

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

IN THE MATTER OF PERMIT TO)	
APPROPRIATE WATER NO. 35-8359)	FINAL ORDER
IN THE NAME OF JOHN B. & DIANE)	SUSPENDING ACTION AND
K. KUGLER)	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, on March 23, 2009 the hearing officer issued a *Preliminary Order Suspending Action and Prohibiting Development*.

On April 6, 2009, the Department received a petition for reconsideration from Kugler. On April 24, 2009, the Department denied the petition for reconsideration.

On May 7, 2009, Kugler filed an “*Exception and Memorandum*” with the Director of the Department. The exceptions raised the following four specific issues:

1. Lack of evidence in the record that the development would significantly affect senior priority water rights;
2. The decision did not address the request for extension of time to complete proofs;
3. The Department’s proposed action constitutes a takings claim under the U.S. Constitution and the Idaho Constitution; and
4. The Department made no determination of finding about the mitigating circumstances that might allow the permittee to pursue the development.

On August 23, 2010, the Director of the Department (who also was the hearing officer) issued an *Order Granting Augmentation Hearing*. As explained in the order, the hearing was granted to address the exceptions:

[T]he Director finds that there was no presentation or opportunity for presentation at the hearing of evidence regarding the effect or injury on senior priority water rights that might be caused by development of the beneficial use proposed by Kugler. The Director also determines Kugler should be granted the opportunity to present evidence about mitigating circumstances that might allow the permit to pursue the development.

The order further explained:

Kugler's exceptions shall be addressed as part of an augmentation hearing held by the Director. The issues to be addressed at the augmentation hearing are:

1. How the proposed development would affect senior priority water rights.
2. Mitigating circumstances for allowance of continued development of the permit.

On February 15, 2011, the Director requested a staff memorandum from Department employees. The request asked staff to address the following issues:

1. Information about the number of active trust water rights (permits and licenses) issued by the Department for a term of years.
2. Data regarding the flow of the Snake River at the Murphy Gage from 1980 to the present.
3. Using the flow rate and irrigated acreage proposed by application no. 35-8359 at the spatial locations for the point of diversion and place of use, and inputting the application information into the Eastern Snake Plain Aquifer Model Version 1.1 ("ESPAM"), simulate the depletionary effects of Kuglers' proposed pumping and water use on reaches of the Snake River modeled by ESPAM.

On or about March 29, 2011, the staff memorandum was submitted to the Director. On March 30, 2011, the Department served the staff memorandum on Kugler. The staff memorandum is part of the record in this matter.

On June 14, 2011, the Director conducted the augmentation hearing. John Kugler appeared representing himself.

Shelley Keen of the Department testified about the Swan Falls dispute and settlement, Snake River minimum flow requirements at Murphy Gage, the appropriation process for trust water, and trust water rights that have a term limit and are currently being reviewed. Keen also testified about moratoriums in the trust water and non-trust water areas, limitations on new appropriations, and delivery calls filed by the surface water coalition and spring users.

Liz Cresto of the Department testified that flows in the Snake River at Murphy Gage have approached minimums required by the Swan Falls Agreement and associated legislation that might invoke regulation of water rights junior to the unsubordinated rights held by Idaho Power.

Allan Wylie of the Department testified about ESPAM model simulations of the proposed Kugler development and the modeled depletions resulting from Kugler's diversion of ground water on flows of the Snake River above and below Milner dam.

Kugler did not offer any additional testimony or additional evidence at the hearing.

Based on the evidence in the record, the Director finds, concludes, and orders as follows.

FINDINGS OF FACT

1. On October 4, 1984, John B. Kugler and Diane K. Kugler ("Kuglers") 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. John 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. John Kugler testified the driller who had possession of the equipment stole it from him and sold it.
4. In 1986, Kuglers 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 Kuglers sought to appropriate is trust water, or water held in trust by the State of Idaho pursuant to the Swan Falls Agreement. The Swan Falls Agreement and associated legislation subordinated portions of hydropower water rights held by Idaho Power to upstream development. The subordinated portions of the hydropower water rights are held in trust by the State of Idaho, and can be diminished by later in time (priority) water rights upon satisfaction of certain criteria. Ground water is trust water if it is tributary to the Snake River below Milner Dam.

6. The Swan Falls Agreement established a summer minimum flow at Murphy Gage of 3,900 cfs. Murphy Gage is located below Swan Falls Dam, and the minimum flow of 3,900 protects an unsubordinated portion of the Idaho Power water rights to generate hydropower at Swan Falls Dam.

7. On July 27, 1990, the Department approved permit to appropriate water no. 35-8359 authorizing appropriation of trust water for irrigation of 313 acres from ground water at the diversion rate of 6.0 cfs. John B. Kugler and Diane K. Kugler were the holders of permit no. 35-8359.

8. 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.

9. In the early 1990's, Kuglers 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.

10. 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.

11. 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").

12. 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 Gage 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.

13. 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.

14. 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.

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

16. 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.

17. 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.

18. 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.

19. 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.

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

21. In 1997, Kuglers reenrolled the proposed place of use in the CRP. The CRP contract period ended in September of 2007.

22. 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.

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

24. Kuglers reenrolled the proposed place of use in the CRP for calendar year 2008.

25. 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.

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

27. Starting in the 1990's, 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. Many of these contested cases remain pending before the Department and the Courts. Decisions in these contested cases have determined that ground water diversions deplete sources of water supplying water to existing water rights and that these depletions injure existing water rights, including water rights authorizing diversion from the Snake River.

28. Some of the senior water right holders calling for delivery of their water rights divert water from the backwater created by Milner Dam, located on the Snake River between Burley and Twin Falls. Snake River water rights identifying points of diversion upstream from Milner Dam are administered separately from Snake River water rights identifying points of diversion below Milner Dam. Except for some required hydropower bypass flows, during normal irrigation season operating conditions, the flow past Milner Dam is reduced to zero. When no Snake River flow passes Milner Dam, existing junior Snake River water rights are curtailed to satisfy senior Snake River water rights.

29. In some recent years, after adjusting for water being delivered through the Murphy Gage reach to lower reaches of the Snake River (below Milner Dam), Snake River flows measured at Murphy Gage have approached the 3,900 cfs minimum flow. If future Snake River flow rates at

Murphy Gage are less than the minimum flow of 3,900 cfs, water right permits, licenses, and decreed water rights authorizing diversion and beneficial use of trust water would be curtailed.

30. 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 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.

31. Recognizing the hydraulic connection between ground water in the Eastern Snake Plain Aquifer and the Snake River, the Department developed the Eastern Snake Plain Aquifer Model ("ESPAM"). By inputting consumptive use at Kuglers' proposed place of use into the model, the model will simulate depletions to the Snake River in various Snake River reaches caused by Kuglers' proposed diversion of ground water and consumptive irrigation use.

32. The current version of the model, ESPAM 1.1, predicts the following steady state depletions to the Snake River caused by Kuglers' proposed pumping and consumption of ground water:

Above Milner Dam	0.68 cfs	490.47 acre-feet/year
Below Milner Dam (trust water)	0.07 cfs	49.37 acre-feet/year

33. During normal irrigation season conditions when water is not spilling over Milner Dam, Kuglers' proposed diversion and consumptive use of ground water will reduce the quantity of water of water available to Snake River senior surface water right holders diverting water above Milner Dam.

34. Kuglers' proposed diversion of ground water will deplete flows in the Snake River below Milner Dam. These depletions will reduce the total flow measured at Murphy Gage. The reductions in flow may jeopardize the maintenance of the minimum flow at Murphy Gage.

CONCLUSIONS OF LAW

Authorities

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:

* * *

(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.

Effect on Senior Water Rights (Exception no. 1)

3. The Eastern Snake Plain Aquifer Model (“ESPAM”) Version 1.1, predicts that, at steady state, Kuglers’ proposed diversion and consumption of water for irrigation will deplete flows in the Snake River by the following amounts:

Above Milner Dam	0.68 cfs	490.47 acre-feet/year
Below Milner Dam (trust water)	0.07 cfs	49.37 acre-feet/year

4. During any time that water is not spilling over Milner Dam, Kuglers’ proposed diversion and consumptive use of ground water will reduce the quantity of water available to Snake River surface water right holders entitled to divert Snake River water above Milner Dam resulting in injury to the Snake River water right holders.

5. The proposed development would also deplete spring flows relied upon by aquaculture interests who hold senior priority water rights in the Snake River reach above Milner Dam.

6. Kuglers’ proposed diversion of ground water will deplete flows in the Snake River below Milner Dam. These depletions will reduce the total flow measured at Murphy Gage. The reductions in flow may jeopardize the maintenance of the minimum flows at Murphy Gage.

7. Senior priority Snake River and spring flow water rights must be protected. The ongoing delivery call decisions by the Department hold that ground water diversions from the Eastern Snake Plain Aquifer are injuring senior water right holders,

8. Prior to the Department allowing development under permit no. 35-8359, Kuglers should be required to mitigate for the simulated depletions to senior water rights that would result from their proposed permit. In addition, Kuglers' permit should be subject to the same review and possible mitigation required of other trust water right holders whose water rights are being reviewed based on the 20 year term of years.

The Request for Extension of Time for Filing Proof of Beneficial Use (Exception no. 2)

9. Kuglers filed a request for extension of time for filing proof of beneficial use in 2007. The request follows a string of previous requests for extension of time approved by the Department.

10. The pendency of a request for extension of time for filing proof of beneficial use does not vitiate the Director's authority to suspend development under a water right permit. Nonetheless, the Director should deny the pending request for extension of time, without prejudice, as a result of the stay of development. The Department will consider another request for extension of time upon any future rescission of this *Final Order Suspending Action and Prohibiting Development*.

"Takings" Claim Under the U.S. Constitution and the Idaho Constitution (Exception no. 3)

11. A permit to appropriate water is an inchoate right to develop and beneficially use the waters of the state of Idaho. *In re Licensed Water Right No. 03-7018 In Name Of Idaho Power Co.*, No. 37348, 2011 WL 2040814, at *8 (Idaho May 26, 2011). A water right vests into a recognizable property right at the time the water right is licensed or decreed. *Id.*

12. The Director has been given the express statutory authority to prohibit further development under a permit to appropriate water. Idaho Code § 42-1805. Because the authority only applies to the undeveloped portion of the permit, there is no inverse condemnation, or "taking" by the Director.

Possible Mitigating Circumstances

13. Kuglers asks the Department to reconsider some of their preliminary efforts to develop water under the permit as mitigating circumstances. Kuglers had an opportunity in 1994 to demonstrate development or substantial financial expenditure. This issue was addressed when the original Temporary Stay Order was issued and will not be revisited.

14. During the current contested case, Kugler could have proposed actions to mitigate for depletions caused by his proposed consumptive use of water to protect senior water rights and to justify further development of trust water. Kugler did not propose any mitigation. Consequently, suspension of further action on permit no. 35-8359 is necessary to protect the vested water rights.

15. Suspension should continue until Kugler proposes mitigation that will fully compensate for his depletions to the Snake River both above and below Milner Dam.

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:

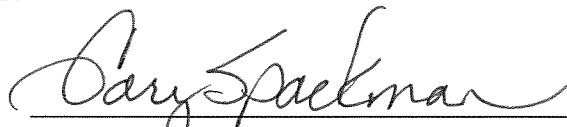
- 1) Additional work by the permit holder in developing a water right under terms of the permit is not authorized until the Department, by order, specifically authorizes resumption of work.
- 2) The permit holder is not authorized to assign ownership of the permit to another party without prior approval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

IT IS FURTHER ORDERED that the request for extension of time to avoid forfeiture is **Denied**, without prejudice.

Dated this 18th day of July, 2011.



Gary Spackman
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of July, 2011, 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: Final Order Suspending Action and Prohibiting Development, and Explanatory Information to Accompany a Final Order

John B. Kugler
Diane K. Kugler
2913 Galleon Court NE
Tacoma, WA 98422



Deborah J. Gibson
Administrative Assistant