BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 37-20742 IN THE NAME OF ROBERT G. FRIEDMAN	))))	**PRELIMINARY ORDER**

This matter having come before the Idaho Department of Water Resources ("Department") as a protested application for permit and the Department having held a conference and a hearing in the matter, the hearing officer enters the following Findings of Fact, Conclusions of Law and Preliminary Order:

FINDINGS OF FACT

1. Robert G. Friedman ("applicant" or "Friedman") owns 10 acres of property located about 6 miles north of Ketchum, Idaho near the confluence of Eagle Creek ("creek") with the Big Wood River ("river") in Blaine County and plans to build a residence, a guest house and a barn on the property and to construct three ponds. The estimated cost of the three buildings is about 2.5 million dollars and the cost of landscaping is estimated to be in excess of $540,000. (See Applicant's Exhibit 13). The applicant has hired a local architectural firm for the design, intends to use local contractors for construction, and plans to buy building materials locally.

2. On July 11, 2002, Friedman submitted Application for Permit No. 37-20742 ("application") to the Department proposing the diversion of 2.0 cubic feet per second ("cfs") of ground water to be used year-round for recreation and aesthetic purposes within the NE1/4NW1/4 Section 23, T5N, R17E, B.M. Blaine County, Idaho in three ponds that will store 16 acre feet of water and will have a total surface area of about 2 acres.

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

3. The Department published notice of the application that was subsequently protested by the Board of Blaine County Commissioners ("county").

4. On November 13, 2002, the Department conducted a hearing in the matter. The applicant was present and was represented by James P. Speck. Douglas A. Werth represented the protestant.

5. Issues the Department is required to consider in this matter are as follows:

a. Whether the appropriation will reduce the quantity of water under existing water rights;

b. Whether the water supply itself is insufficient for the purpose for which it is sought to be appropriated;
c. Whether the application is made in good faith, or is made for delay or speculative purposes;
d. Whether the applicant has sufficient financial resources with which to complete the work involved therein;
e. Whether the proposed appropriation will conflict with the local public interest; and
f. Whether the proposed appropriation is contrary to conservation of water resources within the state of Idaho.

The Department must consider all the issues even though the protestant stipulated that the sufficiency of financial resources of the applicant was not an issue of concern.

6. Exhibits premarked, offered or accepted as a part of the record are as follows:

Applicant's:

Exhibit 1 - Water Requirements and Use Data
Exhibit 2 - Pond and Irrigation System Inflow and Outflow Loss Estimates
Exhibit 3 - Estimated Maximum Net Groundwater Use for Residences
Exhibit 4 - Summary Operations Plan
Exhibit 5 - Friedman Property - Fox Creek Ranch, Survey From West Observation Well to Big Wood River
Exhibit 6 - Well Section & Configuration - Proposed New Well
Exhibit 7-1 - Well Interference Analysis Friedman Project Well
Exhibit 7-2 - Estimated Drawdown From Continuous Pumping of Proposed Friedman Well
Exhibit 8 - Vicinity Map
Exhibit 9 - Stock Certificate issued by Eagle Creek Irrigation Company (Same exhibit as Protestant's Exhibit X)
Exhibit 10 - Friedman Fox Creek Water Operations Schematic
Exhibit 11 - Friedman Fox Creek Water Operations Cross Section
Exhibit 12 - Well Driller Reports (75 reports)
Exhibit 13 - Webb Landscape, Inc., Estimate (5 pages)
Exhibit 14 - NOT OFFERED
Exhibit 15 - Vitae for Charles E. Brockway, P.E., Ph.D.
Exhibit 16 - Flow measurements and copies of photographs (7)
Exhibit 17 - Map
Exhibit 18 - Map
Exhibit 19 - Photographs (10)
Exhibit 20 - Photographs (7)
Exhibit 21 - Photographs (7)

Protestant's:

Exhibit A - Order - In the Matter of Designating the Big Wood River Ground Water Management Area, June 28, 1991
Exhibit B - Management Policy for the Big Wood River Ground Water Management Area, June 28, 1991
Exhibit C - Memorandum dated January 22, 1980 to Department staff from C. Stephen Allred, Re: Big Wood River Appropriations
Exhibit D - Memorandum dated February 1, 1980 from Dave Tuthill to Bob Fleenor and map
Exhibit E - Letter dated July 13, 2000 to Mary Ann Mix from Nick Purdy
Exhibit F - Letter dated July 17, 2000 to Dirk Kempthorne from the Board of Blaine County Commissioners
Exhibit G - Order Declaring Drought Emergency dated July 18, 2000
Exhibit H - Letter dated August 26, 1996 to Board of County Commissioners from Allen Merritt
Exhibit I - Blaine County Resolution 98-1 dated January 26, 1998 adopting a Blaine County Local Public Interest Water Policy
Exhibit J - Local Public Interest Water Policy - Section 8, Chapter 3, Blaine County, April 2000
Exhibit K - Final Order - In the Matter of Applications for Transfer No. 5174 in the Name of Dennis M. Baker and No. 5175 in the Name of Huf-N-Puf Trust
Exhibit L - Order Declaring Drought Emergency dated April 19, 2001
Exhibit M - Order Declaring Drought Emergency dated May 13, 2002
Exhibit N - Photographs (Premarked as N-1 thru N-24)

N-1, N-2, N-3	NOT OFFERED
N-4, N-5, N-6	Admitted
N-7	NOT OFFERED
N-8 thru N-15	NOT ADMITTED
N-16 thru N-18	NOT OFFERED
N-19, N-20, N-21	Admitted
N-22 thru N-24	NOT OFFERED

Exhibit O - USGS Quadrangle sheet, (Amber Lakes, Idaho)
Exhibit P - Aerial Photograph
Exhibit Q - Tax Lot Vicinity Map
Exhibit R - Blaine County Comprehensive Plan
Exhibit S - Minutes of Blaine County Board of Commissioners' meeting held January 26, 1998, adopting Resolution 98-1
Exhibit T - Decree - Arthur J. Winslow v. S. H. Chapman, Watermaster, August 22, 1923
Exhibit U - Eagle Creek Irrigation Company, Certificate of Incorporation
Exhibit V - Articles of Incorporation of Eagle Creek Irrigation Company
Exhibit W - By-Laws of Eagle Creek Irrigation Company
Exhibit X - Stock Certificate issued by Eagle Creek Irrigation Company (Same exhibit as Applicant's Exhibit 9)

Exhibit Y - Compilation of Priority Cuts on the Big Wood River above Magic Reservoir (1998 - 2002)
Exhibit Z - Letter dated December 22, 1997 to Board of County Commissioners from Norman C. Young
Exhibit AA - U.S. Geological Survey Report 89-4018 titled Water Resources of the Upper Big Wood River Basin, Idaho Department of Water Resources
Exhibit AB - Phase 1, Final Report titled "Hydrologic Evaluation of the Big Wood River and Silver Creek Watershed", November 1994

The hearing officer also took official notice of the following:

- The application for permit file and its contents as it existed at the close of the hearing together with any subsequent information that has been properly served on the parties
- Water right records of the Department
- Holdings in past decisions and orders of the Department including the Memorandum Decision and Order issued on June 8, 1993 for Transfer No. 3968 filed in the name of Dr. Lee Enright
- Reports, water measurements and flow records in Department files
- Well Driller Reports
- Application for Transfer No. 5748 in the name of Eagle Creek Irrigation Company
- Application for Permit No. 37-08910 (Relinquished)

7. Water right no. 37-00863 was decreed on August 22, 1923 in the case of Arthur J. Winslow v. S.H. Chapman, watermaster. The right authorizes the diversion of 4.6 cfs of water from Eagle Creek for the irrigation of parts of Sections 14, 15 and 23, T5N, R17E, B.M. also known as part of H.E.S. Nos. 129 and 329. The location of the points of diversion was not described in the decree. The priority of the water right is October 6, 1902. The decree enjoined the watermaster of the Big Wood River from exercising supervision over the water of Eagle Creek during the irrigation season and from interfering with the use of water right no. 37-00863.

8. Eagle Creek Irrigation Company ("ECIC" or "company") is a mutual non-profit irrigation company incorporated in 1973 and is the successor-in-interest to all or a portion of decreed water right no. 37-00863. Each share of stock represents one miner's inch (0.02 cfs) of water when the water is available from Eagle Creek. The by-laws of ECIC provide that during times of water shortage, water will be distributed on a pro-rata basis according to the number of shares held. ECIC has issued 187 shares for which there are 17 shareholders.

9. The president of ECIC testified that the primary function of the company is to construct, maintain and operate a private water distribution system for use by its shareholders. The president also testified that the company has no control over whether a shareholder uses or does not use the shares of water it owns.

10. The applicant owns 10 shares of surface water provided by ECIC. For initial filling of the ponds the applicant proposes to forego use of 16 acre feet of water from Eagle Creek for irrigation of the property during the first year and to impound the water in the ponds. In subsequent years, water lost from the ponds through seepage or evaporation will be mitigated by permanently drying up 2 acres of previously irrigated land on the 10-acre parcel. The applicant plans to pump water from the lower pond to the upper ponds to provide a flow through system using a recirculation pump that can operate independently from the pump diverting water from the proposed well. (See Applicant's Exhibit 10).

11. The applicant plans to periodically pump water from the proposed well in order to provide cooler water for recirculation through the ponds when air temperatures are high. Water discharging from the lower pond will recharge the aquifer near the southwest corner of the property. The applicant plans to only pump ground water during the irrigation season when there is sufficient surface water available from Eagle Creek to mitigate pond evaporation and only when water temperature becomes elevated or dissolved oxygen levels in the ponds are low. The recharge area is a natural area located about 300 to 400 feet from the river that has historically recharged surface water from the ECIC distribution system to the aquifer and ultimately to the river. Recharged water is estimated to reach the river within 4 to 6 hours within 1/4 mile of the recharge area.

12. The applicant's property is the last property served by the distribution system of ECIC and is located southerly of other shareholders served by ECIC. The ditch from Eagle Creek enters the northeast corner of the applicant's property and follows the north side of the property toward the Big Wood River. The applicant's property was not irrigated from about 1977 through 2000 although the ditch on the property carried water toward the Big Wood River during that time. During 2001 and 2002, the applicant irrigated about one third of the property using a 5 1/2 horsepower portable gas powered pump and 12 sprinkler lines. Each line had 12 to 15 sprinkler heads that were spaced about 20 feet apart. (See Applicant's Exhibit 21). Vegetation on the applicant's property includes native grasses and crested wheat.

13. After 40 days of pumping at a rate of 2 cfs, the estimated drawdown in a well located 500 feet from the applicant's proposed well would be about 2 feet. (See Applicant's Exhibit 7). The nearest well to the applicant's proposed well is a domestic well located 720 feet away. The 40-day period is the approximate time for the ground water system to reach equilibrium as a result of pumping the applicant's well.

14. The volume of Eagle Creek water used for the development proposed by the applicant, including evaporation losses from the three ponds, will be less than the amount of water used to irrigate the approximate 10 acres. (See Applicant's Exhibit 3)

15. The applicant has measured the flow in the ECIC ditch where it enters the northeast corner of the applicant's property as follows:

August 2, 2000	0.33 cfs
July 19, 2000	0.22
July 26, 2002	0.18
September 26, 2002	0.18

A witness for the protestant testified that during the time he has observed Eagle Creek from 1977 to the present time, he has always observed some water in the creek.

16. Water recharged to the aquifer near the southwest corner of the applicant's property will not increase the temperature of the Big Wood River because of the larger amount of flow in the aquifer compared to the amount of water being recharged. Past monitoring of similar existing facilities in the Big Wood River drainage, suggests that recharge likely will not increase the amount of nitrate or decrease the amount of dissolved oxygen in the Big Wood River.

17. On May 1, 2002, ECIC filed Application for Transfer No. 5748 proposing to change the nature of use of 2 shares of water (0.04 cfs) of water right no. 37-0863 from irrigation use to recreation/aesthetic uses from April 15 to October 15 each year. The change in use was sought to mitigate water lost through evaporation from proposed ponds to be constructed on the Friedman property. The application for transfer was not protested and presently is pending before the Department.

18. On June 28, 1991, the Department designated the Big Wood River Ground Water Management Area ("management area") in order to provide for increased management of ground water resources. The Management Policy for the management area included provisions for continued processing of non-consumptive use applications. The policy also provides that "approvals of ground water for consumptive uses can be granted upon a showing by an applicant and a determination by the department that the water supply is adequate and other water rights will not be injured."

19. After conducting three public hearings in 1997 and in 1998, the Board of County Commissioners for Blaine County adopted a "Local Public Interest Water Policy" on January 26, 1998. The policy is consistent with the Blaine County Comprehensive Plan but was not adopted as an ordinance of the county. Among other considerations, the policy states that water use "primarily for private recreation or private aesthetic purposes" is contrary to the county's local public interest policy. The policy goes on to say, however, that "When such uses are … for … providing water for non-profit public recreation facilities" the water use probably does not conflict with the county's public interest policy. (See Protestant's Exhibits I and J).

ANALYSIS

Application for Transfer No. 5748 filed by ECIC to change the nature of use of two shares of ECIC water use from irrigation to recreation/aesthetic uses, is a "companion" application to application for permit no. 37-20742 filed by Friedman. If approved, the transfer application would allow use of 2 shares of Eagle Creek water for recreation/aesthetic purposes in the applicant's ponds. The transfer application is a

change in use of an existing water right, not a new appropriation of water. The purpose of the Friedman application is to provide water to the ponds when water temperature becomes elevated or dissolved oxygen levels in the ponds are low. The use of the well is not to provide a new source of water for the ponds to keep them full. Use of water from the well must be so conditioned that it is non-consumptive and not a new source of water to fill the ponds. Stated another way, the purpose of the well is to provide water to maintain the quality of surface water already stored in the ponds.

ECIC testified that it delivers shares of water that are not called for to other shareholders under its distribution system. Nonuse of water during the 1977 through 2000 period by the applicant or predecessors may have resulted in additional water being recharged to the aquifer and ultimately becoming available to water users in the Big Wood River drainage. The loss of an incidental benefit to water users in the drainage, however, should not be considered as an injury when the water users do not have a right to demand or expect to receive wastewater resulting from use of water right 37-00863.

The part of the ECIC water right to be changed to recreation/aesthetic uses by ECIC has not been forfeited through nonuse, even though the shareholders have not exercised use of the irrigation shares to the extent they could have. The recent case of Aberdeen-Springfield Canal Co. v. Peiper, 133 Idaho 82, 982 P.2d 917 (1999), held that failure of stockholders to apply canal company water to beneficial use did not cause the canal company to forfeit its water right appurtenant to stockholder's land. This case appears to be directly applicable to the history of water use on the Friedman property.

The right of the applicant to initially fill the ponds during the first year by foregoing the use of 16 acre feet of water from Eagle Creek for irrigation of the property may not be authorized by either ECIC or by the water right. The applicant needs to research the authority to use the shares of irrigation water for the initial filling of the ponds.

The Local Public Interest Water Policy adopted by the Blaine County Commissioners is an expression of public interest in the county. Other facets of local public interest include the effect of the project on the economy of the area as determined by employment opportunities, both short and long term, the effect the project will have on recreation, fish and wildlife resources in the area, compliance with applicable air, water and hazardous substance standards and compliance with planning and zoning ordinances of state government jurisdictions. If the project is constructed, there will be short-term economic benefits that are positive in terms of local public interest. None of the parties showed that the proposed project will adversely affect recreation, fish and wildlife resources in the area, will not comply with applicable air, water and hazardous substance standards and will not comply with planning and zoning ordinances of state government jurisdictions. In balance, the proposed project is in the local public interest.

As the application and approval are structured, there will be no consumptive commitment of ground water to the proposed project. The source of water for the ponds

is surface water from Eagle Creek. The ground water pumped to the ponds has to be non-consumptive, with the benefit to the project being to provide water to the ponds with increased dissolved oxygen and to replace surface water in the ponds with water at a lower temperature.

CONCLUSIONS OF LAW

1. Section 42-203A, Idaho Code, provides in pertinent part as follows:

> In all applications whether protested or not protested where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the department of water resources may reject such application and refuse issuance of a permit therefor... .

2. Section 42-108, Idaho Code, provides in pertinent part as follows:

> [I]f the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation or if such works or system is owned and/or managed by an irrigation district, no change in the point of diversion, place of use, period of use, or nature of use of such water shall be made or allowed without the consent of such corporation or irrigation district.

3. The Supreme Court of Idaho has held that failure of stockholders to apply canal company water to beneficial use did not cause the canal company to forfeit its water right appurtenant to stockholder's land. Aberdeen-Springfield Canal Co. v. Peiper, 133 Idaho 82, 982 P.2d 917 (1999).

4. Section 42-223(7), Idaho Code, provides the following:

> No portion of a water right held by an irrigation district, a Carey Act operating company, or any other company, corporation, association, or entity which holds water rights for distribution to its landowners, shareholders or members shall be lost or forfeited due to nonuse by such landowners, shareholders or members, unless the nonuse is subject to the control of such entity.

5. The filing of application for transfer no. 5748 by ECIC meets the consent requirement described in Section 42-108, Idaho Code, that otherwise would have to be met by the applicant if ECIC had not filed the application for transfer.

6. Use of water as proposed in the application is non-consumptive and will not reduce the quantity of water in Eagle Creek or in the Big Wood River.

7. The ground water supply itself is sufficient for the purposes intended.

8. The applicant has hired local architectural and landscaping design firms to prepare preliminary designs of the buildings and proposed water related amenities on the applicant's property. The application is made in good faith and not for delay or speculative purposes.

9. The applicant has spent money on the proposed development and has sufficient financial resources with which to complete the project.

10. Among other considerations, the Local Public Interest Water Policy adopted by the Blaine County Commissioners requests the Department to consider issues in the evaluation of transfers that the Department is already required to do by statute, i.e. evaluate potential injury to other water rights, require measuring devices where appropriate, evaluate whether a right to be changed will be enlarged and require recharge as appropriate in connection with mitigation or non-consumptive use proposals.

11. If the applicant's project is constructed, there will be short-term economic benefits that are positive in terms of local public interest. None of the parties showed that the proposed project will adversely affect recreation, or fish and wildlife resources in the area, will not comply with applicable air, water and hazardous substance standards, and will not comply with planning and zoning ordinances of state government jurisdictions. In balance, the proposed project is in the local public interest.

12. The application is not contrary to the conservation of water resources within Idaho.

13. The Department should approve the application with certain conditions.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Permit No. 37-20742 in the name of Robert G. Friedman is **APPROVED** subject to the following conditions:

1. Proof of application of water to beneficial use shall be submitted to the Department on or before **January 1, 2005**.

2. Subject to all prior water rights.

3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the

satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.

4. Prior to diversion of water under this permit, the right holder shall install and maintain measuring devices at the point of diversion (at the well), on the ditch from Eagle Creek where the ditch enters the right holder's property and at a location to measure pond outflow to the recharge area.

5. Use of water under this approval shall be non-consumptive. The right holder shall not divert ground water under this right unless the same or a larger amount of water is simultaneously discharged to the recharge site identified in the application.

6. The right holder shall retain ownership of the 10 shares of ECIC water stock and shall use 2 shares of water to the extent it is available for use in the ponds.

7. This right does not convey any easement or right-of-way to the right holder to use the facilities or land of others.

8. The right holder shall grant reasonable access to Department staff to determine that terms of this approval are being met.

9. Failure of the right holder to comply with the conditions of this approval is cause for the Department to rescind approval of the right.

10. This approval does not waive other approvals that may be needed in connection with wetlands.

11. Use of water under this permit is rescinded if the portion of water right no. 37-00863 transferred under T5748 in the name of ECIC is determined in the Snake River Basin Adjudication to have been forfeited or to be otherwise invalid.

Signed this _2nd_____ day of _____January _____, 2003.

_____/Signed/____
L. GLEN SAXTON, P.E.
Hearing Officer