BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMIT NOS. 34-07247 AND 34-07410 IN THE NAME OF MITCHELL D. SORENSEN AND APPLICATION NO. 34-07430 IN THE NAME OF TIMBER-DOME CANAL COMPANY	**RECOMMENDED ORDER**

The above referenced matter is before the Department of Water Resources (department) because of protests against approval of three applications to appropriate the public waters of the state. An administrative hearing has been held, testimony and evidence have been received and post-hearing briefing has been completed. The hearing officer recommends the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT
CONCERNING THE APPLICATIONS AND PROTESTS

1. The following details apply to application for permit no. 34-07247:

   Name of Applicant: Mitchell D. Sorensen (Sorensen)

   Date Filed: May 30, 1980

   Source: Ground Water

   Diversion Rate: 8.34 cfs

   Purpose of Use: Irrigation

   Period of Use: April 1 to November 1

Point of Diversion: SENE,[1] Section 5, Township 4N, Range 26E, B.M.[2]

Place of Use: NW, SESW, Section 35, Township 4N, Range 25E (200 acres)

Explanatory Information: Water is to be pumped from an existing well into the Moore Canal, then into the Old Utah Construction Canal,[3] and re-diverted from the canal at a point within the NESE, Section 35, Township 4 North, Range 25 East, and transported in a pipe to the place of use.

2. Application for permit no. 34-07247 was amended on February 21, 1984, changing the place of use to 200 acres in the NW, NESW, and SESW, Section 35, Township 4 North, Range 25 East.

3. Application for permit no. 34-07247 was protested by Gerald Stewart, Lewis Rothwell, Mrs. Jesse W. Jensen, Ned R. Walker, David, Lois and Chris Bleak, Larman Anderson, Jay F. Pearson, Virgil Hail, Joe Smith, Ruben Babcock, Richard Taylor, Bill Haralson and the Big Lost River Irrigation District (BLRID). The BLRID subsequently withdrew its protest. A hearing was held on the matter and a "Proposed Memorandum Decision and Order" was issued on August 1, 1989, approving the application with conditions including a requirement to reconstruct the well to take water from aquifers deeper than 300 feet below land surface. The decision did not become final because Sorensen filed exceptions to it.

4. The following details apply to application for permit no. 34-07410:

Name of Applicant: Sorensen

Date Filed: April 12, 1982

Source: Ground Water

Diversion Rate: 10.0 cfs

Purpose of Use: Irrigation

Period of Use: April 1 to November 1

Point of Diversion: SESE, Section 5, Township 4 North, Range 26 East

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1 The "¼" designation is omitted from legal descriptions throughout the document. For example, the term "SENE" means the "SE1/4 of the NE1/4" or more completely, "the southeast quarter of the northeast quarter."

[2] The term "B.M." is a reference to the "Boise Meridian" upon which legal surveys in the state of Idaho are based. The term is omitted from, but implied in subsequent descriptions.

[3] The "Old Utah Construction Canal," which traverses the west side of the lower Big Lost River Valley is known locally by several other names including the "UC Canal," the "Blaine Canal" and the "Timberdome Canal." Herein it is termed the "Blaine Canal" except when quoting from an application or other document.

Place of Use: SE, Section 34, Township 4 North, Range 25 East, N1/2N1/2, Section 3, Township 3 North, Range 25 East (310 acres)

Explanatory Information: Water from a new well will be pumped into the Westside Canal in exchange for water to be diverted from the Blaine Canal in the SWNW, Section 36, Township 4 North, Range 25 East. The diversion rate includes an amount to offset canal company transportation losses that are anticipated to be 60 percent of the diversion rate.[4]

5. Application for permit no. 34-07410 was protested by David B. Bleak, Joe Smith, Gerald Stewart, Big Lost River Irrigation District, Donald Rittenhouse, Idaho Department of Fish and Game, Lawrence R. Babcock representing the Big Lost River Water Users Association, Kirby Jensen, Idaho Rivers United and Idaho Power Company.

6. The following details apply to application for permit no. 34-07430:

Name of Applicants: Mitchell Sorensen, Greg Daniels, Todd Perkes, Norman Niederer, and Everett Acor, Jr. The application has been assigned to the Timberdome Canal Company.

Date Filed: April 8, 1983

Source: Big Lost River and Antelope Creek

Diversion Rate: 199.6 cfs

Purpose of Use: Irrigation

Period of Use: April 1 to November 1

Point of Diversion: NWSE, Section 14, NENW, Section 36, Township 6 North, Range 25 East and NENW, Section 6, Township 6 North, Range 26 East.

Place of Use: Portions of Sections 25, 34, 35 and 36, Township 4 North, Range 25 East, portions of Sections 1, 2, 3, 11, and 12, Township 3 North, Range 25 East, and portions of Sections 17 and 18, Township 3 North, Range 26 East (4990 acres)

Explanatory Information: The water is to be diverted into the Blaine Canal at the Blaine Diversion from the Big Lost River and from headgates on the North and

[4] The applicant testified that the delivery system now employed to convey water from the well to the place of use had been revised to pipe the water to a ditch feeding the Timberdome Canal. The exchange of water with the BLRID is no longer proposed.

South Forks of Antelope Creek. The diversion rate includes a 50 percent conveyance loss.

7. Application for permit no. 34-07430 was protested by Lawrence R. Babcock representing the Big Lost River Water Users Association, Idaho Department of Fish and Game, Idaho Rivers United, Charles Huggins, and Idaho Power Company. Matea H. McCray filed a late protest, but was allowed to intervene.

8. Processing of the applications has been delayed by a series of administrative actions affecting the Big Lost River Basin separately or as a part of the Eastern Snake River Basin. These actions include: a) an administrative hold on processing of applications for new consumptive uses in the Snake River Basin above Swan Falls Dam from November 1982 to November 1988; b) a moratorium on processing applications in the Big Lost River Basin from August 1990 to April 1993, herein termed the "Big Lost Moratorium;"[5] and c) a moratorium on processing of applications in the Snake River Basin upstream from King Hill from April 1993 to the present time, herein termed the "Eastern Snake Plain Area Moratorium."[6]

9. Paragraphs 9 and 12 of the Eastern Snake Plain Area Moratorium provide as follows:

> 9. The moratorium does not prevent the Director from reviewing for approval on a case-by-case basis an application which otherwise would not be approved under terms of this moratorium if,
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> > a. Protection and furtherance of the public interest as determined by the Director, requires consideration and approval of the application irrespective of the general drought related moratorium; or
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> > b. The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location, insignificant consumption of water or mitigation provided by the applicant to offset injury to other rights.
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> 12. This moratorium supercedes and rescinds the Final Order of the department issued on August 7, 1990 which established a moratorium on the issuance of new permits within the Big Lost River drainage. Pending applications for permit or applications for transfer will be treated under terms of this amended moratorium order and may be considered for approval by the

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[5] Reference "Final Order – In the Matter of the Administration of the Use of the Surface and Ground Water of the Big Lost River Basin, Water District 34" entered by the Director of the Department of Water Resources on August 7, 1990.

[6] Reference "Amended Moratorium Order – In the Matter of Application for Permits for the Diversion and Use of Surface and Ground Water within the Eastern Snake Plain Area and the Boise River Drainage Area" entered by the Director of the Department of Water Resources on April 30, 1993.

department in connection with proposed mitigation or compensation for prior water rights.

10. By letter dated November 17, 1997, Sorensen requested that processing of the applications be recommenced and continued to a final decision on each of the applications. Sorensen argued that the applications are not subject to the Eastern Snake Plain Area Moratorium and questioned whether the moratorium remained effective after December 31, 1997, the sunset date for Section 42-1806, Idaho Code, which required that the moratorium order remain in effect until that date. If the moratorium is in effect after December 31, 1997 and does apply to the applications, he sought issuance of permits for applications 34-07247 and 34-07410 conditioned upon compliance with the Water District 34 Water Distribution Rules (IDAPA 37.03.12), herein termed the "Water District 34 Rules," and the mitigation requirements contained in those rules.

11. A hearing was held on September 23 and 24, 1998, in Idaho Falls to consider the applications and the protests against their approval. The matters were consolidated into a single, combined hearing. Sorensen was present and represented by Mr. Kent W. Foster. Mr. Sorensen and Mr. Foster also represented Timberdome Canal Company. The protestants were present and represented as follows: Idaho Department of Fish and Game represented by Mr. Peter Ampe; Idaho Rivers United represented by Marti L. Bridges; Idaho Power Company represented by Norman M. Semanko; Big Lost River Water Users Association represented by Lawrence R. Babcock; Kirby Jensen represented by Norman M. Semanko; Joe Smith represented by Dale Smith; David and Lois Bleak, Reva Walker, Larman Anderson, Matea McCray, and Charles Huggins were present and represented themselves.

12. The following issues were raised in connection with this matter:

a. The proposed use will reduce the quantity of water under existing water rights.

b. The water supply itself is insufficient for the purpose for which it is sought to be appropriated.

c. The application is not made in good faith, but is for speculation or delay.

d. The applicant does not have sufficient financial resources to complete the project to divert and beneficially use the water.

e. The proposed use conflicts with the local public interest.

f. The proposed use is contrary to conservation of water resources for use within the state of Idaho.

g. The processing procedures have not followed Idaho law because the water

sought to be appropriated is water held in trust by the state of Idaho under Section 42-203B, Idaho Code, and should be processed as a trust water diversion using the procedures and criteria of Section 42-203C, Idaho Code.

h. Issues regarding the applicability and effect of the Eastern Snake Plain Area Moratorium: Did the moratorium expire on December 31, 1997? Can applications be processed while the moratorium is in effect? Has an acceptable mitigation plan been proposed?

i. The applications are invalid because they were not claimed in the Snake River Basin Adjudication (SRBA).

13. In accordance with Rule 602 of the "Rules of Procedure" of the department (IDAPA 37.01.01), official notice was taken of the following documents:

a. The department's files for the three applications listed in the caption as they were constituted at the time of the hearing.

b. The "Water Appropriation Rules and Regulations," (IDAPA 37.03.08).

c. The "Water District 34 Rules," (IDAPA 37.03.12).

d. The "Rules for Conjunctive Management of Surface and Ground Water Resources," (IDAPA 37.03.11).

e. The department's files for water right applications, permits and licenses and for claims filed in the SRBA for any right associated with the same point of diversion or place of use as the applications listed in the caption.

f. Topographic maps published by the USGS.

g. The Eastern Snake Plain Area Moritorium order.

h. The Big Lost Moratorium order.

i. The "Plan of Operations for the Big Lost River Irrigation District" adopted about 1935.[7]

j. A report published by the Idaho Water Resources Research Institute entitled "Ground-Water Pumping Impacts on Surface Water Irrigation Diversions from Big Lost River" (1991).

[7] The hearing record includes only a copy of a document purporting to be "Excerpts from Plan of Operations."

k. "Water Resources in the Big Lost River Basin, South Central Idaho," USGS Open File Report No. 79-93, (1970).

l. A departmental open-file report by Steven Baker entitled "Review of Ground Water Conditions in the Big Lost River Valley" (1989).

m. Maps published by the USGS entitled "Aquifer –Test Results, Direction of Ground-Water Flow, and 1984-90 Annual Ground-Water Pumpage for Irrigation, Lower Big Lost River Valley, Idaho" (1992).

n. A report published by the department entitled "Upper Snake River Basin Study" (1997).

o. The department's files for any water right referred to in testimony at the hearing on this matter, including the file for Transfer No. 808 and the "Settlement Agreement and Plan of Operation" dated April 21, 1997, in the files for permits 34-07571 and 34-07573.

p. Watermaster reports and delivery records of Water District 34.

q. List of water quality limited stream segments, 1998 amendment.

FINDINGS OF FACT
APPLICABLE TO ALL THREE APPLICATIONS

14. The name "Big Lost River" properly describes this unusual water system. During the course of its travel from the mountain watershed to the place of discharge onto the Snake River Plain the water of the river sinks then rises again at several locations. The result is a closely interconnected surface and ground water system within the basin. These surface and ground waters are, for the most part, one single water source. Diversion and consumptive use of water, whether from a surface diversion or from a well, decreases the total water supply available and can have an effect on other uses of the resource.

15. Where water was available in the surface streams, it was used early in the settlement of the basin. As a result, rights were established to use surface water for the irrigation of some 23,000 acres of land with priorities generally from 1880 to 1900. In low streamflow periods, the holders of these rights divert and use the entire available water supply of the river. However, during most years, only the very earliest priority surface water rights are able to receive water throughout the entire irrigation season.

16. Rights to the use of water pumped from wells within the basin have been established with priorities generally subsequent in time and inferior to rights from surface water sources for direct flow and storage. Several hundred wells have been drilled within the basin and the water from these wells is used for domestic, municipal and agricultural purposes, including irrigation and

livestock watering. These wells intercept part of the total water supply of the basin and, except as hereafter noted, have an impact on the quantity of water available to those diverting surface water from the Big Lost River and its tributaries. There is only a finite quantity of water within the system and any increase in consumptive use of surface or ground water at one location results in a decrease in the water supply available for use at another location, at some later time, either within the Big Lost River Basin or outside of the basin. Some of these wells have operated for more than 30 years without objection from surface right holders.

17. The flow of the Big Lost River fluctuates widely from year to year and during the year. As measured at the USGS gauging station near Arco, it has annually totaled as much as 395,900 acre feet in water year 1984. The gauging station recorded zero annual flow for several years during the late 1980's and early 1990's.

18. A number of studies and estimates have been made of the ground water resources of the basin. An estimate by the USGS based on data collected in 1968 indicated that the underflow of ground water past Arco in a southerly direction toward the Snake Plain ground water system was in the range of 300,000 acre feet per year (425 cfs).[8] This indicates that there was then a substantial resource, which had been partially developed and was being used to supplement and augment the widely fluctuating surface water supplies of the basin. There has been considerable development of ground water since that time and the amount of unused ground water exiting from the basin has not been recently quantified.

19. The ground water rights in Basin 34 have been included for administration with the surface water rights in a single water district in Basin 34 since 1993. Water District 34 has been active each year for many decades and has provided a watermaster to distribute water during times of scarcity.

20. The Water District 34 Rules provide for the conjunctive management of surface and ground water in the basin. Rule 50 includes a procedure for the holders of senior surface rights injured by the use of junior ground water rights to receive water made available by holders of junior priority ground water rights to mitigate loss of water.

21. Hydrologic information indicates that the surface and ground water within the Big Lost River Basin are closely connected from the headwaters of the stream to a point near Arco. South of this point ground water levels drop steeply to join the Eastern Snake Plain Aquifer (ESPA) which exits to Snake River at Thousand Springs and other locations. Wells drilled south of the location where the ground water loses connection with the Big Lost River will have no effect on the flow of the river. There is a "transition zone" within which wells can be operated without interference with surface water rights in the Big Lost River Basin if cased and sealed through the shallower ground water zones. Upgradient from this transition zone, any well will intercept water tributary to the Big Lost River and thus, at times, will injure prior surface water rights from the Big

[8] "Water Resources in the Big Lost River Basin, South Central Idaho, USGS Open File Report No. 70-93, 1970, page 97.

Lost River and tributaries unless a mitigation or compensation plan is implemented to protect holders of rights to surface water. The locations of the wells sought in applications 34-07247 and 34-07410 are in the "transition zone."

22. Application for Permit No. 34-07247 has been released by Idaho Power Company from Ada County Case No. 81375. Paragraph 7C of the Snake River Water Rights Agreement[9] subordinated the use of water under Idaho Power Company's prior water rights for hydropower generation purposes in the Milner Dam to Swan Falls reach of the Snake River to water uses in place by October 24, 1984, for which applications for permit were filed by June 30, 1985. Because applications for permit 34-07247 and 34-07430 satisfy these criteria, they are not subject to the additional evaluation criteria of Section 42-203C, Idaho Code. Water has not been diverted and used under application for permit 34-07410. Therefore, that application is considered to be a request for reallocation of trust water subject to the provisions of Section 42-203C, Idaho Code.

23. The protestants argued that diversion and use of water from the Big Lost River Basin should not be approved as proposed in any or all of the three applications because:

a. The benefits of diverting and using the water accrue to the applicants and their families not to the general public.

b. Adequate water is not available to fill existing rights to surface and ground water. The protestants and other rightholders in the basin do not receive adequate water for irrigation and other beneficial uses during drought periods such as that occurring from 1986 to 1994. Ground water levels declined during this period forcing the reconstruction of wells used for irrigation, domestic and other uses. The additional diversion and use of water proposed in the three applications would further reduce flows in the Big Lost River and tributaries and reduce ground water supplies. Although the incremental reduction in water availability caused by the proposed uses may not be measurable, it is a real amount that should be quantified to allow the effect to be fully mitigated or the applications should not be approved. Water availability would be further reduced and the injury to existing rights increased because the uses proposed in the applications would divert water to an area from which return flows do not return to the Big Lost River or to aquifers in the Big Lost River Basin.

c. The applicants did not offer mitigation plans with adequate information and detail to assure that existing rights will not be injured. Offering to provide mitigation using the procedures of the Water District 34 rules does not assure that the effects of using water under the applications will be fully mitigated.

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[9] The Snake River Water Rights Agreement is the contract entered into by the Governor of the State of Idaho and Idaho Power Company on October 25, 1984, resolving the Swan Falls controversy.

d. Legalizing the unauthorized use of water, even when the use has occurred for many years, encourages and rewards use outside of the established systems of water management.

e. The applicants did not supply financial statements, loan commitments or other information to demonstrate that the projects could be constructed and water used as proposed.

f. Approval of the applications would set a precedent for approval of all of the approximately 60 applications pending in the basin seeking to appropriate about 600 cfs of water.

FINDINGS OF FACT CONCERNING APPLICATION FOR PERMIT NO. 34-07247

24. Sorensen testified that the well in the SENE, Section 5, Township 4 North, Range 26 East (hereafter termed the SENE, Section 5 well), from which the water is sought to be appropriated under application for permit no. 34-07247, was drilled in 1961 and that the following rights are diverted from this well:

- License no. 34-02428, with a priority date of June 25, 1961,[10] authorizes diversion of 3.85 cfs of ground water for irrigation of 192.5 acres in portions of Section 5 and 9, Township 4 North, Range 26 East.

- Permit no. 34-07096B, with a priority date of January 31, 1975, authorizes diversion of 1.43 cfs of ground water for irrigation of 72 acres in a permissible place of use of 828 acres in parts of Sections 2 and 3, Township 3 North, Range 25 East, and parts of Sections 34 and 35 in Township 4 North, Range 25 East.

- Permit no. 34-07097B, with a priority date of January 31, 1975, authorizes diversion of 1.29 cfs of ground water for irrigation of 64 acres in the same permissible place of use as permit no. 34-07096B.[11]

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[10] The department has recommended that the Snake River Basin Adjudication court change the priority of right no. 34-02428 to April 1, 1979, to avoid injury to other rights because the place of use of the right has been changed under the accomplished transfer provisions of Section 42-1425, Idaho Code. The place of use recommended to the SRBA court is 193 acres within a permissible place of use of 945 acres in parts of Sections 2 and 3, Township 3 North, Range 25 East; parts of Sections 34 and 35, Township 4 North, Range 25 East; and part of Section 5, Township 4 North, Range 26 East.

[11] The point of diversion authorized for permit nos. 34-07096 and 34-07097 is a well in the SENW, Section 17, Township 4 North, Range 26 East. The department's recommendation to the SRBA court split these permits, recognizing part of the diversion rate from the well described on the permits and part from the SENE, Section 5 well. The change in point of diversion recommended by the department is based upon an accomplished change in accordance with Section 42-1425, Idaho Code.

25. The department measured the diversion rate from Sorensen's SENE, Section 5 well in August 1971 (Ref: Proof of beneficial use examination report, dated August 31, 1971, in the department's file for license no. 34-02428). This measurement, used in licensing right no. 34-02428 found the diversion capacity of the well to be 8.34 cfs of which 3.85 cfs was licensed for diversion and use under right no. 34-02428. Sorensen has claimed in the SRBA and the department has recommended that 2.72 cfs from the SENE, Section 5 well be decreed under permit nos. 34-07096B and 34-07097B. If the SRBA court decrees the permits as recommended, existing rights account for all but 1.77 cfs of the diversion rate from the SENE, Section 5 well. If the SRBA court does not decree the permits, 4.49 cfs of the measured diversion rate from the well is not accounted for by existing rights. Sorensen testified that, although the application lists a rate of diversion of 8.34 cfs, he intends to validate through approval of application no. 34-07247 the diversion capacity of the well not now covered by existing rights; i.e., 1.77 cfs to 4.49 cfs depending upon the SRBA court's action with respect to the claims filed. He does not intend to increase the capacity of the well above 8.34 cfs, but does intend to resize the pump and motor at a cost of about $5,000 to allow the full diversion rate to be pumped when the pumping lift from the well is increased by extended drought or extensive pumping from nearby wells.

26. The location of the point of diversion is more than six miles from the requested place of use (Protestant's Exhibit A). A diversion rate of 4.49 cfs to irrigate 200 acres with conveyance through an open canal is reasonable.

27. Sorensen testified that water from the NESE, Section 5 well has been commingled with water from other sources to irrigate the land listed as the proposed place of use in application for permit no. 34-07247 as part of an 828 acre place of use. He indicated that this practice has been occurring since 1978 and no new or additional land would be irrigated if application for permit no. 34-07247 is approved.

28. Sorensen testified that he will comply with the mitigation requirements of Rule 50 of the Water District 34 Rules as necessary to prevent injury to existing water rights. If mitigation cannot be provided to protect existing water rights, the well will be reconstructed to divert water from deeper layers of the aquifer not tributary to the Big Lost River.

•FINDINGS OF FACT
CONCERNING APPLICATION NO. 34-07410

29. Application for permit no. 34-07410 seeks to appropriate ground water from a well to be constructed for irrigation of 310 acres of land that is not irrigated now and has not previously been irrigated using ground water.

30. Sorensen estimated the cost of construction of the well would be about $50,000 plus the cost of the pump and associated equipment. He indicated that he has or could obtain the money to complete the project, but did not provide a financial statement or a loan commitment.

31. The applicant asserted that the project is in the local public interest because it will provide financial assistance to the applicant and his family, will provide jobs in the community and will increase the local tax base.

32. The applicant asserted that the water supply is adequate for the purposes intended and that other rights will not be injured. He offered to provide water for mitigation under the provisions of Rule 50 of the Water District 34 Rules.

FINDINGS OF FACT
CONCERNING APPLICATION NO. 34-07430

33. The original applicants are stockholders in the Timberdome Canal Company and own or operate the place of use listed on application for permit no. 34-07430.

34. Sorensen testified that approval of the application is sought to document an existing practice of diverting flood flows from Big Lost River and Antelope Creek when flow rates exceed that necessary to supply water rights calling for water. Flows have been diverted into the Blaine Canal and used for irrigation of the land at the place of use listed on application for permit no. 34-07430 in ten of the past twenty years.

35. The diversion rate requested includes a conveyance loss based upon the losses observed in the canal. Data to support the requested conveyance loss were not provided. Several protestants testified that the Blaine Canal does not lose large amounts of water to seepage to the ground water system, but does leak and overflow onto the fields through which it traverses.

36. The facilities necessary to divert and transport the water to the place of use are in place, but need improvement. By using excavation equipment to move gravel, the water can be diverted and used with the system now in place. The Timberdome Canal Company will improve the diversion facilities in the future if the permit is issued.

37. Water diverted from Big Lost River and Antelope Creek as requested under application for permit 34-07430 is to replace and augment water available to the land at the place of use from other sources, in particular that presently diverted from ground water. The volume of water consumed from the Big Lost River Basin or from the ESPA will not be increased because no new or additional land will be irrigated.

38. Sorensen testified that diversion and use of water as proposed in application for permit no. 34-07430 is in the public interest because: a) flood flows in Antelope Creek and Big Lost River would be decreased thereby reducing or preventing damage to private and public property; b) ground water supplies would be increased by reducing pumping under existing rights and increasing recharge to the aquifers from seepage from the Blaine Canal through which the water is transported; and c) pumping costs would be reduced for the members of the Timberdome Canal Company.

39. Sorensen testified that diversion and use of water under the right would not injure other rights if administered in priority with other rights in the system.

40. Sorensen testified that the appropriation would conserve water for use in the state of Idaho.

41. David Shaw, testifying as an expert representing the applicants, asserted that the water supply is adequate for the purposes of application for permit 34-07430. Based upon Applicant's Exhibit 2, the flow of the Big Lost River at the USGS Arco gauging station on an average year is 100 to 200 cfs. Mr. Shaw testified that the Arco gauging station is downstream from all diversions from the river in the Big Lost River Valley and, therefore, flow passing this point is excess to that needed under existing water rights.

42. Mr. Shaw testified that diversion and use of water as proposed in application for permit no. 34-07430 would not increase the consumptive use of water from the land to which it is applied because it substitutes for water from other sources. The volume of water entering the ESPA from the Big Lost River Basin would not be reduced, but the location and timing of water entering the ESPA would be changed. The geohydrologic evaluation methods available at this time are not adequate to quantify the effect this change would have on water levels in the ESPA or the flows at Thousand Springs and other discharges from the aquifer.

43. Mr. Sorensen testified that use of water in accordance with application for permit no. 34-07430 would complement the recharge program of Water District 34 under permits 34-07571 and 34-07573 because it serves the same hydrologic purpose. Mr. Sorensen requested that the approval of application for permit 34-07430 be conditioned using the following paragraphs from the "Plan of Operation, Basin 34 Recharge, April 1997:"

> For the Big Lost River itself downstream from Mackay Dam, diversion for recharge downstream from Mackay Dam will not occur unless the flow at the Arco gage is 60 cfs or more, measured as a three consecutive day average. The 60 cfs at the Arco gage is for purposes of this Plan of Operation only and is not and cannot be construed as a minimum flow or minimum flow water right under any theory of law.
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> In the event of a brief but intense weather event which is anticipated to produce flood flows for a period of three days or less, the Recharge Committee may call for and the Watermaster may deliver water for recharge purposes even if the flows at the Arco gage are below 60 cfs so long as the flow at the 2-B Gage is 300 cfs, or more, in excess of the non-recharge water deliveries occurring from the Big Lost River downstream from Mackay Dam.

44. The protestants asserted that diversion and use of water from Big Lost River and Antelope Creek as proposed in application for permit no. 34-07430 is not in the public interest because:

a. High water flows in Antelope Creek are used and necessary to supply water to existing rights from Antelope Creek and the Big Lost River. The flows are particularly needed early in the irrigation season when the spring freshet has not begun in the Big Lost River upstream from Antelope Creek or the Big Lost River flows are reduced by diversion to storage to Mackay Reservoir;

b. Flood flows in the Big Lost River and Antelope Creek are necessary for maintenance of the stream environment, including black cottonwood trees, and to maintain fish and wildlife values that are important to the area.

c. Reaches of the Big Lost River and Antelope Creek that would have reductions in flows if application for permit 34-07430 is approved are on the list of water quality impaired streams issued under section 303d of the federal Clean Water Act. Further reduction in flow in these reaches and the operation of equipment in the channels to build diversions will add to existing water quality problems.

d. The state of Idaho, through action of the Legislature and the Water Resource Board, has an on-going program seeking to increase recharge to the ESPA. Diversions from Big Lost River and tributaries reduce the volume of water available for recharging the aquifer and are counter to the objectives of the state's program to emphasize recharge to the ESPA.

45. Permit nos. 34-07571 and 34-07573 held by Water District 34 authorize the diversion of 800 cfs from the Big Lost River and various tributaries including Antelope Creek for ground water recharge purposes at various locations in the Big Lost River Basin.

CONCLUSIONS OF LAW
APPLICABLE TO ALL THREE APPLICATIONS

1. Section 42-203A(5), Idaho Code, provides 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 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, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, 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. Section 42-203C(1), Idaho Code, provides that applications to appropriate water held in trust by the state of Idaho must be evaluated using the additional criteria of Section 42-203C(2) if the proposed use will significantly reduce the amount of trust water available to the holder of the water right used for power production. Surface and ground water within the Big Lost River Basin is within the area determined by Rule 30.01.a. of the Water Appropriation Rules to be administered as trust water under the Snake River Water Rights Agreement. Rule 45.02 of the Water Appropriation Rules presumes that a significant reduction will not occur if the proposed use will not reduce flows at the USGS Murphy Gauge by more than two acre feet per day, and that an irrigation project of 200 acres or less will not cause a significant reduction.

3. Rule 45 of the "Water Appropriation Rules" (IDAPA 37.03.08) further defines the criteria of Sections 42-203A(5) and 42-203C, Idaho Code, for evaluating applications for permit.

4. Rule 40.04.c of the "Water Appropriation Rules" provides as follows:

> The applicant has the ultimate burden of persuasion for the criteria of Section 42-203A, Idaho Code, and the protestant has the ultimate burden of persuasion for the criteria of Section 42-203C, Idaho Code.

5. The Eastern Snake Plain Area Moratorium did not sunset on December 31, 1997 and remains in effect until withdrawn or amended by order of the Director of the department. Section 42-1806(2), Idaho Code, "approved and confirmed" the moratorium order. Paragraph 1 of the moratorium provides as follows:

> The moratorium shall be in effect on and after its entry and shall remain in effect until withdrawn or modified by order of the Director.

6. Applications to appropriate water are not lost or voided by failure to claim a right in the SRBA. Section 42-1420(1), Idaho Code, provides in pertinent part:

> The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system except that the following described rights shall not be lost by failure to file a notice of claim:
>
> ....

(b) a water right application for permit filed under chapters 2 or 15, title 42, Idaho Code;

....

CONCLUSIONS OF LAW
CONCERNING APPLICATION FOR PERMIT NO. 34-07247

7. Application for permit no. 34-07247 is exempt from processing under the trust water conditions of Section 42-203C, Idaho Code.

8. Pumping of the well from which water is proposed to be diverted under application for permit no. 34-07247 depletes flows in the Big Lost River and other surface flows because the well is not constructed to seal out ground water from near surface zones. Whenever flow in the Big Lost River and other surface sources is not adequate to satisfy all rights with priorities earlier than May 30, 1980 (the filing date for application 34-07247), diversion and use of water as proposed in the application will injure other rights unless the well is reconstructed to seal out near surface ground water that is in hydrologic contact with the river or mitigation is provided to fully offset the injury.

9. The diversion and use proposed in application for permit 34-07247 was occurring during the period of years used as the basis for the mitigation requirement in the Water District 34 Rules. The Rules are subject to amendment as necessary to provide adequate mitigation or other actions required to prevent injury to prior rights from both surface and ground water sources. Mitigation under the Rules will protect surface water rights from injury by ground water uses existing at the time the study was made upon which the mitigation provisions of the Rules are based.

10. Diversion and use of water under application 34-07247 is in the local public interest. The use has been occurring for nearly twenty years and is relied upon by the applicant as a part of his overall farming operation. The use was commenced prior to the enactment of Subsection 42-201(2), Idaho Code, requiring that a permit be obtained before diverting and using water. The Idaho Legislature by enacting Section 42-203B, Idaho Code, recognized the provisions of the Snake River Water Rights Agreement allowing permits to be issued to certain uses commenced prior to October 25, 1984 and for which applications for permit were filed by June 30, 1985. Application for permit 34-07247 meets these requirements.

11. The application is made in good faith, and the applicant has sufficient financial resources to complete the project.

12. Use of water under application for permit no. 34-07247 conserves water for use in Idaho.

13. Application for permit no. 34-07247 should be approved with conditions to prevent injury to prior rights.

CONCLUSIONS OF LAW
CONCERNING APPLICATION FOR PERMIT NO. 34-07410

14. Application for permit no. 34-07410 is subject to the trust water criteria of Section 42-203C, Idaho Code.

15. Application for permit no. 34-07410 is subject to the Eastern Snake Plain Area Moratorium and cannot be approved without a finding by the department that the use complies with the requirements of paragraphs 9 and 12 of the moratorium order. The applicant has not met his burden to show that the proposed diversion and use of water will not injure prior rights to use of water in Basin 34 or from the ESPA nor has he offered a mitigation plan adequate to prevent existing rights from injury. The proposed well and proposed use were not a part of the water use that was analyzed by the study upon which the Water District 34 Rules are based. The impact of diverting water from a new well for a new use may differ from that determined for the aggregate effect of wells existing at the time of the study.

16. The effect of diversion and use of water under application for permit no. 34-07410 on water supplies in Basin 34 and the ESPA is a small but real amount.

17. The applicant did not meet his burden to show that diversion and use of water for irrigation of an additional 310 acres in the Big Lost River Basin is in the local public interest.

18. The applicant did not meet his burden to show financial ability to construct the project.

19. Application for permit no. 34-07410 should be denied.

CONCLUSIONS OF LAW
CONCERNING APPLICATION FOR PERMIT NO. 34-07430

20. The use proposed by application for permit no. 34-07430 will not increase consumptive use of water in the Snake River Basin because it would replace water now used under other existing rights. Application for permit no. 34-07430 is exempt from the trust water processing requirements of Section 42-203C, Idaho Code, and can be processed under paragraphs 9 and 12 of the Eastern Snake Plain Area Moratorium.

21. Diversion and use of water under application for permit no. 34-07430 will not injure other existing rights if diversion is administered in priority with existing rights.

22. The water supply is adequate and the proposed use is a beneficial use of water as a replacement supply for uses already having a full supply under other existing rights.

23. Because the facilities to divert, deliver and use water under application for permit no. 34-07430 presently exist, the application is not speculative and the applicant has the financial resources necessary for the project.

24. The determination of whether diversion and use of water under application for permit no. 34-07430 is in the local public interest requires balancing of several relevant factors. The hearing record documents that maintenance of flows in the Big Lost River and Antelope Creek is necessary to protect the public's interest in important fish and wildlife habitat and water quality values. The record also documents that the use will have a positive impact by reducing diversion of ground water in Basin 34 and leakage from the Blaine Canal will recharge the aquifers in Basin 34. This apparent conflict can be resolved by approving the application for permit with conditions to allow diversion only when the flows in the Big Lost River and Antelope Creek are in excess of those needed to protect the public values.

25. The applicant did not provide adequate information to justify the amount of water requested for conveyance.

26. Application for permit no. 34-07430 should be approved with conditions to protect prior rights and public interest values.

ORDER

IT IS HEREBY ORDERED THAT:

1. Application for permit no. 34-07247 is **APPROVED** subject to the following conditions:

a. Use of water under this permit is subject to all prior water rights.

b. Proof of application of water to beneficial use shall be submitted on or before the date indicated in the final order entered by the Director in this matter.

c. Use of water under this permit is subject to the control of the watermaster of Water District no. 34, Big Lost River and tributaries. Distribution of water for use under this permit shall be in accordance with the Water District 34 Rules including requirements for mitigation as therein provided. If mitigation is not provided to avoid injury to existing rights the well shall be reconstructed to prevent water from any depth less than 300 feet from entering the well.

d. Prior to diversion of water under this permit, the permit holder shall install a lockable control device and a measuring device, subject to the approval of the department, that will provide the watermaster suitable control of the diversion.

e. This permit does not authorize construction of additional wells. If the existing well is reconstructed, the reconstruction shall comply with the permitting

requirements of Section 42-235, Idaho Code.

f. Issuance of this permit does not grant a right-of-way or easement across the lands of another.

g. The rate of diversion under this permit shall not exceed 4.49 cfs and when combined with right no. 34-02428 or any other right or rights determined by the SRBA court to divert from the permit holder's well in the SENE, Section 5, Township 4 North, Range 26 East, the rate of diversion is limited to 8.34 cfs from the well.

h. The place of use is limited to the 200 acres described in the application unless an amendment is filed and approved as provided in Section 42-211, Idaho Code.

2. Application for permit 34-07410 is **DENIED**.

3. Application for permit 34-07430 is **APPROVED** subject to the following. conditions:
a.Use of water under this permit is subject to all prior water rights.

b.Proof of application of water to beneficial use shall be submitted on or before the date indicated in the final order entered by the Director in this matter.

c.Use of water under this permit is subject to the control of the watermaster of Water District no. 34, Big Lost River and tributaries.

d.Issuance of this permit does not grant a right-of-way or easement across the lands of another.

e.Use of water is authorized only during flood events when county commissioners, highway district commissioners, or state emergency agency officials are diverting water into the Blaine Canal as they determine necessary to prevent or reduce damage to public or private property. The amount diverted at the field headgate from the Blaine Canal shall not exceed 0.02 cfs/acre when combined with all other rights appurtenant to the acreage upon which it is being used.

f.The permit holder is not authorized to call for diversion of water under permit no. 34-07430 or to take any action to divert water under the permit unless acting on the written direction and request of the responsible officials acting as provided in paragraph e. This permit has the sole and limited effect of allowing the permit holder to use, in accordance with the permit's priority date, water placed in the Blaine Canal by responsible officials during flood emergencies.

g.At any time within two years from the effective date of this permit, the permit holder may petition the director of the department to consider information allowing

for a determination of the specific flow rates necessary to protect the public interest values in the Big Lost River and Antelope Creek, as recognized in this decision. Upon a determination by the Director of the required flow rates, the approval conditions of permit no. 34-07430 will be amended to allow the permit holder to request the diversion of water under this permit at times when the flow in Antelope Creek or Big Lost River exceeds that required to protect public values. The permit holder shall serve the parties to this proceeding with copies of the petition and any supporting information for the purpose of their review and comment to the department. Upon request, the department will provide an opportunity for hearing on the petition.

h. The permit holder's diversion rate from the Blaine Canal shall not exceed 99.8 cfs when combined with all other rights supplying water to the place of use authorized under permit no. 34-07430.

Signed at Boise, Idaho this 12th day of March, 1999.

/s/
Norman C. Young
Hearing Officer

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on the 16th day of March, 1999, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

Mitchell D. Sorenson
c/o Kent W. Foster
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HAHN & CRAPO
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Idaho Falls ID 83405

Idaho Power Company
Kirby Jensen
c/o Norman M. Semanko
ROSHOLT ROBERTSON TUCKER
PO Box 1906
Twin Falls ID 83303-1906

Idaho Dept. of Fish & Game
c/o Peter J. Ampe
Deputy Attorney General
PO Box 83720
Boise ID 83720-0010

Idaho Rivers United
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/s/
JULIE L. YARBROUGH
Senior Secretary, Water Allocation Bureau