

BEFORE THE DEPARTMENT OF WATER RESOURCES
FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR)
PERMIT TO APPROPRIATE A MINIMUM)
STREAM FLOW, NOS. 37-22262 (BIG WOOD)
RIVER) AND 37-22263 (LITTLE WOOD RIVER))
_____)

FINAL ORDER

On March 18, 2008, the Idaho Water Resource Board, (“Board”) filed an application to appropriate water with the Idaho Department of Water Resources (“IDWR” or “Department”) to appropriate 60 cubic feet per second (“cfs”) from the Big Wood River for a minimum stream flow. IDWR assigned water right no. 37-22262 to the application. On June 13, 2008, the Board amended the application to correct the legal description of the proposed minimum stream flow reach. On October 21, 2008, the Board again amended application no. 37-22262 to correct the description of the minimum stream flow reach. On March 10, 2009, the Board amended application no. 37-22262 for a third time, correcting the ending point of the described minimum stream flow reach. The minimum stream flow reach described in the March 10, 2009 description will be described in the Findings of Fact. The Director determines that these changes were not significant to the application and do not affect the original proposed priority date of March 18, 2008.

On March 18, 2008, the Board filed an application with IDWR to appropriate 74 cfs from the Little Wood River for a minimum stream flow. IDWR assigned water right no. 37-22263 to the application. On July 13, 2008, the Board amended application no. 37-22263 to correct the description of the minimum stream flow reach. On March 10, 2009, the Board again amended application no. 37-22263 to correct the description of the minimum stream flow reach. The Findings of Fact of this Order describe the location of the minimum stream flow reach as set forth in the March 10, 2009 amendment. The amendments to the original application are not significant, and do not affect the proposed priority date of March 18, 2008.

On April 29, 2009, Gary Spackman, hearing officer for IDWR, conducted a hearing in Hailey, Idaho for applications nos. 37-22262 and 37-22263 as required by Idaho Code. In the intervening time between the hearing and the issuance of this decision, the hearing officer was appointed to be the interim director of IDWR. As a result, this decision is issued as a Final Order under signature of the interim director.

LEGAL AUTHORITIES

Idaho Code Title 42, Chapter 15 governs the appropriation of water for minimum stream flows. The Idaho Water Resource Board is the only entity authorized to appropriate water for minimum stream flows in the state of Idaho. Idaho Code § 42-1503 requires that the director publish notice of the proposed minimum stream flow in a newspaper of general circulation within the county where the minimum stream flow is proposed and conduct a public hearing concerning the proposed appropriation of minimum stream flow. Any approval of a minimum stream flow 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;
- (b) is in the public, as opposed to the private, interest;
- (c) is necessary for the preservation of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of the stream;
- (d) is the minimum flow or lake level and not the ideal or most desirable flow or lake level; and
- (e) is capable of being maintained as evidenced by records of stream flows and the water levels and the existing or future establishment of necessary gauging stations and bench marks.

In 2007, the Idaho Legislature enacted Idaho Code Section 42-1508 which modified the factors the Director must consider in determining whether to issue a minimum stream flow for specific applications in the Wood River Basin. Section 42-1508 is quoted below in its entirety:

42-1508. Wood River basin -- Enhancement of instream flows and downstream water supplies. [Effective until December 31, 2012] - (1) The water resource board is hereby authorized and directed to appropriate and hold in trust for the people of the state of Idaho minimum stream flow water rights in designated reaches of the Big Wood River and the Little Wood River for the purpose of preserving, restoring and enhancing fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation and water quality, and to enhance the water supply for other existing downstream water rights, in accordance with the provisions of this section. The designated reaches are in the Big Wood River immediately below the Bellevue diversion (45 district canal) downstream to the United States geological survey gage station number 13140800, located below Stanton Crossing and above Magic Reservoir; and in the Little Wood River from the confluence of Silver Creek downstream to the U.S. bureau of land management diversion located near the city of Richfield.

(2) The water resource board is authorized and directed to appropriate minimum stream flow water rights in amounts up to sixty (60) cfs in the designated reach of the Big Wood River, and up to seventy-four (74) cfs in the

designated reach of the Little Wood River under this section and in accordance with the provisions of section 42-1503, Idaho Code. In acting upon the applications for permit, the director of the department of water resources need not determine that the appropriations are capable of being maintained based upon records of existing stream flows, because it is anticipated that the water rights will be satisfied and maintained over time through the donation of water rights to the board and the operation of the water supply bank within the Wood River basin consistent with the provisions of section 42-1765B, Idaho Code. In addition, the director need not determine that the appropriations meet a minimum amount as defined in section 42-1502(f), Idaho Code, or limit appropriations that might exceed such an amount, because of the need to fulfill the purpose of enhancing water supplies for other existing downstream water rights.

Section 42-1508 identified two locations for minimum stream flows. The first proposed minimum stream flow would be located “in the Big Wood River immediately below the Bellevue diversion (45 district canal) downstream to the United States geological survey gage station number 13140800, located below Stanton Crossing and above Magic Reservoir; ...” The second proposed minimum stream flow is located “in the Little Wood River from the confluence of Silver Creek downstream to the U.S. bureau of land management diversion located near the city of Richfield.

Subparagraph 2 of Section 42-1508 specifies the quantities of water to be appropriated by the Idaho Water Resource Board. These quantities are sixty (60) cfs for the Big Wood River and seventy-four (74) cfs for the proposed minimum stream flow reach of the Little Wood River.

Idaho Code § 42-1765 authorizes contributions of water rights to satisfy the minimum streamflows, confines the locations of points of diversion of existing water rights from which the Big Wood and Little Wood minimum streamflows can be enhanced, and authorizes these dedicated water rights to be held in the Board’s Water Supply Bank.

(1) The water resource board is authorized to accept the donation by gift, grant or bequest of water rights, in whole or in part, from the Big Wood river upstream of the United States geological survey gage station number 13140800 located below Stanton Crossing and above Magic Reservoir, and from Silver Creek tributary to the Little Wood River and to place eligible portions of the water rights into the water supply bank.

(5) For purposes of this section, the board and local committee may not accept for enhanced flows in the Big Wood River any water rights currently diverted into the Bellevue triangle via the 45 district canal (Bellevue diversion). In addition all donated water rights with points of diversion located on the Big Wood River upstream of the 45 district canal shall be diverted into the 45 district canal in order to enhance local water supplies and to increase stream flows in Silver Creek and the Little Wood River.

(6) Water rights placed into the water supply bank from the Silver Creek and Little Wood River portions of the Wood River basin pursuant to this section may only be used to increase stream flows in Silver Creek and the Little Wood River.

Section 42-1508 states that two of the five criteria in Section 42-1503 need not be considered by the Director. The Director “need not determine that the appropriations are capable of being maintained based upon records of existing stream flows. In addition the Director need not determine that the appropriation meet the minimum amount because the appropriation is needed to fulfill the purpose of enhancing the water supply. While the statutory language might be interpreted to only grant the Director discretion in determining whether the quantity of water sought to be appropriated is the amount necessary for preservation and that it is capable of being maintained, an entire reading of the statute leads the Director to determine that the legislature intended to remove from the Director’s consideration these two factors in the decision making.

Because of the above statutory changes, the interim director will limit his review to whether the proposed minimum stream flows will interfere with any other water rights, whether they are in the public, as opposed to the private interest, and whether the proposed minimum stream flow are necessary for preservation of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of the stream.

A further reading of Idaho Code Section 42-1508 (1) states that the “water resource board is . . . **directed** to appropriate and hold in trust for the people of the state of Idaho minimum stream flow water rights in designated reaches of the Big Wood River and the Little Wood River, for the purpose of preserving, restoring and enhancing fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation and water quality, and to enhance the water supply to other existing downstream water rights.” The interim director interprets this statement as a determination by the legislature that the specific minimum stream flows sought by applications 37-22262 and 37-22263 will satisfy these purposes. Furthermore, the expressed legislative statements create a presumption that these minimum stream flow applications are in the public, as opposed to private, interests. Therefore, without evidence to the contrary, the sole factor to be considered by the director is whether these minimum steam flows will injure other water rights.

Based on the above analysis of the legal authority of the director, and also based on the evidence presented at the hearing, the interim director, finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application no. 37-22262 proposes the following:

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|-----------------|---------------------|
| Source: | Big Wood River |
| Purpose of Use: | Minimum stream flow |
| Flow Rate: | 60 cfs |
| Period of Use: | Year round |

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| Description of the minimum stream flow reach: | Beginning in Government Lot 3, (SWNW), Section 36, Township 02 North, Range 18 East, and extending downstream to the NENE, Section 21, Township 01 South, Range 18 East. |
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The end of the minimum stream flow reach is located at Stanton Crossing where the United States Geological Survey operates a stream gage numbered as 13140800.

2. Application no. 37-22263 proposes the following:

| | |
|----------------------------|---|
| Source: | Little Wood River |
| Purpose of Use: | Minimum stream flow |
| Flow Rate: | 74 cfs |
| Period of Use: | Year round |
| Minimum Stream Flow Reach: | Beginning in Lot 5 (SWNW), Section 6, Township 03 South, Range 21 East, and extending downstream to the SW1/4SE1/4, Section 25, Township 04 South, Range 19 East. The downstream terminus of the minimum stream flow reach is located at a U.S. Bureau of Land Management Diversion from the Little Wood River located near the city of Richfield, Idaho. |

3. Minimum stream flows in the designated reaches are to be enhanced by donations of water rights by existing water users. Any donations of these water rights should be placed in the water supply bank within the Wood River Basin. In this way, the rights can be shown to change the nature of use to a minimum stream flow through the water supply bank process.

4. Donations to the Little Wood River must occur either from the Big Wood River upstream of the District 45 Canal diversion in the Big Wood River, Silver Creek, or the Little Wood River above the ending point of the proposed minimum stream flow. If there are any diversions of water, they will most likely come from the Big Wood River or Silver Creek.

5. Concern was expressed at the hearing about the direct physical connection between the waters of the Big Wood River, and Silver Creek. The flows at Silver Creek are somewhat dependent upon recharge to a high water table in the Silver Creek area. Direct injection of Big Wood River water into Silver Creek may not enhance the water quality of Silver Creek or at the Little Wood River downstream. As a result, any direct injection of the Big Wood River water from a delivery canal into Silver Creek should be carefully monitored to insure that the injection of water does not degrade the water quality of Silver Creek and the Little Wood River.

6. Concern was expressed at the hearing about whether there would be any significant water rights donated that would enhance the flow of Silver Creek and ultimately of the Little Wood River in the minimum stream flow reach. Despite these concerns, this is not a factor that can be considered by the Director for these minimum stream flows.

7. Concern was also expressed about whether flow rates donated from the Big Wood River could be delivered through Silver Creek to enhance the flows of the Little Wood River. Because the primary method of enhancing surface water flows in Silver Creek and downstream to the Little Wood River is through ground water percolation, monitoring delivery of water rights donated from the Big Wood River into the Silver Creek drainage is unduly difficult and probably impossible. Junior water users on Silver Creek may divert this additional water in Silver Creek resulting in no net enhancement to the flows of the Little Wood River. Nonetheless, the donation of water rights that would be delivered through the District 45 Canal, and enhance the flows of Silver Creek would not diminish the quantity of water available to other water rights.

8. The minimum stream flow in the Big Wood River is to be maintained by donated flows of water rights authorizing points of diversion from the Big Wood River below the District 45 Canal. The reason for this distinction is that donation of water rights authorizing points of diversion above the District 45 Canal would cause possible diminishment of flows and carrying water for existing water right holders.

9. Donation of water rights with points of diversion below the District 45 Canal point of diversion may remain in the stream of the Big Wood River, or may be diverted through the bypass canal that discharges back into the Big Wood River at a location described as the SW1/4SE1/4, Section 25, Township 04 South, Range 19 East.

10. Water rights donated to the Big Wood River minimum stream flow must be placed in the Water Supply Bank, and by doing so, the nature of use will be changed to a minimum stream flow.

11. Because the donated water right must not have a point of diversion located above the District 45 Canal, other water users water rights will not be diminished by the donation.

12. In order for the Big Wood River minimum stream flow to be delivered, there must be adequate measurement, particularly if the donated water right will be physically diverted out of the Big Wood River, through the bypass canal, and discharged back into the river. The Board will be responsible for maintaining the necessary measuring devices toward delivery of the minimum stream flow water right.

13. Witnesses at the hearing overwhelmingly expressed support for the minimum stream flows. Nick Purdy of Picabo expressed concern about measurement of water delivered toward the Little Wood minimum stream flow. This concern was previously addressed in these findings of fact.

CONCLUSIONS OF LAW

1. The legal authorities for establishment of minimum stream flows for applications nos. 37-22262 and 37-22263 were previously discussed in the section titled "Legal Authorities."
2. The minimum stream flows will be in the public, not the private, interest.
3. Because of limitations on rights that can be donated, the proposed minimum stream flows will not injure other water rights.

ORDER

IT IS HEREBY ORDERED that applications to appropriate water nos. 37-22262 and 37-22263 are **APPROVED** subject to the following conditions:

Permit No. 37-22262 (Big Wood River)

Proof of application of water to beneficial use shall be submitted on or before January 1, 2012.

Subject to all prior water rights.

This right is established pursuant to Idaho Code § 42-1508.

The minimum stream flow may be satisfied by water rights donated to the water supply bank. Water rights accepted into the water supply bank to satisfy this minimum stream flow are subject to the provisions of Idaho Code § 42-1765B and operating procedures of the Wood River Basin Enhancement Water Supply Bank.

The reach of this minimum stream flow begins immediately below the Bellevue diversion (District 45 Canal) in Lot 3, SW¼NW¼ Section 36, T2N, R18E, B.M., and continues downstream to the USGS Big Wood River at Stanton Crossing gaging station in the NE¼NE¼ Section 21, T1S, R18E, B.M., Blaine County.

Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 37.

Upon further finding and order of the director that gaging stations are required to maintain the approved minimum flows under this right, such measuring devices shall be permanently installed and maintained as specified by the director.

The Idaho Water Resource Board, upon receiving a request, or upon its own initiative, may petition the Director for an amendment to this water 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 notify interested parties of the proposed change, and conduct a hearing for the purpose of determining whether the water right 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 this water right would be in the public interest.

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, by court decree, or by a permit or license issued by the director under the provisions of Chapter 2, Title 42, Idaho Code, with a priority date earlier than the priority date of this right.

Use of water under this right shall be non-consumptive.

This minimum stream flow is for the purpose of preserving, restoring, and enhancing fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation and water quality, and to enhance the water supply for other existing downstream water rights.

Pursuant to the provisions of 2007 Idaho Sess. Laws, ch. 262, this water right shall be null and void as of December 31, 2012 unless the act is extended by the Legislature.

Permit No. 37-22263 (Little Wood River)

Proof of application of water to beneficial use shall be submitted on or before January 1, 2012.

Subject to all prior water rights.

This right is established pursuant to Idaho Code § 42-1508.

The minimum stream flow may be satisfied by water rights donated to the water supply bank. Water rights accepted into the water supply bank to satisfy this minimum stream flow are subject to the provisions of Idaho Code § 42-1765B and operating procedures of the Wood River Basin Enhancement Water Supply Bank.

The reach of this minimum stream flow begins at the confluence with Silver Creek in Lot 5, SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 6, T3S, R21E, B.M., and continues downstream to the U.S. Bureau of Land Management diversion near the city of Richfield in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 25, T4S, R19E, B.M., Lincoln County.

Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 37M.

Upon further finding and order of the director that gaging stations are required to maintain the approved minimum flows under this right, such measuring devices shall be permanently installed and maintained as specified by the director.

The Idaho Water Resource Board, upon receiving a request, or upon its own initiative, may petition the Director for an amendment to this water 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 notify interested parties of the proposed change, and conduct a hearing for the purpose of determining whether the water right 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 this water right would be in the public interest.

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, by court decree, or by a permit or license issued by the director under the provisions of Chapter 2, Title 42, Idaho Code, with a priority date earlier than the priority date of this right.

Use of water under this right shall be non-consumptive.

This minimum stream flow is for the purpose of preserving, restoring, and enhancing fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation and water quality, and to enhance the water supply for other existing downstream water rights.

Pursuant to the provisions of 2007 Idaho Sess. Laws, ch. 262, this water right shall be null and void as of December 31, 2012 unless the act is extended by the Legislature.

Dated this 27th day of April, 2010.



Gary Spackman
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of April, 2010, a true and correct copy of the document(s) described below were served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Final Order and explanatory information sheet for a Final Order when a hearing was held.

Pepin Corso-Harris
Water User Dist. #45
11 Purple Sage Lane
Bellevue, ID 83313
Pepin.corsoharris@yahoo.com

James P. Laski
South County Estates
P.O. Box 3310
Ketchum, ID 83340
jrl@lawsonlaski.com

Greg Stahl
Idaho Rivers United
P.O. Box 633
Boise, ID 83701
greg@idahorivers.org

John Schenel
South County Estates
P.O. Box 3310
Ketchum, ID 83340

Chuck Brockway Sr.
Brockway Engineering
2016 Washington St. N
Twin Falls, ID 83301
charles.e.brockway@brockwayeng.com

Dave Cropper
400 N Main St. Suite 2
Hailey, ID 83333

Leonard Beck
Idaho Water Resource Board Member
200 S 272 W
Burley, ID 83318
Leonard.beck@idwr.idaho.gov

Lawrence Schoen
Blaine County Commissioner
206 1st Ave. So. , Suite 300
Hailey, ID 83333
lschoen@co.blaine.id.us

Andy Munter
Idaho Rivers United
P.O. Box 633
Boise, ID 83701

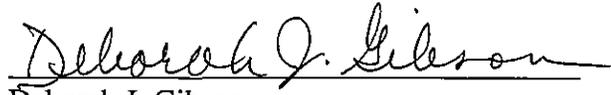
Richard Boyer
P.O. Box 405
Bellevue, ID 83317

Idaho Mountain Express
Attn: Greg Soley
591 First Avenue North
P.O. Box 1013
Ketchum, ID 83340
news@mtexpress.com

Carl Evenson
P.O. Box 824
Bellevue, ID 83313

Randy Carroll
P.O. Box 2715
Ketchum, ID 83340

Morgan Case
IDWR-IWRB
322 E. Front St.
Boise, ID 83702-7374

A handwritten signature in cursive script that reads "Deborah J. Gibson". The signature is written in black ink and is positioned above a horizontal line.

Deborah J. Gibson
Administrative Assistant
Water Management Division