 and should not require mitigation.

6. Pursuant to Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01), the Department may rescind or modify a preliminary order in response to a Petition for Reconsideration within 21 days of receiving the petition.

7. Based on the new evidence available to the Department, the Preliminary Order Voiding Permit was issued in error. The Department should withdraw the Preliminary Order and should issue water right license 23-11238. The mitigation condition for water right license 23-11238 should be modified to only require mitigation when the pond is emptied and refilled.

ORDER

IT IS HEREBY ORDERED that the Preliminary Order Voiding Permit (23-11238) is WITHDRAWN.

Dated this 27th day of February, 2013.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 1st day of March 2013, I mailed a true and correct copy, postage prepaid, of the foregoing ORDER WITHDRAWING PRELIMINARY ORDER VOIDING PERMIT, by U.S. Mail to the person(s) listed below:


Judea Jones
Administrative Assistant

US MAIL

RE: ORDER WITHDRAWING PRELIMINARY ORDER VOIDING PERMIT (23-11238)

**Rob Harris
Holden Kidwell Hahn & Crapo
PO Box 50130
Idaho Falls, ID 83405-0130**

**Bert or Lorna Holland
PO Box 51
Swan Valley, ID 83449**

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.