

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 74-14993 IN THE)
NAME OF THE IDAHO WATER)
RESOURCE BOARD)
_____)

PRELIMINARY ORDER

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

FINDINGS OF FACT

1. On April 12, 2001, the Idaho Water Resource Board ("Board" or "applicant") filed the above captioned application for permit with the Department seeking to establish a minimum stream flow on a reach of the Lemhi River tributary to the Salmon River in Lemhi County, Idaho. The application was filed pursuant to Chapter 15, Title 42, Idaho Code. The reach is further described as follows:

Beginning at water diversion L-6 on the Lemhi River in the southeast quarter (1/4) of section twenty-four (24), township twenty-one (21) north, range twenty-two (22) east of the Boise Meridian, and ending at the confluence of the Lemhi River with the Salmon River near the southwest corner of section thirty-two (32), township twenty-two (22) north, range twenty-two (22) east of the Boise Meridian, in Lemhi County, said reach being approximately 7.5 miles long.

The minimum flow sought is thirty-five (35) cubic feet per second ("cfs") year-round to provide anadromous fish passage in the Lemhi River from diversion L-6 to the mouth of the Lemhi River. The application provided that fifteen (15) cfs of the thirty-five (35) cfs be subordinated to all diversions, including high water or flood water authorized under the Lemhi River basin decree (Lemhi County Case No. 4948).

2. The Department provided notice of the application describing the proposed appropriation and setting the time and place for hearing on the application. Notice was published on August 30, 2001 and September 6, 2001, in the Recorder Herald, Salmon, Idaho and in the Challis Messenger, Challis, Idaho.

3. On September 12, 2001, the Department conducted a public hearing in Salmon, Idaho for the purpose of eliciting testimony regarding the application. The applicant appeared in a formal capacity at the hearing. There were no other full parties or public witnesses.

4. Applicant's Exhibit 1 was offered and accepted as a part of the hearing record. The exhibit shows the location of the minimum streamflow reach and historic Lemhi River flows measured by the US Geological Survey below Lemhi River Diversion L-5 near Salmon, Idaho. The flows were measured as low as approximately 10 cfs during the summer of 2000, but with augmented flow authorized by this minimum streamflow application, were stabilized at more than 20 cfs during the summer of 2001.

5. Sections 42-1506 and 42-1765A, Idaho Code, were enacted by the Idaho legislature authorizing the minimum stream flow appropriation and setting up a local committee to facilitate operation of a water supply bank in the Lemhi River basin.

6. All rights acquired under the application are for instream non-consumptive use and are subject to all vested water rights, permits or applications for permit having a date of priority earlier than April 12, 2001.

7. There was no opposition at the hearing or submitted in writing to approval of the application.

CONCLUSIONS OF LAW

1. Chapter 15, Title 42, Idaho Code, provides that stream flow preservation for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation and water quality, when made pursuant to this statute, is in the public interest and is declared to be a beneficial use of such water.

2. Section 42-1506, Idaho Code, specifically authorizes the Board to file an application to establish a minimum stream flow on the Lemhi River.

3. The proposed minimum stream flow in the application will not interfere with any vested water right, permit, or application for permit having a priority date earlier than April 12, 2001.

4. The flow requested in the application is the minimum flow required to provide anadromous fish passage, and is not the ideal or most desirable flow that could be utilized for this purpose.

5. The proposed minimum stream flow is in the public, as opposed to private, interest.

6. The minimum stream flow proposed in the application is necessary to provide for anadromous fish passage in the river reach.

7. Section 42-1506, Idaho Code, provides that the Board is not required to show that the appropriation is capable of being maintained because it is anticipated that the water right will be maintained through operation of the water supply bank within the

Lemhi River basin consistent with provisions of section 42-1756A, Idaho Code.

8. The Department should approve the application with certain conditions and should issue a permit.

ORDER

IT IS, THEREFORE, HEREBY ORDERED That Application for Permit No. 74-14993 in the name of the Idaho Water Resource Board is **APPROVED** subject to the following conditions:

1. Use of water under the permit shall recognize and allow the continued beneficial diversion of water under any prior existing water right established by diversion and application of water to beneficial use or by an application, permit, or license on file or issued by the Director under provisions of Chapter 2, Title 42, Idaho Code, with a priority of use earlier than April 12, 2001.
2. Fifteen (15) cfs of the thirty-five (35) cfs is subordinated to all diversions, including high water or flood water authorized under the Lemhi River basin decree (Lemhi County Case No. 4948).
3. Use of water under the permit shall be non-consumptive.
4. Upon the future finding and order of the Director that gaging stations are required to maintain the approved minimum stream flow, the right holder shall permanently install and maintain gaging stations as specified by the Department.
5. The purpose of this minimum stream flow is to provide for the passage of anadromous fish in the authorized river reach.
6. The river reach approved is described in Finding of Fact 1 and begins at water diversion L-6 on the Lemhi River in the southeast quarter (1/4) of section twenty-four (24), township twenty-one (21) north, range twenty-two (22) east of the Boise Meridian, and ends at the confluence of the Lemhi River with the Salmon River near the southwest corner of section thirty-two (32), township twenty-two (22) north, range twenty-two (22) east of the Boise Meridian, Lemhi County.
7. The Board, upon receiving a request, or upon its own initiative, may petition the Director for an amendment to the 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 known interested parties of the

proposed change, and conduct a hearing for the purpose of determining whether the right 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 right would be in the public interest.

8. The application hereby approved by the Director shall be submitted to the Idaho Legislature by the fifth day of the next regular legislative session. The Director's approval shall not become finally effective until approved by the legislature pursuant to provisions of Section 42-1503, Idaho Code.
9. Use of water under this right is subject to the control of the watermaster of Water District 74, Lemhi River and tributaries.
10. The right holder shall submit to the Department proof of instream beneficial use of the minimum flow on or before **April 1, 2004**.

Dated this 27th day of September, 2001.

____ Signed ____
L. GLEN SAXTON
Hearing Officer