

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT)	
NO. 23-11238 IN THE NAME OF)	PRELIMINARY ORDER
<u>BERT AND/OR LORNA HOLLAND</u>)	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 occurring under a permit, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On September 22, 2003, Bert and/or Lorna Holland, represented by their attorney, Kent Foster, filed an application with the Department, seeking a permit to divert 2.00 acre-feet from ground water for a series of recreation/aesthetic ponds on property in Swan Valley, Idaho. The ponds were to be filled initially with ground water seepage, but would then be maintained by pumping ground water from a shallow well on the property near the Snake River.

2. The application was approved and permit no. 23-11238 was issued by the Department on December 1, 2003, authorizing the Hollands to develop the water right. Permit 23-11238 included the following condition of approval:

As mitigation for the use of water under this right, each year the right holder shall rent 2.0 acre-feet from the Snake River Rental Pool. Water shall not be diverted under this right if mitigation is not provided.

3. According to aerial photography available to the Department, the ponds were constructed at some point prior to 2004 and have been kept full since that time. The Department conducted a field examination of Permit 23-11238 on June 14, 2012. The field examiner confirmed the existence of the ponds and the ground water well.

4. As part of the licensing review process, the Department must confirm that all of the conditions of the permit have been satisfied. The field examiner contacted Water District 01 to see if Bert or Lorna Holland rented water each year through the Water District 01 Rental Pool as required by the permit. Rental pool records show that Bert and Lorna Holland rented 0.5 acre-feet on April 15, 2004 and have not rented water from the rental pool since then.

5. Bert and Lorna Holland have not complied with the condition requiring annual mitigation for the ponds authorized under permit 23-11238. No diversion should have occurred after 2004 under permit 23-11238 until the mitigation condition listed above was satisfied.

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 the conditions of the permit, it may . . . refuse issuance of a license and void the permit."

2. Bert and Lorna Holland have not complied with the mitigation condition of permit 23-11238. Mitigation is necessary to ensure that senior water rights are not impacted by the diversion of water under permit 23-11238. Therefore, the Department should void the permit pursuant to Idaho Code § 42-219.

ORDER

IT IS HEREBY ORDERED that issuance of a license is **REFUSED** and permit no. 23-11238 is **VOIDED**.

Dated this 31st day of January, 2013.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

YH mailed again
on 2-4-2013

I hereby certify that on the ^{4th} ~~3rd~~ day of ~~January~~ ^{February} 2013, I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER VOIDING PERMIT, U.S. Mail – Certified, to the person(s) listed below:



Judea Jones
Administrative Assistant

US MAIL

RE: PRELIMINARY ORDER VOIDING PERMIT (23-11238)

**Bert Holland and/or Lorna Holland
c/o Holden Kidwell Hahn & Crapo
PO Box 50130
Idaho Falls, ID 83405-0130**

Courtesy copy sent via regular mail to address listed on county taxlot map:

**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.