



State of Idaho

DEPARTMENT OF WATER RESOURCES

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DIRK KEMPTHORNE  
Governor

KARL J. DREHER  
Director

September 29, 2005

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

Jim Dowton Jr.  
Box 1217  
Challis, ID 83226

RECEIVED

OCT 03 2005

Re: Consent Order and Agreement; Notice of Violation Dated April 12, 2005

Department of Water Resources  
Eastern Region

Dear Sirs,

I am in receipt of the Consent Order and Agreement that you executed on September 21, 2005 regarding the Notice of Violation dated April 12, 2005. Please find attached a copy of the agreement that I have executed on behalf of the Idaho Department of Water Resources. The Department appreciates your continued cooperation in this matter.

Please note that I modified some of the findings of fact on the order to reflect the fact that you remitted payment for the original civil penalty in the amount of \$400. Your attorney, Jerry Rigby, remitted the payment on your behalf to the Department on June 3, 2005. The findings were also modified to reflect that you and/or Mr. Rigby visited our regional office on June 30, 2005 and initiated work with Department staff towards submittal of a water right transfer that the Department accepted on September 21, 2005. There had been some miscommunication between the regional office and myself regarding the actions that you took over the summer to comply with the Notice of Violation. I apologize for this misunderstanding and any inconvenience this may have caused.

Please contact me directly at 208-327-7864 if you have any further concerns or questions regarding this matter. The Department appreciates the cooperation you have provided regarding compliance with the Notice of Violation.

Respectfully,

Tim Luke  
Water Distribution Section

Enclosure

- c: Roger Warner, IDWR Eastern Region ✓
- Jerry Rigby, Attorney
- James Speck, Attorney
- Gary Spackman, IDWR
- Terry Blau, IDWR Stream Channel Program
- Bob Foster, IDWR Salmon Field Office
- John Homan, Idaho Attorney General's Office

**BEFORE THE DEPARTMENT OF WATER RESOURCES**  
**OF THE STATE OF IDAHO**  
**CONSENT ORDER AND AGREEMENT**

In the matter of Notice of Violation and Cease and Desist Order dated April 12, 2005, issued to Jim Dowton, pursuant to Section 42-1701B, Idaho Code.

**Findings of Fact**

- 1) Jim Dowton ("Dowton") is the owner of property situated in the SE1/4 of Section 17, Township 15 North (T15N), Range 21 East (R21E), Custer County. The Idaho Department of Water Resources ("Department") issued a Notice of Violation and Cease and Desist Order to Dowton on April 12, 2005 for altering a natural stream channel without a permit and/or storing water in a pond without a water right within the above referenced location. The stream channel in question is an unnamed slough off of the Pahsimeroi River, whose heading is located in the SESE of Section 17, T15N, R21E.
- 2) The Department's order of April 12, 2005 also revoked a Cease and Desist Order dated June 21, 2004 that was issued by the Department to Dowton. The 2004 order required Dowton to shut off water flowing to the above referenced channel by installing check boards or some other controlling device in the wooden control structure located at the head of the ditch channel. The Department issued the order because there were no valid water rights for any uses on the channel, and because it believed that the channel was a former ditch controlled by the wooden check structure located at the head of the channel. Dowton contested the Department's 2004 order and requested a hearing in the matter. A pre-hearing conference was held on November 15, 2004 between representatives of the Department and Dowton and his attorney, Jerry Rigby. Also participating in the hearing was James P. Speck, attorney for BP Bar Ranch, who filed a petition to intervene in the matter contested by Dowton.
- 3) 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 high 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. Either at the November 15, 2004 Department conference, or during one or more field visits with Department representatives prior to the conference, Dowton explained that he 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, or the middle culvert, 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. Dowton also acknowledged that he widened the stream channel located above the control culvert to create a wildlife pond. The Department and parties attending the November 15, 2004 conference discussed concerns about the installation of the two culverts and the check

boards on the culvert where the pond is located, 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 would likely be issued to Dowton for creating a pond without a water right and altering the stream channel without a permit.

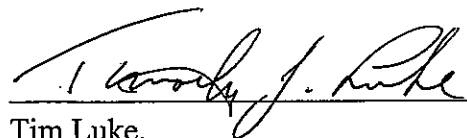
- 4) The Notice of Violation and Cease and Desist Order issued by the Department on April 12, 2005 required that Dowton take the following actions:
  - a) Cease and desist from storing water in the wildlife pond until the Department approves a water right for this use.
  - b) Implement certain stream channel restoration and mitigation measures if a water right is not obtained for the pond (see April 12, 2005 Cease and Desist Order for specific details).
  - c) Provide information to the Department to insure that the culverts installed by Dowton are adequately sized to carry expected peak flows without failure.
  - d) Obtain the necessary approval under the Stream Channel Protection Act before conducting any work within the channel or pond.
  - e) Pay a civil penalty of \$1,000 to the Department on or before June 1, 2005, or pay a civil penalty of \$400 on or before June 1, 2005 if items (a) and (b) above are implemented.
  
- 5) The Department's notice accompanying the April 12, 2005 Notice of Violation and Cease and Desist Order provided Dowton an opportunity to request a compliance conference with the Department. Neither Dowton, nor his attorney requested a compliance conference after issuance of the order dated April 12, 2005. Dowton's attorney contacted the Department prior to June 1, 2005, and indicated that both he and Dowton concurred with the order, and that a penalty of \$400 would be remitted to the Department. Dowton's attorney remitted payment of \$400 to the Department on June 3, 2005. Dowton and his attorney also visited the Department's regional office on June 30, 2005 and submitted a preliminary water right transfer application for review by the Department's regional staff. The application proposed changing the nature of use of an existing water right for the pond.
  
- 6) A Department representative conducted a field inspection of the channel and pond on July 18, 2005. Dowton accompanied the Department representative along with a consultant representing BP Bar Ranch. The Department representative verified that water was not checked up at the control culvert and there was no evidence that the level of the pond had been increased, or that any water had been impounded beyond the normal free flow condition through the culvert. The Department representative did not observe implementation of any restoration or mitigation measures on the channel. Dowton has not submitted any information to the Department regarding culvert sizing and ability to handle peak flows without failure. Dowton has not sought any approval from the Department to conduct any restoration or mitigation work within the pond or stream channel.

In order to remedy the Notice of Violation issued by the Department on April 12, 2005, Dowton and the Department agree as follows:

**Terms of Agreement**

- 1) Dowton agrees to cease and desist further storage of water in the wildlife pond located within the SE1/4 of T15N, R21E until a valid water right is obtained for this use.
- 2) On or before September 21, 2005, Dowton must submit to the Department one of the following items:
  - a) File with the Department an application for water right, or and application for transfer of a water right, along with any appropriate application filing fees, for the use of the wildlife pond located within the SE1/4 of T15N, R21E.
  - b) Submit a plan and time table to the Department for stream channel restoration and re-vegetation work along the channel where the culverts were installed and where the pond was excavated. No restoration or other work within the channel shall commence until the Department approves the plan. The plan must address re-design or removal of the middle culvert and ditch crossing to accommodate flood flow capacities of the channel. The plan must also include sufficient information 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.
- 3) Payment of an agreed civil penalty in the amount of one thousand dollars (\$1,000) is payable to the Idaho Department of Water Resources on, or before September 21, 2005, for the violations identified in the Notice of Violation dated April 12, 2005. The Department will suspend six hundred dollars (\$600) of the penalty upon implementation of item two above.
- 4) The Department may commence and prosecute a civil enforcement action in district court if Dowton fails to comply with any of the terms of this agreement.
- 5) This agreement does not limit the Department from seeking future compliance or regulation of said water use for other issues not directly related to the unauthorized uses that occurred this year.

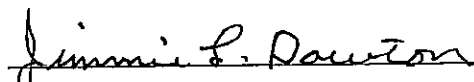
Dated this 29<sup>th</sup> day of September 2005.

  
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Tim Luke,  
Manager, Water Distribution Section  
Idaho Department of Water Resources

## CONSENT

Respondent Dowton acknowledges, in general, the facts set forth during the conference and accepts fully the terms and conditions of this Order. These terms shall become effective upon execution by the parties. Respondent waives any right to contest this Order and consents to the issue hereof.

Signed this 21 day of Sept, 2005.

  
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Jim Dowton