BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 21-13127 IN THE NAME OF DOUGLAS AND/OR DARLA CUTLER	)))	**PRELIMINARY ORDER DENYING PERMIT**

On October 3, 2011, Douglas and Darla Cutler ("Applicants" or "Cutlers") filed Application for Permit No. 21-13127 with the Idaho Department of Water Resources ("Department"), seeking a permit to divert 0.20 cfs from the middle channel of Yale Creek for aesthetic flow and 1.4 acre-feet for aesthetic storage.

The application was advertised to the public beginning on November 3, 2011. Protests were filed by Matt Barton, Fremont-Madison Irrigation District ("FMID"), and Greg and Sandra Studley. On February 17, 2012, the Cutlers and FMID signed a *Stipulation for Withdrawal of Protest* ("FMID Stipulation"). FMID agreed to withdraw its protest in exchange for the Cutlers agreeing to satisfy certain requirements on an annual basis.

The remaining parties were unable to resolve the issues of protest and requested that a formal hearing be held. A hearing was conducted on November 20, 2013 at the FMID office in St. Anthony, Idaho. The parties were allowed to offer testimony and documents into the administrative record. After considering all of the evidence in the administrative record for this application, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application for Permit 21-13127 proposes diverting 0.20 cfs from the middle channel of Yale Creek to fill and maintain a 0.6-acre aesthetic pond located in the NWNE of Section 12, T13N, R42E. The proposed point of diversion from Yale Creek is located within the Applicant's property and is described as the SWNWNE of Section 12, T13N, R42E.

2. The aesthetic pond and flow-through diversion system was constructed in 1999 and has been used since then without a water right. On September 26, 2011, the Department notified the Cutlers that their diversion from Yale Creek was not covered by a water right and ordered the Cutlers to cease and desist any further diversion from Yale Creek until a water right was obtained. Application for Permit 21-13127 was filed in response to the 2011 notice from the Department. There is no evidence in the record that the pond system was used in 2012 or 2013.

3. The existing diversion system consists of a 4" pvc pipe running from the middle channel of Yale Creek to a waterfall feature on the property and then into the aesthetic pond. (Testimony of Douglas Cutler) The 4" pvc pipe runs approximately 100 feet and loses 3 feet in elevation across that distance. (Id.) Given these parameters, the system has a capacity of approximately 0.50 cfs.

The existing diversion system has the capacity to divert the full amount of water proposed in the pending application.

4. According to aerial photography, the pond built by the Cutlers covers approximately 0.6 acres when the pond is full. Using evaporation data from ET Idaho 2009 for the Island Park station, the average daily evaporation during the month of July from a 0.6-acre shallow pond is 0.007 acre-feet (2,250 gallons per day).

5. Yale Creek splits into three channels at a point on the creek upstream of the proposed point of diversion on the middle channel. The split is located approximately 0.5 miles north of the Cutler property.

6. On October 18, 2012, the Department conducted a public hearing to determine which of the Yale Creek channels constitute natural water courses and how the Yale Creek split should be managed. Based on the evidence collected at the public hearing, the Department issued a Cease and Desist Order governing the Yale Creek split. ("Yale Creek Order") The hearing officer for this contested case took official notice of the Yale Creek Order and all of the evidence provided in the October 2012 public hearing.

7. Approximately one mile downstream of the national forest boundary, Yale Creek flows through a culvert under Pine Crest Drive and then splits into three channels. There are no manmade structures causing the creek to split.

8. One of the channels heads to the east ("east channel"), and flows into the West Fork of Mill Creek approximately 1.5 miles downstream of the creek split. Another channel heads to the south ("west channel") and flows into Hotel Creek about 0.6 miles downstream of the creek split. Hotel Creek and Mill Creek flow into Island Park Reservoir.

9. The third channel heads to the southeast (referred to in this order as the "middle channel") and flows into Hotel Creek about 1.0 miles downstream of the creek split. In recent years, the middle channel connects with Hotel Creek for only about one month of the year. During the rest of the year, water flowing into the middle channel sinks before reaching Hotel Creek.

10. For the last 40 years, the middle channel has conveyed less water than the west or east channels. The east and west channels carry the majority of the creek flow. The size and capacity of the middle channel is smaller than the other two channels. The middle channel cannot support the full flow of Yale Creek during high-flow events. However, during high-flow events, the middle channel can still convey a large amount of water.

11. Within the Yale Creek Order, the Department recognized that all three channels now constitute natural, unregulated streams. The Department asserted jurisdiction over the upper portion of all three channels under the Stream Channel Protection Act. The Yale Creek Order included the following order:

> [A]ll people shall cease and desist any manipulation of Yale Creek flows at the creek split. Yale Creek shall be returned to its natural, unblocked state and shall be

allowed to flow through some or all of the three channels according to the natural conductivity of the channels. The flow of the creek shall not be inhibited or blocked in any way near the creek split unless a stream channel permit is obtained to do so.

12. Water from Yale Creek ultimately flows into Island Park Reservoir which releases water into the Henrys Fork of the Snake River. Numerous water rights exist on the Henrys Fork and on the mainstem of the Snake River downstream of the proposed pond.

13. Water delivery records for Water District 01 (Upper Snake River) show that water rights are curtailed in the Upper Snake River system every year. There are only brief periods of high water during the early summer when all water rights on the system are filled.

EVALUATION CRITERIA / ANALYSIS

1. Idaho Code § 42-203A(5) states in pertinent part:

> 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 . . . 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.

2. The applicant bears the ultimate burden of proof regarding all factors set forth in Idaho Code § 42-203A(5).

Injury to Other Water Rights

1. Approval of Permit 21-13127 could reduce the quantity of water under existing water rights. When the middle channel of Yale Creek is connected to Hotel Creek, evaporation from the pond could reduce the quantity of water available to downstream senior water rights.

2. Rule 45.01.a.iv of the Department's Water Appropriation Rules (IDAPA 37.03.08) states: "An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director."

3. The FMID Stipulation signed by the Applicants and FMID proposes a mitigation plan to protect senior water right holders. FMID represents a number of canal companies which divert

water from the Henrys Fork under senior water rights. However, FMID does not represent all water right holders in the Upper Snake River basin.

4. The FMID Stipulation states that the Applicants will rent storage water from the Water District 01 Rental Pool to offset any losses associated with evaporation from the pond.

5. The Water District 01 Rental Pool is not a reliable source of mitigation. The rules governing the rental of water from the Rental Pool change every year. The rules specify who is allowed to rent water and which groups or individuals have priority status to rent the available water. There is a legitimate risk that the Rental Pool rules could be altered to exclude the Applicants from the rental system.

6. Water in the Water District 01 Rental Pool is made up of storage water diverted (stored) under existing water rights. Therefore, any use of the storage water from the Rental Pool still constitutes a reduction in the quantity of water available for use by senior water rights.

7. Renting water from the Water District 01 Rental Pool, by itself, does not add any water to the Snake River system during the times when evaporation losses are occurring. The proposed rental would occur at the beginning of the irrigation season and is largely a paper transaction. There is not a mechanism currently available in the Water District 01 accounting to deliver the storage water in real-time to the parties affected by the evaporation from the proposed pond.

8. For all of these reasons, the mitigation proposed in the FMID Stipulation does not constitute a viable mitigation plan. Although FMID may have given its consent to the proposed mitigation plan, the remaining water users in the Upper Snake basin have not given their consent to the potential injury.

9. One option to avoid injury to other water rights would be to condition the Cutler's permit so that water could only be diverted to fill and maintain the pond when the middle channel of Yale Creek becomes disconnected from Hotel Creek. In such a scenario, any consumptive use of water from the middle channel would be equivalent to a ground water diversion. Idaho Code § 42-111 and § 42-227 would allow the Cutlers to fill and maintain their pond with ground water as long as the total diversion did not exceed 2,500 gallons per day.

10. There was not sufficient evidence provided at the hearing to determine whether this option would be possible. If the flow in the middle channel of Yale Creek is so low that it becomes disconnected from Hotel Creek, it is likely that the flow reaching the Cutler property is minimal. Without additional evidence about the flows in the middle channel of Yale Creek, particularly during low flow events, this option cannot be adopted.

Sufficiency of Water Supply

11. The Applicant (through the evidence provided in the October 2012 public hearing) demonstrated that during the spring run-off period there is sufficient water in the middle channel of Yale Creek to accomplish the proposed use. As stated above, there was not sufficient evidence

presented to determine whether, in the late summer, the flow in the middle channel of Yale Creek is sufficient to satisfy the proposed water use.

Good Faith / Financial Resources

12. Because the diversion works and pond have already been constructed, this review criterion is satisfied. The system constructed is fairly simple. The Application was filed in good faith and the Applicants have sufficient financial resources to maintain the existing system.

Local Public Interest

13. The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a). Local public interest is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." (Idaho Code § 42-202B(3))

14. Evidence presented at the October 2012 public hearing shows that the primary local interest in the three channels of Yale Creek is the increased property value associated with a flowing creek on or near the private properties.

15. Many of the current and previous owners of the recreational lots on all three channels purchased their properties with the understanding that the properties contained or bordered a creek. The prices for purchasing the properties were higher than other properties in the area because of access to the creek channels.

16. The Yale Creek channels are used by the local property owners for fishing and recreation. Current and previous owners have invested large amounts of money developing their properties to facilitate enjoyment of the creek channels.

17. Allowing the diversion of water from the Yale Creek channels for the fill and maintenance of aesthetic ponds would conflict with the local public interest.

Conservation of Water Resources

18. The Applicants demonstrated that the proposed use will be compatible with the conservation of water resources within the state of Idaho. The system proposed by the Applicants is not wasteful and does not demand an unreasonable amount of water for the proposed beneficial use.

Summary

19. Application for Permit 21-13127 should be denied because it will result in a reduction in the quantity of water available to downstream water rights. The mitigation proposed by FMID and the Applicants (annual storage water rental from the Water District 01 Rental Pool) does not constitute adequate mitigation because the rental would still result in a reduction in the quantity of water available to existing water rights.

20. Application for Permit 21-13127 should also be denied because it conflicts with the local public interest.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 21-13127 in the name of Douglas and/or Darla Cutler is DENIED.

Dated this 10th day of December, 2013.

James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of December 2013, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER DENYING PERMIT, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:

Sharla Cox
Administrative Assistant

US MAIL
RE: PRELIMINARY ORDER DENYING PERMIT

Douglas and Darla Cutler
PO Box 401
Island Park, ID 83429

Matt Barton
9968 East UV Ave
Vicksburg, MI 49097

Greg and Sandra Studley
2060 Monticello Drive
Idaho Falls, ID 83404

Kory Lofthouse
50 East Sunset Circle
Rexburg, ID 83440

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this 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, request 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 Department 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.

Section 67-5246(5), Idaho Code, provides as follows:

> Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
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> (a) The petition for reconsideration is disposed of; or
> (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.