BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION TO APPROPRIATE WATER NO. 34-13810 IN THE NAME OF BROKEN RIVER RANCH, L.P.	)	**PRELIMINARY ORDER**

A hearing was conducted on August 10, 2004 in Arco, Idaho for the contested case created by protests filed against application to appropriate water no. 34-13810 in the name of Broken River Ranch, L.P. (Broken River Ranch). The applicant appeared by and through its attorney, Kent Foster. The protestant, Big Lost River Irrigation District, appeared by and through its attorney of record, Kent Fletcher. Protestants Tip Harwood and James Beverly appeared on their own behalf. Protestant Larry Barnes did not appear at the hearing. After hearing the evidence and reviewing the documents received into evidence as exhibits, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application to appropriate water no. 34-13810 proposes the following:

Flow rate:	2.0 cfs
Purpose of use:	Fish & Wildlife
Priority:	June 3, 2003
Period of Use:	Year-round
Point of Diversion:	SW1/4SW1/4NW1/4, Section 27, T8N, R22E, B.M.
Place of Use:	SW1/4NW1/4, Section 27, T8N, R22E, B.M.

2. Application no. 34-13810 proposes diversion of water from Warm Springs Creek to a small pond and discharge of the water back to Warm Springs Creek.

3. The pond was constructed in 1999 or 2000. The pond provides habitat for fish and for waterfowl.

4. Based on measurements of bank and depth dimensions, the pond has an area of about 0.36 acres and an approximate volume of 1.1 acre-feet.

5. Warm Springs Creek in the area of the pond is wide and shallow, and does not protect fish from predators. In addition, Warm Springs Creek in the area of the pond does not provide adequate rearing water for small fish. If the pond is constructed properly, fish migrating from Warm Springs Creek into the pond will be protected from predation and other dangers. If constructed properly, deep slow moving water in the pond, the delivery channel, and the outlet channel will provide habitat for juvenile fish.

6. At the time of initial construction, the diversion and pond were not represented by a water right. In 2003, IDWR issued a notice of violation to Broken River Ranch for illegal diversion and use of water. In response, Broken River Ranch ceased diverting water from Warm Springs Creek to the pond.

7. After water was no longer diverted from Warm Springs Creek into the pond, water evaporated/percolated slowly from the pond.

8. The applicant proposes the diversion of Warm Springs Creek water to the pond to support the natural spawning and survival of wild trout in Warm Springs Creek. The applicant does not intend to stock the pond with fish.

9. On June 27, 2003, the Idaho Department of Fish and Game (Fish & Game) wrote a letter about application no. 34-13810 to IDWR. The letter stated that Fish & Game does not oppose the issuance of a water right for the purposes described in the water right application. In the letter, Fish & Game voiced concerns about livestock watering, accurate measurement, screening, stocking of fish in the pond, planting of riparian vegetation, and regulation of diversion of water.

10. The Fish & Game letter calls for screening of the diversion channel and the outlet channel to prevent migration of native fish into the pond and the migration of nonnative fish out of the pond. This recommendation is inconsistent with the stated objective of allowing native fish to inhabit the channel and the pond.

11. The Fish & Game letter states that the proposed development may "benefit fisheries and wildlife in that location." It is difficult to conclude how a system totally screened from Warm Springs Creek could ever benefit the fishery resource. The hearing officer determines the Fish & Game letter would only require screening if the applicant wanted to stock fish in the pond.

12. Limiting cattle access will enhance the fishery and other wildlife values.

13. Establishment of riparian vegetation will enhance the fishery and other wildlife values.

14. The delivery channel into the pond from Warm Springs Creek is approximately 150 feet long. Fish can easily swim from Warm Springs Creek to the pond and can also swim upstream through the delivery channel back to Warm Springs Creek.

15. The outlet channel from the pond back to Warm Springs Creek is approximately 50 to 60 feet long. The gradient of the channel is steep and water falls rapidly in the channel. Fish cannot swim upstream to or downstream from the pond through the outlet channel.

16. A measuring device is located at the inlet to the pond and also in the outlet channel.

17. At the point of diversion, sticks and logs are placed in Warm Springs Creek to divert water into the delivery channel.

18. Maximum daily seepage loss from the pond is 0.018 cfs.

19. Seepage from the pond into the ground water will ultimately express itself downstream in Warm Springs Creek or the Big Lost River. The applicant did not submit any evidence showing where the seepage losses would reappear.

20. The pond is located in close proximity to Warm Springs Creek. Seepage returns to Warm Springs Creek within a few days of percolation from the pond. In addition, the seepage resurfaces within a short distance downstream of the pond.

21. Maximum daily evaporation from the pond is .0045 cfs. The consumptive irrigation requirement for alfalfa in the area is 2.10 acre-feet per acre annually. The total consumptive use for alfalfa is 2.49 acre-feet per acre annually.

22. Evaporation from the delivery and outlet channels is negligible.

23. Evaporation from a pond is approximately equal to the evapotranspiration from a fully irrigated alfalfa crop growing in a dimensional area equal to the surface area of the pond. If the pond is 0.36 acres in surface area, the pond will evaporate approximately the volume of water necessary to irrigate an area of alfalfa of the same size.

24. Evidence of the historical crops grown at Broken River Ranch was not presented at the hearing. Crops grown in the area are primarily pasture grass and hay, however. Some alfalfa is harvested as hay in the area where Broken River Ranch is located.

25. In addition to direct evaporation, the establishment of riparian vegetation around the pond and along the channels will also increase water consumption.

26. While the maximum estimated evaporation from the pond is small, the loss of surface water is real.

27. Flow in Warm Springs Creek and the Big Lost River will be diminished by evaporation from the pond and other consumptive losses associated with the pond.

28. IDWR is not approving new applications for permit from the Big Lost River that would consume additional water or that would bypass other water users.

29. The Big Lost River Irrigation District stores water in Mackay Reservoir during the non-irrigation season. Storage is dependent on flows from Warm Springs Creek and the Big Lost River into Mackay Reservoir.

30. In addition, other downstream water users hold water rights for natural flow in Warm Springs Creek and the Big Lost River.

31. Because of uncertainties about historical crop consumption and the other consumption that might occur as a result of the pond, nonirrigation of one acre of fully irrigated cropland will mitigate for evaporation and other consumptive losses from the pond.

32. Broken River Ranch irrigates approximately 435 acres. The water rights authorizing irrigation of Broken River Ranch are as follows:

WATER RIGHT NO.	DATE OF PRIORITY	FLOW RATE	SOURCE	NO. OF ACRES	COMBINED NO. OF ACRES
34-861A	5-1-1894	2.98 cfs	Warm Springs Creek	130	437.4
34-399	5-1-1905	1.2 cfs	Warm Springs Creek	60	437.4
34-398	8-30-1909	2.0 cfs	Warm Springs Creek	100	437.4
34-868	12-6-1913	3.2 cfs	Big Lost River	138.5	437.4
34-7010	8-28-1968	1.60 cfs	Garden Creek	79.1	437.4

33. Water right no. 34-861A is deliverable during most times of the year, except when the river is connected, and water from Warm Springs Creek must flow through Mackay Reservoir to satisfy downstream water rights bearing earlier priority dates.

34. Water right no. 34-861A authorizes a flow rate of 0.0224 cfs per acre of irrigated land. While in excess of the estimated evaporation, leaving a flow rate of 0.0224 cfs undiverted in Warm Springs Creek will mitigate for any possible consumptive losses.

35. Broken River Ranch should dry-up one acre of irrigated land under right no. 34-861A to mitigate for losses in the pond.

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 burden of proof regarding the factors of Idaho Code § 42-203A.

3. With adequate mitigation, approval of application no. 34-13810 will not injure other water rights.

4. There is sufficient water in Warm Springs Creek for the purpose sought.

5. The applicant has sufficient financial resources to complete the project.

6. The application is not filed for purposes of speculation, delay or in bad faith.

7. Concerns related to stocking fish, measurement and regulation, and proper fish passage can be addressed with conditions. Limitation of cattle access can be partially accomplished by prohibiting incidental stock watering from the channel or the pond. Channel and pond maintenance to insure proper depth, shading, and riparian cover is not within the expertise or jurisdiction of IDWR. Because Fish & Game has expertise in these matters, and the stated goal of this beneficial use is to improve the native fishery in Warm Springs Creek, the permit holder should coordinate construction and maintenance of the channels and pond with Fish and Game as an integral part of permit development. If the concerns of Fish and Game are addressed, the proposed use of water is in the local public interest.

8. The application is consistent with conservation of the waters of the State of Idaho.

9. Approval of the application will not adversely affect the local economy because of its small size.

ORDER

. IT IS HEREBY ORDERED that application to appropriate water no. 34-13810 is **APPROVED**, subject to the following conditions:

1. Proof of beneficial use shall be submitted on or before December 1, 2005.

2. Subject to all prior water rights.

3. The permit holder shall provide for full upstream and downstream passage of fish in all water channels, ponds, and streams including the following: the delivery channel, the pond, the outlet channel, and Warm Springs Creek. Construction of all measuring devices, headgates, delivery works, or any other obstructions in the delivery and outlet channels or Warm Springs Creek shall allow full upstream and downstream fish passage. Plans for instream structures must adhere to fish passage standards.

4. Planting of fish in Warm Springs Creek, the delivery channel, or the outlet channel is prohibited. The beneficial use for fish only authorizes the passage and rearing of wild trout and other species living in Warm Springs Creek.

5. The permit holder shall coordinate all construction and development activities with the Idaho Department of Fish and Game. At the time proof of beneficial use is submitted, the permit holder must submit documentation that the Idaho Department of Fish and Game has approved the channels and the pond as enhancements to the fishery resources in Warm Springs Creek and that there is a future plan approved by the Idaho Department for Fish and Game for continuing benefits to the fishery resources in Warm Springs Creek.

6. Stockwatering from the delivery channel, the outlet channel, and the pond is prohibited.

7. A measuring device shall be installed at the point of diversion from Warm Springs Creek and in the outlet channel from the pond.

8. A lockable device subject to the approval of the Department shall be maintained on the diverting works in a manner that will provide the watermaster suitable control of the diversion.

9. Prior to a diversion of water from Warm Springs Creek, the right holder shall identify one acre that will no longer be irrigated by water right no. 34-861A. After identification of the acre that will no longer be irrigated, IDWR will limit irrigation by water diverted under water right no. 34-861A to 129 acres and will correspondingly reduce the irrigation flow rate by 0.0224 cfs and the annual irrigation volume by 3.5 acre-feet. The official record for water right no. 34-861A will be changed to show that diversion and use of water for the one acre, including a flow rate of 0.0224 cfs and an annual volume of 3.5 acre-feet, will be dedicated to mitigation purposes.

10. The one-acre identified will also be eliminated from the permissible irrigation place of use description for water right nos. 34-861A, 34-369, 34-398, 34-399, and 34-7010, reducing the total permissible place of use to 436.4 acres.

11. 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 this water right is within State Water District No. 34, Big Lost River.

DATED this _29th_day of November, 2004.

/s/_____
Gary Spackman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _30th_ day of _November_, 2004, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

BROKEN RIVER RANCH
C/O KENT FOSTER
HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS ID 83405

BIG LOST RIVER IRRIGATION DIST
C/O KENT FLETHCER
FLETCHER LAW OFFICE
PO BOX 248
BURLEY ID 83318-0248

LARRY P BARNES
RT 1 BOX 24
PO BOX 808
ARCO ID 83213

JAMES A BEVERLY
PO BOX 444
MOORE ID 83255

LEON HARWOOD
PO BOX 135
ARCO ID 83213

IDWR - EASTERN REGION
900 N SKYLINE DR STE A
IDAHO FALLS ID 83402-1718

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Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau