BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT TO APPROPRIATE WATER, PERMIT NO 74-15613, IN THE NAME OF F JAMES AND PAULA J. WHITTAKER	)	**PRELIMINARY ORDER**

F. James and Paula Whittaker ("Whittakers") filed application to appropriate water no 74-15613 with the Idaho Department of Water Resources ("IDWR" or "Department") The application was protested by the Lemhi Irrigation District, Ellsworth Angus Ranch, the Idaho Department of Fish & Game ("Fish & Game"), and the United States Department of Interior, Bureau of Land Management ("BLM"). BLM subsequently withdrew its protest

On February 6 and 7, 2007, IDWR conducted a hearing for the protests. Kent Foster, Attorney at Law, appeared on behalf of Whittakers. David Barber, Idaho Deputy Attorney General, appeared on behalf of Fish & Game Carl Ellsworth appeared on behalf of the Lemhi Irrigation District and Ellsworth Angus Ranch.

On January 25, 2007, Fish & Game filed a motion for the hearing officer to take judicial notice of the water right recommendations of the Director for Big and Little Timber Creeks in the Snake River Basin Adjudication ("SRBA"). The recommended water rights were attached to the motion as Attachment no. 1. The parties did not object to the hearing officer's consideration of the recommendations. The hearing officer granted the motion and signed an order stating that the hearing officer would consider the recommendations

In addition, Fish & Game moved to offer into evidence a deposition of James Whittaker Whittakers' attorney agreed to allow the deposition to become part of the record and also agreed to have the deposition replace the testimony of James Whittaker. As a result of discussions about the need for some examination, the parties agreed that the deposition of James Whittaker would become part of his testimony, but James Whittaker was also called as a witness. The deposition of James Whittaker was marked and received into evidence as Protestants' Exhibit No 37

Several documents attached to James Whittaker's deposition were marked as deposition exhibits 1 through 10. The parties stipulated that these documents, attached to James Whittaker's deposition, would also become hearing exhibits. To avoid confusion about numbering, the documents attached to the deposition retained the same numbering

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as in the deposition. The deposition documents will be referred to as Applicant's Exhibits 1 through 10. An additional document was marked as Applicant's Exhibit 11 and was also received into evidence

Prior to the hearing, Fish & Game marked its exhibits numerically as Exhibits 1 through 38. Because of duplicate numberings, the hearing officer determined that the applicant's exhibits would be referred to specifically as Applicant's Exhibits 1 through 11 and the exhibits submitted by Fish & Game would be numbered Protestants' Exhibits 1 through 38

Finally, Ellsworth Angus Ranch submitted one document to the hearing officer The document was marked as Protestants' Exhibit 101.

FINDINGS OF FACT

1. Application to appropriate water no. 74-15613 proposes the following:

Source: Big Timber Creek tributary to the Lemhi River
Nature of Use: Irrigation
Flow Rate: 4.0 cfs
Priority: April 22, 2005
Period of Use: March 15 to November 15
Point of Diversion:
T15N R26E Section 8 NWSE[1]

Place of Use:

				Acres
T16N	R25E	Section 25	NESW	40
			SESW	40
			NESE	40
			NWSE	40
			SWSE	40
			Total	200 acres

2. The proposed point of diversion would be located approximately three miles upstream from the confluence of Big Timber Creek and the Lemhi River, and just downstream from the confluence of Little Timber Creek and Big Timber Creek.

3. Big Timber Creek is a perennial tributary to the Lemhi River near the headwaters of the Lemhi River. Big Timber Creek flows approximately through the center of the town of Leadore and discharges to the Lemhi River nearby.

[1] In this decision, the public land survey numeric descriptor "1/4" is assumed to follow each two alpha character public land survey locator when the numeric descriptor is missing For instance, in this example, the full description would be the NW1/4SE1/4, Section 8, Township 15 North, Range 26 East, Boise Meridian.

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4. Big Timber Creek and its tributaries are watercourses traversing a total distance of approximately 56 miles.

5. During the 1960's and 1970's, the surface water rights in the Lemhi River and its tributaries were adjudicated by the District Court of the Seventh Judicial District of the State of Idaho (hereafter referred to as the "Lemhi River Adjudication"). Holders of these water rights decreed in the Lemhi River Adjudication filed claims for the water rights in the SRBA. Witnesses at the hearing testified that the total of the flow rates for existing water rights naming Big Timber Creek as a source is approximately 96 cfs. The hearing officer attempted to verify this number from a summary of the water right claims of which the hearing officer took notice (see the document in the file labeled "Attachment # 1") The total of the individual flow rates calculated by the hearing officer for the claimed, decreed, licensed, and permitted water rights equaled approximately 100 cfs, not 96 cfs. There are also additional decreed water rights authorizing diversion from tributaries to Big Timber Creek.

6. Each individual water right decreed in the Lemhi River Adjudication quantifies a flow rate for diversion after the spring runoff when water rights are regulated.

7. The Lemhi River Adjudication also authorized water right holders to divert floodwater in excess of the flow rates quantified for use when water rights are being regulated. The Lemhi River Adjudication did not quantify the flow rates for the high flow diversion in excess of the quantified flows, but authorized diversion of floodwater with a general provision in the decree. By generally authorizing diversion of unquantified floodwater flows, the Lemhi River Adjudication established a basis for the filing of SRBA claims asserting the right to divert floodwater flows in the Lemhi River Basin.

8. The SRBA claims asserting water rights for the floodwater diversions recognized by the Lemhi River Adjudication will be addressed in the SRBA. The recommendations of the Director to the SRBA Court, of which the hearing officer took notice, include these high flow claims.

9. The Director recommended recognition by the SRBA Court of water rights for both claims with decreed and licensed quantified flow rates and also for decreed unquantified flow rates. Witnesses at the hearing testified that the total of flow rates for all the recommended rights naming Big Timber Creek and tributaries as a source is approximately 222 cfs. The hearing officer attempted to verify this number from a summary of the water right claims of which the hearing officer took notice (see Attachment # 1). The flow rates accumulated by the hearing officer did not equal 222 cfs. The sum of flow rates in Attachment #1 equals approximately 230 cfs.

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10. During the irrigation season, diversion of water under claimed water rights often dewaters Big Timber Creek in the lower portions of the stream. During the non-irrigation season, Big Timber Creek flows to the Lemhi River.

11. For purposes of administration, the Lemhi River Adjudication identified Big Timber Creek and its tributaries as separate streams from the Lemhi River. As a result, IDWR created Water District 74-W, and the Watermaster for Water District 74-W administers the water rights on Big Timber Creek, Little Timber Creek, and their tributaries without regard for the priorities of water rights authorizing diversion from the Lemhi River.

12. In many years during a short period of the spring, runoff flows in Big Timber Creek significantly exceed the water diverted for irrigation, and the excess water discharges from Big Timber Creek into the Lemhi River. Whittakers seek to appropriate water for diversion and use during these high flow periods and any other time during the irrigation season when flows are sufficient that all of the rights called for on Big Timber Creek, Little Timber Creek, and their tributaries have been satisfied. Whittakers recognize their ability to divert water may be limited to a few days to a few weeks in any given year.

13. Whittakers propose to irrigate a 200-acre parcel. Prior to 1993, the 200 acres were irrigated with water diverted under water right no. 74-0063. In 1993, Whittakers removed water right no. 74-0063 from the 200 acres of land with a transfer of water right approved by IDWR.

14. The proposed place of use presently produces pasture grass. Although Whittakers may only be able to irrigate the 200 acres for a short period of time, the land, when irrigated, will grow forage for approximately 200 animal-unit-months of feed that are not presently available to Whittakers' cattle.

15. Because of previous irrigation of the proposed place of use, Whittakers hold a right-of-way for the diversion and delivery system. In addition, the ditches and headgate for delivery are still physically intact.

16. Whittakers propose to flood irrigate the proposed place of use. Because of the existing right-of-ways and the existing physical delivery system, Whittakers' expenditure of funds to divert water as proposed will be minimal.

17. Spring chinook salmon, steelhead, and bull trout inhabit the Lemhi River and some of its tributaries. Spring chinook salmon, steelhead, and bull trout are all listed as threatened species under the Endangered Species Act. The Upper Salmon River Model Watershed (formerly the Lemhi River Model Watershed), the local Soil Conservation District, various other local groups, and various state and federal entities have been working in the Lemhi River Basin attempting to restore habitat for spring chinook salmon. Some of these efforts include construction and placement of screens in diversion canals to prevent juvenile fish from being flushed into the fields with the

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irrigation water, diversion consolidations, construction of headgates, and innovative water transactions and system reconfigurations to restore flows in streams that were previously dewatered. Restoring flows in tributary creeks presently disconnected from the Lemhi River as a result of irrigation during the summer months is a high priority. Reconnection of the tributaries to the Lemhi River will open significant additional habitat for salmon, steelhead, and bull trout spawning.

18. Reconnection of Big Timber Creek with the Lemhi River is one of the top five projects in ranking of importance within the Lemhi River Basin.

19. At the present time, a project to restore 4.5 cfs of flow in the previously dewatered section of Big Timber Creek above its confluence with the Lemhi River is almost complete. The 4.5 cfs will accommodate the movement of juvenile fish from the Lemhi River into the Big Timber Creek Drainage.

20. Studies conducted by the Bureau of Reclamation, United States Department of Interior, conclude that 13 cfs of flow is needed in lower Big Timber Creek to allow migration of adult spring chinook salmon, steelhead, and fluvial bull trout into Big Timber Creek (See Protestants' Exhibit 16).

21. Local landowners, local officials, local irrigation entities, model watersheds, and local governing bodies have cooperatively participated in acquiring water to reconnect tributaries of the Lemhi River to the main stem of the Lemhi River and have promoted other projects to restore and protect anadromous fish.

22. The reconnections, screening, improved diversion structures, riparian habitat improvement, are components of a conservation plan, supported by the local people and the agencies responsible for overseeing recovery, to protect the local people from liability should there be an incidental taking of an endangered species. If a conservation plan is approved by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, local water users are protected from liability should a spring chinook salmon, steelhead, or bull trout be killed, injured, or otherwise "taken" as a result of diversion and use of water for irrigation.

23. In addition, the state of Idaho has an obligation under the Nez Perce Agreement and the Wild & Scenic Rivers Agreement to promote the recovery of anadromous fish.

24. Typically, senior water right holders whose rights authorize diversion from Big Timber Creek and Little Timber Creek will not divert water early in the year because they know their water rights can be satisfied later in the year. Later in time priority right holders divert water from Big Timber Creek and its tributaries early in an attempt to irrigate prior to demands being made upon the water by senior priority water right holders.

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CONCLUSIONS OF LAW

1. Idaho Code § 42-203A states in pertinent part:

> 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, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; 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 applicant bears the ultimate burden of proof regarding all the factors set forth in Idaho Code § 42-203A.

3. Idaho Code § 42-202B defines the local public interest:

> "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.

4. Irrigation is a beneficial use of water, and is a traditional use of water that gives rise to a presumption of public interest. The benefits that can be derived from diversion of water and irrigation as proposed by Whittaker, even for a short period of time, are real and substantial.

5. On the other hand, there is a possibility that Whittaker could further dewater Big Timber Creek while diverting water for irrigation. The purpose of the reconnection effort is to reestablish continuous flows from Big Timber Creek into the Lemhi River.

6. Reconnection of Big Timber Creek and the Lemhi River has been promoted through significant efforts of the local people and government agencies as one of the solutions for salmon, steelhead, and bull trout recovery. The stream reconnection and other salmon, steelhead, and trout recovery efforts by the local people have resulted in an approved conservation plan under the Endangered Species Act. The local water

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users are protected from incidental take liability. It is not in the local public interest to allow a new appropriation that will result in further dewatering of Big Timber Creek that would frustrate the reconnection efforts.

7. It is in the public interest, however, to allow Whittaker to divert water during high flow periods when sufficient water is flowing in Big Timber Creek to satisfy the passage requirement of adult anadromous fish.

8. Furthermore, in considering the conservation of the waters of the state of Idaho, portions of unappropriated water in streams supporting anadromous fish should remain in the stream for the protection of the fish habitat.

9. The proposed diversion of water will not reduce the amount of water available for other water right holders. There is sufficient water, at times, to satisfy the appropriations sought by Whittaker.

10. Whittaker has sufficient financial resources to construct the project.

11. Whittaker did not file the application for purposes of speculation, delay, or in bad faith.

ORDER

IT IS HEREBY ORDERED that application for permit to appropriate water is **Approved** subject to the following conditions:

Proof of beneficial use shall be submitted on or before September 1, 2012.

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, the water right is within State Water District No. 74W.

This right does not grant any right-of-way or easement across the land of another.

Prior to diversion of water under this right, the right holder shall install and maintain a locking controlling works, subject to the approval of the Department, in a manner that will provide the watermaster suitable control of the diversion.

Prior to the diversion and use of water under this right, the right holder shall install and maintain an acceptable measuring device, including data logger, at the authorized point of diversion, in accordance with Department specifications.

When notified by the Department or by a watermaster with regulatory authority over this right, the right holder shall report the amount of water diverted in connection with this right. The report shall be submitted in the manner and frequency specified by the Department or the watermaster.

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Prior to diversion and use of water under this approval, the right holder shall comply with all fish screening and/or fish passage requirements of the Idaho Department of Fish and Game.

At any time the flow rate in Big Timber Creek is greater than 13 cfs at all locations from the confluence of Little Timber Creek and Big Timber Creek down to the confluence of Big Timber Creek and the Lemhi River, the right holder may divert water under this right at a flow rate equal to the difference between the measured flow and 13 cfs, but not exceeding the flow rate authorized by this right.

The right holder shall cease diverting water under this right if the flows are less than 13 cfs at any location between the point of diversion and the confluence of Big Timber Creek and the Lemhi River.

To determine whether water can be diverted under this right, the right holder and/or the watermaster shall measure the flows in Big Timber Creek at an existing measuring station near the Townsite of Leadore, located in the NENWNW, Section 31, T16N, R22E. The Department retains jurisdiction to require the right holder to install and maintain additional measuring sites to insure required bypass flows are maintained during diversions under this right.

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 the permit holder had no control.

DATED this 11th day of September, 2007.

Gary Spackman
Hearing Officer

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