BEFORE THE DEPARTMENT OF WATER RESOURCES

FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT TO APPROPRIATE WATER FOR A MINIMUM STREAMFLOW NO. 83-11962 IN THE NAME OF THE IDAHO WATER RESOURCE BOARD	)))))	**PRELIMINARY ORDER**

On October 13, 2005, the Idaho Department of Water Resources (IDWR) conducted a hearing for application for permit to appropriate water for a minimum stream flow no. 83-11962 as required by Idaho Code § 42-1503. The Idaho Water Resource Board (the "Board") was represented by Board member Dick Wyatt. No other persons or entities were formal parties to the hearing. Representatives of the U.S. Army Corps of Engineers and a representative of the Nez Perce Tribe offered informal testimony and comment.

Following the presentation of testimony, and after considering the information in the file, the hearing officer left the record open until approximately the end of October for submittal of additional evidence. On October 27, 2005, the Board submitted a three page, untitled document discussing minimum stream flows for the North Fork of the Clearwater River. The author of the document is unknown. Jean Baldridge, an employee of an entity named ENTRIX, sent the document to Bill Graham of IDWR, who forwarded it to the hearing officer. ENTRIX is purportedly a consultant for the Nez Perce Tribe.

Based on the evidence and information available, the hearing officer finds, concludes and orders as follows:

FINDINGS OF FACT

1. On April 1, 2005, the Board filed application for permit to appropriate water no. 83-11962, seeking a minimum stream flow in the North Fork of the Clearwater River, tributary to

the Clearwater River. The following describes the components of the minimum stream flow:

PERIOD OF USE	FLOW RATE
1/1 to 1/31	1,349 cfs
2/1 to 2/28	1,838 cfs
3/1 to 3/31	2,885 cfs
4/1 to 4/30	5,863 cfs
5/1 to 5/31	10,396 cfs
6/1 to 6/30	8,470 cfs
7/1 to 7/31	2,331 cfs
8/1 to 8/31	1,128 cfs
9/1 to 9/30	873 cfs
10/1 to 10/31	828 cfs
11/1 to 11/30	1,239 cfs
12/1 to 12/31	1,237 cfs
Purpose for the minimum stream flow:	To preserve fish, wildlife, scenic and recreational values and to protect and enhance water quality.
Beginning of minimum stream flow reach:	The confluence of the North Fork of the Clearwater River with Kelly Creek in the SW1/4SW1/4, Sec. 18, T39N, R10E, Boise-Meridian
Ending reach:	The confluence of the North Fork of the Clearwater River with Beaver Creek in Lot 7 (NE1/4SE1/4NE1/4) Sec. 6, T40N, R07E, Boise-Meridian.
Length of Minimum Stream Flow Reach:	44.6 river miles
Proposed Priority Date:	April 1, 2005

2 Application to appropriate water no 83-11962 proposes a minimum stream flow that will recognize an instream flow agreed to in the Snake River Water Rights Agreement, dated May 16, 2004 (hereafter referred to as "the Nez Perce Agreement") The Nez Perce Agreement was a settlement of the Nez Perce Tribe's claims to water rights in the Snake River Basin Adjudication (SRBA)

3. The following are limitations to the minimum stream flow that were recognized in the Nez Perce Agreement:

a. The water right is subordinate to future domestic, commercial, municipal, and industrial uses These uses will be referred to hereafter as "DCMI" uses.

b The water right is also subordinate to future non-DCMI development of a total flow rate equal to: (i) 74.88 cfs, or (ii) the flow rate exceeding a base flow equivalent to the unimpaired monthly eighty percent (80%) exceedence flow, whichever is less.

4. The minimum stream flow reach is located beginning at approximately the upper limits of the Dworshak Reservoir impoundment and extending upstream approximately forty-five miles to the mouth of Kelly Creek.

5. The proposed minimum stream flow was determined using USGS regression equations. The product of the regression equations was an "unimpaired exceedence flow," a theoretical flow that would exist if there were no man-made impacts to or diversions from the stream.

6. The proposed minimum flow sought is the flow that would be expected to be exceeded forty-percent (40%) of the time if there were unimpaired flows in the minimum stream flow reach of the North Fork of the Clearwater River.

7 Exhibit 1(k), a hydrograph of North Fork Clearwater River flows, depicts average monthly stream flow data from 1967 to 2004 at USGS Gage No. 13340600. The USGS gage is

located near the downstream end of the proposed minimum stream flow reach. Exhibit 1(k) also depicts each monthly segment of the proposed minimum stream flow for an entire year. The hydrograph curve for the proposed minimum flows mirrors the mean monthly stream flow measured at the USGS gage. During most periods of time, however, the proposed minimum stream flow is slightly less than the mean monthly flow.

8. Documentation provided by the Board following the hearing states that the optimal monthly flow for fisheries resources is approximately the mean monthly flow. The documentation also states that minimum stream flows should be between eighty to one hundred percent (80% to 100%) of mean monthly values. The monthly minimum stream flows sought by application for minimum stream flow application no 83-11962 fall within the range between eighty to one-hundred percent (80% to 100%) of the measured monthly flows

9. The parties to the Nez Perce Agreement, including the Nez Perce Tribe and the State of Idaho, recognized that the minimum stream flows in the North Fork of the Clearwater River have public value.

10. The proposed minimum stream flow reach is located within the boundaries of the Clearwater National Forest.

11. The federal government or the Nez Perce Tribe hold water rights or water right claims identifying the North Fork Clearwater River as a source. Most of these water rights or claims are for instream or recreational nonconsumptive uses. A handful of small water rights authorize diversions for domestic uses from the North Fork Clearwater River or its tributaries.

CONCLUSION OF LAW

1. Idaho Code § 42-1503 states:

> Upon the conclusion of the hearing 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 or rejecting said application.

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 for 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 water levels in the existing or future establishment of necessary gauging stations and benchmarks.

2. Because the minimum stream flow sought by this application is located primarily within lands owned by the federal government, and because there are no significant water rights diverted within the minimum stream flow reach, approval of a minimum stream flow for application no. 83-11962 will not interfere with any vested water rights. This minimum stream flow should be junior to all water rights bearing a priority date earlier than April 1, 2005.

3. Recognition of this minimum stream flow in the Nez Perce Agreement and the subsequent non-opposition to the minimum stream flow establishes that the minimum stream flow is in the public, as opposed to the private, interest.

4. The monthly minimum stream flows sought by application for permit no. 83-11962 are necessary for the preservation of fish habitat. No information was presented at the hearing establishing water needs for wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of the stream.

5. Based on the documentation submitted after the hearing, the minimum stream flow is less than the optimum or most desirable flow, and is a minimum flow.

6. The stream flow records and the regression equation computations establish that the minimum stream flow is capable of being maintained.

ORDER

IT IS HEREBY ORDERED that application for permit to appropriate water no 83-11962, seeking a minimum stream flow in the North Fork of the Clearwater River, is **Approved** subject to the following conditions:

1 Use of water under Permit No. 83-11962 shall recognize and allow the continued beneficial diversion of water under any existing water right established by diversion and application to 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 priority dates earlier than April 1, 2005.

2 Use of water under Permit No. 83-11962 shall be nonconsumptive.

3. Upon the future finding and order of the Director that gaging stations are required to administer the approved minimum stream flows, the right holder shall permanently install and maintain gaging stations as specified by the Department.

4. The Board, upon receiving a request or upon its own initiative, may petition the Director for amendment to the permit or license. 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 permit or subsequent license 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 permit or license would be in the public interest. An amendment cannot increase the flow rate.

5. Permit No. 83-11962 shall be submitted to the Idaho Legislature by the fifth day of a regular legislative session and the Director's approval shall not become finally effective until approved by the legislature pursuant to provisions of Idaho Code § 42-1503.

6 This minimum stream flow provides for fish habitat.

7. The reach of minimum stream flow approved is described as follows: Beginning at the confluence with Kelly Creek in the SE1/4NW1/4SW1/4, Section 18, T39N, R10E, B.M., Clearwater County, and extending downstream 44.6 river miles to the confluence with Beaver Creek in Lot 7 (NE1/4SE1/4NE1/4), Section 6, T40N, R04E, B.M.

8. The permit is subordinate to future domestic, commercial, municipal, and industrial uses

9. This permit is subordinate to future non-DCMI development of a total flow rate equal to: (i) 74.88 cfs, or (ii) the flow rate exceeding a base flow equivalent to the unimpaired monthly eighty percent (80%) exceedence flow, whichever is less.

10 Proof of beneficial use shall be submitted on or before April 1, 2011.

DATE this 9th day of December, 2005

Gary Spackman
Hearing Officer