

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

IN THE MATTER OF APPLICATION FOR)
PERMIT NO. 65-23006 IN THE NAME OF) **PRELIMINARY ORDER DENYING**
ROY M. BARNES) **APPLICATION FOR PERMIT**
_____)

PARTIES

On March 29, 2005, Roy M. Barnes (“Barnes” or “applicant”) applied to the Department of Water Resources (“IDWR” or “Department”) for a permit to appropriate 1.75 cubic feet per second (“cfs”) of water from the Payette River and from an unnamed drain flowing into the Payette River. The applicant proposes to use the water for irrigation, stock watering, wildlife, and wildlife storage purposes on his property located in the NE¼ of Section 10, T6N, R2W, B. M., in Gem County. IDWR assigned number 65-23006 to the application.

On February 13, 2006, Joy Sisler (“Sisler” or “protestant”) protested application no. 65-23006.

CASE SUMMARY

Roy Barnes, Joy Sisler, and others deliver water to their parcels of land through a shared ditch for irrigation and stock watering purposes. The ditch is commonly known as the Beutler-Bane Ditch. (In this order, the Beutler-Bane Ditch may be called simply “the ditch.”) Barnes’ diversion from the ditch is upstream from Sisler’s diversion from the ditch. In his application, Barnes proposes taking water from the ditch to irrigate 35 additional acres. Barnes also proposes using the ditch in the wintertime to deliver water into and through a series of small ponds on his property. Joy Sisler asserts that Roy Barnes’ increased use of the water in the ditch will reduce the amount of water available to fill her water rights during the irrigation season. Sisler also asserts that Roy Barnes’ use of water in the wintertime will prevent her from repairing and maintaining the shared ditch.

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On August 22, 2007, the Department conducted a hearing for Sisler's protest against application no. 65-23006. At the hearing, applicant Barnes represented himself, and protestant Sisler represented herself. The following witnesses testified at the hearing:

- Tim Shelton of Idaho Department of Fish and Game
- Applicant Roy Barnes
- Protestant Joy Sisler
- Joy Sisler's daughter Maggie Sisler

At the hearing, the hearing officer admitted the following items into evidence:

- Exhibit 1 – The applicant's photograph of a culvert/diversion works from the Gill Slough into the Beutler-Bane Ditch
- Exhibit 2 – The applicant's photograph of the culvert/diversion works blocked by an earthen berm.
- Public records maintained by the Department, including all records pertaining to water rights, claims to water rights, and applications for water rights.

JURISDICTION AND AUTHORITIES

Idaho Code § 42-202 states in pertinent part:

For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall, before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources for a permit to make such appropriation.

Idaho Code § 42-203A 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, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for

the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; 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.

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

Rule 45.01.c.i of the Department's Water Appropriation Rules (IDAPA 37.03.08.045.01.c.i) states that the application will be found to have been made in good faith if the applicant "shall have legal access to the property necessary to construct and operate the proposed project"

ISSUES PRESENTED

1. Sisler asserts that Barnes' proposed use of water would change the rotation of water by the users of the shared ditch. Sisler asserts that Barnes' proposed irrigation of 35 acres will require him to take water from the shared ditch for a longer period than has been his customary practice. Sisler asserts that by taking water for a longer period of time, Barnes will reduce the amount of time that water is available in the ditch to satisfy Sisler's water rights.

2. Sisler asserts that wintertime delivery of water in the Beutler Bane Ditch will encourage use of the ditch by muskrats and beavers and prevent maintenance of the ditch. Sisler asserts that muskrats and beavers will excavate along the banks of the ditch and cause blowouts in the ditch bank. After the ditch bank is breached, the ditch may not carry water during the time that Sisler needs the water to irrigate her land. Sisler argues that wintertime use of the ditch will eliminate the opportunity to maintain and repair the ditch. The applicant's proposed March 1 start date for the irrigation use instead of the March 15 start date authorized for other irrigation water rights delivered through the Beutler-Bane Ditch aggravates this concern.

FINDINGS OF FACT

1. In application no. 65-23006, Roy Barnes proposes to appropriate water from the Payette River during the irrigation season and from an unnamed drain, known locally as the Gill Slough, during the non-irrigation season. The elements of the proposed water right are:

Applicant: Roy M. Barnes

Priority Date: March 29, 2005

Sources and Points of Diversion:

- Diversion from the Payette River, a tributary of the Snake River, at Govt. Lot 7 (SW $\frac{1}{4}$ SW $\frac{1}{4}$), Section 6, Township 6 North, Range 1 West, B.M.
- Diversion from an Unnamed Drain, a tributary to the Payette River, at Govt. Lot 4 (SW $\frac{1}{4}$ NW $\frac{1}{4}$), Section 11, Township 6 North, Range 2 West, B.M.

Water Uses, Quantities, and Seasons of Use:

- Diversion to Storage 1.00 cfs 1/1 to 12/31
- Wildlife Storage 31.2 af 1/1 to 12/31
- Wildlife 1.00 cfs 1/1 to 12/31
- Irrigation (35 acres) 0.70 cfs 3/1 to 11/15
- Stockwater 0.05 cfs 1/1 to 12/31

Total Quantity: 1.75 cfs

Place of Use: Govt. Lots 1 and 2 (S $\frac{1}{2}$ NE $\frac{1}{4}$), Section 10, Township 6 North, Range 2 West, B.M.

2. The quantity of water requested for each of the proposed water uses is within the range that the Department typically deems to be reasonably efficient.

3. The watermaster of Water District 65 delivers Payette River water into the Gill Slough during the irrigation season. Roy Barnes, Joy Sisler, and others divert the Payette River water from the Gill Slough into the Beutler-Bane Ditch for delivery to their farms and ranches.

4. Barnes intends to use the water proposed for diversion in application no. 65-23006 for irrigation of 35 acres, for stock watering, and for filling, maintaining and refreshing a series of existing ponds that he constructed in cooperation with Idaho Department of Fish and Game.

5. Barnes does not seek to divert an additional rate of diversion from the Payette River into the Gill Slough during the irrigation season. Instead, Barnes seeks to irrigate 35 additional acres when he is not irrigating another field using water from the Payette River.

6. Water flowing through Barnes' ponds would discharge back to the Beutler-Bane Ditch and flow toward the protestant's land.

7. The ponds provide nesting, breeding, and rearing habitat for waterfowl from the late winter through the spring. In the late winter, the waterfowl stake out territory. In the spring, they build nests, breed, and rear their young. The ponds also provide loafing habitat for waterfowl in the summer, fall, and early winter. Barnes hunts ducks at the ponds in the fall. The ponds also support populations of fish, but fishing is a secondary purpose for the ponds.

8. Waterfowl benefit more from ponds with a stable water level than from ponds with fluctuating water levels. Fluctuating water levels can flood waterfowl nests, which are established late in April and inhabited through May. Waterfowl establish their nesting territories as early as the end of January. Stable water levels also promote the growth of insects and aquatic food eaten by ducks.

9. Joy R. Sisler, J. H. Sisler, or Sisler Family LLC own the following surface water rights for use on the ranch located at the end of Beutler-Bane Ditch on the north side of the Payette River in Sections 3, 4, 9, and 10 of Township 6 North, Range 2 West, Boise Meridian. Maggie Sisler, Joy Sisler's daughter, may also divert water as authorized by these water rights.

Basin	Sequence	Priority Date	Rate (cfs)	Source	Water Use(s)	Acres
65	3307	6/20/1968	0.10	WASTE WATER	IRRIGATION	3
65	3310	5/4/1959	0.51	WASTE WATER	IRRIGATION	15
65	11264	11/10/1883	8.05	PAYETTE RIVER	IRRIGATION	172
65	13881	4/23/1999	0.03	WASTE WATER	STOCKWATER	
65	13882	3/30/1999	0.03	PAYETTE RIVER	STOCKWATER	
65	22391	5/4/1959	0.02	WASTE WATER	STOCKWATER	
65	22392	6/20/1968		WASTE WATER	STOCKWATER	
65	22393	11/10/1883	0.02	PAYETTE RIVER	STOCKWATER	

10. Water Rights 65-11264 and 65-22393 are delivered through Gill Slough and the Beutler-Bane Ditch.

11. Barnes owns the following surface water rights for use on the farm located along the Beutler-Bane Ditch on the north side of the Payette River in Sections 3 and 10 of Township 6 North, Range 2 West, Boise Meridian:

Basin	Sequence	Priority Date	Rate (cfs)	Source	Water Use(s)	Acres
65	5312	11/27/1944	1.00	WASTE WATER	IRRIGATION	50
65	11262	11/10/1883	1.20	PAYETTE RIVER	IRRIGATION	41

12. Water Right 65-11262 is delivered through Gill Slough and the Beutler-Bane Ditch.

13. Storage of water in the ponds located on Barnes' land currently is not authorized by a water right.

14. Sisler and Barnes share the Beutler-Bane Ditch with other water users, including James Standley, the Richard and Roxanne Zamzow Trust, and Maggie Sisler.

15. James Standley owns the land where the water is diverted from the Gill Slough into the ditch. The ditch crosses through Standley's land before it reaches Barnes' land.

16. Barnes does not have a right-of-way for delivery of water across Standley's land during the irrigation season, and Barnes has not attempted to condemn or otherwise establish a right-of-way.

17. The users of water delivered through the Beutler-Bane Ditch rotate water on an informal basis. Barnes typically uses water delivered through the ditch 5 of every 15 days. Barnes proposes to use water up to five additional days of every 15 days to irrigate 35 additional acres. Joy Sisler and Maggie Sisler irrigate roughly four times the number of acres that Barnes irrigates.

Rotation benefits Joy Sisler and Maggie Sisler because they need a head of water sufficient to push water across the gravelly soil on their ranches.

18. With the possible exception of the Zamzows, who own land between Barnes and Sisler, the users of the Beutler-Bane Ditch do not maintain measuring devices and lockable controlling works sufficient for the regulation of water in strict accordance with their water rights.

19. Joy Sisler and Maggie Sisler clean and repair the Beutler-Bane Ditch during the non-irrigation season. Moss builds up in the ditch during the irrigation season, and muskrats and beavers damage the ditch banks. For adequate maintenance, the ditch must be dry for at least one month after the first of the year when water levels have dropped and ground water is not rising in the ditch. To dry out the ditch, the Sislers stop diverting stock water pursuant to right no. 65-22393 for approximately one month.

20. The season of use for the irrigation water rights currently delivered through the Gill Slough and the Beutler-Bane Ditch is March 15 to November 15.

21. The Beutler-Bane Ditch cannot carry 1.75 cfs more than it carries under existing water rights.

ANALYSIS

The users of the Beutler-Bane Ditch informally rotate water as an inexpensive alternative to employing reliable measuring devices, formally regulating their distribution of water, and establishing highly efficient irrigation systems. The Beutler-Bane Ditch will not hold more water than it carries now. Authorizing Barnes to take additional water from the Beutler-Bane Ditch during the irrigation season would upset the rotation that Sisler relies upon to receive a sufficient head of water to flood irrigate her land. The Department could require the Beutler-Bane Ditch users to install measuring devices and discontinue or modify the rotation to ensure strict compliance with each user's water rights. However, requiring measuring devices would impose an expense on all the users without ensuring that there would be enough capacity in the Beutler-Bane Ditch for delivery of the water requested in this application.

The proposed wintertime use of water is also problematic. Water rights cannot be established in trespass, and Barnes does not have a right-of-way to convey water across Jim Standley's land during the winter. (In fairness, however, it should be noted that Right 65-22393 authorizes Sisler to deliver a small amount of water all year through the Beutler-Bane Ditch for stock watering purposes). Barnes testified that he could not establish an alternative route of conveyance for the water. Furthermore, the ditch has to be dry for a month in January or February so Joy and Maggie Sislers can clean and repair it. January or February is when the local water table drops and the ditch dries out if no water is diverted into it. It is likely that the water level in Barnes' ponds also declines in January and February, just when waterfowl are establishing their territories prior to constructing their nests. If Barnes were to replenish the ponds in late February or March after the ditch had been cleaned and repaired, he would probably interrupt the waterfowl breeding activity he hopes to promote.

A troubling aspect of this case is that Barnes does not have a water right to store water in the ponds, which were constructed with financial support from the State of Idaho. While Barnes may have diverted Payette River water into the ponds in the past, the main source of water in the ponds is probably ground water that seeps into the man-made depressions. Barnes should fill the ponds or file an application to appropriate ground water for storage in the ponds.

CONCLUSIONS OF LAW

Reduction of the quantity of water under existing rights

1. The applicant did not show that he can use water during the irrigation season to irrigate 35 additional acres without reducing the amount of water available to the protestant.

2. *Interfering with the protestant's opportunity to clean and maintain the shared ditch, which she relies upon for the delivery of water under prior water rights, would injure the protestant by gradually or catastrophically reducing the ability of the ditch to carry water.*

Sufficiency of the water supply for the proposed use

3. The supply of water from the Payette River and the unnamed drain (Gill Slough) is sufficient for the proposed use. *Without diverting more water from the source, however, there will be insufficient water for the purposes sought.*

Good faith, delay, and speculation

4. Because Roy Barnes does not have legal access to convey water across his neighbor's property during the non-irrigation season, IDWR cannot find that he filed the application in good faith.

Financial resources

5. Roy Barnes has sufficient financial resources to complete the project proposed in the application.

Local public interest

6. It is not in the local public interest for the Beutler-Bane ditch to contain water year-round without the opportunity for cleaning and maintenance.

Conservation of water resources

7. The proposed appropriation of water is consistent with the conservation of water resources in Idaho because the proposed quantities of water do not exceed reasonable efficiency standards for the proposed water uses.

Potential adverse affects on the local economy

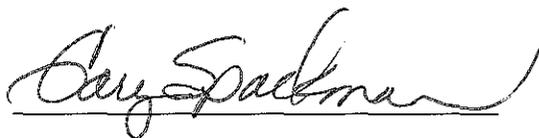
8. The proposed appropriation of water will not harm the economy of the watershed or local area where the water will be diverted and used.

9. The Department should reject the application as provided in Idaho Code § 42--203A.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that Application for Permit No. 65-23006 in the name of Roy Barnes is **REJECTED** and the issuance of a permit is **REFUSED**.

Dated this 28th day of January, 2008.



GARY SPACKMAN
Hearing Officer

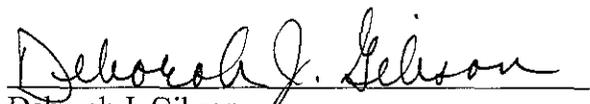
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of January, 2008, a true and correct copy of the foregoing document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Preliminary Order and Explanatory Sheet for "Responding to Preliminary Orders..." when a hearing was held.

Roy M. Barnes
2606 Sunset Dr
Emmett, ID 83617

Joy Sisler
4455 Sunset Dr.
Emmett, ID 83617


Deborah J. Gibson
Administrative Assistant