

Claim No. 21-7355

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

RECEIVED

DEC 1 1988

Department of Water Resources
Eastern District Office

IN THE MATTER OF APPLICATIONS FOR)
FOR PERMIT NOS. 21-7283 AND)
21-7355 (WARM RIVER) TO ESTABLISH)
A MINIMUM STREAMFLOW IN THE NAME)
OF THE IDAHO WATER RESOURCE BOARD)
_____)

PROPOSED MEMORANDUM
DECISION AND ORDER

On June 19, 1981, the Idaho Water Resource Board (Board) filed with the Idaho Department of Water Resources (Department) Application for Permit to Appropriate Water No. 21-7283, seeking to preserve a minimum streamflow on Warm River which is tributary to Henrys Fork, Snake River. The application proposed the establishment of a minimum streamflow in the reach of Warm River beginning at the confluence with the Henrys Fork, and extending upstream about one half mile to the Idaho State Highway 47 bridge.

On September 27, 1984, the Board filed an additional Application for Permit to Appropriate Water No. 21-7355 with the Department, which seeks to preserve a minimum flow in an additional eight miles of Warm River. The additional proposed minimum flow reach begins at State Highway 47 bridge, the upstream end of the reach proposed under Application No. 21-7283, and extends upstream to Warm River Springs.

Both applications seek a flow of 141 cubic feet per second (cfs) for the purpose of maintaining high quality fisheries and spawning and rearing habitat.

The Department consolidated the hearings on the two applications because they were for adjoining reaches of the same stream. Notice of the time and place of hearings was properly published. A public hearing was held in St. Anthony, Idaho, on November 20, 1985. Bobby D. Fleenor of the Department served as hearing officer.

Parties appearing in a formal capacity at the hearing included the Board which is the applicant, the Idaho Department of Fish and Game (Fish & Game), which supported the minimum flow and was the entity that requested the application be filed by the Board, and Leigh Chantrill, who opposed the application because it might prevent the water from being used for some future beneficial purpose. Other individuals and representatives of organizations also appeared and presented their views and comments as public witnesses with some for and some against the application.

After the close of the hearing, the record remained open for (15) fifteen days for the submission of additional written materials.

Based upon the sworn testimony, documentation, public statements included in the record, and upon his understanding of the facts and the law, the hearing officer, as a representative of the Director of the Department, finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application for Permit No. 21-7283 proposes a minimum streamflow of 141 cfs in the reach beginning in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec.

13, T9N, R43E, B.M., Fremont County, at the confluence of Warm River and Henrys Fork, and extending upstream approximately one-half mile to the intersection of State Highway 47 with Warm River located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 12, T9N, R43E, B.M., Fremont County.

2. Application for Permit No. 21-7355 proposes the establishment of a minimum streamflow of 141 cfs from the intersection of State Highway 47 and Warm River, located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 12, T9N, R43E, B.M., Fremont County, and extending upstream approximately eight (8) miles to a point where the flows from Warm River Springs discharge into Warm River, located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 10, T10N, R44E, B.M., Fremont County.

3. Historical records from 1912 through 1932 reveal that flows dropped below the requested minimum streamflow rate on only two occasions.

4. Fish & Game modeled the flows on Warm Springs to determine the minimum streamflow below which a substantial loss of fish habitat and aquatic food growth would occur. The studies were limited to four transects located in the lower one-half mile reach that is defined by Application for Permit No. 21-7283. Based upon Fish & Game studies, 141 cfs is the minimum streamflow in the one-half mile reach proposed by Application for Permit No. 21-7283 and is not the optimum or most desirable streamflow.

5. Warm River is an extraordinary river because of its constant flow, and the high quality of its water. Large numbers of fish residing in Henrys Fork spawn in Warm River.

6. Angler use is approximately 4,000 to 5,000 angler days per year. The river is heavily fished, particularly the lower reach defined by Application No. 21-7283.

7. The transects used for determination of a minimum flow do not represent the entire reach of river flow for which a minimum streamflow is being sought. The lower portion, where all the transects were located, is open and flows more slowly, while the upper portion which was not evaluated by using transects is more narrow and turbulent.

8. Only two water rights were found that list points of diversion within the proposed minimum flow reach. The diversions for those water rights are small, are prior in time, and will not affect the proposed minimum flows.

9. Policy 4D of the Idaho State Water Plan lists a portion of the proposed minimum streamflow reaches as a possible reservoir site. The Board requested that the minimum flow be subordinated to the proposed reservoir.

CONCLUSIONS OF LAW

1. Idaho Code § 42-1501 provides that streamflow preservation for the protection of fish and wildlife habitat, and recreation, is in the public interest and is declared to be a beneficial use of such water.

2. Idaho Code § 42-1503 sets forth the criteria to be considered by the Department in reviewing an application for minimum streamflow:

Upon the conclusion of the hearings and completion of any investigation conducted by the director, he shall enter his findings in writing approving the application in whole, or in part, or upon conditions or rejecting said

application. Approval of any such application must be based upon a finding that such appropriation of minimum streamflow:

- (a) will not interfere with any vested right, permit, or water right application with priority of right dated earlier than the date of receipt in the office of the director of a complete application for appropriation of minimum streamflow filed under the provisions of this act;
- (b) is in the public as opposed to private, interest;
- (c) is necessary for the preservation of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of the stream;
- (d) is the minimum flow or lake level and not the ideal or most desirable flow or lake level; and,
- (e) is capable of being maintained as evidence by records of stream flows, water levels, and the existing or future establishment of necessary gauging stations and bench marks.

3. Any right to be acquired under the application is for instream non-consumptive use and is subject to all vested water rights, permits, or water right applications having dates of priority earlier than June 19, 1981 for Application No. 21-7283 and September 27, 1984 for Application No. 21-7355.

4. A minimum streamflow appropriation is necessary to preserve recreational value and fish and wildlife habitat.

5. The establishment of a minimum streamflow on Warm River is in the public as opposed to the private interest.

6. Policy 4D of the Idaho State Water Plan lists potential reservoir sites which should be protected from significant land use change. Policies set forth in the State Water Plan are deemed to be statements of public interest. Warm River is one of the sites specifically listed in Policy 4D.

7. The minimum flow on Warm River was modeled using transects from only the one half mile reach sought under Application No. 21-7283.

8. The minimum streamflow of 141 cfs is a true minimum, and not the ideal or most desirable flow for the minimum flow reach from the confluence of Warm River with Henrys Fork to the intersection of Warm River with State Highway 47, the minimum flow reach identified by Application No. 21-7283.

9. In the eight mile reach identified under Application No. 21-7355, however, the stream channel characteristics are dramatically different than the reach identified by Application No. 21-7283 and representative transects must be identified and the flow modeled to establish a minimum and not an optimum flow.

10. The minimum flow sought is capable of being maintained.

11. The Director of the Department of Water Resources has considerable flexibility and authority to grant appropriations subject to future appropriations for uses which the public interest may show to be of greater importance. Shokal v. Dunn, 109 Idaho 330, 337, 707 P.2d 441 (1985).

12. A perpetual commitment of a significant amount of water from Warm River without a workable method of changing the terms of that use could at some future date adversely affect the public interest.

ORDER

IT IS HEREBY ORDERED that Applications for Permit Nos. 21-7283 and 21-7355 are APPROVED subject to the following conditions:

1. The use of water under the permits shall recognize and allow the continued beneficial diversion of water for irrigation and other purposes under any prior existing water rights established by diversion and application to beneficial use or by any application, permit, or license on file or issued by the Director under the provisions of Chapter 2, Title 42, Idaho Code, with the priority of water right date earlier than June 19, 1981, for Application No. 21-7283 and September 27, 1984, for Application No. 21-7355.

2. Upon the future finding and order of the Director that gauging stations are required to determine the approved minimum flows on Warm River are being maintained, such measuring devices shall be permanently installed and maintained as specified by the Department.

3. The Director retains jurisdiction to review and amend any and all parameters of this permit and subsequent license. Any person seeking review and amendment of the permit or license shall file a request with the Board, which request shall describe the amendment sought, the reasons for the proposed amendment, and a statement of the change in circumstances since the permit or license was issued or last reviewed that merit a review of the permit or license. A copy of the petition shall be served upon the Director of the Department of Water Resources. The Board, upon receiving a request, or upon its own initiative, may petition the Director for an amendment to the permit or license. The petition must set forth any significant change in

circumstances and evidence of the public interest supporting the proposed amendment. The Director will notify the general public and specific persons or known interested parties of the proposed change, and conduct a hearing for the purpose of determining whether the permit or subsequent license should be amended in the public interest. The burden of proof at the hearing shall be upon the person or party seeking the amendment to establish that amendment of the permit or license would be in the public interest.

4. Proof of instream beneficial use of the minimum streamflow appropriated shall be submitted in a manner approved by the Department within 5 (five) years after the permit approval is finally effective as herein provided. Proof shall be filed in the following manner:

Application No. 21-7283

Sufficient proof of beneficial use has been made regarding the extent of use, the availability of flows, and finally, the establishment of a minimum flow through professional studies so that no further studies or data will be required for filing of proof. Following affirmative action by the legislature, proof can be filed on Application No. 21-7283.

Application No. 21-7355

Sufficient proof has been filed with the Department regarding the need of a minimum flow for fish habitat and recreational values, and the availability of flows in Warm River. Following affirmative action by the legislature, information

sufficient to establish the minimum, not optimum, flow shall be submitted to the Department with proof of beneficial use.

This minimum flow is subordinated to the future construction of a dam on Warm River and storage behind the dam that might inundate portions or all of the proposed minimum flow reach. If the Board determines that a reservoir site on Warm River is no longer in the public interest, removal of the site from the State Water Plan will also remove the subordination of this minimum flow to the proposed reservoir.

Dated this 28 day of November, 1988.


BOBBY D. FLEENOR, Hearing Officer
Department of Water Resources

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of November, 1988, I mailed a true and correct copy, postage prepaid, of this Proposed Memorandum Decision and Order to:

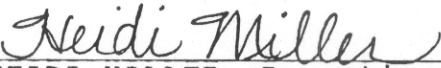
Leigh Chantrill
Newdale, ID

Idaho Fish & Game
Steve Goddard
Box 25
Boise, ID 83720

Gene Gray
2393 Watts Lane
Payette, ID 83661

Dave Rydalch
Rt. 2, Box 108
St. Anthony, ID 83445

Ted Sorenson
550 Linden
Idaho Falls, ID 83401


HEIDI MILLER, Receptionist

RECEIVED
APR 15 1994

Department of Water Resources
Eastern District Office

April 12, 1994

Idaho Water Resource Board
Statehouse Mail
Boise, ID 83720

RE: Permit No. 21-07355

Dear Permit Holder:

Enclosed is a copy of your approved Request for Extension of Time submitted in connection with the above referenced permit. The time within which to submit proof of beneficial use is extended to April 1, 1999.

Please note that the department has granted this extension based upon governmental agency delay. It is important that you work diligently toward the completion of this project during the construction period allowed. The department may not be able to grant additional extension requests.

If you have any questions or if I can be of any further assistance, please feel free to contact me.

Sincerely,

JULIE L. YARBROUGH
Senior Secretary

Enclosure

c: IDWR-Regional Office

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MAR 16 1994

Department of Water Resources

RECEIVED

APR 15 1994

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
Eastern District Office

For Office Use Only
\$15 Fee Received by N/A
Date _____
Receipt No. _____

REQUEST FOR EXTENSION OF TIME

TO PROVIDE ADDITIONAL TIME IN WHICH TO SUBMIT PROOF OF
BENEFICIAL USE FOR A WATER RIGHT PERMIT

The Idaho Department of Water Resources will consider this form as a request that the permit holder(s) be granted an additional period of time in which to complete development of water right under the provisions of Section 42-204, Idaho Code.

Permit No. 21-7355

Name(s) of Permit Holder: IDAHO WATER RESOURCE BOARD

Mailing Address: Statehouse, Boise, ID 83720

Date Proof is Due 4/1/94 Telephone No. (208) 327-7910

Describe what work has been completed toward the development of this water right:
(This must be filled out! If no work has been completed, show "none".)

None

Costing \$ _____

The permit holder(s) has been unable to complete the remainder of the work for the following reasons:

Inadequate data has been collected to show that the permitted flow is the minimum
needed to protect the resources. Additional time is needed to collect the data.

Permit holder(s) request an extension to 4/1, 19 99.

FEE: \$15.00

F. Dore Gdalkh
(Signature)*

*If other than permit holder, Power of Attorney must be supplied.

ACTION OF THE DEPARTMENT OF WATER RESOURCES

IT IS HEREBY ORDERED that the above request for extension of time be APPROVED and the time within which to submit proof of beneficial use is extended to April 1, 1999.

Signed this 11th day April, 19 94

A. Shaw Saylor
Chief, Water Allocation Bureau

Proof of Beneficial Use for Warm River (21-07355)

Idaho Department of Fish and Game conducted fish population and habitat assessment surveys on the Warm River, Idaho, during July and August, 1998. The eight mile stretch of river between Warm River Spring and the Warm River Campground was divided into approximately four equal-length reaches. With each reach, we selected a representative site, ranging in length from 75 to 120 yards (Figure 1). Data were collected on fish species composition; stream bed substrate composition; water velocity and depth; and water temperature and cover components.

Fish species identification and percent composition data were collected by snorkeling. Stream bed substrate composition and cover components were visually estimated. Water column depth and velocity were measured at a single transect within each site with a Swoffer model 2100 flow meter and handheld wading rod (Table 1). Water temperature was measured with a handheld thermometer at the time of the snorkeling survey. Site 2 was located in a high gradient, boulder/cascade habitat type that was too difficult and dangerous to snorkel. Only water depth and velocity data were obtained at this site.

We observed rainbow trout, brown trout, brook trout, mountain whitefish, and sculpin. Rainbow trout were observed throughout the entire study area, but were not the dominant species at any site. Mountain whitefish were observed only at site 1 and brook trout were found only at site 4, near the old Warm Springs Hatchery. Brown trout outnumbered rainbow trout at sites 1 and 3, but were not found at site 4 (Figure 2).

Cobble and boulder were the dominant substrate types at all sites (Figure 3). Hiding cover for fish consisted largely of boulders, submerged aquatic vegetation, and undercut banks. Overhanging vegetation provided only minimal cover. Water temperatures ranged from 53° F to 61° F (Table 2).

We used RHABSIM ver. 2.0 software to model fish habitat availability for a variety of flows. Rainbow and brown trout were selected as target species and simulated flow regimes ranged from 100 cfs to 350 cfs. The hydraulic data calibration data set was collected during August 1998, when river flows measured approximately 250 to 300 cfs. The results of the habitat simulation runs are displayed in figures 4 through 7. In most cases, the habitat/flow relationship is greatest at flows equal to or greater than 200 cfs. Flows of less than 200 cfs would provide the greatest habitat availability for rainbow trout juveniles and brown trout fry. One should keep in mind that the RHABSIM models used only account for the relationship between two physical habitat variables (velocity and depth) and flow. It does not take into account more dynamic and difficult to model biological variables, such as fish age class

variability, food production potential, or species interactions, such as competition and predation. These factors are not directly related to stream flow characteristics and thus cannot be incorporated into the RHABSIM models.

The current, licensed instream flow water right for 141 cfs only provides a marginally acceptable level of protection of the aquatic environment in this eight-mile reach of Warm River. Flows of 200 cfs or more would provide better protection for the aquatic resources, while the natural flow regime would be considered optimum.

Table 1. Transect hydraulic data for study sites on Warm River, Idaho.

	<u>Site Number</u>			
	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>
Transect width (ft)	88	71	95	95
Avg. velocity (fps)	1.95	1.62	1.82	1.65
Avg. Depth (ft)	1.61	2.07	1.44	1.60
Length (yds)	120	NS	90	75
Discharge (cfs)	309	282	273	257

Table 2. Water temperatures and cover components for study sites on Warm River, Idaho.

	<u>Site Number</u>			
	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>
Overhanging veg.	N	ND	N	N
Undercut banks	N	ND	Y	Y
Large woody debris	Y	ND	Y	Y
Submerged veg.	Y	ND	Y	Y
Boulders	Y	ND	Y	Y
Temperature (°F)	61	60	57	53

Y= yes; N=no; ND= no data

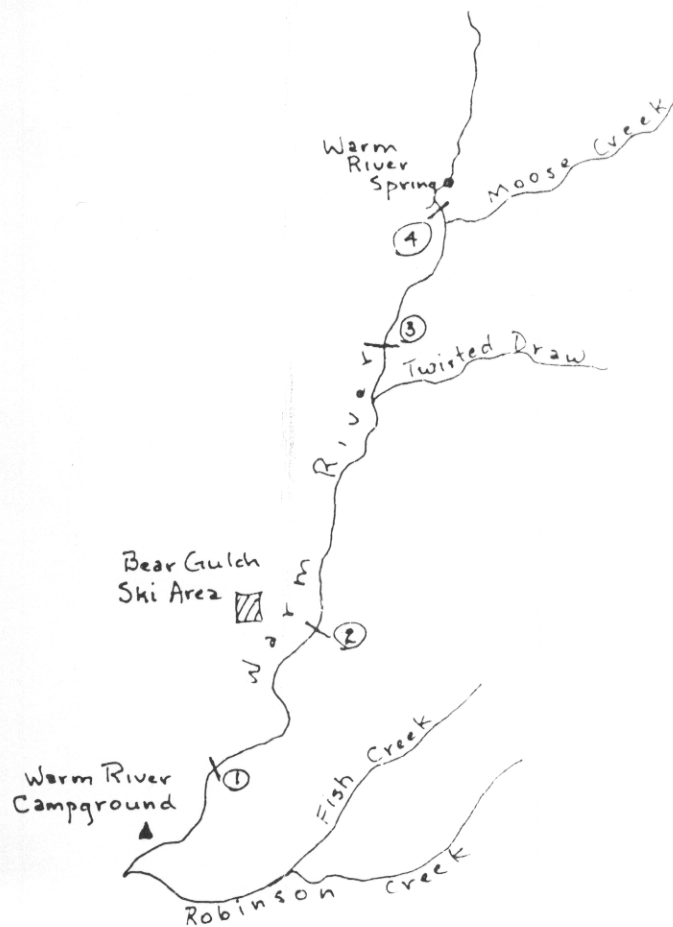


Figure 1. Location of study sites, Warm River, Idaho, August 1998. Study sites denoted by numbers. Map not to scale.

Figure 2. Percent fish species composition. Warm River, Idaho, by study site

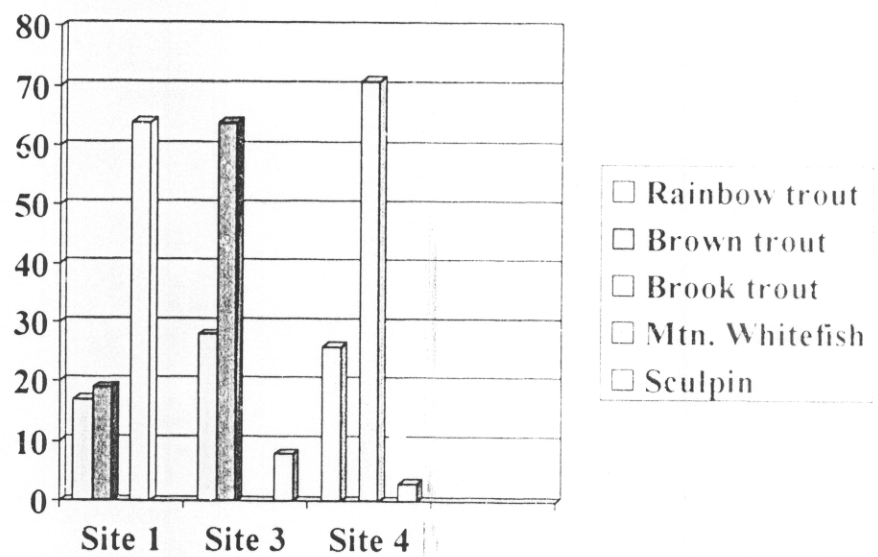
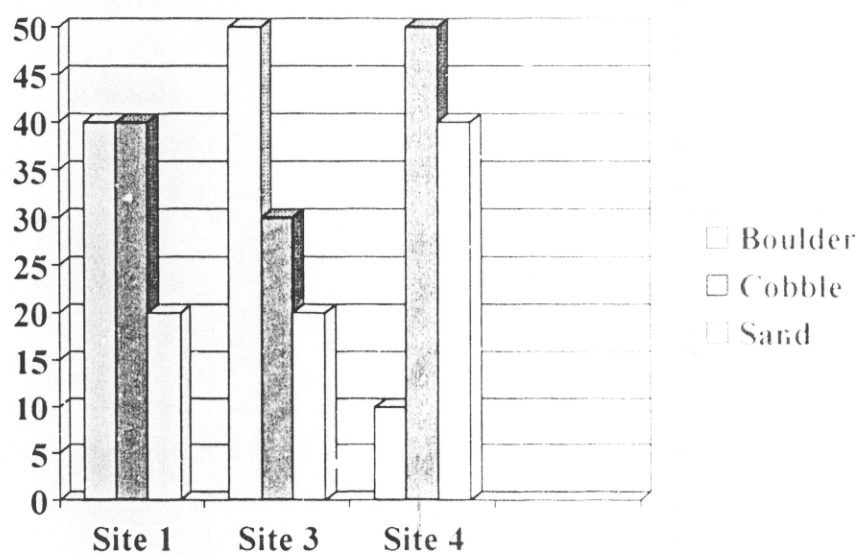


Figure 3. Percent stream bed composition, by study site.
Warm River, Idaho.



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