



State of Idaho

DEPARTMENT OF WATER RESOURCES

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

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

JAMES E. RISCH
Governor

KARL J. DREHER
Director

July 27, 2006

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

CERTIFIED MAIL

Re: Notice of Violation and Cease and Desist Order

Dear Mr. Dowton,

Please find enclosed a Notice of Violation and Cease and Desist Order regarding irrigation of lands without a water right. The Idaho Department of Water Resources (Department) sent you a Pending Notice of Violation letter dated June 27, 2006 about this matter but received no response. Please note all civil penalties and compliance dates stipulated in the attached order.

If you object to any provision in this Notice of Violation and Cease and Desist Order, you have the opportunity to schedule a compliance conference to discuss the violation with the Department in accordance with Section 42-1701B, Idaho Code. If you wish to request a compliance conference with the Department, you must do so within 14 days of receipt of this notice. The Department will schedule a conference within 21 days of receipt of the notice or at a later date that is mutually convenient. If a compliance conference is not requested or you fail to comply with the requirements of this notice, the Department may proceed with a civil enforcement action through the Attorney General in district court.

Please write this office or contact me directly at 208-287-4959 to request a compliance conference or discuss any questions you may have concerning this matter.

Respectfully,

Tim Luke
Water Distribution Section Manager

Encl.

Cc: Ted O'Neal, Water District 73 Watermaster
Gary Spackman, IDWR Water Allocations Bureau Chief
Bob Foster, IDWR Salmon Field Office
Roxanne Brown, IDWR Adjudication Bureau
Lyle Swank, IDWR Eastern Region Manager
John Homan, Deputy Attorney General

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

IN THE MATTER OF DIVERSION)
OF WATER BY JIM DOWTON SR.) NOTICE OF VIOLATION AND CEASE
WITHOUT A VALID WATER RIGHT) AND DESIST ORDER

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 use of water by Jim Dowton Sr., (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 June 19, 2006, Department staff investigated use of an irrigation center pivot on land owned by Dowton located in the NESE of Section 20, T15N, R20E, B.M., in Custer County. Department staff found what appeared to be an expansion of the center pivot at this location involving approximately 15 acres of land. The 15 acres under the pivot had a three to four inch crop growth and there was evidence of pivot tracks running across this growth.
2. Review of aerial photography and/or satellite images from previous years show no prior evidence of irrigation of the 15 acres in question. The review indicates that the expansion occurred in 2006.
3. Further review of the irrigation water rights owned or claimed by Dowton indicates that Dowton is irrigating about 73 acres more than the total number of acres authorized by his irrigation water rights, including the 15 acres described in items 1 and 2 above. The water rights owned or claimed by Dowton and reviewed by the Department in making this finding include 73-86C, 73-86D, 73-87, 73-96A, 73-96B, 73-97A, 73-2170, and 73-10058. The additional 58 acres of irrigation also appear to be an expansion of use without valid water rights. The 58 acres are located primarily in the NENW, NWNE, SWNE and SENE of Section 20, and the SESW of Section 17, T15N, R21E. Expansion of these approximately 58 acres appears to have occurred between 1992 and 2004 based on review of available satellite imagery. Field visits by IDWR staff in 2006 confirm that the 58 acres in question have been irrigated in 2006. Aerial photography from 1988 shows the total irrigated acreage under the above referenced water rights and lands owned by Dowton to be 493 acres. The total irrigated acres in 2004 are about 551 acres and the total irrigated acres in 2006 are about 566 acres.

4. The Department sent Dowton a Pending Notice of Violation Regarding Potential Unauthorized Use of Water dated June 27, 2006. The notice was sent by certified mail and advised Dowton regarding the Department's investigation of the 2006 15-acre pivot expansion and the fact that those acres had no prior history of irrigation. The notice further advised Dowton of the Department's finding that that the total acres irrigated by Dowton exceed the total number of acres authorized by his rights. The notice advised Dowton that a search of Department records found no additional water rights or claims for the expanded irrigated acres. The notice asked Dowton to identify any water rights that may authorize the irrigation expansions and/or to clarify the Department's understanding about Dowton's water rights and claims. The letter further asked that Dowton either cease and desist from diverting water to at least the 15-acre expansion or obtain a valid water right for use of the 15-acre expansion. Dowton was asked to respond to the Department within ten (10) days of receiving the notice.

5. On or about July 14, 2006, the Department received from the United States Postal Service a return receipt of the certified Pending Notice of Violation dated June 27, 2006 sent to Dowton. The receipt showed that the Pending Notice of Violation was received at Dowton's address of record on file at the Department on July 11, 2006. A Linda Hatch signed the return receipt on behalf of or as an agent of Dowton.

6. As of the date of this order, Dowton has not contacted the Department regarding the Department's Pending Notice of Violation dated June 27, 2006.

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- 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.

3. 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:

...
(ii) For irrigation uses, three hundred dollars (\$300) annually for each acre irrigated, in whole or in part, by the illegal use or diversion.


4. The director should issue a Notice of Violation instructing Dowton to cease and desist from irrigating the 73-acre expansion or obtain a valid water right for the expansion.

ORDER

IT IS HEREBY ORDERED as follows:

1. Dowton shall cease and desist any further diversion of water to the 73-acre irrigation expansion located in the NENW, NWNE, SWNE, SENE and NESE of Section 20, and the SESW of Section 17, T15N, R21E. Dowton shall not irrigate the 73 acres until valid water rights are obtained for the lands or unless authorized by the Department.
2. Dowton shall pay a civil penalty in the amount of twenty-one thousand, nine hundred dollars (\$21,900), which is the maximum penalty authorized by law for an illegal diversion of water for irrigation of 73 acres. The civil penalty shall be due and payable to the Department no later than August 31, 2006.
3. 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 27th day of July, 2006.


DAVID R TUTHILL, Jr.
Administrator
Water Management Division