



State of Idaho

DEPARTMENT OF WATER RESOURCES

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Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: [www.idwr.idaho.gov](http://www.idwr.idaho.gov).

DIRK KEMPTHORNE  
Governor

KARL J. DREHER  
Director

May 19, 2005

Re: In the matter of diversion of water by Jimmie Dowton without a valid water right and alteration of a stream channel without a permit

Dear Interested Parties:

The Department of Water Resources (department) has issued the enclosed **Order Denying Petition for Reconsideration** pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party files an exception and/or brief as described in the enclosed information sheet.**

If you have any questions, please call me at (208) 287-4942.

Sincerely,

A handwritten signature in cursive script that reads "Deborah J. Gibson".

Deborah J. Gibson  
Administrative Assistant  
Water Allocation Bureau

Enclosures

c: IDWR - Regional Office

RECEIVED

MAY 23 2005

Department of Water Resources  
Eastern Region

## **EXPLANATORY INFORMATION**

The accompanying order is an **Order Denying Petition for Reconsideration** of the "preliminary order" issued previously in this proceeding by the department pursuant to section 67-5243, Idaho Code.

### **EXCEPTIONS AND BRIEFS**

Within fourteen (14) days after the service date of this denial of petition for reconsideration of the preliminary order, any party may in writing file exceptions to any part of the preliminary order and file a brief 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.

If any party appeals or takes exceptions to the preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

### **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 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.

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF DIVERSION OF	)	
WATER BY JIMMIE DOWTON	)	<b>ORDER DENYING</b>
WITHOUT A VALID WATER RIGHT	)	<b>PETITION FOR</b>
AND ALTERATION OF A STREAM	)	<b>RECONSIDERATION</b>
CHANNEL WITHOUT A PERMIT	)	
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On April 12, 2005, the Idaho Department of Water Resources (IDWR) issued an Order Revoking Cease and Desist Order Dated June 21, 2004 and, in the same document, issued a Notice of Violation and Cease and Desist Order to Jimmie Dowton (Dowton). The June 21, 2004 cease and desist order (now revoked) was issued to Jimmie Dowton because IDWR initially concluded Dowton was diverting water from the Pahsimeroi River into a channel traversing the Dowton property (referred to hereafter as the "Dowton Channel"). Dowton requested a hearing, creating a contested case. BP Bar Ranch, Inc. (BP) intervened in the contested case.

After further investigation, IDWR determined: (1) The headworks at the mouth of the Dowton Channel had been in place for decades and was used to prevent flow of flood waters into the Dowton Channel, not to divert water; (2) IDWR did not have sufficient evidence to determine that Dowton had placed material in the Pahsimeroi River channel to increase flows into the Dowton Channel; and (3) the Dowton channel is a natural flow channel of the Pahsimeroi River and is not an artificial channel.

The current Notice of Violation and Cease and Desist Order was issued to Dowton because Dowton excavated in the Dowton channel, placed a culvert in the Dowton Channel, and impounded water behind the culvert.

On April 27, 2005, BP filed a Petition for Reconsideration. The Petition for Reconsideration was timely filed.

In the Petition for Reconsideration, BP argues the following:

The Department should review all photographs of the work in BP's possession, take those steps necessary to obtain all applicable aerial photography, order a site visit by BP's representatives accompanied by the Department's stream channel alteration specialist, evaluate all of the additional evidence, and then reconsider its decision to not order the removal of this material from the River.

Two issues are implied in BP's Petition for Reconsideration: (1) Is the Dowton Channel a natural channel of the Pahsimeroi River or an artificial channel constructed by Dowtons?, and (2) Was material placed in the Pahsimeroi River to force more water into the Dowton Channel?

IDWR reviewed all the photographs provided by BP. IDWR had previously reviewed most of the information submitted by BP. IDWR remains convinced the Dowton Channel is a natural flow channel. Although there may be other photographs not immediately available to IDWR, IDWR does not believe these additional photographs would change the determination by IDWR.

Staff of IDWR and the U.S. Army Corps of Engineers trained to assess stream channel alterations inspected the headworks of the Dowton Channel and the material in the Pahsimeroi River Channel directly downstream from the headworks. The inspectors could not determine whether the material in the channel had been naturally or artificially placed in the channel. Furthermore, the aerial images reviewed by IDWR do not reveal sufficient detail at the headworks to determine whether material in the Pahsimeroi River was naturally or artificially deposited. As a result, IDWR could not determine whether Dowton altered the channel of the Pahsimeroi River.

IDWR does not have the authority to order Dowton to allow a private third party to enter onto Dowton's property.

#### ORDER

IT IS HEREBY ORDERED that the Petition for Reconsideration filed by BP Bar Ranch, Inc. is **DENIED**.

Dated this 18<sup>th</sup> day of May, 2005.



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Gary Spackman  
Water Allocation Bureau Chief

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19<sup>th</sup> day of May, 2005, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

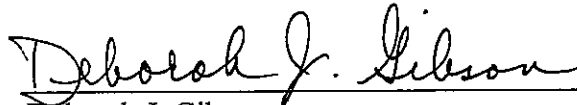
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Deborah J. Gibson  
Administrative Assistant  
Water Allocation Bureau