

OCT 13 2009

DEPT. OF WATER RESOURCES
SOUTHERN REGION

3. Attached hereto as Exhibit 2 is the license for water right 37-7919.
4. Attached hereto as Exhibit 3 is the license for water right 37-8307.
5. Attached hereto as Exhibit 4 are documents from the Backfile for water right 37-7919.
6. Attached hereto as Exhibit 5 are documents from the Backfile for water right 37-8307.
7. Attached hereto as Exhibit 6 is the Modified Transfer for Water right 37-21956.

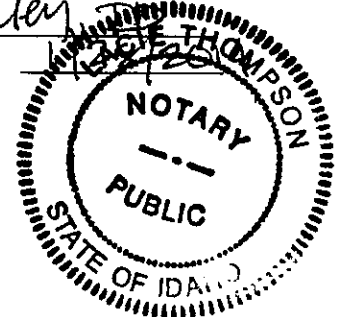
FURTHER YOUR AFFIANT SAYETH NOT.

DATED this 9th day of October, 2009.

Fritz X. Haemmerle
FRITZ X. HAEMMERLE

SUBSCRIBED AND SWORN to before me this 9th day of October, 2009.

Lauri Thompson
NOTARY PUBLIC FOR IDAHO
Residing at: *Harley*
Commission expires: *12/31/2012*



CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of October, 2009, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

Gary Spackman
Director, Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
FAX: (208) 287-6700

Allen Merritt
1341 Fillmore St., Suite 200
Twin Falls, ID 83301-3380
FAX: (208) 736-3037

XX By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

 By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.

✓ By telecopying copies of same to said attorney(s) at the telecopier number , and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

+ E-mail

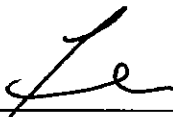

FRITZ X. HAEMMERLE

EXHIBIT 1

EXHIBIT 2

State of Idaho
Department of Water Resources

WATER RIGHT LICENSE

WATER RIGHT NO. 37-07919

Priority: June 19, 1981

Minimum Instream Flow:

70.00 CFS

This is to certify, that STATE OF IDAHO
IDAHO WATER RESOURCE BOARD
STATEHOUSE
BOISE ID 83720

has complied with the terms and conditions
of the permit, issued pursuant to Application for Permit dated June 19, 1981; and
has submitted Proof of Beneficial Use on January 2, 1992. A minimum stream flow in

BIG WOOD RIVER

tributary to MALAD RIVER

has been established as follows:

BENEFICIAL USE

PERIOD OF USE

RATE

MINIMUM INSTREAM FLOW

1981 to 12/31

70.00 CFS

LOCATION OF MINIMUM STREAM FLOW REACH

Beginning of Stream Flow Reach

SESW, Sec. 33, Township 04N, Range 17E

End of Stream Flow Reach

SWNW, Sec. 36, Township 02N, Range 18E

BLAINE County

CONDITIONS/REMARKS:

1. This right is subject to all other rights with the exception of Right No. 37-07866.
2. Use of water under this right shall be regulated by the watermaster of State Water District No. 17.
3. Use of water under this right shall be non-consumptive.
4. This minimum stream flow right shall be considered in the evaluation of applications for permit to appropriate waters from the Big Wood River and tributaries filed after 6/19/81.
5. Upon the future finding and order of the director that gauging stations are required to maintain the approved minimum flow on Big Wood River, such measuring devices shall be permanently installed and maintained as specified by the Department.

MINISTER

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State of Idaho
Department of Water Resources

WATER RIGHT LICENSE

WATER RIGHT NO. 37-07919

CONDITIONS/REMARKS:

6. The Director retains jurisdiction to review and amend any and all parameters of this right. Prior to undertaking a review of the water right, the Director shall identify the reasons for exercising retained jurisdiction under this condition, and give notice thereof to the public generally and to specific persons or parties known by the Director to be interested. The Director shall thereafter conduct a hearing for the purpose of determining whether the minimum stream flow should be modified or amended in the public interest. The burden of proof at the hearing shall be upon the person or persons seeking to establish that a particular parameter of the water right should be modified or amended to satisfy the public interest. Review of the water right under this condition shall occur prior to 15 years after issuance of the license.
7. Pending a general re-evaluation of the Big Wood stream system, the use of water under this right shall recognize and allow the continued beneficial diversion, both within and upstream from the minimum flow reach of water for irrigation and other purposes under any prior existing water right established by diversion and application for beneficial use or by an application, permit, or license on file or issued by the Director under the provisions of Chapter 2, Title 42, Idaho Code, with a priority of water right later than the 5/19/81 priority date of this right.
8. This minimum stream flow reach from the confluence with Warm Springs Creek in the SW 1/4, Section 1N, 7E, 12W, approximately 18 miles upstream from the mouth of the Bellevue Canal in the SWNW, 1/4, Section 1N, 7E, 12W.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. Witness the seal and signature of the Director, affixed at Boise, this 13th day of OCTOBER, 1994.

Acting for R. Keith Higginson, Director

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EXHIBIT 3

State of Idaho
Department of Water Resources

WATER RIGHT LICENSE

WATER RIGHT NO. 37-08307

Priority: October 16, 1987 Minimum Instream Flow: 119.00 CFS

This is to certify, that STATE OF IDAHO

IDAHO WATER RESOURCE BOARD

STATEHOUSE

BOISE ID 83720

has complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated October 16, 1987; and has submitted Proof of Beneficial Use on March 2, 1994. A minimum stream flow in

BIG WOOD RIVER

tributary to MALAD RIVER

has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE</u>
MINIMUM INSTREAM FLOW	01/01 to 12/31	119.00 CFS

LOCATION OF MINIMUM FLOW REACH:

Beginning of Stream Flow Reach

SENW , Sec. 13, Township 04N, Range 17E

End of Stream Flow Reach

SWNW , Sec. 36, Township 02N, Range 18E
BLAINE County

CONDITIONS/REMARKS:

1. This right is subject to all prior water rights.
2. Use of water under this water right will be regulated by the watermaster of State Water District No. 37.
3. Use of water under this right shall be non-consumptive.
4. Use of water under this right shall recognize and allow the continued beneficial diversion of water under any prior existing water right established by diversion and application to beneficial use or by an application, permit, or license on file issued by the Director under provisions of Chapter 2, Title 42, Idaho Code, with the priority of the water right dated earlier than 10/16/87, the priority of this right.
5. Upon the future finding and order of the director that gauging stations are required to maintain the approved minimum flow on the Big Wood River, such measuring devices shall be permanently installed as specified by the Department.
6. This right is subordinate to development of groundwater for domestic and municipal uses as defined by the management plan for the Big Wood River Ground Water Management Area.

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State of Idaho
Department of Water Resources**WATER RIGHT LICENSE**

WATER RIGHT NO. 37-08307

CONDITIONS/REMARKS:

7. The Director retains jurisdiction, as described below, to review and amend any and all parameters of this right. The Board, upon receiving a request, or upon its own initiative, may petition the Director for an amendment to the right. 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 right should be amended in the public interest. The burden of proof at the hearing shall be upon the persons or parties seeking the amendment to establish that the amendment of the right would be in the public interest.
8. This minimum stream flow reach is from the confluence with Warm Springs Creek in the SENW, S13, T4N, R17E downstream approximately 18 miles to the Bellevue diversion in the SWNW, S36, T2N, R18E.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code.
Witness the seal and signature of the Director, affixed at Boise, this 11TH
day of OCTOBER, 1994.

Acting for R. Keith Higginson, Director

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EXHIBIT 4

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)	
PERMIT NO. 37-7919 TO ESTABLISH)	
A MINIMUM STREAM FLOW IN THE)	AMENDED MEMORANDUM
BIG WOOD RIVER IN THE NAME OF)	DECISION AND ORDER
THE IDAHO WATER RESOURCE BOARD)	
_____)	

On October 17, 1986, the Director of the Department of Water Resources (Department) issued a Memorandum Decision and Order approving, subject to conditions, the application of the Idaho Water Resource Board for water right permit No. 37-7919 for a minimum stream flow on the Big Wood River. The decision modified in several respects a proposed memorandum decision and order issued by the hearing officer for the Department on January 24, 1986.

On November 6, 1986, the Idaho Department of Fish and Game (Fish and Game) filed a petition for rehearing before the Department seeking modification of condition No. 3 of the permit which subordinates the minimum stream flow water right to valid beneficial use water rights established by diversion and application to beneficial use prior to May 20, 1971; and condition No. 8 which retains jurisdiction in the director to review the parameters of the permit not earlier than 15 years after issuance of

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the permit or the subsequent license. The petition for rehearing was denied by order of the director on November 17, 1986.

On December 8, 1986, Fish and Game appealed the director's decision to the District Court for the Fourth Judicial District, Ada Civil No. 89946, seeking removal of conditions Nos. 3 and 8.

After the filing of the appeal, the parties engaged in negotiations to settle the litigation. An Agreement of Parties was executed on January 15, 1987 which specifies the wording of Conclusions of Law 1 and 2, and Conditions 3 and 8. On January 15, 1987, the district court issued an Order Remanding Cause to the Idaho Department of Water Resources for the purpose of permitting the Department to issue this amended memorandum decision and order in a manner consistent with the Agreement of Parties. For clarity, the entire memorandum decision and order is shown hereafter, with modifications to Conclusions of law 1 and 2, and Conditions 3 and 8.

BACKGROUND

On June 16, 1981, the Idaho Water Resource Board (Board) filed with the Idaho Department of Water Resources (Department) an application for permit to preserve a minimum flow in the Big Wood River, tributary to the Snake River, in Blaine County. The application was filed by the Board at the request of the Idaho Department of Fish and Game in accordance with the provisions of Chapter 15, Title 42, Idaho Code.

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A public meeting was held by the Board on September 22, 1983, in Hailey, Idaho, for the purpose of determining public interest with respect to said application. On October 7, 1983, the Board adopted a resolution requesting the director to withhold administrative action on said application pending a more thorough analysis of minimum flows on the Big Wood River. On June 8, 1984, the Board requested that the director proceed with administrative action on the application.

Notice describing the proposed appropriation and setting the time and place for the required hearing was published on October 24 and 31, 1985, in the Wood River Journal, Times News, Idaho Statesman, Lewiston Morning Tribune, and Post Register.

Parties appearing in a formal capacity included members of the Board; representatives of the Idaho Department of Fish and Game; Mr. Ed Nigbor, Blaine County Planning Director; and Mr. Robert Sherwood, Attorney in Fact for Helen M. Fassett.

Based upon sworn testimony, documentation and statements included in the record, and his understanding of the law, the director of the Department makes the following Findings of Fact, Analysis, Conclusions of Law, and Order.

FINDINGS OF FACT

1. On June 19, 1981, the Board filed Application for Permit No. 37-7919 to appropriate a minimum stream flow in the Big Wood River, which is tributary to the Snake River, Blaine County, pursuant to the provisions of Chapter 15, Title 42, Idaho Code.

10-2-85

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2. Application for Permit No. 37-7919 proposes to appropriate a minimum stream flow in the Big Wood River throughout a reach from the point of diversion of the Bellevue Canal located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 36, Township 2N, Range 18E, upstream approximately eighteen miles to the confluence with Warm Springs Creek in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, Township 4N, Range 17E, B.M., Blaine County. The proposed rate of flow is 70 cubic feet per second.

3. The purpose of the proposed instream appropriation is to maintain trout habitat within the reach defined above.

4. Based upon testimony of the staff of the Department, a finding is made that various water rights evidenced by licenses, permits, and decrees exist with points of diversion located within the designated minimum stream flow reach. In addition, approximately 55 recorded beneficial use water rights, and an undetermined number of unrecorded beneficial use water rights, divert water at points within this minimum stream flow reach, or on upstream tributaries. The testimony of the Board specifically provided that the minimum stream flow application is not intended to interfere with any vested water right, permit or water right application.

5. The minimum stream flow reach defined in Application for Permit No. 37-7919 is located within State Water District No. 37, Big Wood River and tributaries.

6. All rights acquired under Application for Permit No. 37-7919 are for instream non-consumptive uses.

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7. Based upon testimony presented at the hearing, a finding is made that the benefits to be derived from the minimum stream flow application will be enjoyed by members of the public as opposed to being limited to private use or enjoyment.

8. Based upon the sworn testimony, documentation, and statements comprising the record in this matter, a finding is made that the minimum stream flow application is necessary to maintain trout habitat.

9. Based upon testimony and evidence submitted by the Idaho Department of Fish and Game, a finding is made that the flow requested in the application is the minimum flow required to maintain trout habitat and is not the ideal or most desirable flow which could be utilized for that purpose. A finding is also made that the designated flow of 70 cubic feet per second is not necessarily an adequate flow for recreation, aesthetics and other minimum flow uses, so additional flows on all or portions of the designated reach may be found to be necessary to satisfy these additional uses.

10. Based upon testimony and evidence submitted concerning available flow measurement data, a finding is made that the flow requested is usually capable of being maintained.

11. Water Right Permit No. 37-7866, in the name of Consolidated Power Company, with date of priority November 14, 1980, describes a point of diversion and point of return within the minimum stream flow reach. This permit has been approved for

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a rate of flow of 75 cubic feet per second, with thirteen conditions of approval including condition "M" as follows:

Diversion of water under this permit is subject to the provisions of minimum stream flow Water Right No. 37-7919, Big Wood River, which may require that as much as 70.0 cubic feet per second be allowed to remain undiverted from the source.

ANALYSIS

There is one primary item of contention that has been raised with respect to this minimum stream flow application. This item is whether the requested 70 cubic feet per second is an adequate rate of flow to be established as a minimum stream flow for the reach in question.

Testimony by the Idaho Department of Fish and Game indicates that for the eighteen mile reach that has been identified, the requested rate of flow of 70 cubic feet per second is the minimum and not the ideal flow to maintain trout habitat. Personnel from the Idaho Department of Fish and Game acknowledged that there are some areas within the defined reach where 70 cubic feet per second would not be adequate to maintain trout habitat. However, 70 cubic feet per second was determined to be the best representative minimum flow for the reach based on instream flow analysis methodologies available in the late 1970's. Idaho Department of Fish and Game personnel indicated that newer instream flow methodologies often result in the determination of higher rates of flow as minimum flows, as compared with results of the methodologies available in the 1970's, but that rates of flow determined by newer methodologies are not significantly

greater in magnitude than the flows determined by earlier methodologies.

Testimony and documentation in the file indicate that while the 70 cubic feet per second identified in the application may be an adequate instream flow to maintain trout habitat throughout most of the defined reach, some additional flows may be required for other minimum stream flow purposes, such as recreation and aesthetics. The expressed intent of the applicant and most others providing testimony on this matter is that the appropriate means for establishing any flow in excess of 70 cubic feet per second is to first establish a base minimum flow of 70 cubic feet per second as defined in Application No. 37-7919, and to identify any additional minimum stream flow requirements in a subsequent request to the Board.

CONCLUSIONS OF LAW

1. The proposed minimum stream flow appropriation will not interfere with any vested water right, permit or right under an application having priority date earlier than June 19, 1981. An exception is that water right permit No. 37-7866 with date of priority of November 14, 1980 for 75 cfs for hydropower purposes has been subordinated to the proposed minimum stream flow appropriation. Another exception is to the application of Section 42-607, Idaho Code, which requires the watermaster to distribute water only to decreed, permitted or licensed rights in times of scarcity. Distribution of water to prior existing water rights established by diversion and application to a beneficial use may be interfered with in contravention of Section 42-1502, Idaho

Code, if delivery of water to the minimum stream flow right is not subordinated to such rights.

2. The proposed minimum stream flow should not be allowed to alter historic delivery practices to valid beneficial use water rights in Water District No. 37, Big Wood River.

3. The proposed minimum stream flow appropriation is in the public, as opposed to private, interest.

4. The proposed minimum stream flow appropriation is necessary to maintain trout habitat.

5. The proposed minimum stream flow appropriation is the minimum flow required for the purpose cited in Conclusion of Law No. 4, and is not the ideal or most desirable flow.

6. The proposed minimum stream flow appropriation is usually capable of being maintained.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that Application for Permit No. 37-7919 is APPROVED subject to the following conditions:

1. The use of water under this permit is subject to all prior rights, with the exception of Water Right No. 37-7866.

2. This minimum stream flow permit shall be considered in the evaluation of applications for permit to appropriate waters from the Big Wood River and tributaries filed after June 19, 1981.

3. Pending a general readjudication of the Big Wood stream system, the use of water under this permit shall recognize and allow the continued beneficial diversion, both within and

upstream from the minimum flow reach, of water for irrigation and other purposes under any prior existing water right established by diversion and application to a beneficial use or by a application, permit or license on file or issued by the director under the provisions of chapter 2, title 42, Idaho Code, with a priority of water right date earlier than the June 16, 1981 priority date of this permit. See I.C. § 42-1502(g) (Supp. 1986).

4. The minimum stream flow approved under this application is subject to control by the watermaster of Water District 37, Big Wood River and tributaries.

5. The use of water under this permit shall be non-consumptive.

6. Upon the future finding and order of the director that gauging stations are required to maintain the approved minimum flow on Big Wood River, such measuring devices shall be permanently installed and maintained as specified by the Department.

7. Proof of instream beneficial use of the minimum stream flow appropriated shall be submitted in a manner approved by the Department within five years after the permit approval is finally effective as herein provided. The proof submitted shall include at least three years of flow data for the water course. The proposed frequency of the data accumulation must be submitted to the director for review and approval.

8. The Director retains jurisdiction to review and amend any and all parameters of this permit and subsequent license. Prior to undertaking a review of the water right, the Director

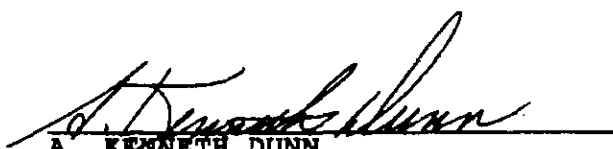
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shall identify the reasons for exercising retained jurisdiction under this condition, and give notice thereof to the public generally and to specific persons or parties known by the Director to be interested. The Director shall thereafter conduct a hearing for the purpose of determining whether the minimum stream flow should be modified or amended in the public interest. The burden of proof at the hearing shall be upon the person or party seeking to establish that a particular parameter of the water right should be modified or amended to satisfy the public interest. Review of the water right under this condition may not occur prior to 15 years after issuance of either the permit or the license.

9. The application hereby approved by the director shall be submitted to the Idaho Legislature by the fifth day of the next regular legislative session, and the director's approval shall not become finally effective until approved by the Legislature pursuant to the procedure provided by Section 42-1503, Idaho Code.

10. Proof of application of water to beneficial use shall be on or before January 1, 1992.

DATED this 16th day of January, 1987.


A. KENNETH DUNN
Director

OCT 20 1994

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT)
NO. 37-7919 TO ESTABLISH A MINIMUM)
STREAMFLOW IN THE BIG WOOD RIVER IN THE) CERTIFICATE OF MAILING
NAME OF THE IDAHO WATER RESOURCES BOARD)
_____)

I HEREBY CERTIFY That on this the 16th day of January, 1987,
true and correct copies of the foregoing AMENDED MEMORANDUM
DECISION AND ORDER was mailed, postage prepaid to:

Gene Gray, Chairman
Idaho Water Resource Board
Route #1, P.O. Box 46-A
Payette, ID 83661

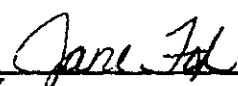
Ed Nigbor, Planning Director
Blaine County Planning and
Zoning Commission
P.O. Box 149
Hailey, ID 83333

Virgil Moore
Idaho Department of Fish and Game
Statehouse
Boise, ID 83720

Steve Goddard
Idaho Department of Fish and Game
Statehouse
Boise, ID 83720

Reid Newby
Water District 37
P.O. Box H
Shoshone, ID 83352

Robert Sherwood
River's Edge Ranch
P.O. Box 273
Sun Valley, ID 83353


JANE FOX
Receptionist/Typist
Idaho Department of Water Resources

OCT 20 1994

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, DEPARTMENT OF)
FISH AND GAME,)
)
Petitioner-Appellant,)
vs.)
)
A. KENNETH DUNN, DIRECTOR,)
IDAHO DEPARTMENT OF WATER)
RESOURCES, IN THE MATTER OF)
APPLICATION FOR PERMIT NO.)
37-7919 TO ESTABLISH A MINIMUM)
STREAM FLOW IN THE BIG WOOD)
RIVER IN THE NAME OF THE WATER)
RESOURCE BOARD,)
)
Respondent.)

Civil No. 89946

AGREEMENT OF PARTIES

This Agreement is entered into by and between the parties to the above-captioned appeal pending before the district court. The parties include the Idaho Department of Fish and Game (Fish and Game), and the Idaho Department of Water Resources (Water Resources).

RECITALS

1. In response to a request by Fish and Game, the Idaho Water Resource Board on June 16, 1981, filed with Water Resources an application for permit No. 37-7919 to appropriate water to preserve a minimum stream flow in the Big Wood River in accordance with the provisions of Chapter 15, Title 42, Idaho Code.

2. On October 17, 1986, the director of Water Resources

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issued a Memorandum Decision and Order approving permit No. 37-7919 with conditions. The decision modified in several respects a proposed memorandum decision and order issued by the Water Resources' hearing officer on January 24, 1986.

3. On November 6, 1986, Fish and Game filed a timely petition for rehearing which was denied by order of the director of Water Resources on November 17, 1986.

4. On December 8, 1986, Fish and Game appealed from the final administrative decision of Water Resources seeking removal of conditions Nos. 3 and 8 of the approved permit.

5. Since the filing of the appeal, the parties have engaged in negotiations to settle the litigation.

6. The parties desire to enter into the following Agreement to resolve all issues on appeal in this proceeding before the district court.

7. Each party agrees to bear its own costs and attorney fees.

IN CONSIDERATION OF THE PROMISES STATED, THE PARTIES AGREE AS FOLLOWS:

1. The proceeding on appeal to the district court shall be remanded to Water Resources for the purpose of issuance of an Amended Memorandum Decision and Order which shall contain the following provisions:

(a) Conclusion of Law No. 1 shall read as follows:

1. The proposed minimum stream flow appropriation will not interfere with any vested water right, permit or right under an application having priority date earlier than June

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19, 1981. An exception is that water right permit No. 37-7866 with date of priority of November 14, 1980 for 75 cfs for hydropower purposes has been subordinated to the proposed minimum stream flow appropriation. Another exception is to the application of Section 42-607, Idaho Code, which requires the watermaster to distribute water only to decreed, permitted or licensed rights in times of scarcity. Distribution of water to prior existing water rights established by diversion and application to a beneficial use may be interfered with in contravention of Section 42-1503, Idaho Code, if delivery of water to the minimum stream flow right is not subordinated to such rights.

(b) Conclusion of Law No. 2 shall read as follows:

2. The proposed minimum stream flow should not be allowed to alter historic delivery practices to valid beneficial use water rights in Water District No. 37, Big Wood River.

(c) Condition No. 3 of the Permit shall read as follows:

3. Pending a general readjudication of the Big Wood stream system, the use of water under this permit shall recognize and allow the continued beneficial diversion, both within and upstream from the minimum flow reach, of water for irrigation and other purposes under any prior existing water right established by diversion and application to a beneficial use or by a application, permit or license on file or issued by the director under the provisions of chapter 2, title 42, Idaho Code, with a priority of water right date earlier than the June 16, 1981 priority date of this permit. See I.C. § 42-1502(g) (Supp. 1986).

(d) Condition No. 8 of the permit shall read as follows:

8. The Director retains jurisdiction to review and amend any and all parameters of this permit and subsequent license. Prior to undertaking a review of the water right, the Director shall identify the reasons for exercising retained jurisdiction under this condition, and give notice thereof to the public.

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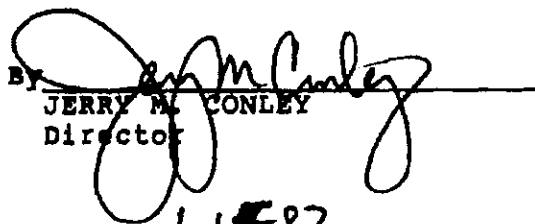
generally and to specific persons or parties known by the Director to be interested. The Director shall thereafter conduct a hearing for the purpose of determining whether the minimum stream flow should be modified or amended in the public interest. The burden of proof at the hearing shall be upon the person or party seeking to establish that a particular parameter of the water right should be modified or amended to satisfy the public interest. Review of the water right under this condition may not occur prior to 15 years after issuance of either the permit or the license.

2. Entry into this Agreement does not constitute a waiver by any of the parties of any legal right or position they may assert in any proceeding other than this instream flow proceeding involving water right permit No. 37-7919.

3. Immediately upon implementation of this Agreement, the parties shall move to dismiss the appeal pending before the district court in this proceeding.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date following their respective signatures.

IDAHO DEPARTMENT OF FISH
AND GAME

BY 
JERRY M. CONLEY
Director

Date

1-14-87

IDAHO DEPARTMENT OF WATER
RESOURCES

BY 
A. KENNETH DUNN
Director

Date

1-14-87

OCT 20 1987

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR PERMIT NO. 37-7919 TO	)	
ESTABLISH A MINIMUM STREAM FLOW	)	ORDER ON PETITION
IN THE BIG WOOD RIVER IN THE NAME	)	FOR RECONSIDERATION
OF THE IDAHO WATER RESOURCE BOARD	)	AND REHEARING
	)	

On October 17, 1986, the Director of the Department of Water Resources issued a Memorandum Decision and Order approving Permit No. 37-7919 with conditions. On November 6, 1986, the Idaho Department of Fish and Game filed a timely Petition For Reconsideration and Rehearing. The Director's consideration and disposition of the issues raised by Fish and Game's petition are as follows:

1. Fish and Game argues that it is contrary to law for the Director in his memorandum decision and order to have modified finding of fact no. 4 and conclusion of law no. 1 because no party filed exceptions to these provisions. Fish and Game does not cite any legal authority for its assertion that the Director lacks authority to modify a provision in a hearing officer's proposed decision because it has not been specifically objected to by a party.

Paragraph V of the Director's January 24, 1986 order issuing the proposed memorandum decision provides as follows:

Following the submission of all exceptions, briefs and oral arguments, if they are heard, the Director shall issue a final decision adopting, modifying or rejecting and replacing the proposed decision. Copies of the decision and order shall be served on all parties.

In this proceeding Fish and Game filed exceptions to the proposed decision. The Director considered those exceptions and as a result modified the proposed decision as reflected in his final decision. The Director is not aware of legal authority prohibiting him from modifying provisions of the proposed decision which were not specifically excepted to by a party. Certainly, the opportunity to file a petition for rehearing provides Fish and Game with an opportunity to address the propriety of the Director's modifications and adequately safeguards Fish and Game's right to due process.

Finally, while Fish and Game's exceptions did not specifically call for a modification of finding of fact no. 4 and conclusion of law no. 1, they did address the subject matter contained in those two provisions of the proposed decision. Thus, it is reasonable that Fish and Game could have expected the Director to make modifications to the two provisions in response to its filed exceptions.

Testimony from the hearing, quoted in part in the final decision, supports the modification made to finding of fact no. 4. The modification to conclusion of law no. 1 is consistent with the provisions of the minimum stream flow act. I.C. § 42-1502(g) defines "unappropriated water" as follows:

(g) "Unappropriated water" means water which is not subject to diversion and use under any prior existing water right established by diversion and application to a beneficial use or by application, permit or license on file or issued by the director under the provisions of chapter 2, title 42, Idaho Code, with a priority of water right date earlier than an application for appropriation of minimum stream flow filed under the provisions of this act."

I.C. § 42-1503 provides ,in part, as follows with respect to the approval of an application for a minimum stream flow permit:

Approval of any such application must be based upon a finding that such appropriation of minimum stream flow:

(a) will not interfere with any vested water right, permit, or water right application with priority of right date earlier than the date of receipt in the office of the director of a complete application for appropriation of minimum stream flow filed under the provisions of this act;

The Director believes that the above-quoted provisions of the minimum stream flow act support conclusion of law no. 1 and condition no. 3 to the effect that, notwithstanding I.C. § 42-607, the minimum stream flow permit shall be subordinated for distribution purposes to valid beneficial use water rights which are first documented by the filing of a claim, pursuant to I.C. § 42-243, showing the right to have been initiated prior to May 20, 1971.

Fish and Game asserts that condition no. 3 is clearly erroneous and contrary to Idaho law. In making this argument, Fish and Game focuses completely on I.C. § 42-607 regarding the duties of the watermaster in delivering water rights in time of

shortage and ignores the more specific provisions of the minimum stream flow act.

2. Fish and Game points out an apparent inconsistency between the language used in conclusions of law nos. 1 and 2. Conclusion of law no. 1 uses the terms "recorded" and "unrecorded" in referring to the two classes of water rights described in I.C. § 42-607. The conclusion might more accurately have contained the phrase "adjudicated, decreed, permit or licensed right" in place of the term "recorded", and the phrase "diversions having no adjudicated, decreed, permit or licensed right" in place of the term "unrecorded".

While conclusion of law no. 1 concludes that the minimum stream flow right should be subordinated to "unrecorded" prior rights established by diversion and beneficial use, conclusion of law no. 2 provides that the minimum stream flow right should be subordinated to beneficial use water rights for which a "claim" has been filed pursuant I.C. § 42-243. It is important to note that filing a claim to a beneficial use water right does not result in an "adjudicated, decreed, permit or licensed right." Any confusion which may exist should be adequately resolved by reference to condition 3 of the order which states:

3) Pending a general readjudication of the Big Wood stream system, the use of water under this permit shall recognize and allow the continued beneficial diversion, both within and upstream from the minimum flow reach, of water for irrigation and other purposes based on valid recorded and unrecorded beneficial use water rights, provided that unrecorded diversions are first documented by the filing of a claim, pursuant to

Section 42-243 Idaho Code, showing the right to have been initiated prior to May 20, 1971.

3. Fish and Game renews the argument made in its exceptions to the proposed decision that the Director is without authority to impose the future review provision contained in condition no. 8 to the permit. Fish and Game asserts that its argument is supported by the fact the Legislature in 1985 added I.C. § 42-203B to authorize time limits for hydro power permits but remained silent with respect to minimum stream flow permits. Fish and Game further asserts that its position is supported by the fact that the controversy regarding the future review provision was brought to the attention of the 1986 Legislature through the submission of the Pahsimeroi River minimum stream flow permit no. 73-7045 and that the Legislature took no steps to resolve the dispute.

The Director does not find Fish and Game's arguments on the future review provision to be convincing. The fact that the 1985 Legislature passed legislation to assure that the Director had authority to issue term permits for hydro power projects is not conclusive as to whether the Director has authority to condition a minimum stream flow permit with a future review provision. Likewise, the fact that the 1986 Legislature did not address the issue even though the Pahsimeroi River minimum stream flow permit, which contained such a future review provision through stipulation with Fish and Game, was before it does not support Fish and Game's position. If any significance were to be given to the Pahsimeroi permit it should rather weigh in favor of a

lack of need for specific legislation since the Legislature allowed the permit to become final without striking the future review provision.

The Director acknowledges for purposes of responding to the petition for rehearing that past minimum stream flow permits, with the exception of the Pahsimeroi River permit, have not contained future review provisions. The Director, however, declines Fish and Game's request to take official notice of each of these permits since it would unduly add to the record in this proceeding and be inconclusive on the issue raised. The Director's justification for deviation from the past practice may be found in a reading of the Supreme Court's decision in Shokal v. Dunn, 109 Idaho 330 (1985) which makes clear the responsibility of the Director to safeguard the interests of the public not only today but in the future.

4. Fish and Game renews the argument made in its exceptions that finding of fact no. 10 and conclusion of law no. 6, which state "the flow requested is usually capable of being maintained," are inadequate because evidence shows the minimum flow can be maintained 99 percent of the time which is more than "usually". The Director continues to find the objection to be without merit as stated in the memorandum decision and order.

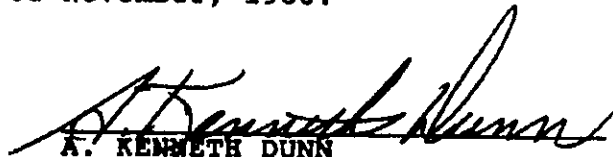
ORDER

Based upon the above reconsideration of the decision in this matter,

IT IS HEREBY ORDERED that the Petition For Rehearing filed by the Department of Fish and Game is hereby denied and that the

decision of the Director remains as set forth in the Memorandum Decision and Order dated October 17, 1986.

DATED this 17th day of November, 1986.


A. KENNETH DUNN
Director

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 37-7919 TO)
ESTABLISH A MINIMUM STREAM FLOW)
IN THE BIG WOOD RIVER IN THE NAME)
OF THE IDAHO WATER RESOURCE BOARD)

MEMORANDUM DECISION AND ORDER

BACKGROUND

On January 24, 1986, a proposed memorandum decision was issued by the Department of Water Resources hearing officer, providing for the approval of the minimum stream flow as requested under conditions to insure compliance with the statutes and to protect the public interest. On February 7, 1986, William Dillon III, counsel representing the Idaho Department of Fish and Game, filed exceptions to the proposed memorandum decision and asked that the memorandum decision be amended and modified. In summary, these exceptions involve the following issues:

(1) The rate of stream flow should be found to be "capable of being maintained" rather than "usually capable of being maintained".

(2) The minimum stream flow should be distributed water in preference to senior unrecorded rights.

(3) The director should not retain jurisdiction to review and amend the minimum stream flow permit 15 years after issuance of the permit or license.

On May 8, 1986, the department mailed to all parties copies of a letter dated April 24, 1986, from Gene M. Gray, Chairman of the Idaho Water Resource Board, and a resolution approved by the Board supporting "an appropriate term review" and "making the minimum stream flow right subject to prior recorded rights and unrecorded rights until the cutoff date of June 30, 1988."

On May 30, 1986, Susan (Stanfield) Mattos filed comments of the Idaho Department of Fish and Game opposing the augmentation of the hearing record with Mr. Gray's April 24, 1986 letter and the Board resolution conveyed by that letter.

On June 23, 1986, the department mailed to all parties a "notice of opportunity to contest matters officially noticed" referencing and conveying Mr. Gray's letter of April 24, 1986. The department also mailed the Board's resolution associated with the letter and Board resolution dated June 6, 1986, "endorsing and approving the inclusion of conditions Nos. 3 and 8 contained in the proposed memorandum decision, and requesting that the agency record be augmented with a copy of the resolution".

On July 9, 1986, Susan Mattos filed the objections of the Idaho Department of Fish and Game to the augmentation of the record with these materials.

RULING ON MOTION TO AUGMENT

The applicant's request to augment the record is hereby denied. The following documents have not been considered in the decision:

(1) Agenda item No. 9, minimum stream flow application, Big Wood River from the approved minutes of the Idaho Water Resource Board meeting of March 11, 1986, pages 1, 6, 7 & 9.

(2) A letter dated April 24, 1986, from Gene M. Gray, Chairman of the Idaho Water Resource Board to the director summarizing the action taken by the Board at its March 11, 1986 meeting under agenda item No. 9, minimum stream flow application, Big Wood River.

(3) A resolution the Idaho Water Resource Board dated June 6, 1986 endorsing and approving inclusion of conditions nos. 3 and 8 contained in the

proposed memorandum decision and order of the department in the matter of minimum stream flow application No. 37-7919 and requesting that the agency record be augmented with a copy of the resolution.

RULING ON EXCEPTIONS TO PROPOSED DECISION

Historic Delivery Practices

Fish and Game takes exception to proposed conclusion of law No. 2 which states: "The proposed minimum stream flow should not be allowed to alter historic delivery practices of Water District No. 37, Big Wood River." Fish and Game also takes exception to condition No. 3 of the proposed order which states: "The use of water under this permit shall recognize and allow the continued diversion, both within and upstream from the minimum flow reach, of water for irrigation purposes based on valid recorded and unrecorded beneficial use water rights, to the extent that the unrecorded diversions can be verified as having been initiated prior to May 20, 1971."

The Water Resource Board, as applicant, in testimony at the hearing recognized the legal requirement that establishment of the minimum stream flow could not interfere with existing water rights. Board member, F. Dave Rydalch, testified in part as follows: "The Board reviewed the request with the intent that any minimum stream flow right would not interfere with any vested water right, permit or water right application. . .," (emphasis added).

Based upon this testimony finding of fact #4 is hereby amended and adopted as follows:

Finding of Fact 4: Based upon testimony of the staff of the department, a finding is made that various water rights evidenced by licenses, permits, and decrees exist with points of diversion located within the designated minimum stream flow reach. In addition, approximately 55 recorded beneficial use water rights, and an undetermined number of unrecorded beneficial use water rights, divert water at points within this minimum stream flow reach, or on upstream tributaries. The testimony of the Board specifically provided that the minimum stream flow application is not intended to interfere with any vested water right, permit or water right application.

A comparison of the decision criteria required by Section 42-1503 Idaho Code, with the definition of "unappropriated water" in Section 42-1502(g) Idaho Code, confirms that the term "vested water right" includes rights lawfully established by diversion and beneficial use. The evidence documents that numerous undecreed but potentially valid rights established by diversion and beneficial use exist that could be interfered with if water is distributed only to recorded rights as provided by Section 42-607 Idaho Code, if those recorded rights include the minimum stream flow right requested. The choice is thus clear: Either the minimum stream flow must be subordinated for water distribution purposes to the valid prior unrecorded rights or the minimum stream flow must be denied to prevent interference with delivery of these rights. Conclusion of law No. 1 of the proposed memorandum decision and order shall be modified to address this issue to read as follows:

Conclusion of Law #(1) The proposed minimum stream flow appropriation will not interfere with any vested water right, permit or right under an application having priority date earlier than June 19,

1981. An exception is that water right permit No. 37-7866 with date of priority November 14, 1980 for 75 cfs for hydropower purposes has been subordinated to the proposed minimum stream flow appropriation. Another exception is that Section 42-607 Idaho Code, requires the watermaster to distribute water to recorded rights in times of scarcity. Distribution of water to unrecorded prior rights lawfully established by diversion and beneficial use would be interfered with if delivery of water to the minimum stream flow right is not subordinated to such rights.

However, to partially address the concerns of Fish and Game that the minimum stream flow right should not be treated as junior in time to all valid beneficial use water rights initiated prior to May 20, 1971, the following modification shall be made to the proposed memorandum decision and order:

Conclusion of Law No. 2 shall be modified to read:

Conclusion of Law No. (2) The proposed minimum stream flow should not be allowed to alter historic delivery practices to valid beneficial use water rights in Water District No. 37, Big Wood River for which a claim to a water right has been filed with the director of the Department of Water Resources.

Condition No. 3 of the proposed order shall be modified to read:

Condition No. (3) Pending a general readjudication of the Big Wood stream system, the use of water under this permit shall recognize and allow the continued beneficial diversion, both within and upstream, from the minimum flow reach, of water for irrigation and other purposes, based on valid recorded and unrecorded beneficial use water rights, provided that unrecorded diversions are first documented by the filing

of a claim, pursuant to Section 42-243 Idaho Code, showing the right to have been initiated prior to May 20, 1971.

Retained Jurisdiction

Fish and Game takes exception to condition No. 8 of the proposed order which states:

Condition No. (8) The director retains jurisdiction to review and amend any and all parameters of this permit and subsequent license upon his determination that the public interest is no longer served by the minimum stream flow as established. The director may review the permit and subsequent license 15 years after issuance of either the permit or the license.

The hearing record documents that other potential uses exist for the water of Big Wood River. The record also demonstrates that the public interest at this time supports establishment of the minimum stream flow.

Minimum stream flows appear to be more permanent than rights requiring diversion from the stream. Minimum stream flows are not likely to be subject to loss by abandonment or forfeiture. The Board, as applicant and right holder, is not given authority to convey a minimum stream flow right to another entity or to change the nature of use of the right. The Director is charged with determining that appropriations of water are and remain in the public interest. The opportunity must be preserved to periodically review whether this minimum stream flow right remains in the public interest. Section 42-1503, Idaho Code, authorizes the director of the Department of Water Resources to approve an application for minimum stream flow in whole or in part or upon conditions. Without the term "review condition" (condition No. 8), a finding could not be

made to find this minimum stream flow in the public interest and approval of the minimum stream flow permit would be denied.

In order to partially address the concern of Fish and Game regarding the retention of jurisdiction by the director, condition No. 8 of the proposed order shall be modified to read as follows:

Condition No. (8) The director retains jurisdiction to review the permit and subsequent license not earlier than 15 years after issuance of either the permit or license to modify any and all parameters of the permit or license upon a determination that such modifications are in the public interest. The director shall provide notice and opportunity for hearing in accordance with applicable law prior to amending the permit or license due to a change in the public interest.

Other Exceptions

Fish and Game also takes exceptions to those portions of finding of fact No. 10 and conclusion of law No. 6 which state, "the flow requested is usually capable of being maintained". Fish and Game argues that the evidence shows the minimum flow can be maintained 99 percent of the time which is more than "usually". The director determines this exception to be without merit because the stream flow records analyzed are only for a site near Hailey. Department of Water Resources staff exhibit No. 3 states that "flows at upstream end of the reach are not well defined".

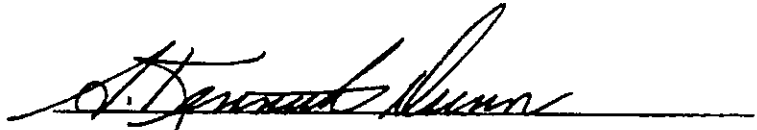
ORDER

IT IS HEREBY ORDERED that proposed memorandum decision and order issued herein is adopted as the final decision and order with those modifications to

finding of fact No. 4 and to conclusions of law No. 1 and 2, and conditions No. 3 and 8 as set forth above in this decision.

IT IS FURTHER ORDERED that proof of application of water to beneficial use shall be on or before November 1, 1991.

DATED this 17th day of October, 1986.

A handwritten signature in cursive script, appearing to read "A. Kenneth Dunn", is written over a horizontal line.

A. KENNETH DUNN

Director

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT)
NO. 37-7919 TO ESTABLISH A MINIMUM)
STREAM FLOW IN THE BIG WOOD RIVER)
IN THE NAME OF THE IDAHO WATER RESOURCE)
BOARD)

PROPOSED
MEMORANDUM DECISION
AND ORDER

On June 16, 1981, the Idaho Water Resource Board (hereafter Board) filed with the Idaho Department of Water Resources (hereafter Department) an application for permit to preserve a minimum flow in the Big Wood River, tributary to the Snake River, in Blaine County. The application was filed by the Board at the request of the Idaho Department of Fish and Game in accordance with the provisions of Chapter 15, Title 42, Idaho Code.

A public meeting was held by the Board on September 22, 1983, in Hailey, Idaho, for the purpose of determining public interest with respect to said application. On October 7, 1983, the Board adopted a resolution requesting the Director to withhold administrative action on said application pending a more thorough analysis of minimum flows on the Big Wood River. On June 8, 1984, the Board requested that the Director proceed with administrative action on the application.

Notice describing the proposed appropriation and setting the time and place for the required hearing was published on October 24 and 31, 1985, in the Wood River Journal, Times News, Idaho Statesman, Lewiston Morning Tribune, and Post Register.

Parties appearing in a formal capacity included members of the Board; representatives of the Idaho Department of Fish and Game; Mr. Ed Nigbor, Blaine County Planning Director; and Mr. Robert Sherwood, Attorney in Fact for Helen M. Fassett.

Based upon sworn testimony, documentation and statements included in the record, and his understanding of the law, the Hearing Officer as a representative of the Director of the Department proposes the following Findings of Fact, Analysis, Conclusions of Law, and Order.

FINDINGS OF FACT

1) On June 19, 1981, the Board filed Application for Permit No. 37-7919 to appropriate a minimum stream flow in the Big Wood River, which is tributary to the Snake River, Blaine County, pursuant to the provisions of Chapter 15, Title 42, Idaho Code.

2) Application for Permit No. 37-7919 proposes to appropriate a minimum stream flow in the Big Wood River throughout a reach from the point of diversion of the Bellevue Canal located in the SW1/4 NW1/4, Section 36, Township 2N, Range 18E, upstream approximately eighteen miles to the confluence with Warm Springs Creek in the SE1/4 NW1/4, Section 13, Township 4N, Range 17E, B.M., Blaine County. The proposed rate of flow is 70 cubic feet per second.

3) The purpose of the proposed instream appropriation is to maintain trout habitat within the reach defined above.

4) Based upon testimony of the staff of the Department, a finding is made that various water rights evidenced by licenses, permits, and decrees exist with points of diversion located within

the designated minimum stream flow reach. In addition, approximately 55 recorded beneficial use water rights, and an undetermined number of unrecorded beneficial use water rights, divert water at points within this minimum stream flow reach, or on upstream tributaries. The testimony of the Board specifically provided that the minimum stream flow application is not intended to affect the delivery of prior water rights represented by permits, licenses, or decrees.

5) The minimum stream flow reach defined in Application for Permit No. 37-7919 is located within State Water District No. 37, Big Wood River and tributaries.

6) All rights acquired under Application for Permit No. 37-7919 are for instream non-consumptive uses.

7) Based upon testimony presented at the hearing, a finding is made that the benefits to be derived from the minimum stream flow application will be enjoyed by members of the public as opposed to being limited to private use or enjoyment.

8) Based upon the sworn testimony, documentation, and statements comprising the record in this matter, a finding is made that the minimum stream flow application is necessary to maintain trout habitat.

9) Based upon testimony and evidence submitted by the Idaho Department of Fish and Game, a finding is made that the flow requested in the application is the minimum flow required to maintain trout habitat and is not the ideal or most desirable flow which could be utilized for that purpose. A finding is also made that the designated

flow of 70 cubic feet per second is not necessarily an adequate flow for recreation, aesthetics and other minimum flow uses, so additional flows on all or portions of the designated reach may be found to be necessary to satisfy these additional uses.

10) Based upon testimony and evidence submitted concerning available flow measurement data, a finding is made that the flow requested is usually capable of being maintained.

11) Water Right Permit No. 37-7866, in the name of Consolidated Power Company, with date of priority November 14, 1980, describes a point of diversion and point of return within the minimum stream flow reach. This permit has been approved for a rate of flow of 75 cubic feet per second, with thirteen conditions of approval including condition "M" as follows:

Diversion of water under this permit is subject to the provisions of minimum stream flow Water Right No. 37-7919, Big Wood River, which may require that as much as 70.0 cubic feet per second be allowed to remain undiverted from the source.

ANALYSIS

There is one primary item of contention that has been raised with respect to this minimum stream flow application. This item is whether the requested 70 cubic feet per second is an adequate rate of flow to be established as a minimum stream flow for the reach in question.

Testimony by the Idaho Department of Fish and Game indicates that for the eighteen mile reach that has been identified, the requested rate of flow of 70 cubic feet per second is the minimum and not the ideal flow to maintain trout habitat. Personnel from the Idaho Department of Fish and Game acknowledged that there are some areas within the

defined reach where 70 cubic feet per second would not be adequate to maintain trout habitat. However, 70 cubic feet per second was determined to be the best representative minimum flow for the reach based on instream flow analysis methodologies available in the late 1970s. Idaho Department of Fish and Game personnel indicated that newer instream flow methodologies often result in the determination of higher rates of flow as minimum flows, as compared with results of the methodologies available in the 1970's, but that rates of flow determined by newer methodologies are not significantly greater in magnitude than the flows determined by earlier methodologies.

Testimony and documentation in the file indicate that while the 70 cubic feet per second identified in the application may be an adequate instream flow to maintain trout habitat throughout most of the defined reach, some additional flows may be required for other minimum stream flow purposes, such as recreation and aesthetics. The expressed intent of the applicant and most others providing testimony on this matter is that the appropriate means for establishing any flow in excess of 70 cubic feet per second is to first establish a base minimum flow of 70 cubic feet per second as defined in Application No. 37-7919, and to identify any additional minimum stream flow requirements in a subsequent request to the Board.

CONCLUSIONS OF LAW

1) The proposed minimum stream flow appropriation will not interfere with any vested water right, permit, or right under an application having a priority date earlier than June 19, 1981. An exception is that Water Right Permit No. 37-7866 with date of priority

November 14, 1980, for 75 cubic feet per second for hydropower purposes, has been subordinated to the proposed minimum stream flow appropriation.

2) The proposed minimum stream flow should not be allowed to alter historic delivery practices of Water District No. 37, Big Wood River.

3) The proposed minimum stream flow appropriation is in the public, as opposed to private, interest.

4) The proposed minimum stream flow appropriation is necessary to maintain trout habitat.

5) The proposed minimum stream flow appropriation is the minimum flow required for the purpose cited in Conclusion of Law No. 4, and is not the ideal or most desirable flow.

6) The proposed minimum stream flow appropriation is usually capable of being maintained.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that Application for Permit No. 37-7919 is APPROVED subject to the following conditions:

1) The use of water under this permit is subject to all prior rights, with the exception of Water Right No. 37-7866.

2) This minimum stream flow permit shall be considered in the evaluation of Applications for Permit to appropriate waters from the the Big Wood River and tributaries filed after June 19, 1981.

3) The use of water under this permit shall recognize and allow the continued diversion, both within and upstream from the minimum flow reach, of water for irrigation purposes based on valid recorded and unrecorded beneficial use water rights, to the extent

that the unrecorded diversions can be verified as having been initiated prior to May 20, 1971.

4) The minimum stream flow approved under this application is subject to control by the watermaster of Water District 37, Big Wood River and tributaries.

5) The use of water under this permit shall be non-consumptive.

6) Upon the future finding and order of the Director that gauging stations are required to maintain the approved minimum flow on Big Wood River, such measuring devices shall be permanently installed and maintained as specified by the Department.

7) Proof of instream beneficial use of the minimum stream flow appropriated shall be submitted in a manner approved by the Department within five years after the permit approval is finally effective as herein provided. The proof submitted shall include at least three years of flow data for the water course. The proposed frequency of the data accumulation must be submitted to the Director for review and approval.

8) The Director retains jurisdiction to review and amend any and all parameters of this permit and subsequent license upon his determination that the public interest is no longer served by the minimum stream flow as established. The Director may review the permit and subsequent license 15 years after issuance of either the permit or the license.

9) The application hereby approved by the Director shall be submitted to the Idaho Legislature by the fifth day of the next regular legislative session, and the Director's approval shall not become finally effective until approved by the Legislature pursuant to the procedure provided by Section 42-1503, Idaho Code.

Dated this 21st day of January, 1986.

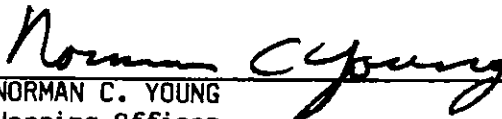

NORMAN C. YOUNG
Hearing Officer

EXHIBIT 5

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMIT TO)	
APPROPRIATE WATER NOS. 37-8258 AND 37-8307)	
IN THE NAME OF THE IDAHO WATER RESOURCE)	
BOARD TO ESTABLISH MINIMUM STREAMFLOWS IN)	ORDER RESCINDING
THE BIG WOOD RIVER)	MEMORANDUM DECISION
	AND ORDER

After this matter was heard and a final decision issued, additional issues have been raised which require further consideration. Therefore, the Director finds, concludes and orders as follows:

FINDINGS OF FACT

1. A hearing was properly held regarding the minimum streamflows, and a proposed decision issued. The order portion of the proposed decision contained a condition which stated:

8. To the extent groundwater withdrawal may affect surface water flows, these permits are subordinate to development of domestic and municipal groundwater supplies.

2. The proposed decision was adopted by the Director by order dated January 2, 1991. The minimum streamflow decision was submitted to the Legislature as required by Idaho Code § 42-1503 on January 10, 1991.

3. Following submittal of the application to the Legislature, substantial controversy arose regarding the condition subjecting the minimum streamflow to depletion by

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domestic and municipal groundwater withdrawals and the coordination of the minimum streams with water management planning for the Big Wood River Basin.

4. The Director notified the Senate President Pro Tem and the Speaker of the House by letter dated February 6, 1991, that he was withdrawing approved permits 37-8258 and 37-8307 from consideration by the legislature until further administrative hearings were held to address the newly raised issues.

CONCLUSIONS OF LAW

1. The rescision of the prior proposed order and the order adopting the proposed memorandum decision and order is necessary to allow an additional hearing and data gathering to address the additional issues.

2. The rescision of the orders issued approving the minimum streamflow shall not, in any way, vitiate the record that has already been gathered by the Department. Further hearings should augment the existing record.

IT IS HEREBY ORDERED that the Proposed Memorandum Decision and Order, dated December 7, 1990, and the Order Adopting Proposed Decision Memorandum and Order, dated January 2, 1991, are RESCINDED.

IT IS FURTHER ORDERED that additional data will be gathered, and additional hearings held concerning subordination of surface water flows to development of groundwater and to determine the effect and coordination of a minimum streamflow on water management planning in the Big Wood River Basin.

ORDER - Page 2

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IT IS FURTHER ORDERED that the record already created for these minimum streamflows shall remain intact, and that additional hearings and data will supplement the existing record.

Dated this 22ND day of February, 1991.


R. KEITH HIGGINSON, Director
Department of Water Resources

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CERTIFICATE OF MAILING

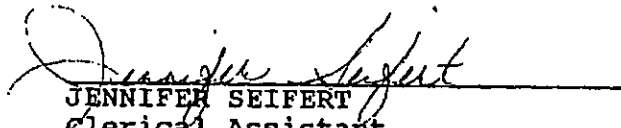
I hereby certify that on this 28th day of February, 1991,
I mailed a true and correct copy of the Order Rescinding
Memorandum Decision and Order, postage prepaid, to the following
individuals:

Blaine County Planning and
Zoning Commission
Ralph Cisco
P.O. Box 149
Hailey, ID 83333

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

IDWR - Southern Region

Friends of the Big Wood River
P.O. Box 4411
Ketchum, ID 83340


JENNIFER SEIFERT
Clerical Assistant

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

IN THE MATTER OF APPLICATIONS FOR PERMIT
NOS. 37-8258 AND 37-8307 IN THE NAME OF THE
IDAHO WATER RESOURCE BOARD TO ESTABLISH
MINIMUM STREAMFLOWS IN THE BIG WOOD RIVER

ORDER ISSUING
PROPOSED MEMORANDUM
DECISION

R. Keith Higginson, Director of the Department of Water Resources, having reviewed the attached proposed decision prepared by this appointee, GARY SPACKMAN, who conducted the hearing or who has read the record in this case, hereby approves the same as a proposed decision pursuant to Idaho Code, Sec. 67-5211.

Each party to these proceedings who appeared at the hearing is given the opportunity, pursuant to Idaho Code, Sec. 42-1701A and 67-5211, to file exceptions to the proposed decision and to present briefs and oral arguments. If no timely and proper exceptions are received, an order by the Director will be entered adopting the proposed decision as his final decision.

I.
EXCEPTIONS

A. To be considered by the Director, exceptions must:

1. be received by the Director on or before the 15th day following the day of service of this Order and the proposed decision,

2. specifically identify the portions of the proposed decision to which exceptions are made and specifically state the grounds for those exceptions, and

3. be sent to each of the parties who appeared or their attorneys.

II.
BRIEFS

A. Any briefs in support of exceptions to the proposed decision shall be filed with the Director at the same time that party's exceptions are filed with the Director.

B. All response briefs to the exceptions must be filed with the Director within 15 days after the exceptions were served upon the responding party.

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III.

A. No oral arguments before the Director on the proposed decision will be held unless specifically requested by a party filing exceptions to the proposed decision and unless that request is filed with the Director concurrently with the filing of that party's exception.

B. If oral arguments have been properly requested by a party filing exceptions, any other party, upon reasonable notice to the Director, shall have the right to present oral argument in response to the exceptions filed.

C. Oral arguments before the Director on exceptions to the proposed decision shall be heard at the discretion of the Director, pursuant to Idaho Code, Sec. 42-1701A. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour the oral arguments will take place and of the period of time allocated for the arguments of this case. Unless the Director orders otherwise, all oral arguments shall be heard in Boise, Idaho.

IV.

CERTIFICATE OF SERVICE

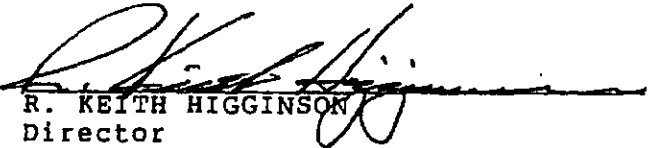
All exceptions, briefs, requests for oral argument and other matters filed with the Director in connection with the proposed decision shall be served on all other parties to these proceedings in accordance with Rule 7.2.

V.

FINAL DECISION

Following the submission of all exceptions, briefs and oral arguments, if they are heard, the Director shall issue a final decision adopting, modifying or rejecting and replacing the proposed decision. Copies of the decision and order shall be served on all parties.

Dated this 10TH day of December, 19 90.


R. KEITH HIGGINSON
Director

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IN THE MATTER OF APPLICATIONS FOR PERMIT
TO APPROPRIATE WATER NOS. 37-8258 AND
37-8307 IN THE NAME OF THE IDAHO WATER
RESOURCE BOARD TO ESTABLISH MINIMUM
STREAMFLOWS IN THE BIG WOOD RIVER

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CERTIFICATE OF MAILING

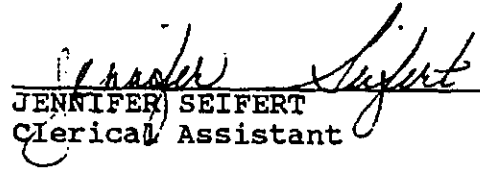
I hereby certify that on this 4th day of January, 1991, I mailed a true and correct copy of the Order Adopting Proposed Memorandum Decision and Order, postage prepaid, to the following individuals:

Blaine County Planning and
Zoning Commission
Ralph Cisco
P.O. Box 149
Hailey, ID 83333

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

Friends of the Big Wood River
P.O. Box 4411
Ketchum, ID 83340

IDWR- Southern Region


JENNIFER SEIFERT
Clerical Assistant

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

IN THE MATTER OF APPLICATIONS FOR PERMIT)
TO APPROPRIATE WATER NOS. 37-8258 AND)
37-8307 IN THE NAME OF THE IDAHO WATER)
RESOURCE BOARD TO ESTABLISH MINIMUM)
STREAMFLOWS IN THE BIG WOOD RIVER)

PROPOSED
MEMORANDUM
DECISION AND
ORDER

On February 24, 1986, the Idaho Water Resource Board (Board) filed with the Idaho Department of Water Resources (Department) application for permit no. 37-8258 to establish a minimum streamflow in the Big Wood River, located in Blaine County, Idaho. The minimum streamflow was requested by the Blaine County Planning and Zoning Commission, and was filed pursuant to the provisions of Chapter 15, Title 42, Idaho Code. A public meeting was held by the Board in Hailey, during March, 1986, for the purpose of determining whether the public would support the application. Following the local public information meeting, the Board requested that the Director of the Department consider the merits of the application.

Following the public information meeting, applications for permit to appropriate water nos. 37-8297 and 37-8298 were filed by the Sun Valley Company to divert water from Warm Springs Creek and the Big Wood River for snow-making purposes. Because of concern that the minimum streamflow would prevent diversion of water for snow-making, the Blaine County Planning and Zoning

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Commission requested that the Board subordinate its filing to the snow-making proposal. After considering the request, the Board withdrew the portion of the original application which proposed a minimum flow downstream from the confluence with Warm Springs Creek and filed application for permit no. 37-8307, which seeks a minimum streamflow for the portion withdrawn.

Notice describing the proposed applications and setting the time and place for the required hearing was published on October 18 and 25, 1990, by statewide publication. A public hearing was held at the Blaine County Courthouse and at the Ketchum City Hall on November 14, 1990.

Parties appearing in a formal capacity included the Board, the Blaine County Planning and Zoning Commission, the Blaine County Commission, and the Friends of the Big Wood River.

Based upon the record and the information contained in the Department files and upon his understanding of the law, the hearing officer, as a representative of the Director, proposes the following findings, conclusions, and order:

FINDINGS OF FACT

1. Application for permit no. 37-8258 proposes to appropriate a minimum streamflow in a reach of the Big Wood River beginning at the Sawtooth National Recreation Area Boundary, located in the SE1/4NW1/4, Section 10, T5N, R17E, B.M., and extending downstream approximately 9 miles to the confluence of Warm Springs Creek with the Big Wood River, located in the SE1/4NW1/4, Section 13, T4N, R17E, B.M., Blaine County. The

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application proposes a year-round flow rate of 200 cubic feet per second (cfs).

2. Application for permit no. 37-8307 proposes to appropriate a minimum streamflow in a reach of the Big Wood River beginning at the confluence of Warm Springs Creek with the Big Wood River, located in the SE1/4NW1/4, Section 13, T4N, R17E, B.M., and extending downstream approximately 18 miles to the Bellevue diversion, located in the SW1/4NW1/4, Section 36, T2N, R18E, B.M., Blaine County. The application proposes a year-round flow rate of 119.23 cfs.

3. The purposes of the minimum streamflow applications are to maintain fish and wildlife habitat, water quality, aesthetics and recreation.

4. The flows of the Big Wood River have been monitored by the United States Geological Service (USGS) at two locations. One gauging station was located North of Ketchum (upper gauge), just upstream from the confluence of the Big Wood River with the North Fork of the Big Wood River, approximately at the beginning of the minimum streamflow reach proposed by application no. 37-8258. USGS began gathering data at the station in 1948, but discontinued data gathering in 1971. A second gauging station is presently located near Hailey (lower gauge). This gauge is located within the reach requested in application no. 37-8307. USGS began gathering data at the Hailey gauge in 1915, and continues to gauge flows at the location.

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5. The flow records collected at the upper gauge do not account for inflow contributed by the North Fork of the Big Wood River. The approximate drainage area of the North Fork of the Big Wood River is approximately 25% of the drainage area of the Big Wood River above the confluence. Approximately 25% more flow would be measured below the confluence.

6. A review of the hydrologic data for the upper reach reveals two distinct flow periods, April through August, and September through March.

7. For the period of April-August, the maximum flow records for the upper gauge reveal that flows of 200 cfs or more have been recorded during each of the months. When an additional 25% is added to reflect flows contributed by the North Fork of the Big Wood River, ~~200~~ cfs is capable of being maintained in the upper reach during April-August.

8. The maximum flow at the upper gauge for the flow period of September-March during the years of record is 119 cubic feet per second. The addition of 25% for flows contributed from the North Fork of the Big Wood River equals approximately 150 cfs. Flows in excess of 150 cfs in the upper reach during the flow period of September-March are not maintainable.

9. A previous water right application, now permit to appropriate water no. 37-7919, authorizes a minimum streamflow of 70 cfs during the entire year in the reach from the confluence of the Big Wood River with Warm Springs Creek downstream to the Bellevue diversion. The combination of 119.23 cfs, proposed by

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application no. 37-8307, and the 70 cfs previously permitted, equals a total minimum streamflow proposal of 189.23 cfs.

10. The fraction portion of the requested minimum streamflow rate is too small to measure accurately and should be changed to 120.00 cfs.

11. Flow records at the Hailey gauge reveal that 190 cfs flows in the Big Wood River with sufficient frequency during all months of the year that it is capable of being maintained. A few water rights are diverted between the gauging station and the Bellevue diversion, but most of the flow measured at the lower gauge is diverted at the Bellevue diversion.

12. Water rights with earlier dates of priority are diverted within the minimum streamflow reaches. The minimum streamflows will not affect the delivery of water to the owners of these earlier in time rights.

13. The Department records reveal two power projects authorized within the minimum streamflow reaches. One project was located near the City of Hailey, and the other project was proposed near Bellevue. Evidence presented at the hearing proved that the power plant near Hailey has not operated for many years. The Bellevue project was never constructed, and the permits authorizing its construction, permits nos. 37-7866 and 37-8159, have lapsed.

14. The Big Wood River is a focal resource for the residents who reside in and the tourists who visit the Big Wood River Valley.

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15. The Big Wood River is a heavily fished trout stream and is also important for aesthetics, recreation, and the general quality of life in the Big Wood River Valley.

16. Testimony of guides who fish the river continuously established that the quality of fishing begins to diminish when flows drop below between 150 and 180 cubic feet per second.

17. In addition, Mary Ostencrofts, Chairman of the Wood River Recreation District, stated that a reduction of flows in the Big Wood River below the amounts that are currently maintainable would drastically diminish the recreational and aesthetic value of the Big Wood River. The Big Wood River is used extensively by the general public for natural interpretation, and is accessible by the public even through private ownership which adjoins the river.

18. The public uses the river extensively, and the maintenance of the river at levels that are fishable and conducive to aesthetic and recreation uses benefits the entire Wood River Valley.

19. Withdrawal of groundwater within the Big Wood River basin may reduce the flow of the Big Wood River and its tributaries.

20. Future development in the Big Wood River Valley will depend on groundwater as a source of culinary water.

CONCLUSIONS OF LAW

1. Idaho Code § 42-1501 provides that streamflow preservation for the protection of aesthetics and recreation

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uses, fish and wildlife habitat, and water quality are in the public interest and are declared to be beneficial use uses 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 for rejecting said application. Approval of any such application must be based on a finding that such appropriation of minimum streamflow:

a) will not interfere with any vested water right, permit, or water right application with priority of right date 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 the private interest;

c) it 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 streamflows and water levels and the existing and future establishment of the necessary gauging stations and benchmarks.

3. Any right acquired pursuant to application for permit no. 37-8258 for instream non-consumptive uses subject to all vested water rights, permits, or water right applications having dates of priority earlier than February 24, 1986.

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4. Any right to be acquired pursuant to application for permit no. 37-8307 for instream non-consumptive uses subject to all vested water rights, permits, or water right applications having dates of priority earlier than October 16, 1987.

5. The proposed minimum streamflow appropriations are necessary to preserve fish and wildlife habitat, aesthetics and recreational uses. Evidence was not submitted to show these appropriations are necessary to preserve water quality.

6. The minimum streamflow is in the interest of the public as opposed to the private interest.

7. A flow rate of 200 cubic feet per second is maintainable in the upper reach during the period of April-August. A flow rate of 150 cfs is maintainable in the upper reach during the period of September-March.

8. A flow rate of 190.00 (or 120.00 cfs under this application) is maintainable in the lower reach for the entire year.

9. The flow rates set forth in the preceding two paragraphs are true minimum flow rates, and are not the optimum flow rates for full preservation of aesthetics, recreational use, and fish and wildlife habitat.

10. The proposed minimum streamflows will not interfere with any vested water right, permit, or water right application with priority of right date earlier than the date of the minimum streamflow applications.

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11. The proposed minimum streamflows should be subordinate to future domestic and municipal development of groundwater which may affect the flow of the Big Wood River and its tributaries.

ORDER

IT IS HEREBY ORDERED that applications for permit nos. 37-8258 and 37-8307 are APPROVED and subject to the following conditions:

1. Use of water under this permit shall recognize and allow the continued beneficial diversion of water under any prior existing water right established by diversion and application to beneficial use or by an application, permit, or license on file issued by the Director under provisions of Chapter 2, Title 42, Idaho Code, with the priority of the water right dated earlier than February 24, 1986, for permit no. 37-8258, and October 16, 1987, for permit no. 37-8307.

2. The use of water pursuant to this permit shall be non-consumptive.

3. Upon the future finding and order of the Director that gauging stations are required to maintain the approved minimum flow on the Big Wood River, such measuring devices shall be permanently installed as specified by the Department.

4. The minimum streamflow established by permit no. 37-8258 is limited to 200 cfs during the period of March-August, and 150 cfs during the period of September-March.

5. The minimum streamflow established by permit no. 37-8307 is approved for 119.00 cfs for the entire year.

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6. Proof of beneficial use may be submitted to the Department upon final approval of the permit by the Idaho Legislature. In no case shall proof of beneficial use be filed after five (5) years following final approval by the legislature.

7. 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 subsequent license shall file a request with the Board, which requests shall include the amendment sought, the reasons for the 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 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 public interest supporting the proposed amendment. The Director will notify the general public and specific persons or parties known to be interested in 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 parties seeking the amendment to establish that the amendment of the permit or license would be in the public interest.

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8. To the extent groundwater withdrawal may affect surface water flows, these permits are subordinate to development of domestic and municipal groundwater supplies.

Dated this 7th day of December, 1990.


GARY SPACKMAN, Hearing Officer
Department of Water Resources

CERTIFICATE OF MAILING

I hereby certify that on this 10th day of December, 1990, I mailed a true and correct copy of the Proposed Memorandum Decision and Order, postage prepaid, to the following individuals:

Blaine County Planning and
Zoning Commission
Ralph Cisco
P.O. Box 149
Hailey, ID 83333

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

Friends of the Big Wood River
P.O. Box 4411
Ketchum, ID 83340


JENNIFER SEIFERT
Clerical Assistant

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EXHIBIT 6

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)	
TRANSFER NO. 73969 IN THE NAME OF)	
ROBERT ROHE)	
_____)	
	PRELIMINARY ORDER GRANTING PETITION FOR RECONSIDERATION IN PART AND AMENDING APPROVAL OF TRANSFER

This matter is before the Department of Water Resources (Department) on a petition to reconsider the preliminary order of the Department approving water right transfer No. 73969. The Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On August 7, 2009, the Department approved Application for Transfer No. 73969 (transfer) as a preliminary order (order) of the Department pursuant to Idaho Code § 67-5243 and Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01.730). The order was mailed to Robert Rohe (applicant or petitioner) on August 7, 2009.
2. On August 21, 2009, the Department received a timely Petition for Reconsideration of the order (petition) pursuant to Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a) from the applicant's attorney, Fritz X. Haemmerle.
3. The minimum stream flow (MIF) rights 37-7919 and 37-8307 cover the reach of the Big Wood River between Warm Springs Creek downstream approximately 18 miles to the District 45 Canal diversion.
4. Water right 37-21956 has historically been diverted into the Hiawatha Canal located between Hailey and Ketchum within the MIF reach described above.
5. The transferred point of diversion for the Rohe site is a ground water source located just off the Big Wood River and hydraulically connected to the Big Wood River.
6. The transferred point of diversion for the Rohe site is in the Gimlet Subdivision, said subdivision is located between Hailey and Ketchum within the MIF reach described above and also above the Hiawatha Canal diversion.

7. The Hailey gauge is located near Hailey below the Hiawatha Canal diversion and the Rohe site and currently is the only permanent gauge on the Big Wood River within the MIF rights reach described above.
8. The water right transfer is totally within the MIF rights reach described above and does not attempt to move diversion of water outside of the MIF rights reach described above.
9. The water right 37-21956 being transferred has a priority date of March 23, 1883.
10. The applicant did not consent to mitigate or subordinate for injury to the MIF rights.
11. The existing rights considered by the Department that may be injured as a result of the transfer if no special conditions are imposed include:
 - a. rights that have historically relied on and shared conveyance losses in the Hiawatha Canal with right 37-21956.
 - b. minimum stream flow (MIF) rights 37-7919 and 37-8307 in the name of the Idaho Water Resource Board in the reach between the Hiawatha Canal and the Rohe project.
12. The Department placed conditions 2, 3 and 4 on right 37-21956 to prevent injury to existing rights as a result of the transfer and to mitigate for the approval of permit 37-22385.
13. Condition 2 states: "To prevent injury to other water users caused by approval of transfer 73969 the watermaster shall deliver a 0.03 cfs portion of this right for irrigation into the Hiawatha Canal where it shall remain undiverted and used for conveyance loss. The other portion authorized for irrigation (0.02 cfs) shall be diverted from ground water from the pond located in Lt1 (NWNENE) S6, T3N, R18E used to irrigate 0.9 acres."
14. The Department has determined that 0.03 cfs is a reasonable rate for conveyance loss of the original right in the Hiawatha Canal and is the minimum rate necessary to leave in the Hiawatha Canal to protect existing right holders in the Hiawatha Canal.
15. The application for transfer proposed 0.08 cfs of the right being moved be left in the Hiawatha Canal to avoid injury to existing rights.
16. Rohe is purchasing right 37-21956 from Cropper and the sales agreement

between Cropper and Rohe required 20% (0.03 cfs) be left in the Hiawatha Canal and is the basis for condition 2.

17. Condition 3 states: "To prevent injury to water rights 37-7919 and 37-8307 held by the Water Resource Board for minimum stream flow on the Big Wood River the 0.02 cfs allowed for irrigation use from ground water authorized by transfer 73969 shall be subject to curtailment 3 days after flows at the Hailey gauge drop below 189 cfs or curtailed by priority, which ever occurs first. The Director retains jurisdiction to modify the condition of use authorized by transfer 73969 to prevent injury to other users as may be required based on future studies or the addition of gauges on the Big Wood River. "

18. The Department has analyzed available data and finds that on average at the site of the Rohe diversion the flow in the Big Wood River drops below 189 cfs three days after the gauge at Hailey drops below 189 cfs.

19. Condition 4 states: "The 0.06 cfs portion of this right listed as mitigation use shall remain undiverted to compensate for the evaporation losses necessary to maintain the pond authorized under right 37-22385 and to mitigate potential injury to rights 37-7919 and 37-8307."

20. Evaporative loss for the pond authorized under right 37-22385 also utilized as a part of the diversion system under right 37-21956 pursuant to this transfer is found to be 0.01 cfs.

21. The 0.05 cfs portion of the 0.06 cfs identified in Condition 4 does not mitigate for injury to rights 37-7919 and 37-8307 because the additional water would only be available below the point where injury to the MIF would occur.

22. The petition seeks removal of conditions 3 and 4 from right 37-21956 imposed as conditions of approval of Transfer No. 73969.

ANALYSIS

The movement of water rights upstream on the Big Wood River will decrease the flow in the river between the site of the original diversion and the site of the new diversion. The reduction of flow in this reach injures MIF rights if flows drop below those protected by the MIF rights (189 cfs). River gauges do not exist at every diversion up and down the river. Currently a gauge at Hailey allows monitoring of the river. River flows elsewhere up and down the river may be projected or estimated using diversion records of the watermaster of flows diverted from the river and measurements or estimates of tributaries flowing into the river. To positively determine the flow of the Big Wood River at the

proposed site of the Rohe diversion the applicant could be required to install and maintain a river gauge at that site. This however is likely over burdensome. Reasonably, a statistical analysis to predict the flow at the proposed Rohe site is best but if not acceptable to the applicant then the transfer should be denied.

The movement of water rights out of the Hiawatha Canal will decrease the flow in the canal and place an additional burden on the rights left which have historically relied on the flows of the right being moved to share in conveyance loss. The application for transfer proposed to leave 0.08 cfs of the right being moved in the Hiawatha to avoid injury to existing rights. Rohe is purchasing right 37-21956 from Cropper and the sales agreement between Cropper and Rohe required 20% (0.03 cfs) be left in the Hiawatha Canal and is the basis of Condition 2. The original approval of this transfer was based on the sales agreement, but if the applicant has proposed as stated on the application to leave 0.08 cfs in the Hiawatha Canal this is reasonable and the approval should be amended.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 which governs the transfer process provides in pertinent part: "The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured"

2. Neither chapter 15, title 42, Idaho Code, which provides for the establishment of MIF rights, or the conditions of approval of rights 37-7919 or 37-8307 preclude the need to assess and address the potential injury to these specific rights or type of rights that may result as a consequence of transferring rights vested at the time of establishment of the MIF rights.

3. The Department must condition rights involved in transfers to avoid injury to all other existing rights regardless of the priority date of the other rights or deny the transfer.

4. The Department can modify or amend a preliminary order before it becomes final.

5. To address conveyance loss on the Hiawatha, Condition 2 should be modified from 0.03 cfs to 0.08 cfs as a portion for irrigation into the Hiawatha Canal.

6. Condition 4 should be modified from 0.06 cfs to 0.01 cfs to compensate for evaporation losses.

7. Condition 3 should remain unchanged to protect MIF rights.

ORDER

IT IS HEREBY ORDERED that the preliminary order granting approval of Transfer 73936 is **AMENDED** as described on the attached "Amended Transfer of Water Right No 73969, dated September 4th 2009.

Dated this 4th day of September, 2009.



ALLEN MERRITT
Southern Region Manager