

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

RECEIVED

MAY 07 2009

DEPARTMENT OF WATER RESOURCES

**IN THE MATTER OF PERMIT NO. 35-8359)
IN THE NAME OF JOHN B. KUGLER and)
DIANE K. KUGLER)**

**EXCEPTION AND
MEMORANDUM**

In the middle of September, 2007 applicant visited the department's office in Boise in order to ascertain the status of applicant's water permit. At that time applicant was advised that he would be called in respect to that question as the individual's computer was down. Instead of a call applicant received a 60 day notice that completion of works was required to be filed in December. Applicant then applied for a three year extension of time in which to complete the works rather than the five year extension provided by the Idaho statutes. In response to that application applicant received an Order Continuing Indefinite Stay In Development Period dated December 6, 2007. Applicant filed a request for consideration and an informal hearing was held on March 31, 2008. Nothing was thereafter heard from the department and after several repeated inquiries a formal hearing was held on January 21, 2009 rather than in 2008 as reflected in the Preliminary Order Suspending Action And Prohibiting Development issued by the hearing officer on March 23, 2009. Applicant now has requested reconsideration of that order by the director. During all of the time since the department issued applicant's permit applicant has been precluded by law from completing the licensing requirements by first federal law and then by the department and remains precluded from developing the farm by development and appropriation of water for application to a beneficial use on the ground. Applicant continues to be precluded by federal law however as testified at the hearing that preclusion is terminated as of September 30, 2009.

Applicant's first exception to the order is that the hearing officer has made findings of fact on which no evidence was introduced by either the department or the applicant at the hearing and the applicant had not been advised that such evidence was desired or contemplated by the hearing officer. At the informal hearing the hearing officer had expressed a concern that an earlier order may have a defect permitting applicant to proceed to development. The most significant factor to applicant on which no evidence was presented is that the applicant's development would significantly effect senior priority rights. Applicant believes that the finding of a fact without supporting evidence presented at the hearing constitutes a deprivation of constitutional rights under both the Idaho constitution and the U.S. constitution. Furthermore several Idaho cases, including American Falls Water District v. Department of Water Resources, 143 Idaho 862, 154 P.3rd 433 reflects that administration requires a determination as to how, when and where

**SCANNED
AUG 7 4 2010**

and to what extent the diversion of water from one source impacts the water flows in the same source and other sources.

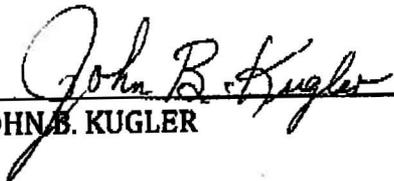
Applicant's second exception is that the hearing officer failed to consider a legal issue raised by applicant. The hearing officer failed to make any determination as to why a three year extension of time in which to complete proof of appropriation as requested should or could not be granted. Applicant has had a right to proceed to development on the filing of the application and its approval as well as at the time of the issuance of the permit. Applicant has sought the limited extensions permitted by statute and continually paid the fees for the same. In conjunction with that is the contention of applicant that the granting of an indefinite stay on the express conditions set forth as a substantial obstruction of applicant's property right which is appurtenant to applicant's farm ground. The granting of the permit at the time of issuance created an implied contract between the department and the applicant. As reflected in *State v. Hagerman Water Rights Owners*, 130 Idaho 736, where a party alleges facts different from those contained in a report in a one-party case, an evidentiary hearing must be held.

Applicant's third exception is that the issuing of an indefinitely timed prohibition against applicant's attempt to complete the licensing requirements of securing the full appropriation rights constitutes a "taking" of property in violation of the 5th amendment of the U.S. Constitution and also of the Idaho Constitution. "Any destruction, interruption or deprivation of the usual and ordinary use of property amounts to a taking of the same" in violation of the constitution of the State of Idaho. *Knowles v. New Sweden Irrigation District*, 16 Idaho 217, 101 P. 81.

Applicant's fourth exception is that the hearing officer failed to make any determination or findings in respect to the right of the department to consider mitigating circumstances. Considerable evidence was presented concerning factors that could be considered in mitigation and permit an extension of time in which to proceed with the farm development. That failure also requires a review by the Director.

Applicant respectfully asks that the Director grant reconsideration of the hearing officer's order and provide applicant with the opportunity to submit such other evidence as might be requested or considered and upon conclusion of the same grant to applicant the right to proceed with the development of the farm lands subject to the priority rights of all senior water rights holders that may be effected, if any.

Dated this 7th day of May, 2009.



JOHN B. KUGLER

SCANNED

AUG 24 2010