



State of Idaho

DEPARTMENT OF WATER RESOURCES

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April 13, 2005

DIRK KEMPTHORNE  
Governor

Jim Dowton Sr.  
HC 62 Box 2360  
May, ID 83253

Jim Dowton Jr.  
Box 1217  
Challis, ID 83226

KARL J. DREHER  
Director

**CERTIFIED MAIL**

**RECEIVED**

Re: Order Revoking Cease and Desist Order Dated June 21, 2004  
Notice of Violation and Cease and Desist Order to Jim Dowton

**APR 18 2005**

Department of Water Resources  
Eastern Region

Dear Gentlemen,

Enclosed is an Order Revoking a Cease and Desist Order dated June 21, 2004, and a new Notice of Violation and Cease and Desist Order regarding the use of water for a pond on a natural stream channel without a water right, and altering a natural stream channel without a permit on a channel of the Pahsimeroi River. Please note all civil penalties and compliance dates stipulated in the attached order. Please also note your opportunity to request a compliance conference concerning this matter as well as the time frame and manner in which such a request must be made.

Also attached is an unsigned copy of a letter from Gary Spackman, Idaho Department of Water Resources (IDWR), to Jerry Rigby and James Speck, dated December 23, 2004. IDWR learned this week that this letter did not go to the intended recipients. Unfortunately, IDWR does not have an original signed copy of the letter and we cannot verify whether the letter was mailed or simply lost in the mailing process. The letter was intended to provide copies of certain satellite images on record at IDWR as requested at the pre-hearing conference held in Challis on November 15, 2004. The letter also provided a summary of the pre-hearing conference and outlined the action that IDWR planned to initiate regarding this matter. IDWR apologizes for any inconvenience or confusion resulting from non-delivery of this letter.

Respectfully

Tim Luke

Water Distribution Section Manager

Encl.

Cc: Gary Spackman, IDWR Water Allocations Bureau Chief  
Bob Foster, IDWR Salmon Field Office  
Terry Blau, IDWR Southern Region Office  
Jerry Rigby, Attorney  
James P Speck, Attorney  
Representative Lenore H. Barrett  
Jim Martiny, Water District 73 Watermaster  
Tom Curet, IDFG, Salmon  
IDWR Eastern Region

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

IN THE MATTER OF DIVERSION     )   ORDER REVOKING CEASE AND DESIST  
OF WATER BY JIM DOWTON         )   ORDER DATED JUNE 21, 2004  
WITHOUT A VALID WATER RIGHT, )   NOTICE OF VIOLATION AND CEASE  
AND ALTERATION OF A STREAM   )   AND DESIST ORDER  
CHANNEL WITHOUT A PERMIT     )

The Director of the Department of Water Resources (Department or IDWR), being charged with the duty of protecting streams, protecting vested water rights, enforcing certain statutes of the state of Idaho and the rules of the Department, and being authorized to order the cessation of violations or attempted violations of the provisions of the law relating to appropriation and distribution of water, has investigated the alteration of a stream channel and the use of water by Jim Dowton Sr. and/or Jim Dowton Jr., (herein referred as Dowton).

Based on the department's investigation and understanding of the law, the Director finds, concludes and orders as follows:

**FINDINGS OF FACT**

1. On or about May 28, 2004, the Department was contacted by Brooke Coleman (Coleman), a landowner in the Pahsimeroi River valley, regarding construction or use of a ditch on the Pahsimeroi River located in Section 17, Township 15 North (T15N), Range 21 East (R21E). Coleman alleged there had been recent construction or work completed on the ditch and submitted photos to the Department showing portions of the ditch channel beginning at the river heading and going downstream some distance. The photos showed the existence of a pond on the ditch with a regulating gate and culvert. The photos revealed that some recent excavation work might have been completed around the pond.
2. On June 2, 2004, the Department's Salmon Field Office representative visited the Coleman property to observe the ditch in question. The Department representative was not able to observe the ditch from the Coleman property. The department representative attempted to contact Dowton, but Dowton was not available at the time of the visit.
3. On June 3, 2004, the Department sent Dowton correspondence advising him that the Department had been contacted about the recent construction and use of a ditch on the Pahsimeroi River within Section 17, T15, R21E. The notice advised Dowton that a search of Department records showed that no water right records could be found for the ditch in question. The letter asked Dowton to identify any water rights that may allow use of the ditch and/or to clarify the Department's understanding about the ditch. The letter further asked that Dowton either cease and desist from diverting water to the ditch or obtain a valid water right for use of

the ditch if, in fact, the ditch was being used for some purpose. Dowton was asked to respond to the Department within ten (10) days of receiving the notice.

4. On June 11, 2004, a Department representative visited the site with Dowton. Dowton explained that the ditch and a wooden control structure located at the head of the ditch had been in place for over 30 years and that water from the Pahsimeroi River has flowed to this ditch channel for more than 30 years. Dowton further explained that he had installed two culverts in the channel over the past three years to provide access to his property between the ditch channel and the river. Dowton stated that the control gate on one of the two culverts was installed to control the level of water in the channel when harvesting a crop of hay from the ground adjacent to the ditch channel. The Department representative took photos confirming the existence of a pond behind the culvert with the control gate, but observed no other use of water from the ditch channel. Photos taken by the representative also confirmed the existence of the wooden control structure at the head of the channel, but that there was no gate or check boards installed in the structure to regulate or control flow to the ditch channel. The representative's photos and inspection of the river near the wooden control structure did not provide conclusive evidence of any excavation or alteration of the river channel near the head of the ditch channel. The representative advised Dowton that use of water from the ditch channel would require a water right and that any work in the Pahsimeroi River channel near the head of the ditch channel would require a stream channel alteration permit. The Department representative documented his field visit via a memorandum dated June 11, 2004, and forwarded the memo to his immediate supervisor.

5. Also on June 11, 2004, the Department received a facsimile letter from Coleman, on behalf of himself and other members in the partnership of the Last Chance Ranch. The letter complained that the ditch channel constituted a potential illegal diversion. Coleman alleged that the "ditch circumvents roughly 80 percent of the traditional river basin that exists within the property limits of the Last Chance Ranch", and that "the diversion includes deposition of fill and debris into the Pahsimeroi River channel for the apparent purpose of diverting large volumes of water into a newly constructed ditch and culvert system." Coleman further alleged that recent actions taken to divert water to the ditch channel resulted in reduced river flows "with noticeable consequences including caving riverbanks, dried up portions of the river bottom, and silt depositions below the ditch reentry point."

6. On June 21, 2004, the Department sent Dowton a Preliminary Order to Cease and Desist Diversion of Water from the Pahsimeroi River. Specifically, the preliminary order required Dowton to shut off the water from the river to the ditch channel by installing check boards or some other controlling device in the wooden control structure located at the head of the ditch channel. The order required Dowton to shut the water off on or before July 8, 2004, and that locking controlling works be installed at the head of the channel on or before August 15, 2004.

7. On July 8, 2004, the Department received a letter from Gordon S Thatcher, attorney for Dowton, objecting to the Department's preliminary order, and requesting the matter be set for hearing. Mr. Thatcher's letter summarized his client's objection to the order as follows:

- a) The channel in question is really a natural channel or slough that frequently carries high water.

- b) The wooden structure at the head of the channel is not a diversion structure but rather a flood control structure that had been in place for more than 45 years. Rocks had been placed in the channel at the same location prior to installation of the control structure to control or minimizing flooding of downstream property.
- c) Dowton had installed a culvert three years ago to cross the slough and allow farming on both sides of the slough, and "to back-up water when they are working the hay ground downstream from the structure."
- d) The culvert and resulting stream should be considered a benefit for fish and wildlife.
- e) Dowton does not divert any water from the slough.

8. On July 9, 2004, fishery biologists from the Idaho Department of Fish and Game (IDFG) toured the channel from the heading to a point below Dowton's property. The Department received e-mail correspondence from an IDFG biologist stating that the channel is valuable to fish and wildlife, and encouraging the Department not to close the channel. The IDFG biologist reported that most of the channel (minus the upper end) appeared to be a historic overflow channel of the Pahsimeroi River.

9. On July 27, 2004, a stream channel specialist from the Department toured the channel with Dowton, stream channel representatives from the United States Army Corps of Engineers, and the Department's Salmon office representative. The Department's stream channel specialist who toured the site prepared a memo dated August 13, 2004, documenting the visit. The Department's stream channel specialist concluded that the channel is a natural side channel of the Pahsimeroi River. Dowton told the Department during the visit that there are three culverts on the channel within Dowton's property, and that the upper and lower culverts were installed 25 to 30 years ago to provide access to land between the channel and the river. The middle culvert, which includes a standpipe with slots for boards to control the water level immediately upstream, was installed three to five years ago. Dowton also reported during the July 27<sup>th</sup> site visit that the channel above the middle culvert and standpipe was widened to create a wildlife pond. The Department stream channel specialist advised Dowton that either a water right or stream channel alteration permit should have been obtained prior to installing the culvert and pond. When advised of the legal requirements, Dowton indicated he would obtain a water right for the pond. During the visit, the Department concluded that there were no additional uses or diversion of water from the channel other than the pond.

10. On August 10, 2004, the Department sent correspondence to Gordon S. Thatcher regarding scheduling of a pre-hearing conference.

11. On September 7, 2004, BP Bar Ranch, Inc. (BP), petitioned to intervene in the contested case through its attorney of record James P. Speck. The Department granted intervention to BP on September 30, 2004.

12. On November 15, 2004, the Department conducted a pre-hearing conference with Dowton, and his attorney Jerry Rigby. Also participating in the conference was James P. Speck, representing BP.

13. The Department and the parties attending the conference agreed that the control structure at the head of the channel had been used historically as a device for restricting flows down the channel, not for diverting water to the channel. The Department stated it would revoke its order dated June 21, 2004 that required Dowton to shut off the water to the channel. The Department further agreed to send a copy of all aerial photos or images that it had on file showing the channel and surrounding lands. The Department and parties also discussed concerns about the installation of the culvert and control gate/standpipe, as well as the pond that was excavated in the channel by Dowton within the past three years. The Department advised the parties that a Notice of Violation might be issued to Dowton for creating a pond without a water right and altering the stream channel without a permit.

14. At the pre-hearing conference on November 15, 2004, the participants discussed whether any valid water rights were appurtenant to the land irrigated by Dowton between the channel and the Pahsimeroi River. The Department researched its water right records and has determined that Dowton owns one valid water right that is appurtenant to the land between the channel and the river, within the SESE of Section 17, T15N, R21E. The water right is decreed 73-87, with a priority date of May 1, 1900. The source of water for the right is the Pahsimeroi River.

#### CONCLUSIONS OF LAW

1. Idaho Code 42-351 states, in pertinent part:

(1) It is unlawful for any person to divert or use water from a natural watercourse or from a ground water source without having obtained a valid water right to do so, or to divert and use water not in conformance with a valid water right.

...

(3) Upon investigation of available information, the director of the department of water resources shall have the discretion to issue a written notice of violation to the person in accordance with the provisions of section 42-1701B, Idaho Code, for the illegal diversion or use of water.

2. Idaho Code 42-3803(a) states, in pertinent part:

No person shall engage in any project or activity which will alter a stream channel without first applying to and receiving a permit therefore from the director (of the department of water resources).

3. Idaho Code 42-3809(2) states, in pertinent part:

When the director of the department of water resources determines that any person is in violation of any provision of this chapter ..., the director may commence an administrative enforcement action by issuing a written notice of violation in accordance with the provisions of section 42-1701B, Idaho Code.

4. Idaho Code 42- 1701B(2) states, in pertinent part:

The notice of violation shall state the remedy, including any demand to cease and desist, restoration and mitigation measures, and the amount of any civil penalty the director seeks for redress of the violation.

5. Idaho Code 42-1701B(6)(a) further states:

Any person determined in a judicial civil enforcement action to have substantially violated any designated provision of title 42, Idaho Code, or any rule promulgated pursuant to that title, shall be liable for a civil penalty not to exceed ten thousand dollars (\$10,000), or one hundred fifty dollars (\$150) per day for a continuing violation, whichever is greater; except that persons determined to be in violation of section 42-351, Idaho Code, shall be liable for a civil penalty not to exceed:

(i) For non-irrigation uses, fifty dollars (\$50) per one-tenth (0.1) cubic feet per second of water or part thereof diverted per calendar day, or fifty dollars (\$50) per two-tenths (0.2) of an acre-foot of water or part thereof diverted to storage, up to a maximum penalty of fifty thousand dollars (\$50,000) per year for water illegally used or diverted.

6. The director should issue a Notice of Violation instructing Dowton to obtain a valid water right for the pond located in the SESE of Section 17, T15N, R21E, or either remove or re-design the middle culvert and return the stream to its former state with a plan approved by IDWR.

### ORDER

IT IS HEREBY ORDERED as follows:

1. The Notice of Violation and Cease and Desist Order dated June 21, 2004, that required Dowton to shut off the water to the channel from the Pahsimeroi River, whose heading is located in the SESE of Section 17, T15N, R21E, is REVOKED.
2. Dowton shall cease and desist from storing water in the pond behind the middle culvert until the Department approves a water right for this use.
3. If Dowton does not obtain a water right for the pond, then he shall complete the following restoration and mitigation measures:
  - a) Return the stream to its former average width in a manner that will not cause sediment movement downstream, and re-vegetate the stream banks and disturbed areas with a mix of desirable native forbs, grasses, trees and shrubs approved by Idaho Department of Fish and Game and IDWR.
  - b) Submit a plan to the Department for the stream channel restoration and re-vegetation work. No restoration work shall commence until the Department approves the plan.

- c) Re-design or remove the middle culvert and ditch crossing to accommodate flood flow capacities of the channel.
4. Sufficient information must be provided to the Department to insure that the middle culvert and other stream crossings on Dowton's property are adequately sized to carry the expected peak flows without failure.
5. Dowton shall apply under the Stream Channel Protection Act for authorization to conduct any additional work within the channel including work within the existing pond.
6. For failure to comply with the law, Dowton shall pay a one thousand dollar (\$1,000) civil penalty to the Department, which penalty is due on or before June 1, 2005. The Department will suspend six hundred dollars (\$600) of the penalty upon implementation of items two through three of the order above (i.e.; filing of a water right or water right transfer application or completing the restoration measures, and submitting information to show that the culverts and stream crossings are adequately sized to handle peak flows without failure).
7. Dowton shall have the opportunity to enter into a **Consent Agreement** with the Department to remedy the violation and to assure future compliance with the laws of the State of Idaho.

DATED this 12<sup>th</sup> day of April, 2005.



L. GLEN SAXTON, P.E.  
Administrator  
Water Management Division

**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. 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.