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	))))	**FINAL ORDER**

INTRODUCTION

This matter is before the Director of the Idaho Department of Water Resources ("Director" or "Department") following the issuance of a "Preliminary Order" and an "Order Denying Petition for Reconsideration" by the Department's Hearing Officer, L. Glen Saxton. The action arises from an application for permit by Robert L. Friedman ("Friedman" or "applicant") to divert 2.0 cubic feet per second ("cfs") of ground water for use in three ponds. In a related transaction, Eagle Creek Irrigation Company ("ECIC" or "irrigation company") obtained approval under Transfer No. 5748 to change the nature of use for 0.04 cfs of its surface water rights from irrigation use to aesthetic purposes. Friedman is a shareholder in the irrigation company. Blaine County ("County" or "protestant") protested the application for permit, but not the transfer. The County challenged Friedman's application for permit on the grounds that Friedman had forfeited the right to use his ECIC water and that Friedman's proposed aesthetic ponds were contrary to the local public interest.

The Department's Hearing Officer heard the matter on November 13, 2002. Friedman was present and represented by counsel James P. Speck of Speck & Aansted. The County appeared through counsel Douglas A. Werth of Bieter, Werth, & Walker, PLLC. On January 2, 2003, the Hearing Officer issued a preliminary order approving Friedman's application for permit. On February 4, 2003, the Hearing Officer denied the County's petition for reconsideration. The County filed a petition for review with the Director on February 18, 2003. Friedman filed a response to the petition for review on March 4, 2003.

SUMMARY OF HEARING OFFICER'S DECISION

The Hearing Officer considered the challenges of the County and held that (1) Friedman had not forfeited his shares of stock in ECIC nor his right to use the water represented by those shares of stock; (2) there is sufficient ground water available to satisfy the proposed permit without reducing the stream flow in the Big Wood River; and (3) the evidence did not suggest

that the proposed permit would violate the local public interest. The Hearing Officer approved the application subject to conditions.

The Director concurs with the decision of the Hearing Officer. The Director adopts the substance of the Hearing Officer's preliminary order in this matter and hereby enters a final order with the following findings of fact, analysis, conclusions of law, and order:

FINDINGS OF FACT

1. Friedman owns 10 acres of property located about six miles north of Ketchum, Idaho near the confluence of Eagle Creek with the Big Wood River ("river") in Blaine County. Friedman plans to build a residence, a guesthouse and a barn on the property and to construct three ponds. The estimated cost of the three buildings is about $2.5 million and the cost of landscaping is estimated to be in excess of $540,000. (See Applicant's Exhibit 13).

2. On July 11, 2002, Friedman submitted Application for Permit No. 37-20742 ("application") to the Department proposing the diversion of 2.0 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 two acres.

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

3. The Department published notice of the application and the County filed a protest in response.

4. On November 13, 2002, the Department conducted a hearing at which both the applicant and the protestant presented evidence through exhibits and testimony.

5. The issues considered by the Department 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.

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

Applicant's Exhibits:

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 Exhibits:

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; and
- Application for Permit No. 37-08910 (Relinquished)

7. Water right no. 37-00863 was decreed on August 22, 1923, in *Arthur J. Winslow v. S.H. Chapman* ("Winslow decree"). 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 decree does not describe the location of the points of diversion of the water right. 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. ECIC 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 two 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 2.0 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 during the irrigation season, will be less than the amount of water used historically to irrigate the approximately 10 acres. (See Applicant's Exhibit 3). Average precipitation during the non-irrigation season exceeds any evaporation and sublimation losses that may occur from the three ponds during the non-irrigation season. (See Applicant's Exhibit 1).

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

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

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 two shares of water (0.04 cfs) under right no. 37-00863 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 was approved by the Department on January 6, 2003, based upon the Department's determination that water from the two shares would cover the evaporation losses from the ponds when water is available under the shares.

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

ECIC filed Application for Transfer No. 5748 to change the nature of use for two shares of its water right from irrigation to recreation/aesthetic uses. The filing was a "companion" application to Application for Permit No. 37-20742 filed by Friedman. The transfer allows for the use of two shares of ECIC's Eagle Creek water right to be used for recreation/aesthetic purposes in Friedman's ponds. The transfer is a change in use of an existing water right, not a new appropriation of water. There were no protests filed and the Department on January 6, 2003, approved the transfer. The purpose of Friedman's application is to provide cooler temperature ground water to the ponds when the water temperature in the ponds becomes elevated or the dissolved oxygen level in the ponds is low. The proposed use of ground water by Friedman is not intended to provide a new source of water to keep the ponds full. The non-consumptive purpose of the ground water appropriation is to provide a source of water to maintain the quality of the surface water already stored in the ponds.

Forfeiture

The County asserts that because of non-use Friedman has forfeited his right to the use of water represented by shares of stock in ECIC. The assertions are based on the County's position that Friedman as a shareholder is the appropriator of water right no. 37-00863, and not ECIC. It is well established in Idaho that a canal company, which is the holder of a water right, is the appropriator, not its shareholders. In this case, the records of the Department show that ECIC is the legal titleholder of water right no. 37-00863.

The County argues that *Aberdeen-Springfield Canal Company v. Peiper,* 133 Idaho 82, 982 P.2d 917 (1999), relied upon by Friedman, is not applicable under the facts of the present case. Friedman cites *Peiper* for its holding that the failure of a shareholder to apply canal company water to a beneficial use did not cause the canal company to forfeit its water right appurtenant to the shareholder's land when the non-use was beyond the control of the appropriator. The County contends that *Peiper* is inapplicable because the Aberdeen-Springfield Canal Company was created under the Carey Act and ECIC is not a Carey Act company. The

County argues that *Peiper* cannot be applied to this case because there are factual differences between the operation of the Aberdeen-Springfield Canal Company and ECIC. Although factual differences may exist in the operation of the companies, the legal principle set forth by the Court in *Peiper* is controlling.

The County further argues, "because Friedman may have failed to use his share of those water rights does not mean that ECIC was prevented by circumstances over which it had no control from exercising its right to the water." The Hearing Officer found credible evidence that when water, represented by the shares of stock owned by a particular shareholder, is not used or called for by that shareholder, ECIC does, in fact, deliver that water to other shareholders for use on lands within the service area of ECIC. The record in this case does not support a determination of forfeiture for any portion of the water right held by ECIC that is represented by the shares of stock issued to Friedman.

The County also argues that the application for permit should be rejected because the *Winslow* decree governing Eagle Creek is "dubious" given its entry as a default judgment. Any concern regarding unique provisions of the *Winslow* decree may be addressed as a part of the ongoing Snake River Basin Adjudication. Unless the *Winslow* decree is modified through the judicial process, the Department is required to recognize the provisions of the decree in its administration of water rights.

Local Public Interest

The County argues that the permit proposed by Friedman violates the local public interest policy adopted by Blaine County. The County's public interest policy includes various factors that the Department is already statutorily required to consider, such as the potential injury to existing water users, water conservation, the use of measuring devices, and mitigation requirements. The County argues that evaporation from the impoundment of water in ponds is wasteful and violates the County's public interest policy to conserve water. Friedman's expert witness, Charles Brockway, however, testified that evaporative losses from an equivalent surface area of a pond are essentially the same as evapotransporation losses from a like area of irrigated land.

Regarding potential injury to existing water users, the County asserts that junior water right holders who divert water from the Big Wood River will be injured because the water that once reached the river, as a result of nonuse by Friedman, will no longer be available. The Hearing Officer rejected this argument based upon the testimony that ECIC delivers water not used by a shareholder to other shareholders within its distribution system. Any nonuse of water by Friedman and his predecessors from 1977 through 2000 may or may not have resulted in additional water being recharged to the aquifer and ultimately becoming available to water users with rights from the Big Wood River. However, the possible loss of such an incidental benefit to other water users is not a recognizable injury in the absence of a portion of ECIC's water right

37-00863 being determined forfeited. Because forfeiture cannot be found under the facts of this case, the Director concurs with the Hearing Officer that approval of the permit does not violate the local public interest.

Statutory Compliance

The County argues that Friedman has failed to demonstrate compliance with the provisions of Idaho Code § 42-203A(5), which sets forth the criteria for approval of an application for permit to appropriate water. The Hearing Officer concluded that Friedman's proposal would not adversely affect the rights of existing water users. The evidence submitted showed that the water supply is sufficient and that the application was made in good faith. The parties stipulated that Friedman had adequate financial resources to complete the project. Friedman presented sufficient evidence to demonstrate that the proposed project does not conflict with the local public interest. Finally, Friedman supplied credible expert testimony that the proposed ponds are not inconsistent with state water conservation policies. The Director agrees with the Hearing Officer's determination that the applicant has satisfied the statutory criteria for issuance of a water right permit in this case.

As the Hearing Officer noted, Friedman did not demonstrate a right to the use of ECIC water for the purpose of initially filling the ponds. The County suggests that this should be a basis for rejecting the application. The Department, however, may properly condition its approval of the application upon the requirement that Friedman obtain the necessary authorization to fill the ponds with 16 acre-feet of ECIC water. The Director agrees with the Hearing Officer's determination that Friedman should be allowed the opportunity to satisfy this condition of the order.

Mitigation

The approved permit will authorize the non-consumptive use of ground water to regulate temperature and dissolved oxygen levels in the proposed ponds. The source of the water to maintain water levels in the ponds is from Eagle Creek. The water consumed through evaporation from the ponds during the irrigation season is to be mitigated by permanently drying up two of the ten acres that Friedman was authorized to irrigate with his ECIC shares. Friedman is to use surface water from two ECIC shares that have been changed to aesthetic use to maintain the water levels in the ponds. If ECIC surface water is not available, Friedman is not permitted to use ground water to maintain the water levels in the ponds. Ground water is not a source of mitigation water for the ponds, nor is it a source of water to maintain the water levels in the ponds. Rather, the use of ground water is for the sole purpose of regulating temperature and dissolved oxygen levels in the ponds.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A(5), as amended by the 2003 Legislature, 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, as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho; … the director of the department of water resources may reject such application and refuse issuance of a permit therefor or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The definition of the local public interest now codified at Idaho Code § 42-202B(3) is as follows:

> "Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

3. Idaho Code § 42-108 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.

4. 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.

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

6. The application is made in good faith and not for delay or speculative purposes.

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

8. The Local Public Interest Water Policy adopted by the Blaine County Commissioners requests the Department to consider water conservation and other issues in water right proceedings that the Department is already required to consider 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.

9. Based upon the evidence in the record it is concluded that construction of the proposed project would not adversely affect the public water resource in a manner inconsistent with the local public interest. The evidence does not demonstrate that the proposed project will adversely affect water quantity or water quality in a manner detrimental to other water users, to recreational users, or to the fish and wildlife resources in the area. The proposed project is consistent with the local public interest.

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

11. The applicant complied with the consent requirement of Idaho Code § 42-108 as evidenced by ECIC having applied for and received approval to change the nature of use from irrigation to recreation/aesthetic use for the two shares of its water right to be used for this project.

12. The Idaho Supreme Court has held that the failure of a stockholder to apply canal company water to beneficial use did not cause the canal company to forfeit its water right appurtenant to the stockholder's land. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 87, 982 P.2d 917, 921 (1999).

13. Neither Friedman nor ECIC forfeited the use of water represented by Friedman's shares of stock in ECIC. This conclusion is based primarily upon the evidence in the record that the water represented by the Friedman shares was made available to other ECIC shareholders when not used by Friedman, and alternatively on the Idaho Court's holding in the *Peiper* case.

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

ORDER

IT IS 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. The right is 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 two shares of water, to the extent the water 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 _25th_ day of August 2003.

____/Signed/___
KARL J. DREHER
Director