

MEMORANDUM

TO: Gary Spackman
FROM: John Homan 
DATE: April 5, 2010
RE: IN THE MATTER OF PERMIT NO. 35-8359 IN THE NAME OF JOHN B. KUGLER and DIANE K. KUGLER

At your request I reviewed the file in the above matter and make the following recommendation on how best to proceed given the long history of this permit and the recent orders issued by the Department. The application for permit in this case was filed in 1984. The Department issued Permit No. 35-8359 in 1991. Because development under Permit no. 35-8359 involved trust water, Kugler Permit was subject to additional restrictions. The Department has processed two 5 year extensions of time to file proof over the years and development of the permit has been delayed because of the Eastern Snake Plain Moratorium and Kugler's participation in the CRP program.

In November 2007, Kugler filed for another extension of time and the Department responded by issuing an Order dated December 6, 2007 entitled Order Continuing Stay in Development Period, but did not address the requested extension directly in the Order. Kugler filed a timely Request for Reconsideration and Hearing that was received by the Department on December 21, 2007. The Department held a hearing on January 21, 2009 and issued Preliminary Order Suspending Action and Prohibiting Development on March 23, 2009. Kugler filed a Petition for Reconsideration with the Department on April 6, 2009 alleging that among other issues that the hearing officer failed to fully consider mitigating factors as provided by law. The Petition for Reconsideration was denied by the Department on April 24, 2009. In response to the denial, Kugler filed with the Department on May 7, 2009 another document entitled Exception and Memorandum which is currently pending before the Department awaiting action.

In the May 7, 2009 Exception and Memorandum, Kugler alleges four exceptions.

- 1) lack of evidence in the record that development would significantly affect senior priority water rights requests that the Department grant reconsideration,

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- 2) the decision did not address the request for extension of time to complete proof,
- 3) that the Department's proposed action constitutes a takings claim under the U.S. Constitution and the Idaho Constitution, and
- 4) that the Department made no determination or findings about the mitigating circumstances that might allow the permit to proceed to development.

Exceptions nos. 1 and 4 appear to be similar and could be addressed in greater detail once the Department examines the extent of mitigation that might be offered by Kugler. Given the unique circumstances and the long and twisted history of this permit, I recommend that the Department issue an order granting review or reconsideration of the preliminary order for the purposes of revisiting at least those issues described under exceptions nos. 1 and 4 and provide Kugler with another opportunity to come before the Department and put on mitigation evidence of how the permit can be developed without harming senior water rights.

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