BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 37-21119 IN THE NAME OF LANE RANCH ASSOCIATION INC.	))))	**PRELIMINARY ORDER DENYING APPLICATION**

This matter having come before the Idaho Department of Water Resources ("Department") in the form of an application for permit, the Department makes the following Findings of Fact, Conclusions of Law and Preliminary Order:

STANDARD FOR DECISION

Water right applications are processed under Idaho Code § 42-203A which provides, in part, that:

> (5) The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. 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

A water right applicant bears the burden of proof for the factors the Director of the Idaho Department of Water Resources must consider under Section 42-203A, Idaho Code Cantlin v. Carter, 88 Idaho 179, 187 (1964). The criteria for evaluating the factors listed above are described in IDAPA 37.03.08.45 (Water Appropriation Rule 45).

FINDINGS OF FACT

1. On June 6, 2003, Lane Ranch Association Inc. ("applicant") initiated Application for Permit No. **37-21119** ("application") which was amended on June 23, 2003, then later revised on July 16, 2004 as follows:

Source:	Elkhorn Creek
Use and rate of diversion:	4.5 cubic feet per second ("cfs") for Wildlife 4.5 cfs for Recreation 4.5 cfs for Aesthetic
Total rate of diversion:	4.5 cfs
Points of diversion:	SE1/4NW1/4SW1/4 Section 20; NE1/4SE1/4SE1/4 Section 19 all in T4N, R18E, B.M. in Blaine County.

(Note The "1/4" designations will be omitted from subsequent legal descriptions in this order as well as reference to T4N, R18E, B.M in Blaine County).

Season of use:	January 1 to December 31 for all uses
Place of Use:	All Uses: NESE, SESE S19; NWSW S20; NWNW S29; NENE 30
Remarks:	Other rights for same uses requested include 37-81, 37-82, 37-4016 and 37-7201. The Narrative attached to and made part of the application states in part:

When the discharge of Elkhorn Creek is in excess of 2.2 cfs, all of the flow is conveyed through the existing system and serves to enhance the water quality and aesthetic qualities of the ponds even though there is no water right for flow in excess of 2.2 cfs except for the 10 cfs water right for filling the system (37-4016) Additionally the narrative states in part: *The application requires no additional construction or alteration of the existing ditch and pond system on Lane Ranch. The system a flow through system is now capable of utilizing and transporting the currently authorized flow for irrigation, wildlife, recreation and aesthetics as well as the flow applied for in this application. Pond sizes will not be increased and the consumptive use requirement for the system has been met under the current water rights*

MAP:	The attached map depicts the upper point of diversion in the SENWSW S20 to be upstream or above the first existing pond on Lane Ranch Subdivision.

2. The Department published notice of the application in the Wood River Journal and no timely protests were received.

3. Water rights 37-81, 37-82, 37-7201 and 37-4016 held by the applicant were modified by transfer 3609 in 1990 that converted these historical irrigation water rights (105 acres) into water rights with elements for reduced irrigation (24 4 acres) and added elements for water features within the Lane Ranch Subdivision. The water features include ponds on Elkhorn Creek, man-made streams and ponds on the man-made streams. The beneficial use elements for these water features are described as Recreation, Wildlife and Aesthetic. Right 37-81 is for use of water from the Big Wood River. Rights 37-82, 37-7201 and 37-4016 are for use of water from Elkhorn Creek. Right 37-4016 is associated with the ponds and provides storage volume in the ponds mentioned above and provide diversion rate to the ponds for storage. Rights 37-82 and 37-7201 provide diversion rates for the man-made streams ("East Channel" diverted in the NWSW S20 and the "Equalizing pipeline to West Ditch" diverted in the SESE S19).

4. Rights 37-81and 37-82 which contain the irrigation elements for use on Lane Ranch Subdivision were modified by transfer 3881 which was a contested case in 1993. This transfer resulted in converting 1.1 acres of irrigation to Wildlife, Recreation and Aesthetic uses for additional ponds in the NENE S30. The entire place of use for the Wildlife, Recreation, and Aesthetic uses for these two rights was moved to the NENE S30.

5. On September 27, 2004, Department staff conducted a field review of the water uses on Lane Ranch Subdivision. The review found that the diversion to the "East Channel" is regulated by a headgate without measuring device and is located within the SESE S19. The "East Channel" flows south and then turns west where it dumps back into Elkhorn Creek within the NENE S30. The "West Channel" heads in the NESE S19 at a pond ("Head Pond") that straddles the NESE and SESE S19. Water enters the "Head Pond" at the NW corner from a pipeline delivering pumped water from the Big Wood River. Water may also enter the pond from water pumped from Elkhorn Creek (pump located in pond on Elkhorn Creek that also straddles the NESE and SESE S19.) Water leaves the "Head Pond" flowing south creating the "West Channel". Water may also overflow from the "Head Pond" flowing southeast back into the pond on Elkhorn Creek where the pump mentioned above is located. The "West Channel" flowing south enters a pond ("Irrigation Pump Pond") that is also supplied water from a stream flowing from the west that derives water from the pipeline from the Big Wood River. A pumping plant diverts from this "Irrigation Pump Pond" that supplies the irrigation uses in the subdivision. The "West Channel flows south from the "Irrigation Pump Pond" and eventually dumps into Elkhorn Creek within the NENE S30 several hundred feet below where the "East Channel" enters Elkhorn Creek. Below the "West Channel" point of injection, Elkhorn Creek flows south through the NENE and SENE S30 through ponds before dumping into the Big Wood River in the SENE S30.

6. Elkhorn Creek has been altered through the Lane Ranch Subdivision but continues to be a continuously flowing stream tributary to the Big Wood River. The lower reach of Elkhorn Creek at times is augmented with water pumped from the Big Wood River.

ANALYSIS

This application was filed to record a water right for stream flows that flow through the subdivision. The applicant appears to believe that its water rights are deliverable at the stream gage above their upper pond on Elkhorn Creek and that since at times flows exceed their rights for 2.2 cfs then they need an additional right to cover these flows. The rights currently held by the applicant as recorded do not support this position. A stream channel flows through the subdivision and passes water through the subdivision without the requirement of a water right. Additionally the rights as recorded do not reflect how the diversion works have been constructed and should be corrected by the applicant by filing a transfer

CONCLUSIONS OF LAW

1. The appropriation doctrine is based on diversion of water from a public water source and placing water to beneficial use. Diversion is normally an essential element for development of a water right. There are, however, provisions in the Idaho Code that allow for creating in-stream stockwater rights. (Idaho Code Title 42, Chapter 1, Section 113, and Title 42, Chapter 15.)

2. The applicant's proposal as drafted would create a de-facto minimum stream flow water right contrary to the laws of this state and is not in the local public interest

3. The Department should not approve the application as submitted.

ORDER

IT IS THEREFORE ORDERED that Application for Permit No 37-21119, filed in the name of Lane Ranch Association Inc, is hereby **DENIED**.

Signed this 1st day of December, 2004.

Gary Spackman