

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF PERMIT NO. 63-12447)
IN THE NAME OF ARK PROPERTIES, LLC)
AND MAYFIELD TOWNSITE, LLC)
_____)

PRELIMINARY ORDER

This matter having come before the Department of Water Resources (Department) in the form of an Application for Amendment of Permit, the Department finds, concludes, and orders:

FINDINGS OF FACT

1. On April 28, 1998, Sand Spring Ranch & Company (applicant) applied to the Department to appropriate 4.0 cubic feet per second (cfs) from ground water at four points of diversion located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$, and SW $\frac{1}{4}$ SW $\frac{1}{4}$, of Section 24, Township 1 North, Range 4 East, and the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 19, Township 1 North, Range 5 East, B.M., Elmore County, for the irrigation of 200 acres within a 980 acre permissible place of use. A permissible place of use authorizes the irrigator to rotate the authorized number of irrigated acres within a larger area from one irrigation season to another.
2. On March 10, 1999, the Department approved the application as Permit No. 63-12447 (permit). A condition on the permit stated that proof of construction of works and application of water to beneficial use (proof) shall be submitted to the Department on or before March 1, 2004.
3. On December 31, 2003, the Department notified the permit holder, by certified mail, that proof was due soon and included instructions on how to submit proof.
4. On March 1, 2004, because the Department did not receive an acceptable proof statement or a request for extension of time to submit proof (extension), the permit lapsed.
5. On May 4, 2004, the applicant submitted a reinstatement request and a request for extension of time to submit proof of beneficial use. The applicant requested an extension until March 1, 2009, to submit proof of beneficial use. The Department reinstated the permit, approved the extension request, and advanced the priority date of the permit to July 1, 1998.
6. On August 11, 2005, the Department received an Assignment of Permit (assignment) assigning the permit to ARK Properties, LLC. The Department acknowledged receipt of the assignment.
7. On October 24, 2007, the Department received an assignment from ARK Properties, LLC, assigning a 1/3 (one-third) portion of the permit to Marty Goldsmith. The Department did not process the assignment to Marty Goldsmith. On April 14, 2008, the Department received an amended assignment that was meant to replace the October 24, 2007 assignment. In the assignment, ARK Properties, LLC, assigned a 1/3 (one-third) portion of the permit to Mayfield Townsite, LLC. On April 24, 2008, the Department received another assignment that re-stated the purpose of the April 14, 2008 assignment. ARK Properties, LLC, and Mayfield Townsite, LLC, are the permit holders (permit holders).

8. On April 26, 2008, a certified water right examiner completed an examination to confirm the beneficial use of water established in connection with the permit.
9. On February 26, 2009, the Department received proof with the field examiner's completed beneficial use field report. The field examiner found that 200 acres were irrigated and recommended that the Department issue a license for 200 acres of irrigation within a 962 acre permissible place of use. The field examiner also reported that the place of use was developed in a different legal description than what was permitted.
10. On December 19, 2011, Department staff reviewed the field examiner's report and found that throughout the authorized development period for the permit, the permit holders applied water to the same 200 acres within the proposed permissible place of use. Neither the field examiner nor the permit holders have presented evidence confirming that different acres within the proposed permissible place of use had been irrigated before the permit holders submitted proof of beneficial use.
11. On December 21, 2011, Department staff sent a draft Application for Amendment (draft amendment) to the permit holders. The Department notified the permit holders that the permitted place of use must be amended to depict the legal description of the 200 acres that were irrigated.
12. On January 31, 2012, the Department received an Application for Amendment (amendment) from the field examiner, on behalf of the permit holders, that proposed changing the permissible place of use to 1,284 acres. The 1,284 acre permissible place of use in the amendment included the 200 acres that were listed in the draft amendment. Department staff requested that the field examiner provide additional information to demonstrate how the 1,284 acre permissible place of use was developed during the authorized development period for the permit. The request also stated that if information cannot be provided to substantiate the irrigation of more than 200 acres within the permissible place of use, the amendment can only be approved for a place of use of 200 acres.
13. To date, the Department has not received any additional information.
14. Idaho Code § 42-211 provides in pertinent part as follows:

Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of diversion or proposed use or uses of the water, he shall file an application for amendment upon forms to be furnished by the department of water resources together with the statutory fee for filing and recording same, and upon receipt thereof it shall be the duty of the department of water resources to examine same and if approval thereof would not result in the diversion and use of more water than originally permitted and if the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application and return an approved copy to the permit holder. The director of the department of water resources shall give such notice to other affected water users as he deems appropriate and may grant the amendment, in whole or in part or upon conditions, or may deny same.

CONCLUSIONS OF LAW

1. The permit holder did not develop a 962 acre permissible place of use or a 1,284 permissible place of use in accordance with the permit.
2. The permit holders developed 200 acres of irrigation.
3. The permit holder's opportunity to irrigate additional acres throughout the permissible place of use in connection with the permit ended when the permit holders submitted proof of beneficial use. Therefore, the permitted place of use should not exceed what the permit holders actually established during the authorized development period for the permit.
4. The provisions of Idaho Code § 42-211 authorize the Department to grant an application for amendment in part.
5. Changing the permitted place of use to depict the 200 acres actually irrigated by the permit holders will not result in more water being diverted and used than originally permitted, and it will not injure other water users.
6. The Department should partially approve the Application for Amendment to limit the place of use to the 200 acres irrigated in connection with the permit by the time the permit holders submitted proof of beneficial use. The 200 acre place of use should be approved as:

			NE				NW				SW				SE				Totals
Twp	Rge	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
01N	04E	13																1.0	1
01N	05E	18											1.0						1
													L4						
01N	04E	24	30.0		30.0	33.0				9.0	35.0	9.0	1.0	18.0	2.0	16.0	4.0		187
01N	05E	19					9.0	2.0											11
							L1	L2											
Total Acres: 200.0																			

ORDER

IT IS THEREFORE, HEREBY ORDERED that Application for Amendment of Permit No. 63-12447 is **PARTIALLY APPROVED**, with the place of use as shown in Conclusion of Law No. 6.

IT IS FURTHER ORDERED that Application for Amendment of Permit No. 63-12447 is subject to the following conditions:

1. The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

2. After specific notification by the Department, the right holder shall install a suitable measuring device or shall enter into an agreement with the Department to use power records to determine the amount of water diverted and shall annually report the information to the Department.

3. Water bearing zone to be is between 400 and 1000 feet.

4. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the lands above.

Dated this 31st day of May, 2012.

Shelley W. Keen

Shelley W. Keen, Manager
Water Right Permits Section

CERTIFICATE OF SERVICE

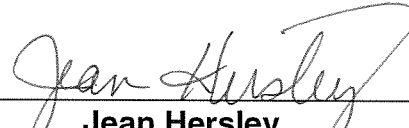
I hereby certify that on June 1, 2012, I mailed a certified true and correct copy, postage prepaid, of the foregoing **PRELIMINARY ORDER** to the person (s) listed below:

RE: PRELIMINARY ORDER IN THE MATTER OF PERMIT NO. 63-12447

**ARK PROPERTIES
C/O JOHN MCCALLUM
11204 N BAR 21 DR
GLENN FERRY ID 83623-5033**

**MAYFIELD TOWNSITE LLC
PO BOX 1359
CALDWELL ID 83606**

**SPF WATER ENGINEERING LLC
300 E MALLARD DR STE 350
BOISE ID 83706
ATTN: SCOTT KING**



Jean Hersley
Technical Records Specialist I

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.