

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF PERMIT NO. 37-21384)
IN THE NAME OF LAWRENCE L. CALKINS)
AND/OR SANDRA L. CALKINS)
_____)

PRELIMINARY ORDER
VOIDING PERMIT

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

FINDINGS OF FACT

1. On November 19, 2004, Lawrence L. Calkins and/or Sandra L. Calkins (permit holders) applied to the Department for a permit to appropriate 0.12 cubic feet per second from ground water within Government Lot 4 (SW¼SW¼), Section 19, Township 4 South, Range 20 East, B. M., for domestic use in three homes.

2. On February 15, 2005, the Department approved the application as Permit No. 37-21384 (permit).

3. Approval condition no. 1 on the permit said:

Proof of application of water to beneficial use shall be submitted on or before February 01, 2010.

4. Approval condition no. 5 on the permit said:

Prior to any diversion and use of water under this water right, the right holder shall (1) provide evidence of participation in a mitigation plan, approved by the director, and administered by a ground water district or other recognized organization, or (2) provide individual mitigation approved by the director.

5. Approval condition no. 6 on the permit said:

Noncompliance with any condition of this right, including the requirement for mitigation, is cause for the director to issue a notice of violation, cancel or revoke the right, or, if the right is included in a water district, request that the watermaster curtail diversion and use of water.

6. On February 2, 2010, the permit lapsed because the permit holders did not submit the required proof of beneficial use.

7. On February 10, 2010, the Department sent the permit holders a lapse notice by certified mail.

8. On February 18, 2010, the Department received a *Statement of Completion for Submitting Proof of Beneficial Use* and the required examination fee for the permit.

9. The Department has not received evidence that the permit holders have complied with the mitigation requirement set forth in approval condition no. 5 of the permit.

10. On April 13, 2010, the Department sent the permit holders a letter requesting evidence that they have complied with the mitigation requirement set forth in approval condition no. 5 of the permit. The Department sent the letter to the permit holders' address of record in Richfield, Idaho. On April 21, 2010, the Department sent a copy of the same letter to the permit holders' alternate address in Waldport, Oregon.

11. Idaho Code § 42-218 states, in pertinent part:

A permit upon which the proof of beneficial use has not been submitted, or a request for extension of time has not been received on or before the date set for such proof, shall lapse and be of no further force nor effect. Notice of said lapsing shall be sent by the department to the applicant at the address of record by regular mail provided:

1. That within sixty (60) days after such notice of lapsing the department may, upon a showing of reasonable cause, reinstate the permit with the priority date advanced a time equal to the number of days that said showing is subsequent to the date set for proof

12. Idaho Code § 42-219(8) states:

In the event that the Department shall find that the applicant has not fully complied with the law and 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. The provisions of Idaho Code § 42-219(8) authorize the Department to void permits for which the permit holder has not fully complied with the law and the conditions of the permit.

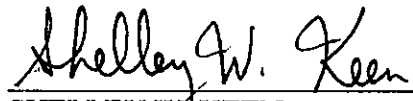
2. The permit holders have not complied with the conditions of the permit and Idaho Code § 42-219(8) because they have not provided evidence of participation in a mitigation plan, approved by the director and administered by a ground water district or other recognized organization, or provided individual mitigation approved by the director.

3. The Department should void the permit pursuant to Idaho Code § 42-219(8).
4. Idaho Code § 42-218a provides that the Department may reinstate a permit upon a showing of reasonable cause by the permit holder within sixty days of the date of notice of lapsing.
5. The question of whether the permit should be reinstated is moot because the permit will be voided regardless of the outcome.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that issuance of a license is **REFUSED** and Permit No. 37-21384 is **VOIDED**.

Dated this 3rd day of June, 2010.


SHELLEY W. KEEN

Statement of Available Procedures and Applicable Time Limits

RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES (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 issuance 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.