

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

IN THE MATTER OF AN APPLICATION) **PRELIMINARY ORDER**
FOR DRILLING PERMIT IN THE NAMES) **DENYING APPLICATION FOR**
OF JOHN AND DIANE KUGLER) **DRILLING PERMIT**
_____)

In 2014 John Kugler and Diane Kugler (“Kuglers”) filed an Application for Drilling Permit (“application” or “well drilling application”) for an irrigation well to serve as the point of diversion for Permit to Appropriate Water No. 35-8359. Later that year, the Department of Water Resources (“Department”) denied the application. After the Department also denied Kuglers’ petition for reconsideration of the denial order, Kuglers appealed the Department’s denial order to District Court. Kuglers argued that IDWR had not conducted a hearing in connection with the application. The Department stipulated to conducting a hearing pursuant to Idaho Code § 42-1701A(3). In response, the District Court dismissed Kuglers’ appeal and returned the matter to the Department to conduct the hearing. On January 22, 2016, the Department conducted a hearing to take evidence and testimony in connection with the application. John Kugler appeared as the sole witness at the hearing.

This matter having come before the Idaho Department of Water Resources (“Department”) as the result of a hearing to consider an application for a drilling permit, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On July 18, 2011, the Department issued a *Final Order Suspending Action and Prohibiting Development* (“final order”) in the matter of Permit to Appropriate Water No. 35-8359 (“water appropriation permit”). John B. Kugler and Diane K. Kugler are the permit holders. The final order states:

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. On August 15, 2011, Kuglers filed a petition for judicial review of the Department’s final order (“petition”) with the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, identified as Case No. CV 2011-15672. Among the issues raised in Kuglers’ petition was whether they were “entitled to be issued a well drilling permit.”
3. On May 23, 2012, the District Court concurrently issued a *Memorandum Decision and Order on Petition for Judicial Review* and a *Judgment* affirming the Department’s final order addressing the water appropriation permit. In its ruling, the District Court found that the

drilling permit issue was not properly before the court because Kuglers had not applied for a drilling permit or received a Department decision regarding a drilling permit. Kuglers did not appeal the District Court's decision.

4. On September 29, 2014, Kuglers filed a request for an extension of time to provide additional time in which to submit proof of beneficial use for the water appropriation permit ("extension request") and an application for drilling permit for the construction of a well to serve as the point of diversion for the water appropriation permit.
5. On November 26, 2014, the Department issued a preliminary order ("preliminary order") denying both the extension request and the application for drilling permit. The Department denied the extension request and the application for drilling permit because the District Court had upheld the Department's final order suspending action on the water appropriation permit. The Department deemed it unnecessary for Kuglers to construct a well when they were not authorized to divert and use water from it.
6. On December 22, 2014, the Department denied Kuglers' petition for reconsideration of the preliminary order.
7. On February 3, 2015, Kuglers' petitioned the District Court for review of the Department's preliminary order. In the *Petition for Review*, Kuglers raised the issue of whether they were entitled to a hearing in connection with the application for drilling permit.
8. On September 4, 2015, the Department stipulated to providing Kuglers a hearing on the application for drilling permit. The Department agreed to the hearing because the application for water appropriation, not the application for drilling permit, was the subject of the District Court's decision in May of 2012 and because the Department had not previously held a hearing in connection with the application for drilling permit, as it had for the water appropriation permit.
9. On January 22, 2016, the Department conducted a hearing to take evidence and testimony in connection with the application for drilling permit. John Kugler appeared as the sole witness at the hearing.
10. Kuglers propose to drill a 22-inch well in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 32, Township 6 South, Range 29 East, B. M. The proposed well may be as deep as 650 feet, and it is intended to divert water that is less than 85 degrees Fahrenheit at the bottom of the well.
11. The point of diversion authorized by the water appropriation permit is in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 32, Township 6 South, Range 29 East, B. M. The proposed location for the well, as described in Finding of Fact 10, is not consistent with the point of diversion authorized by the Kuglers' water appropriation permit.
12. The Department has not authorized resumption of work related to Permit to Appropriate Water No. 35-8359.

13. The following dialogue occurred at the hearing while John Kugler was testifying:

Hearing Officer: Would there be any value to you, or what value would there be, uh to have a well on your property if there were no opportunity to divert from it immediately? Would that well, would the existence of the well, still provide value to you?

John Kugler: No. Not at all.

CONCLUSIONS OF LAW

1. If not properly constructed and regulated, wells can result in the waste or contamination of ground water. The Department issues drilling permits pursuant to Idaho Code § 42-235, which states, in pertinent part:

Prior to beginning construction of any well, or changing the construction of any well, the driller or well owner shall obtain a permit from the director of the department of water resources to protect the public health, safety and welfare and the environment, and to prevent the waste of water or mixture of water from different aquifers.

2. A drilling permit does not authorize the diversion and use of water. As stated in Idaho Code § 42-229:

The right to the use of ground water of this state may be acquired only by appropriation. Such appropriation may be perfected by means of the application permit and license procedure as provided in this act

3. The Department issues water appropriation permits pursuant to Idaho Code § 42-204.

4. Rule 45.01.b of the Department’s Well Construction Standards Rules (IDAPA 37.03.09) states:

Drilling permits will not be issued for construction of a well which requires another separate approval from the department, such as a water right permit, transfer, amendment or injection well permit, until the other separate permitting requirements have been satisfied.

5. The diversion and use of ground water pursuant to Kuglers’ water appropriation permit no. 35-8359 is not authorized at this time.

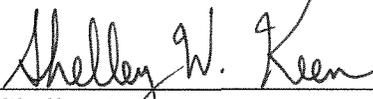
6. As stated by John Kugler at the hearing, the issuance of a drilling permit to authorize construction of a well to serve as the point of diversion for water appropriation permit no. 35-8359 would provide Kuglers no value as long as the opportunity to divert and use ground water from the proposed well remains suspended.

7. It would be inconsistent with Rule 45.01.b. of the Department's Well Construction Standards Rules to issue a drilling permit to construct a well when the required separate authorization to divert water is suspended.
8. Constructing and maintaining a well with no authorization to divert water from it would be contrary to the program objectives, stated in Idaho Code § 42-235, "to protect the public health, safety and welfare and the environment, and to prevent the waste of water or mixture of water from different aquifers."
9. The Department should deny the application for drilling permit because it would provide no value to the Kuglers, it would be inconsistent with Rule 45.01.b. of the Department's Well Construction Standards Rules, and it would be contrary to the program objectives stated in Idaho Code § 42-235.

ORDER

IT IS HEREBY ORDERED that the application for drilling permit submitted on September 29, 2014, in the names of John B. Kugler and Diane K. Kugler, is **DENIED**.

Dated this 12th day of February, 2016.



Shelley W. Keen
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 12, 2016, I mailed a true and correct copy, postage prepaid, of the foregoing Preliminary Order Denying Application for A Drilling Permit to the persons listed below:

**JOHN B KUGLER
DIANE K KUGLER
2913 GALLEON CT NE
TACOMA WA 98422**



Jean Hersley
Technical Records Specialist 2