BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT NO. 35-8359 IN THE NAME OF JOHN B. KUGLER	))))	**PRELIMINARY ORDER SUSPENDING ACTION AND PROHIBITING DEVELOPMENT**

On December 6, 2007, the Idaho Department of Water Resources ("Department") issued an *Order Continuing Indefinite Stay in Development Period.* John B. Kugler ("Kugler") timely filed a petition for reconsideration and a request for a hearing.

On January 21, 2008, the Department conducted a hearing. Kugler appeared and testified on his behalf. After considering the testimony and the information contained in file no. 35-8359, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On October 4, 1984, John B. Kugler and Diane K. Kugler filed an application to appropriate water with the Department. The Department assigned no. 35-8359 to the application.

2. The place of use proposed by application no. 35-8359 had previously been dry farmed.

3. Kugler testified that, in the mid-1980's, he expended significant money to purchase drilling equipment for a well driller who was supposed to drill a well as authorized by permit no. 35-8359. Kugler testified the driller who had possession of the equipment stole it from him and sold it.

4. In 1986, Kugler enrolled the property in the Conservation Reserve Program ("CRP") for a period of ten years. CRP enrollment required that crops not be grown on the property.

5. The ground water Kugler sought to appropriate is trust water, or water held in trust by the State of Idaho pursuant to the Swan Falls Agreement. Ground water is trust water if it is tributary to the Snake River below Milner Dam. On July 27, 1990, the Department approved permit to appropriate water no. 35-8359. John B. Kugler and Diane K. Kugler were the holders of permit no. 35-8359.

6. Permit to appropriate water no. 35-8359 was issued with the following condition:

> Any license issued by IDWR pursuant to the permit or portion thereof for the use of trust water is subject to a term review of 20 years after the date of this approval to determine availability of water for the use to re-evaluate the public interest at the end of the term.

7. In the early 1990's, Kugler attempted to contract with Idaho Power to provide electricity to the property, but Idaho Power couldn't complete the construction and tie-in for three years.

8. A well was never constructed on the property. Power was not run to the land. No work was done on the land to develop the diversion works and irrigation system to irrigate the property.

9. On June 6, 1991, John B. Kugler assigned the entire interest in permit no. 35-8359 to Northwest Farm Credit Services, ACA ("Farm Credit Services").

10. On May 15, 1992, the Director of the Department issued an order establishing a moratorium prohibiting the processing and approval of most applications for permit to appropriate water from all surface and ground water sources upstream from the USGS Gauge on the Snake River near Weiser, Idaho. On April 30, 1993, the Director issued an *Amended Moratorium Order* (Trust Water Moratorium Order) that reduced the area of the previous moratorium to an area identified as the Trust Water Area. The moratorium order was issued to protect existing water rights that were being impacted by drought, reduced recharge, and increased demands in the Trust Water Area. The point of diversion authorized for permit no. 35-8359 is within the Trust Water Area.

11. On November 9, 1994, the Director of the Department issued an *Order for Temporary Stay of Development and Notice of Formal Proceedings* (Temporary Stay Order) in connection with certain permits within the Trust Water Area for which proof of beneficial use of water (proof) had not been filed with the Department. As grounds for the Temporary Stay Order, the Director cited the Trust Water Moratorium Order, various calls by senior surface and ground water right holders against holders of later in time ground water rights, and drought conditions that aggravated water shortages experienced by all water right holders. The Temporary Stay Order required the permit holders to 1) submit proof of beneficial use developed under their permit, 2) request authority to continue development based on substantial investment towards development of the permit, or 3) request an indefinite stay in the development period.

12. The Temporary Stay Order provided that permit holders could:

> Request an indefinite stay in the development period for the project, or any part of the project for which a substantial investment has not been made, until the conditions that resulted in this order have been alleviated if such should ever occur. Upon

approval of any such stay, no further development is to occur until such time as the department has issued an extension of time setting a date for completion of the project.

Permit no. 35-8359, then held by Farm Credit Services, was one of the permits to which the Temporary Stay Order applied.

13. On March 8, 1995, Farm Credit Services filed an Assignment of Permit with the Department. The document conveyed ownership of permit no. 35-8359 to both Farm Credit Services and to John Kugler.

14. On March 30, 1995, Farm Credit Services filed a response to the Temporary Stay Order with the Department requesting an indefinite stay in the development period for the permit. No information was submitted regarding substantial investment towards development of the permit.

15. On April 4, 1995, the Department issued an order granting an indefinite stay in the development period for Permit No. 35-8359 subject to the following conditions:

1) Additional work by the permit holder in developing a water right under terms of the permit is not authorized until the department specifically authorizes resumption of work.
2) The permit holder is not authorized to assign ownership of the permit to another party without prior approval of the department.
3) The department may rescind or modify the indefinite stay hereby granted if the Eastern Snake River Plain moratorium is modified or rescinded.
4) This order does not grant a stay in development beyond December 31, 1997.

16. On April 30, 1995, the Department sent a notice to Farm Credit Services that proof of beneficial use was due on or before July 1, 1995. On August 25, 1995 Farm Credit Services filed a Request for Extension of Time for Filing Proof of Beneficial Use (extension request) with the Department. On September 8, 1995, the Department approved the extension request and set the proof due date to December 31, 1997.

17. The order granting an indefinite stay was scheduled to expire on December 31, 1997, the same day that proof of beneficial use was due.

18. In 1997, John B. Kugler and Diane Kugler reenrolled the proposed place of use in the CRP. The CRP contract period ended in September of 2007.

19. Additional extension requests were approved on December 5, 1997 and December 17, 2002. The last extension of time extended the proof due date to December 1, 2007.

20. On September 30, 2007, the Department sent a notice to John and Diane Kugler and a copy to Farm Credit Services that proof of beneficial use was due on or before December 1, 2007. On November 1, 2007, John and Diane Kugler filed another extension request with the Department to extend the proof due date to December 1, 2010.

21. John B. Kugler and Diane Kugler reenrolled the proposed place of use in the CRP for calendar year 2008.

22. The Department did not act on the application for extension of time for filing proof of beneficial use. Instead, on December 6, 2007, the Department issued an *Order Continuing Indefinite Stay in Development Period.* The order that stayed the development prohibited additional development under the permit and prohibited assignment of the permit unless approved by the Department.

23. On January 28, 2008, Farm Credit Services assigned its interest in permit no. 35-8359 to John B. Kugler.

24. After the approval of permit no. 35-8359, several water users holding water rights authorizing diversion of water from the Snake River, tributary springs, and ground water in the ESPA filed petitions for delivery call. Some of these petitions for delivery call seeking curtailment of pumping by junior priority water rights have resulted in curtailment orders, mitigation plans to compensate for depletions caused by pumping, and protracted legal proceedings before the Department and in the Courts of the State of Idaho. These contested cases remain pending before the Department and the Courts. Decisions in these contested cases have determined that ground water diversions will cause depletions to sources of water supplying water to existing water rights and that these depletions will cause injury to the existing water rights.

25. The Department issued many permits for appropriation of trust water during the late 1980's and early 1990's, the same period of time that permit no. 35-8359 was approved. These permits and subsequent licenses issued contained a 20 year term similar to the term of years for permit no. 35-8359 quoted above. The condition allowed the Department to review whether there is sufficient trust water to allow continued recognition of the water right and, if so, whether continued use of the trust water is in the public interest. The 20 year term will be expiring for many of these rights within the next five years. The Department will review these water rights to determine whether there is trust water for continued use of the water and whether it is in the public interest to recognize these water rights for additional terms of years.

CONCLUSIONS OF LAW

1. Idaho Code § 42-1805 states, in pertinent part:

> In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:
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> * * *
>
> (7) After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights and to ensure compliance with the provisions of chapter 2, title 42, Idaho Code . . ..

2. Idaho Code § 42-1805 grants the Director the authority to specifically order suspension of development of ground water authorized by permit no. 35-8359.

3. The ongoing delivery calls, decisions by the Department holding that diversions of ground water are injuring senior water right holders, and the pending review of trust water rights to determine whether the water rights should be recognized for additional terms of years establish that existing vested water rights must be protected, and that suspension of further action on permit no. 35-8359 is necessary to protect the vested water rights.

4. As the Department reviews the existing trust water rights, permit no. 35-8359 should also be reviewed to determine whether the facts, after the law is applied to them, justify further development.

5. Development authorized by permit no. 35- 8359 should be suspended until the review of trust water rights containing a term condition is conducted.

ORDER

IT IS HEREBY ORDERED that further **action on permit no. 35-8359 is Suspended** and further development is prohibited. The suspension and prohibition of development is more specifically described in the following conditions:

1) Additional work by the permit holder in developing a water right under terms of the permit is not authorized until the Department, by order, specifically authorizes resumption of work.
2) The permit holder is not authorized to assign ownership of the permit to another party without prior approval of the Department.

This order does not prevent the Director from reviewing continued development of permit no. 35-8359 if:

1) The Director determines that protection and furtherance of the public interest justifies continued development of a permit; or
2) The Director determines that continued development and use of water will have no effect on prior water rights because of its location, insignificant consumption of water or mitigation provided by the permit holder to offset injury to other rights.

Dated this 23rd day of March, 2009.

Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of March, 2009, a true and correct copy of the document(s) described below were served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Preliminary Order and Explanatory Information sheet for a Preliminary Order when a hearing was held.

JOHN B KUGLER
2913 GALLEON CT NE
TACOMA WA 98422

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau