BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION TO APPROPRIATE WATER NO. 63-31878, IN THE NAME OF BOWN CROSSING, LLC.	))))	**FINAL ORDER**

On February 8, 2005, the Idaho Department of Water Resources (the "Department") issued a *Preliminary Order* approving application for permit to appropriate water no. 63-31878 in the name of Bown Crossing, LLC. ("Bown Crossing"). On February 22, 2005, the U. S. Department of Interior, Bureau of Reclamation ("Reclamation") filed with the Department *Reclamation's Petition for Reconsideration.* On March 4, 2005, Bown Crossing responded to the petition for reconsideration. On March 10, 2005, the Department issued an *Order Denying Petition for Reconsideration.*

On March 23, 2005, Reclamation filed *Reclamation's Exceptions to the Preliminary Order* with the Director of the Department (the "Director"). On April 6, 2005, Bown Crossing responded to the exceptions. This final order addresses the exceptions.

EXCEPTIONS

Reclamation takes exception to the preliminary order on the following grounds:

1. Reclamation argues the Department cannot issue permit no. 63-31878 describing the source of water as the Boise River, and in the same permit, prohibit additional diversion from the Boise River under the permit;

2. Reclamation argues the Department cannot approve a water right permit authorizing diversion water from a canal or man-made channel that conveys already appropriated water; and

3. Reclamation argues the Department can only authorize diversion of already appropriated water through an application for transfer and associated reduction of use by the original appropriator.

Possible Inconsistency Between Source Identification and Restriction Prohibiting Additional Diversion from the Source of Water

When approving a permit to appropriate water, the Department must identify the source from which water is to be derived. The Department has consistently attempted to identify the public water supply from which water is to be diverted. In considering an application to appropriate water proposing a consumptive use of water, the analysis to determine whether there

is sufficient water for the purposes sought would require a determination of whether there is unappropriated water from the source. For applications proposing nonconsumptive uses of water, however, the Department need not consider whether there is additional unappropriated water in the source, but only whether there is sufficient water through the delivery system to satisfy the proposed use.

The Department has issued approved permits to appropriate water to holders of existing consumptive water rights who proposed secondary nonconsumptive uses of water. In addition, the Department has approved water right permits to proponents of nonconsumptive use of water diverted by others under perfected water rights. In both cases, a showing of unappropriated water was not required, but the water right identified the public water source from which water was derived.

There is no conflict in identifying the Boise River as the source of water and at the same time prohibiting diversion of additional water from the Boise River, limiting the use to water already diverted into Loggers Creek under existing water rights.

Appropriation of Water From a Man-Made Channel

The discussion of traditional appropriation for nonconsumptive uses set forth above to address the first exception is also applicable to this exception. In addition, adoption of Reclamation's argument would prevent the efficient use of existing facilities for additional beneficial use of the waters of the State of Idaho. The reasoning would require that new, parallel delivery facilities be constructed and may require additional quantities of water to be diverted from the source of water. Reclamation's argument contradicts legislative directives and common law promoting optimal utilization of the water resources of the state, and that new uses be consistent with principles of conservation of the waters of the State of Idaho.

A water right could not be perfected using the delivery system and trespassing upon the property or rights of way of existing water right holders. Applicant's Exhibit No. 10 is a letter to the applicant's counsel from River Run Homeowners' Association stating it has no objection to "use of Loggers Creek water in Bown Crossing only for non-consumptive aesthetic water rights." The consent of River Run Homeowners' Association allows Bown Crossing to divert Logger's Creek water into its aesthetic amenity channels.

Filing of an Application for Transfer

Reclamation correctly states that Bown Crossing could have filed an application for transfer. Filing an application for transfer was not its only alternative, however. If the factors that must be considered by the Department are satisfied, Bown Crossing can appropriate water with a recent priority date that is dependent on flows diverted under other water rights.

Unappropriated Water

Both Bown Crossing and Reclamation discuss testimony about stream flow gains to the Boise River between Lucky Peak and the point of diversion for the Logger's Creek Extension. The parties agreed that flows in the Boise River increase from 7 to 12 cfs between Lucky Peak

and the Logger's Creek Extension. Bown Crossing suggests that the decision may be deficient because it does not recognize the gain.

Because Bown Crossing stipulated that it would only divert water into its aesthetic amenity facilities that had been diverted under other water rights, it was not necessary to determine whether there was unappropriated water in the Boise River.

As a result of the above reasoning, amendment of the preliminary order is not necessary. The Director should adopt the preliminary order in its entirety.

ORDER

IT IS HEREBY ORDERED that the hearing officer's Preliminary Order dated February 8, 2005, is adopted in its entirety, and becomes the Final Order of the Director.

Dated this 17th day of November, 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November, 2005, a true and correct copy of the above and foregoing documents described below were served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Final Order
Statement of Available Procedures and Applicable Time Limits, when a hearing has been held.

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