

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

IN THE MATTER OF PERMIT	)	PRELIMINARY ORDER PARTIALLY
NO. 35-13521 IN THE NAME OF	)	GRANTING AND PARTIALLY DENYING
NAME OF ANDREW E. POVEY	)	PETITION FOR RECONSIDERATION
_____	)	

This matter having come before the Department of Water Resources (Department) as a result of a petition for reconsideration of a preliminary order issuing a Permit to Appropriate the Public Waters of the State of Idaho, the Department finds, concludes, and orders:

FINDINGS OF FACT

1. On March 3, 2005, the Department issued Permit 35-13521 (permit) to Andrew E. Povey (permit holder) for the diversion and use of 5.20 cubic feet per second of ground water located in the Eastern Snake River Plain aquifer in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 35, Township 6 South, Range 29 East, B. M., for the irrigation of 260 acres of land in Power County. The permit included twelve conditions of approval.

2. Water Appropriation Rule 50.01 (IDAPA 37.03.08.050.01) says:

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.

3. The permit was issued as a preliminary order pursuant to Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01.730.).

4. On March 17, 2005, the Department served notice to the applicant that the permit had been issued.

5. Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a.) provides in pertinent part as follows:

Any party may file a petition for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order.

6. On March 30, 2005, the Department received the permit holder's petition for reconsideration of the preliminary order (petition) issuing the permit. In his petition, the permit holder stated his opposition to the requirements of approval conditions numbered 1, 6, 9, and 12.

Approval Condition No. 1

7. Approval condition no. 1 on the permit says, “Proof of application of water to beneficial use shall be submitted on or before March 01, 2006.”

8. In his petition, the permit holder said, “I have always thought that a permit holder had 5 years to put his permit to use.”

9. Idaho Code § 42-204 says, in pertinent part:

The department shall require that actual construction work and application of the water to full beneficial use shall be complete within a period of five (5) years from the date of such approval, but may limit the permit to a less period than is named in the application, and the permit shall set forth the date when beneficial application of the water to be diverted by such works shall be made.

10. Water Appropriation Rule 50.07 (IDAPA 37.03.08.050.07) says:

The Director may condition permits to require commencement of construction of project works within a designated time interval not to exceed one year and completion of construction of project works and beneficial use of water within a time interval not to exceed five (5) years.

11. At Item 7 of his application the permit holder indicated that he would require one year to complete his works and apply the water to beneficial use.

Approval Condition No. 6

12. Approval condition no. 6 on the permit says:

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 determine the amount of water diverted from power records or to maintain an existing measuring device.

13. In his petition, the permit holder states that he is not opposed to measuring and recording the amount of water diverted in connection with the permit, but rather he believes that a data logger is too expensive and that there are other effective methods for determining the amount of water diverted.

14. Idaho Code § 42-701 says, in pertinent part:

Each such appropriator shall construct and maintain, when required by the director of the department of water resources, a rating flume or other measuring

device at such point as is most practical in such canal, ditch, wellhead or pipeline for the purpose of assisting the watermaster or department in determining the amount of water that may be diverted into said canal, ditch, wellhead or pipeline from the stream, well or other source of public water. Plans for such headgates, rating flumes or other measuring devices shall be approved by the department of water resources.

15. Idaho Code § 42-701(2) says, in pertinent part:

If an appropriator determines that installation and maintenance of a measuring device required by the director would be burdensome for his diversion, the appropriator may, upon approval of the director, execute an agreement with the director and submit to the director such information and technical data concerning the diversion and pumping facilities as the director determines necessary to establish the relationship of power usage to water withdrawal by any pump used to divert public water.

16. The permit holder has not submitted technical information to show that a method other than installation of a measuring device and a data logger would be sufficient to record the volume of water diverted in accordance with this permit.

Approval Condition No. 9

17. Condition No. 9 on the permit says:

To mitigate for the depletion of water resulting from the use of water under this right and to prevent injury to senior water right holders, the right holder shall cease diverting and using water as authorized by the following water rights for the purposes and amounts specified below. Moreover, the official record for the following water rights will be changed to show that diversion and use of water is not authorized because the rights, or portions thereof, are being dedicated to mitigation purposes.

Right No.	Use Changed to Mitigation	Mitigation Rate	Mitigation Vol.	Acres
35-2727A	Irrigation	1.99 cfs	383.2	95.8
35-7603C	Irrigation	0.87 cfs	296.8	74.2

The land that will no longer be irrigated under these rights is located within W1/2NE, E1/2NW, NWNW, S17; SENE, S18; T04S, R31E.

36-16291	Irrigation	0.11 cfs	20.8	5.2
36-16293	Irrigation	0.16 cfs	31.2	7.8
36-16295	Irrigation	0.04 cfs	7.6	1.9
36-16297	Irrigation	0.01 cfs	4.4	1.1

The land that will no longer be irrigated under these rights is located within

NWSE, S24, T08S, R21E.

43-13345	Irrigation	0.84 cfs	200.0	50.0
43-13347	Irrigation	0.15 cfs	96.0	24.0

The land that will no longer be irrigated under these rights is located within N1/2NE, SWNE, S02, T10S, R26E.

If the specified mitigation rights, or portions thereof, are sold, transferred, leased, used on any place of use, or are not deliverable due to a shortage of water or a priority call, then the amount of water authorized for diversion under this permit shall be reduced by the same proportion as the reduction to the mitigation rights.

18. In his petition the permit holder stated:

I would like the last paragraph to read that specified mitigation rights, or portions **thereof may not be: sold, transferred, or leased;** for any other purpose without consent of right holder of record of right #35-13521. The owner of mitigation rights was paid in full (\$850) per acre to give up said rights.

19. In his petition the permit holder also stated:

I would also like to add a paragraph in #9 that says, after 20 years, only watermaster of said right (35-13521) needs to be reported to. This is due to the IDWR's groundwater model that claims the effects should all be equaled out in 20 years or less.

20. In connection with his application for permit, the permit holder gave the Department documentation showing that he had entered into an agreement to purchase the water rights listed in approval condition no. 9 (mitigation rights) from a broker and that the broker had entered into agreements to purchase the rights from their owners of record.

21. The owners of the mitigation rights, according to records on file with the Department, are as follows:

<u>Right No.</u>	<u>Owner(s)</u>
35-2727A	Roy E. Hincks
35-7603C	Roy E. Hincks
36-16291	Marilyn L. Phillips and/or Vernon C. Phillips
36-16293	Marilyn L. Phillips and/or Vernon C. Phillips
36-16295	Marilyn L. Phillips and/or Vernon C. Phillips
36-16297	Marilyn L. Phillips and/or Vernon C. Phillips
43-13345	Sagewood Ranch, L.L.C.
43-13347	Sagewood Ranch, L.L.C.

22. Idaho Code § 42-248(1) says:

All persons owning or claiming ownership of a right to use the water of this state, whether the right is represented by decree of the court, by claim to a water right filed with the department of water resources or by permit or license issued by the director of the department of water resources, shall provide notice to the department of water resources of any change in ownership of any part of the water right or of any change in the owner's mailing address, either of which occurs after June 30, 2000. Notice shall be provided within one hundred twenty (120) days of any change using forms acceptable to the director.

23. On April 30, 1993, the Department established a moratorium on the issuance of new permits for consumptive uses of water diverted from the Eastern Snake River Plain aquifer. Item 9.b of the moratorium order states that the Department may issue permits if the applicant provides mitigation to offset injury to other rights.

24. On April 19, 2005, the Department issued an order *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A & B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company* concluding that prior rights to divert and use surface water are being injured by the diversions of Eastern Snake River Plain ground water pumpers with water rights junior to (later in time than) February 27, 1979.

Approval Condition No. 12

25. Condition No. 12 on the permit says:

Any license issued by IDWR pursuant to the right 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 and to re-evaluate the public interest at the end of the term.

26. In his petition, the permit holder said, "I strongly disagree that the IDWR should have any right to review after 20 years."

27. Water Appropriation Rule 10.17 (IDAPA 37.03.08.010.17) defines Trust Water as follows:

Trust Water. That portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action either with agreement of the holder of the hydropower right as provided by Section 42-203B(5), Idaho Code or without an agreement as provided by Section 42-203B(3), Idaho Code.

28. Water Appropriation Rule 30.01.c (IDAPA 37.03.08.030.01.c) says:

Trust water flows under the Snake River water rights agreement are those occurring in the Snake River and tributaries in the geographic area designated in Rule Subsection 030.01.a. which exceed the established minimum stream flows but are less than the water rights for hydropower generating facilities in the Swan Falls Dam to Milner Dam reach of Snake River, to the extent such rights were unsubordinated prior to the Snake River water rights agreement. Minimum average daily flows have been established by action of the Water Resource Board and legislature at the U.S. Geological Survey gauging station located near Murphy (Section 35, Township 1 South, Range 1 West B.M.) in the amount of three thousand nine hundred (3900) cfs from April 1 to October 31 and five thousand six hundred (5600) cfs from November 1 to March 31, and at Milner gauging station located in Section 29, Township 10 South, Range 21 East, B.M. in the amount of zero (0) cfs from January 1 to December 31.

29. Water Appropriation Rule 50.10 (IDAPA 37.03.08.050.10) says:

The director may condition permits to insure that established minimum stream flows and prior rights including prior rights reserved by federal law are not injured.

30. Appendix A of the Water Appropriation Rules (IDAPA 37.03.08 Appendix A) is a map showing the geographic area from which ground water is determined to be tributary to the Snake River in the Milner Dam to Swan Falls Dam reach. The area depicted in Appendix A is commonly known as “the Trust Water area.”

31. The authorized point of diversion for the permit is located within the Trust Water area.

32. Idaho Code § 42-203A(5) says:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a

permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

33. None of the mitigation rights has been designated as authorizing the diversion and use of Trust Water.

CONCLUSIONS OF LAW

1. The petition was submitted on time.
2. The Department has authority pursuant to Idaho Code § 42-204 to grant up to five years for the permit holder to establish a water use and to submit proof of beneficial use in connection with the permit.
3. The Department should grant the permit holder a period of five years in which to establish a water use and to submit proof of beneficial use in connection with the permit.
4. The Department has authority pursuant to Idaho Code § 42-701 to require water right holders to install and maintain measuring devices, including data loggers, necessary for the administration of their water rights.
5. The permit holder has the opportunity pursuant to Idaho Code § 42-701(2) and approval condition no. 6 of the permit to seek a variance from the measuring device and data logger requirement at any time.
6. The permit holder has not demonstrated that the volume of water diverted in connection with this permit can be recorded accurately using a method other than the installation of a measuring device and a data logger.
7. The Department should deny the permit holder's request to modify approval condition no. 6.
8. If either the permit holder (or his broker) has acquired the mitigation rights, the Department must be notified in accordance with Idaho Code § 42-248(1).
9. The mitigation provided by the permit holder in connection with the permit must be permanent to offset injury to other rights.
10. The Department has no reason to restrict the sale, transfer, or lease of the mitigation rights by their rightful owners.
11. The Department should deny the permit holder's request to modify approval condition no. 9.
12. The permit authorizes the diversion and use of Trust Water.

13. Idaho Code § 42-203A(5) requires IDWR to prevent injury to existing water rights and to protect the local public interest when authorizing new appropriations of water.

14. Trust Water held by the state is a valuable asset in economic and other terms. The state has a responsibility to determine whether this asset provides the greater benefit to the people of Idaho as a source of flow for hydropower and other instream uses, or for upstream consumptive economic development. In either case the trust water resource must be managed on a continuing basis. This continuing management can be assured by issuing permits for the use of the trust water for specific terms long enough to amortize the development investment. The priority of the filing would not be lost at the end of the term, but in reprocessing the public interest would be re-evaluated and the adequacy of the water supply would be considered.

15. The Department has the authority to condition permits such that the interest of the public in the water use established in connection with the permit can be re-evaluated by the Department after 20 years.

16. The mitigation rights authorize the diversion of public water, not Trust Water.

17. By mitigating with rights that are for the diversion of the public waters of Idaho and not Trust Water, the permit holder will compensate the Snake River for the impacts of his diversions under this permit on the flows in the Snake River.

18. As long as the required mitigation is provided from the rights described in approval condition no. 12 of the permit, or in some similar manner with rights that are not Trust Water rights, the diversion and use of water under this permit can be treated as if it were not for the diversion and use of Trust Water.

19. The Department should modify approval condition no. 12 to say that as long as mitigation is provided in the manner described in approval condition no. 9 with water rights that are for the diversion and use of the public waters, not Trust Water, then the permit and any subsequent license are not subject to review to re-evaluate the availability of water and the public interest in the water right.

ORDER

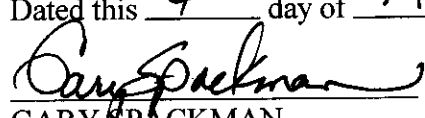
IT IS, THEREFORE, HEREBY ORDERED that reconsideration of approval condition no. 1 of Permit No. 35-13521 in the name of the Andrew Povey is GRANTED, and the date by which proof of application of water to beneficial use shall be submitted is CHANGED to March 1, 2010.

IT IS FURTHER HEREBY ORDERED THAT reconsideration of approval condition no. 6 of the permit is DENIED. However, the permit holder may seek a variance, subject to the approval of the Department, of the measuring device and data logger requirement in accordance with approval condition no. 6 at any time by providing technical information demonstrating that the volume of water diverted in connection with the permit can be measured and recorded by other reliable means.

IT IS FURTHER HEREBY ORDERED THAT reconsideration of approval condition no. 9 of the permit is DENIED.

IT IS FURTHER HEREBY ORDERED THAT reconsideration of approval condition no. 12 of the permit is GRANTED and the language of approval condition no. 12 of the permit is MODIFIED as follows:

Any license issued by IDWR pursuant to the right 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 and to re-evaluate the public interest at the end of the term. However, as long as mitigation is provided in the manner described in approval condition no. 9 or in a similar manner with water rights that are for the diversion and use of the public waters, not Trust Water, then the permit and any subsequent license are not subject to review to re-evaluate the availability of water and the public interest in the water right.

Dated this 4th day of May, 2005.

GARY SPACKMAN