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DEPARTMENT OF
WATER RESOURCES

Attorney for Bowns Creek Properties LLC

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PERMITS 61-12096
IN THE NAME OF BOWNS CREEK
PROPERTIES LLC, 63-32499 IN THE
NAME OF MAYFIELD TOWNSITE LLC,
AND 63-35473 IN THE NAME OF
MAYFIELD RANCH LLC

**BRIEF OF BOWNS CREEK
PROPERTIES LLC IN RESPONSE TO
REQUEST FOR BRIEFS**

I. INTRODUCTION

This Brief is submitted on behalf of Bowns Creek Properties LLC (hereinafter “*Bowns Creek*”) in response to the *Request for Briefs* issued by Hearing Officer James Cefalo on May 12, 2026, in the above-captioned consolidated proceedings. The background concerning these proceedings is set forth in the *Request for Briefs* which is incorporated herein.

The *Request for Briefs* poses six questions concerning the interpretation and interplay of Idaho Code §§ 42-301, et seq, and Idaho Code § 42-204, as they relate to the permit requirements for commencing and completing work and the statutory rights to seek extensions of time. This Brief addresses each question in the order presented/requested by the Hearing Officer, drawing upon the text of the relevant statutes, their legislative history, and Idaho court precedent.

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II. ARGUMENT

1. Does Idaho Code § 42-301 Establish Permit Requirements Independent of and in Addition to Any Conditions Listed on a Permit Issued by the Department?

Question #1 begins with the statutory construction and the interpretation of Idaho Code § 42-301. “Statutory interpretation begins with the literal language of the statute.” *Nelson v. Evans*, 166 Idaho 815, 820, 464 P.3d 301, 306 (2020). “Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction.” *Wheeler v. Idaho Dept. of Health & Welfare*, 147 Idaho 257, 263, 207 P.3d 988, 994 (2009) (quoting *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999)). The words “may” or “should” as used in a statute are permissive while the words “shall” and “must” are mandatory, not discretionary. See *Twin Falls Cty. Idaho Comm’n on Redistricting*, 152 Idaho 346, 349, 271 P.3d 1202, 1205 (2012); *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995). The language in the statute following the word “shall” describes the mandate. *Goodrick v. Field*, 167 Idaho 280, 283, 469 P.3d 608, 611 (2020).

Idaho Code § 42-301 provides the following:

If the holder of a permit to appropriate the public waters **shall (1)** fail to comply with **the requirements of his permit** as to the commencing of work **or** the filing of bond **thereunder, or the completion** of one-fifth (1/5) of the construction work within one half (1/2) the time allowed for the entire completion of such construction work, **or shall (2)** fail to complete the entire construction work **within the time specified in his permit**, said permit may be cancelled and voided by the department of water resources as hereinafter provided at the instance of any person or persons holding any permit for the diversion of water from the same stream, such permit postdating the permit which is sought to be cancelled.

(Emphasis added and the numbers are added).

The statutory requirements, as discussed *infra* to the extent they are even still applicable, provide for two (2) separate requirements which each follow the word “shall” and which create the two separate requirements by using the disjunctive “or” in the statute. The first requirement

relates to the “commencing” of work, filing of a bond and/or the completion of a portion (20%) of the work, while the second requirement relates to the overall/entire “completion” of work. As explained below, both the first and second requirements are specifically tied to the permit conditions (and thus no independent requirements established).¹

The first requirement in I.C. § 42-301, following the first “shall”, relates to the failure to comply with the commencement of work or the filing of a bond or the completion of one-fifth of the work within the time provided in the “requirements of his permit.” Thus, one must look to the permit conditions to see if there are any commencement specific requirements, bond specific requirements or one-fifth completion specific requirements which have not been complied with by the permit holder. These were condition requirements of permits issued prior to 1967. These requirements are not independent of or in addition to the permit requirements but rather specifically state that if “the requirements of his permit” are not met then the Department “may” proceed to cancel a permit upon the “instance” of another permit holder.

With respect to the bond requirement, which is specifically raised in Question #3 below, the statute refers to the requirements of the permit or the bond “thereunder.” Thus, this part of the first requirement of I.C. § 42-301, as provided in the permit refers to any bond required “thereunder.” This reference to any bond requirement is specifically referring to and following reference to the permit itself and any bond requirement which is pursuant to or provided in the permit. The statute does not use the phrase “hereunder” as if it intended to refer to an independent

¹ It should also be noted, and as discussed in more detail below, the requirements do not provide for mandatory cancellation but rather provide the Department with the discretion to cancel by the use of “may” in the statute. The same discretion that is also provided to the Department for in granting extensions of time under I.C. § 42-204. In other words, the statute does not use the word “shall” as to the action taken by the Department and thus failure to comply with the requirements, to the extent applicable, is not mandatory but rather it discretionary. Thus, the fact that I.C. § 42-301 has been superseded by the rights provided in I.C. § 42-204 does not circumvent a mandatory statutory obligation but rather is consistent and in harmony with allowing the Department discretion to apply the conditions and extension requests as applicable.

statutory bond requirement provided for in this specific statute. There is no separate bond requirement independently created or imposed by the statute. In other words, if there is not a bond requirement included in the permit conditions then there is no bond requirement at issue for purposes of I.C. § 42-301. This is also consistent with the fact that there was a bond requirement in I.C. § 42-204 but it was later stricken and removed by the amendments in 1967.

With respect to the language which provides for completion of “one-fifth (1/5) of the construction work within one half (1/2) the time allowed for the entire completion of such construction work”, again, it follows the first “shall” as provided “by the requirements of his permit.” This is not an independent requirement but rather relates to “the requirements of his permit as to” the following items which are a disjunctive “or”. Furthermore, this language in the statute is specifically tied to the time allowed for the entire completion as provided under the permit.² In other words, the “time allowed for the entire completion of such construction work”, is a requirement/condition provided for in the permit, and there is no independent requirement unless it is stated in the permit. This requirement is not independent of or in addition to the permit requirements but rather specifically states if requirements “as to” those provided in the permit are

² It should be noted that the “time allowed for the entire completion” as provided under the permit can be modified by extensions as statutorily allowed pursuant to I.C. § 42-204 which is another reason that the application of I.C. § 42-301 has been superseded by I.C. § 42-204 and the provisions that the permit holder establish that the permit holder has exercised reasonable diligence and good cause appears therefor. Thus, instead of a potentially moving “time allowed for the entire completion” and which provides discretion to the department, there is a reasonable diligence and good cause standard now provided for in statute. This is consistent with the fact that I.C. § 42-204 was amended in 1967 to clarify that the 20% requirement was amended when an extension is granted and that clarification was no longer necessary once the statute was amended. The Department still has discretion to determine if the permit holder is in fact exercising reasonable diligence as to the commencement and whether good cause exists. In fact, the Department’s “Instructions for Filing a Request for Extension of Time to Submit Proof of Beneficial Use” provide for “Good Cause” and the Applicant “must” provide the reason for the delay and that you have proceeded with due diligence. “Evidence of due diligence may include well drilled . . .” In other words, the Department does not apply a one-fifth/20% of the work completed since the statute was amended but rather applies the due diligence standard set forth in I.C. § 42-204.

not met then the Department “may” proceed to cancel a permit upon the “instance” of another permit holder.

The second requirement in I.C. § 42-301, which follows the word “shall” relates to the failing “to complete the entire construction within the time specified in his permit.” (Emphasis added). This is a requirement directly and specifically tied to the completion of the construction as “specified” in the permit so one must look to the permit itself, and the conditions therein, to see if there is a construction completion requirement.³ This requirement is not independent of or in addition to the permit requirements but rather specifically states that if those permit requirements are not met then the Department “may” proceed to cancel a permit upon the “instance” of another permit holder.

2. If Idaho Code § 42-301 Establishes an Independent Requirement for a Permit Holder to Commence Work, When Must the Permit Holder Commence Work?

As provided in answer to Question #1, there is no independent requirement provided in I.C. § 42-301 as to the “commencement” of work because the commencement provisions in the first requirement are tied to the conditions stated in the permit. Moreover, Bowns Creek does not acknowledge or agree requirements in I.C. § 42-301 remain operative or applicable. To the contrary, I.C. § 42-301 and any commencement and/or construction completion requirements provided therein, have been superseded by I.C. § 42-204(3), including, but not limited to, removal of the conditions in I.C. § 42-301 by amendment, statutory extension rights and the discretion of the Department to approve extensions for various reasons upon reasonable diligence and good cause. The requirements provided in I.C. § 42-301 attempted to mirror the standard conditions

³ Even if there is a construction completion requirement, which is initially a period of 5 years to submit proof of beneficial use, in the permit, Idaho law, specifically I.C. § 42-204, allows for certain extension of time as to the construction completion/proof of beneficial use requirement. Thus, even if there is a construction completion/proof of beneficial use requirement provided in the permit conditions, those permit conditions may be modified with extensions of time as statutorily allowed for in I.C. § 42-204. The point is that any requirement in I.C. § 42-301 is superseded by I.C. § 42-204 and the statutory rights provided therein.

requirements which may have existed at the time, but as explained below, these requirements have been amended, modified and altogether removed by the amendments to I.C. § 42-204 over the years. Review by the Department of the construction completion/proof of beneficial use, and whether a permit holder has exercised reasonable diligence in completing/commencing some portion of the work is measured by good cause and is at the discretion of the Department. It is no longer measured/quantified by some defined fraction of the work such as 20% within a time period because such language has been completely stricken and removed from I.C. § 42-204.

As discussed further in response to Question #4, the amendments to § 42-204 bear on whether the commencement requirements of I.C. § 42-301 remain applicable. Compliance is measured solely by the commencement/completion deadlines and extension framework stated in I.C. § 42-204 as amended and which specifically allow the Department discretion to determine whether reasonable diligence and good cause exist under the circumstances.

Idaho Code § 42-204(3) provides that with respect to all permits (other than municipal RAFN permits), the Department shall require construction work and application to beneficial use to be complete within a period of five (5) years from the date of approval, but may limit permit development to a shorter period. The permit shall set forth the date when beneficial use shall be made (i.e. completion of construction). Idaho Code § 42-204(1) further provides that the Department may approve or grant a permit upon conditions as provided in this chapter. Thus, pursuant to I.C. § 42-204, unless otherwise limited by the Department in a condition on the permit, the construction requirements shall be five (5) years from the date of the approval of the permit. Furthermore, any construction requirements shall be subject to the right of the permit holder to seek extensions of time pursuant to I.C. § 42-204(3)(a)-(f). Thus, the construction and completion of work for all permits is governed by I.C. § 42-204(3).

With respect to “commencement of construction”, I.C. § 42-204, has been amended over the years concerning commencement of construction deadlines. For instance, in 1967, the statute was amended to remove the language that one-fifth/20% of the work must be completed within one-half of the time period of time allowed to complete the work thereby effectively superseding I.C. § 42-301 (ch. 374, sec. 3, pg. 1079). However, in 1967, I.C. § 42-204 still had statutory language which required a permit holder of 25 cfs or less to commence excavation or construction within 60 days of issuance of the permit. This was later amended in 1982 to provide that the permit holder must commence excavation or construction within one year of the date of issuance of the permit (ch. 62, sec. 1, pg. 122). Then in 2020, I.C. § 42-204 was again amended to completely remove the provisions requiring the commencement of construction altogether (ch. 164, sec. 1, pg. 477). Thus, given I.C. § 42-301 has been superseded, and I.C. § 42-204 has been amended to remove any commencement of construction requirements, the only applicable requirements for commencement would be in the permit conditions themselves.

That said, commencement of construction is not completely unfettered. If a permit holder seeks more time to complete the construction, the Department must still review the request to determine if the permit holder has exercised reasonable diligence and good cause exists. See the Department’s instructions and the requirements of good cause discussed in Footnote 2, *supra*. Thus, the permit holder must still establish that the permit holder has exercised reasonable diligence. Physical commencement such as excavation may still not have occurred because of government delays or other reasons beyond the control of the permit holder and it is within the Department’s discretion to determine whether such delays are reasonable.

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3. If Idaho Code § 42-301 Establishes an Independent Requirement for a Permit Holder to File a Bond, What Is the Amount of the Bond?

As stated in response to Question #1, *supra*, Idaho Code § 42-301 does not provide for an independent requirement for a permit holder to file a bond. Thus, there is no bond required unless it is specifically provided in the requirements of the permit “thereunder.” If a bond is required, then the amount would have been required as a specific condition in the permit. Since no bond is required under any of the permits at issue in this matter, there is no bond amount required. This is consistent with the fact that I.C. § 42-204 was amended in 1967 to remove the bond requirement altogether which is why it is no longer a condition of permits issued after 1967.

4. How Do the 1967 and 2020 Amendments to Idaho Code § 42-204 Affect Idaho Code § 42-301, Specifically the Provisions About Commencing Work, Filing a Bond, and Completing One-Fifth of the Construction Work Within One-Half of the Time Allowed for Completion of Such Construction Work?

Idaho courts apply two well-established canons of statutory construction when resolving conflicts between statutory provisions: (1) a later-enacted statute reflects the legislature’s most recent intent and prevails over inconsistent earlier statute, and (2) a specific statute governs over a more general one. *State v. Wiggins*, 155 Idaho 116, 123, 306 P.3d 201, 208 (2013) (*citing Mickelsen v. City of Rexburg*, 101 Idaho 305, 307, 612 P.2d 542, 544 (1980)). Additionally, where the legislature has struck or materially amended statutory provisions, courts presume it intended to reject or modify the earlier requirements. *Chandler’s-Boise, LLC v. Idaho State Tax Comm’n*, 162 Idaho 447, 455, 398 P.3d 180, 188 (2017) (*citing Intermountain Health Care, Inc. v. Bd. of Cnty. Comm’rs of Madison Cty.*, 109 Idaho 685, 687, 710 P.2d 595, 597 (1985)).

In 1967, I.C. § 42-204 was amended to remove/strike the very requirements referenced in I.C. § 42-301 with respect to one-fifth of the work completed within one-half of the time allowed to complete the project and to remove/strike the bond requirements. Thus, post-1967, these requirements are no longer required permit conditions and thus rendering the references to these

permit conditions in I.C. § 42-301 as obsolete and superseded at least with respect to any permits issued after 1967. The references to these permit requirements in I.C. § 42-301 may still have remained applicable to any permits issued prior to the amendments in 1967, which is possibly why Chapter 3, Title 42 was not simply repealed at the same time as the amendments, but these conditions are clearly not applicable to permits issues after 1967.

The amendments to I.C. § 42-204 in 1967 also removed/struck the prior language of the statute which provided: ~~“that extension of time for completion of works under this proviso shall automatically extend the time for completion of the twenty percent (20%) required to be done in half (1/2) the time and for making proof of application of water to beneficial use.”~~ Thus, the Legislature not only struck and removed the requirement of one-fifth/20% of the work be completed as a condition to permits, but it also struck the one-fifth/20% requirement as it related to extensions of time to clarify that it is no longer applicable. In other words, any question as to whether the granting of an extension of time also extended the time to complete 20% of the work was superseded or rendered obsolete by the amendments.

The Legislature has returned to this framework repeatedly since then, confirming its ongoing primacy by further amending the deadlines for commencement and grounds for extensions reflecting the Legislature’s deliberate and sustained attention to the permit commencement/completion framework established by I.C. § 42-204. Under the later-enacted, more specific provisions of I.C. § 42-204, the operative requirements for commencing and completion work are governed by the permit conditions and extension framework established by I.C. § 42-204, as amended. To the extent that I.C. § 42-301 contains requirements that are inconsistent with or duplicated by the amended I.C. § 42-204, the modern and more specific statute controls.

The Idaho Supreme Court's decisions support this approach. In *Keller v. Magic Water Co.*, 92 Idaho 276, 282-83, 441 P.2d 725, 731-32 (1968), decided shortly after the 1967 amendments, the Court upheld multiple extensions of time granted under I.C. § 42-204 without applying the I.C. § 42-301 one-fifth completion rule as an independent barrier to permit validity. The Court deferred to the State Engineer's administrative discretion under the amended I.C. § 42-204 framework, suggesting that the amended provision had become the operative standard for measuring permit compliance. *Id.*

With respect to commencement of construction, as discussed, *supra*, I.C. § 42-204 has been amended over the years to completely remove the commencement of construction requirements. In 1967, I.C. § 42-204 was amended to remove the 20% requirement. In 1982, it was amended to remove the 60-day requirement. In 2020, it was amended to remove the one-year requirement. Presumably permits issued during those periods were conditioned with the appropriate statutory requirement in place and effective at the time the permit was issued. As provided in response to Question #2, the applicable requirements for commencement would be set forth in the permit conditions themselves. For purposes of addressing this Question, the point is still that as to commencement or construction, as well as any statutory rights to extensions for commencement/construction, the operative and controlling statute is I.C. § 42-204 and the permit conditions.

5. If the Amendments to Idaho Code § 42-204 Have Eliminated the Requirements That a Permit Holder Commence Project Construction Within One Year, File a Bond, and Complete One Fifth of the Construction Work Within One-Half of the Time Allowed for Completion of Such Construction Work, Is Idaho Code § 42-301 Still Applicable?

As discussed throughout this *Brief*, I.C. § 42-301 is no longer operative or applicable and has been superseded and replaced by the amended I.C. § 42-204. Chapter 3, Title 42 may not have been repealed in 1967 because it may have remained applicable as to any permits issued prior

to 1967 but it is otherwise no longer applicable or relevant to permits issued subsequent to 1967.

Given that there are no longer permits pending which were issued prior to 1967, the entire Chapter is no longer applicable and could be/should be repealed. The Department has over the past few years engaged in clean-up of various statutes and chapters which either overlap with each other or which are antiquated and outdated and this is what the Department should do with Chapter 3, Title 42. There is no legitimate utility or validity to it.

Moreover, while the Legislature could/should formally repeal Chapter 3, Title 42, Idaho Code as being outdated and no longer applicable, it effectively has done so via I.C. § 42-204(7) which provides that the provisions of I.C. § 42-204 “shall apply to all existing permits pending before the department on July 1, 2021 and that all pending permits are entitled to the maximum qualifying extensions available.” Again, the Legislature is presumed to modify or amend earlier inconsistent statutes and in this situation the Legislature made it clear that it wanted all permit holders to have all available rights to extensions or otherwise as allowed under I.C. § 42-204. Commencement and construction requirements are specifically provided in I.C. § 42-204 and Chapter 3, Title 42 cannot be read in isolation without allowing the permit holder all available rights, including the statutory rights to extensions under I.C. § 42-204(3).

- 6. Idaho Code § 42-301 States That a Permit May Be Cancelled if the Permit Holder “Shall Fail to Complete the Entire Construction Work Within the Time Specified in His Permit.” Idaho Code § 42-204(6) States That “a Permit Holder Who Fails to Comply With the Provisions of This Section Within the Time or Times Specified Shall Be Deemed to Have Relinquished All Rights Under Its Permit.” If the Relinquishment Described in § 42-204(6) Is Automatic, Is There Any Practical Utility in the Process Created by Chapter 3, Title 42, for a Proposed Project That Is Not Completed by the Proof Due Date Established in the Permit?**

The answer to Question #6 is, NO, Chapter 3, Title 42 does not serve any remaining purpose or practical utility given the amendments to I.C. § 42-204 and the fact that I.C. § 42-204(6) provides that a permit holder who fails to comply with the section’s requirements within the

specified time “shall be deemed to have relinquished all rights under its permit.” In fact, I.C. § 42-204, which again is the most recent and specific statute and governs under statutory construction, further provides additional protections and notice to a permit holder which are not included in Chapter 3, Title 42, including: a) “Sixty (60) days before the date set for the completion of the appropriation of water under any permit, the department shall forward notice to the permit holder by certified mail . . . the necessity of submitting” proof of beneficial use or a request for extension of time (I.C. § 42-204(3)); and b) any permit holder aggrieved by the decision of the department regarding a request for extension may request a hearing pursuant to I.C. § 42-1701A(3) and seek judicial review of a final decision.

Thus, there is a specific statutory framework in place to provide notice of the construction completion deadlines so that a permit holder is on notice of the potential relinquishment of the permit (aka due process requirements are met), and there is a statutory framework to challenge a decision concerning an extension (whether approved or not approved) by the Department. Juniper Station is currently availing itself to these rights by seeking a hearing to contest/challenge the extension approvals issued by the Department. Again, the more specific and more recent statute should control and the process and framework provided in I.C. § 42-204 and I.C. § 42-1701A(3) should govern these proceedings.

III. CONCLUSION

For the foregoing reasons, the answers to the Hearing Officer’s six questions may be summarized as follows:

(1) Idaho Code § 42-301 does not provide for independent statutory requirements separate from the permit conditions. Idaho Code § 42-301 attempted to mirror permit conditions in place

at the time it was enacted but these conditions have since been superseded by the amendments to permit conditions and extension rights provided in I.C. § 42-204;

(2) Completion of construction under a permit is governed by I.C. § 42-204 and the amendments thereto. As to commencement of construction, I.C. § 42-204 has removed any specific requirements and thus only applicable requirements for commencement would be in the permit conditions themselves. There is still a review by the Department as to whether reasonable diligence and good cause is established by the permit holder if the permit holder seeks an extension of time to complete beneficial use;

(3) There is no independent bonding requirement required or provided for in I.C. § 42-301 and thus the bonding requirement is only applicable if it is a stated condition of the permit. Furthermore, the bonding requirement is no longer a required condition under I.C. § 42-204 pursuant to the amendments in 1967;

(4) Idaho Code § 42-204 and the amendments thereto superseded and modified the operative requirements under I.C. § 42-301. Again, I.C. § 42-301 attempted to mirror the permit conditions required at the time but those conditions are no longer applicable and have been superseded by the amendments to I.C. § 42-204;

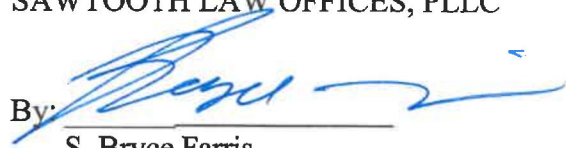
(5) Idaho Code § 42-301 is no longer operable or applicable and has been superseded by the more recent and more specific provisions in I.C. § 42-204. Construction, commencement and extensions are specifically governed by I.C. § 42-204 and the amendments thereto; and

(6) There is no practical utility for Chapter 3, Title 42, Idaho Code, because it has been superseded by the provisions of I.C. § 42-204, and there are specific provisions in I.C. § 42-204 which provide for the relinquishment of the permit under I.C. § 42-204(6), notice provisions from the Department to the permit holder, the right to applicable extensions, and the right of the permit

holder or other aggrieved party to request a hearing under I.C. § 42-1701A(3). All rights provided under the antiquated and defunct provisions of Chapter 3, Title 42 have been replaced and superseded by more specific current and applicable provisions in I.C. § 42-204. Any further proceedings in these consolidated matters must be governed by I.C. § 42-204, I.C. § 42-1701A(3) and the current Department Rules of Procedure and not by some superseded and antiquated process provided in Chapter 3, Title 42. Chapter 3, Title 42 is simply no longer applicable or relevant.

DATED this 26th day of June, 2026.

SAWTOOTH LAW OFFICES, PLLC

By: 

S. Bryce Farris

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 26th day of June, 2026 by the following method:

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