

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

IN THE MATTER OF PERMIT	)	PRELIMINARY ORDER DENYING
NO. 73-12257 IN THE NAME OF	)	PETITION TO WAIVE PERMIT
STANLEY M. DOWTON AND	)	CONDITIONS & RETURNING
PATRICIA DOWTON	)	PROOF OF BENEFICIAL USE
_____	)	

This matter having come before the Department of Water Resources (“Department”) as a request to waive a lockable device and measuring device requirements, the Department finds, concludes, and orders:

FINDINGS OF FACT

1. On April 20, 2017, the Department issued Permit No. 73-12257 (“Permit”) authorizing Stanley M. Dowton and Patricia Dowton (“Permit Holders”) to divert 0.52 cfs of waste water from the Carter Ditch for irrigation purposes.

2. Permit condition no. 5 states:

Prior to diversion of water under this right, the right holder shall install a lockable device, subject to the approval of the Department, in a manner that will provide the watermaster suitable control of the diversion.

3. Permit condition no. 6 states:

Prior to the diversion and use of water under this right, the right holder shall install and maintain acceptable measuring device(s), including data logger(s), at the authorized point(s) of diversion and in accordance with Department specifications, or shall obtain an approved variance from the Department to employ an alternative method to determine and record the amount of water diverted.

4. On February 26, 2018, the Permit Holders submitted a *Statement of Completion for Submitting Proof of Beneficial Use* (“Proof”) for the Permit together with a request to waive requirements of condition nos. 5 and 6. The Permit Holders also submitted a supporting statement from the watermaster of Water District 73, Pahsimeroi River, stating “I don’t feel that it is necessary for neither a headgate or measuring device because it being off the end of the Carter Ditch.”

5. The Permit is located within Water District 73 for regulation and distribution of water. On November 18, 2002, the Department issued an order requiring installation of measuring devices and headgates for all diversions of water from the Pahsimeroi River and tributaries prior to the diversion of water in 2003.

6. The Pahsimeroi River is tributary to the Salmon River upstream from the ending point of the minimum stream flow established on the Salmon River consistent with the purposes of the federal Wild and Scenic Rivers Act, Pub. L. 90-542, 82 Stat. 906, Oct 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.) and decreed as Water Right 75-13316.
7. Water District 73 is a sub-district of Water District 170, Upper Salmon River Basin, and includes all surface and ground water rights, except for de minimis water uses, in Administrative Basin 73. On March 23, 2018, the watermaster of Water District 170 commented on the Permit Holders' request to waive Permit condition nos. 5 and 6, making two points. First, waste flows in the Carter Ditch may in fact return to the Pahsimeroi River by way of a small ditch at the north end of the place of use. Second, water measurement in the Pahsimeroi basin is required "by the Wild and Scenic Agreement."

APPLICABLE STATUTES, RULES, AND AUTHORITIES

IDAPA 37.03.08.50.01 states:

The Director may issue permits with conditions to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, and specifically to meet the criteria of Section 42-203A, Idaho Code, and to meet the requirements of Section 42-203C, Idaho Code, to the fullest extent possible including conditions to promote efficient use and conservation of energy and water.

Idaho Code § 42-701(1) states, in pertinent part:

The appropriators or users of any public waters of the state of Idaho shall maintain to the satisfaction of the director of the department of water resources suitable headgates and controlling works at the point where the water is diverted. Each device shall be of such construction that it can be locked and kept closed by the watermaster or other officer in charge, and shall also be of such construction as to regulate the flow of water at the diversion point.

The Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees ("Stipulation") signed by the United States of America, the State of Idaho, and other parties to the Snake River Basin Adjudication in July of 2004 states on page 5:

IDWR will condition each water right permit or license issued after the effective date of this Stipulation for a non-de minimis water right upstream from the ending point of the Wild and Scenic River as set forth in this Stipulation to require that each diversion is equipped with lockable controlling works, a measuring device, and a data logger or other suitable device that regularly monitor and records the rate of diversion.

Idaho Code § 42-217 states, in pertinent parts:

On or before the date set for the beneficial use of waters appropriated under the provisions of this chapter, the permit holder shall submit a statement that he has used such water for the beneficial purpose allowed by the permit.

Upon receipt of such proof and the fee as required in section 42-221, Idaho Code, by the department of water resources the department shall examine, or cause to be examined . . . [t]he capacities of the ditches or canals or other means by which such water is conducted to such place of use, and the quantity of water which has been beneficially applied for irrigation or other purposes.

The department or the person making such examination under the direction of the department shall prepare and file a report of the investigation

IDAPA 37.03.02.35.02.d. states:

Field reports which indicate that a measuring device or lockable controlling works, required as a condition of approval of the permit, has not been installed, are not acceptable and will be returned to the examiner unless the measuring device requirement or lockable controlling works requirement has been formally waived or modified by the Director.

CONCLUSIONS OF LAW

1. Pursuant to IDAPA 37.03.08.50.01 the Department can issue permits with conditions to promote the public interest and efficient use of water.
2. Pursuant to Idaho Code § 42-701(1) the Department can require appropriators of a public water source to install lockable controlling devices on the diverting works for their water rights.
3. Through the Stipulation, the State of Idaho committed to a program of lockable controlling works and measuring devices on new water diversions to promote efficient administration of water rights in streams tributary to the Salmon River upstream from the ending point of the minimum stream flow established by Water Right 75-13316. The commitment in the Stipulation applies to the Pahsimeroi River drainage.
4. It is not in the public interest to waive the lockable device or measuring device requirements on the Permit.
5. The Department should deny the Permit Holders' request to waive the lockable device and measuring device requirements on the Permit.

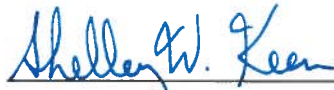
6. Pursuant to Idaho Code § 42-217 and IDAPA 37.03.02.35.02.d, the Department cannot complete the field report or issue a license when a lockable device and measuring device required as a condition of approval of the permit are not installed. The Department should return the Proof because the Permit Holders have not complied with the lockable device and measuring device requirements of the Permit.¹

ORDER

IT IS HEREBY ORDERED that the Permit Holders' petition to waive the lockable device and measuring device conditions on the Permit is **DENIED**.

IT IS ALSO HEREBY ORDERED that the Permit Holders' Proof for the Permit is **RETURNED**.

Dated this 27th day of March, 2018.



Shelley W. Keen, Manager
Water Rights Section

¹ Proof for the Permit is due May 1, 2018. If the Permit Holders resubmit an acceptable Proof statement by May 1, 2018, there will be no loss of priority for the Permit. To avoid loss of priority, the Permit Holder may also seek an extension of time pursuant to Idaho Code § 42-204. Proof submitted after May 1, 2018, without an approved extension may result in loss of priority.

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DOB

73-12257

Sent To

Street, Apt. No.;

or PO Box No.

City, State, ZIP+4

Stanley M + Patricia Dorton
400 Burdett St SE
Ellis ID 83235

2579 2494 4444 7777 9999 1234 5678 9012



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

March 27, 2018

STANLEY M DOWTON
PATRICIA DOWTON
700 BURSTEDT LN
ELLIS ID 83235

RE: Preliminary Order in the matter of Permit No. **73-12257**

Dear Permit Holders:

The accompanying order is a "**preliminary order**" issued by the department pursuant to Rule 730 of the department's Rules of Procedure (IDAPA 37.01.01). It can and will become a final order without further action of the department unless any party petitions for reconsideration within fourteen (14) days after issuance as described in the enclosed information sheet.

The Department is returning your Proof of Beneficial Use (Proof) statement as it is unacceptable until compliance with the lockable device and measuring device requirements of the permit has been met.

Proof is due May 1, 2018. If you resubmit an acceptable Proof statement by May 1, 2018, there will be no loss of priority for the permit. To avoid loss of priority you may also seek an extension of time pursuant to Idaho code § 42-204. Proof submitted after May 1, 2018, without an approved extension may result in loss of priority.

If you have any questions regarding this matter, please call me at 208-287-4951.

Sincerely,

Pamela S. Skaggs
Water Rights Supervisor

Enclosure(s)

c: WATER DISTRICT #73
WATER DISTRICT #170

CERTIFICATE OF SERVICE

I hereby certify that on **March 28, 2018**, I mailed a true and correct copy, **certified**, postage prepaid, of the foregoing (**PRELIMINARY ORDER DENYING PETITION TO WAIVE PERMIT CONDITIONS & RETURNING PROOF OF BENEFICIAL USE**) to the person(s) listed below:

RE: Preliminary Order in the Matter of Permit No. **73-12257**

**STANLEY M DOWTON
700 BURSTEDT LN
ELLIS ID 83235**

**PATRICIA DOWTON
700 BURSTEDT LN
ELLIS ID 83235**

**WATER DISTRICT #73
TED ONEAL
81 FUREY LANE
MAY ID 83253**

**WATER DISTRICT #170
CINDY YENTER
102 S WARPATH
SALMON ID 83467**



Darla Block
Technical Records Specialist

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "Preliminary Order" issued by the department pursuant to section 67-5243, Idaho Code. It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

Skaggs, Pam

From: Yenter, Cindy
Sent: Friday, March 23, 2018 4:42 PM
To: Skaggs, Pam
Subject: Downton-Request to Waive Measuring Device Conditions for Permit 73-12257

Water District 73 does not assess waste water and the watermaster does not see a need to measure or regulate these diversions. Even though the watermaster indicated that waste flows in this ditch have no where to go, they may in fact find their way to the Pahsimeroi River by way of a small ditch at the north end of the fields which crosses the Pahsimeroi Road and enters a larger system of drains. The issue may be that the catch ditch may only convey a limited amount of flow and use of the waste water for irrigation helps alleviate the potential for flooding west of the road. This water comes in very low in the Pahsimeroi and is not really needed to help satisfy senior rights. The minimum instream flow on the lower Pahsimeroi River is always met.

Unfortunately there are other reasons for measurement of waste water in the Upper Salmon Basins. Primarily, measurement is required by the Wild and Scenic Agreement, and accountability of all regulated diversions is required under Idaho law. Even if a local water district does not routinely measure or assess waste water diversions, this does not preclude the need to regulate those diversions in the future to help satisfy downstream senior rights in the main stem Salmon River.

*Cindy Yenter
Watermaster, WD170
IDWR Salmon Field Office
102 S Warpath, Salmon ID 83467
cindy.yenter@idwr.idaho.gov
208-742-0655
208-731-0901 cell*

RECEIVED

FEB 26 2018

DEPARTMENT OF
WATER RESOURCESSTATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
STATEMENT OF COMPLETION
FOR SUBMITTING PROOF OF BENEFICIAL USE

COPY

FOR OFFICE USE ONLY

Amt. of Fee \$ 100.00

Receipt No. C104692

Received By TK

Date Received 2-26-18

The Idaho Department of Water Resources considers this form a statement by the permit holder(s) that development of a water right has been completed and that water has been applied to beneficial use to the extent described below. This form must be accompanied by an examination fee, when necessary, Q! by a completed Beneficial Use Field Report prepared by a certified water right examiner. Please refer to the instructions and fee schedule for this form. If ownership of the permit has changed, contact any Department office or visit the Department's website at idwr.idaho.gov for an Assignment of Permit form. If you wish to relinquish your permit because you have not established the authorized use of the water and are n.Q! applying for an extension, please notify the Department in writing.

1. Permit No. Telephone No.

73-12257

208-833-4200 Stan cell

2. Name of Permit Holder(s)

Stanley M. Downton Patricia Downton

3. Mailing Address

City

700 Burstedt Ln.

Ellis

State

ID

Zip

83235

Email

downton3x ranch@gmail.com

4. Source of Water If GROUND WATER (well), Date Drilled mo. / yr.

Well Driller

Drilling Permit Number

Waste Water - Carter Ditch

5. Extent of use(s) completed as authorized by the water right permit: Domestic (No. of households) _____

Stockwater (No. and type of stock)

Irrigation (No. of acres) Other

26.0

6. Total rate of diversion or storage volume for which proof is 0.52 cfs
submitted cfs OR acre-feet.

7. Compliance with a measuring device requirement, lockable controlling device requirement, and/or other conditions of permit:

Refer to the approval conditions on your permit and respond accordingly.

The Department will not issue a license if permit conditions are not met. * See attached correspondence.

Measuring Device

Is a measuring device required?

Yes ☐No ☐

If yes, has the measuring device been installed?

Yes ☐No ☐

Lockable Controlling Device

Is a lockable device required to control the diversion?

Yes ☐No ☐

If yes, has the lockable device been installed?

Yes ☐No ☐

Fish Screen

Is a fish screen required?

Yes ☐No ☐

If yes, has the fish screen been installed?

Yes ☐

Other Conditions of Permit

Do the approval conditions on your permit require you to submit additional information in connection with your proof of beneficial use? If yes, list the conditions below and attach documents with the required information.

Completed? Yes ☐ NO ☒

8. Fee Enclosed \$ 100⁰⁰ or not applicable O. See fee schedule on page 2 of the instructions. Proof statements filed without an appropriate fee, will be considered incomplete.

COPY

9. Person to contact to accompany the Department representative during field examination of the water system.

Name Stan Downton Telephone Number 208-833-4200

Mailing Address 700 Burstedt Ln. City Ellis

State ID Zip 83235 Email downton3xranh@gmail.com

The information given on this form is my true statement of the extent to which the above numbered permit has been developed and water has been diverted and applied to a beneficial use. I understand that any undeveloped portion of the permit is relinquished to the State of Idaho.

Signature of Permit Holder Patricia Downton, co-owner Date 2-22-18
(Include your title, if on behalf of company or organization)

Mail to: Idaho Department of Water Resources, PO Box 83720, Boise, ID 83720-0098

RECEIVED

FEB 26 2018

DEPARTMENT OF
WATER RESOURCES

IOWA

2-14-18

To whom it may concern

I don't feel that it is necessary for neither a head gate or measuring device because it being off the end of the Carter Ditch. It is in field past the Carter Ditch and there is no other place for the water to go or regulate but onto the ground requests for beneficial use.

Yed O'Neal
Water Master
Water Dist #73

DOWTON 3X RANCH

Stan and Trish Dowton 700 Burstedt Lane Ellis, ID 83235 ph. 208.876.4200

Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

February 22, 2018

To Whom It May Concern:

Regarding Permit to Appropriate Water No. 73-12257.

We would like to ask for a waiver of the terms specified in conditions 5 and 6 for this waste water right because the installation of measuring devices and lockable head gates at the point of diversion are located within the field of the place of use which is the last property of the end of the Carter Ditch. Basically, the water has nowhere else to go.

We have attached a statement from District 73 Water Master, Ted O'Neal to confirm this information.

The water right application was also reviewed by an on-site visit last spring by Cindy Yenter from the IDWR office in Salmon who could affirm the situation.

The 26.0 acres was irrigated in the 2017 season.

Thank you for considering this request to remove conditions 5 and 6 of this permit and thereby allowing us to file the enclosed Statement of Completion.

Respectfully,



Stanley M. Dowton
Patricia A. Dowton

RECEIVED

FEB 26 2018

DEPARTMENT OF
WATER RESOURCES