BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 72-16624 AND 72-16625 IN THE NAME OF FIRSTFRUITS FOUNDATION AND CHRISTOPHER W. JAMES TRUST	)	**PRELIMINARY ORDER**

This matter having come before the Idaho Department of Water Resources ("Department") in the form of protested applications for permit and the Department having held a conference and 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 October 15, 2002, Firstfruits Foundation and Christopher W. James Trust ("applicant") submitted Application for Permit No. 72-16624 ("application") to the Department proposing the diversion of 0.20 cubic feet per second ("cfs") of ground water to be used year-round for domestic purposes. The location of the point of diversion is within NW1/4SE1/4 Section 3, T13N, R18E, B.M., Custer County, Idaho and the proposed place of use is within lots 2, 3 and 4, S1/2 NW1/4 Section 2, T13N, R18E, B.M. and SW1/4SE1/4 Section 35, T14N, R18E, B.M.

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

2. On October 15, 2002, the applicant also submitted Application for Permit No. 72-16625 ("application") to the Department proposing the diversion of 0.40 cfs of water from Garden Creek tributary to the Salmon River to be used from April 1 to October 31 for aesthetic purposes. The location of the point of diversion and place of use are within lot 3 Section 2, T13N, R18E, B.M., Custer County, Idaho.

3. The Department published notice of application 72-16624 that was protested by Bonnie Rowles and Jeffrey J. Yeo and of application 72-16625 that was protested by Dee Keppner on behalf of Water District 72-B.

4. On April 6, 2004, the Department conducted a hearing in the matter in Challis, Idaho. Christopher W. James was present and represented the applicant.

Protestants Bonnie Rowles and Jeffrey J. Yeo were present and represented themselves. Don Rowles, a member of the Water District 72-B advisory committee was present on behalf of protestant Water District 72-B.

5. Issues the Department can consider in this matter are as follows:

a. Whether the appropriation will reduce the quantity of water under existing water rights;
b. Whether the water supply itself is insufficient for the purpose for which it is sought to be appropriated;
c. Whether the application is made in good faith, or is made for delay or speculative purposes;
d. Whether the applicant has sufficient financial resources with which to complete the work involved therein;
e. Whether the proposed appropriation will conflict with the local public interest; and
f. Whether the proposed appropriation is contrary to conservation of water resources within the state of Idaho.

6. Exhibits premarked, offered or accepted as a part of the record are as follows:

Applicant's Exhibits:

1. Letter dated March 1, 2004, from Christopher W. James with the following attachments in connection with Application for Permit No. 72-16624:

    1. Water measurement readings for Well #2 for 2001, 2002 and 2003
    2. Letter dated September 5, 2003, to Karl Dreher and Jim Stanton from Christopher W. James
    3. Financial statement from Wells Fargo Bank Northwest for Firstfruits Foundation
    4a. Letter dated March 3, 2003, to Gloria Jakovak from William Teuscher
    4b. Letter dated February 14, 2003, to Gloria Jakovak from Kellye Eager
    5. Letter dated May 29, 2002, to Catherine Becker from Corey Skinner
    6. Schematic of Living Waters Ranch

2. Letter dated March 1, 2004, from Christopher W. James with Attachment 1 in connection with Application for Permit No. 72-16625

Protestant's Exhibits:

A. Report titled Hydrologic Investigation of the Garden Creek Watershed and Aquifer prepared by Brockway Engineering - February 11, 1999
B. Report titled Hydrogeologic Analysis of the Water Supply for the Community of Challis, Custer County, Idaho prepared by Idaho Water Resources Research Institute – February 25, 2003 (Preliminary Draft)
C. Protest of Jeffrey Yeo
D. Protest of Bonnie Rowles
E. Letter dated May 21, 2002, to Department of Water Resources from Catherine Becker
F. Letter dated July 10, 2003, to Custer County Commissioners from Catherine Becker
G. Letter dated July 22, 2003, to Garden Creek Association from Catherine Becker
H. Letter to Betty Horn from Don Munkers (Not dated)
I. Living Waters Ranch Well #1 Meter Readings – 2003, 2002 and 2001
J. Information from Living Waters Ranch website
K. Letter dated August 1, 2000, to Mark Dietrich from Christopher W. James and letter dated August 17, 2000, to Charles G. Brockway from Christopher James
L. Application for Permit (draft)
M. Letter dated July 21, 2003, to Christopher James from James E. Stanton
N. Phase 1 Sewer System Log – Living Waters Ranch
O. Summary by Garden Creek Water District of Factors Pertaining to Application for Permit no. 72-16625
P. Letter dated September 30, 2003, to Steve Adams from William Teuscher
Q. Letter dated December 19, 2003, to Steve Adams from William Teuscher

The hearing officer also officially noticed well driller reports in Department files. This notice includes the report for the domestic well drilled in 1997 for protestant Jeffrey Yeo.

7. The applications seek the use of water in connection with a church camp/conference center ("church camp") that is located about 4 miles west of the city of Challis, Idaho in the Garden Creek drainage. Existing facilities at the church camp include an 8,500 square foot chapel designed to accommodate 450 people, a 5,000 square foot lodge with a sleeping capacity of 50 persons, 9 chalets, two mini lodges, 12 motel units, a shop, a powerhouse, a manager's residence, a shower house, RV sites some with facilities and some without facilities, and a tent camping area. The applicant plans additional development such as a cafeteria, an activities building and more individual rental units. The applicant can sleep about 236 people at the church camp.

8. Presently the church camp receives water from a well identified as Well #2 (aka the mechanical building well) that was drilled in 1997 to a depth of 63 feet. The well provides about 15 gallons per minute ("gpm") of water. A 35,000 gallon elevated

water tank is part of the water distribution system and is used to stabilize fluctuating water demands and to provide water for fire protection. The applicant wants to cease use of this well and to use the artesian well described in application 72-16624 in order to minimize contamination problems that the applicant has experienced using Well #2. There is not a recorded water right for use of Well #2.

9. The applicant does not have other ground water rights for domestic use for the church camp.

10. The well sought for use under application 72-16624 is an existing artesian well located about 0.8 miles upgradient from the church camp. The depth of the well is about 400 feet below land surface. Although the flow available from the well is disputed, the applicant has pumped 40 gpm from the well in excess of 3 hours with a draw down of about 20 feet. If this application is approved, the applicant intends to abandon use of Well # 2. The applicant stated that use of water from the artesian well is intended to replace church camp use of water from Well #2 and is not intended to be an appropriation in addition to any other domestic use (or unrecorded claim) for the church camp facility.

11. The applicant owns several water rights diverted from Garden Creek that are used for the irrigation of the applicant's land. The irrigated lands include a 7.5 acre tract furthest upstream, a 13.2 acre tract upstream and adjacent to the church camp and a 3.3 acre tract downstream from the church camp.

12. Existing development in the Garden Creek drainage, not counting the applicant's development, includes about 12 single-family residences up gradient from the church camp and about 8 or 9 residences down gradient. Ground water generally is not used for irrigation in the drainage.

13. The total annual surface water yield from the Garden Creek drainage is estimated to be 13,530 acre feet ("AF"). Ground water discharge from the aquifer associated with Garden Creek is estimated to be 16.7 AF per year. Garden Creek gains water in some reaches and loses water in other reaches. (See Protestant's Exhibit A).

14. Ground water and surface water in the Garden Creek drainage upstream from Challis are hydraulically connected. Depletion of ground water will decrease the amount of surface water available in Garden Creek. (See Protestant's Exhibit A).

15. Protestant's Exhibit A, prepared in connection with the applicant's facility concludes that "The aquifer is ... marginally suitable for domestic residences and other low-use facilities." The report also concludes that depletion of ground water at the facility will result in decreased discharge of Garden Creek with the long-term impact on the aquifer being a lowering of the water table and a corresponding decrease in reach gains and an increase in reach losses.

16. Water level measurements taken from the city of Challis's municipal wells suggest that depletion from the aquifer is increasing over time and that the city "... should closely monitor upstream water use in order to assess potential sources of contamination ...". (See Protestant's Exhibit B).

17. Garden Creek is within Water District 72-B where water deliveries are administered during times of water shortage by a watermaster. Water delivery records of Water District 72-B show that water delivery to junior users on Garden Creek is curtailed at times during most water years due to diminishing flow available to provide water to all water rights.

18. Using a total demand of 13,000 gallons per day, the amount of water diverted by the applicant under application 72-16624 would be about 14.6 AF per year. Assuming the diversion of ground water results in a depletion to the flow of Garden Creek of 25%, in terms of irrigation, the amount of water depleted would be about the amount of water needed to irrigate 1.5 acres of land based on a consumptive use of 2.5 AF/acre. (See Protestant's Exhibit A).

19. Protestants Bonnie Rowles and Jeffrey Yeo were concerned that use of water by the applicant would injure existing water rights and is not in the local public interest.

20. Bonnie Rowles owns a bed and breakfast in Challis and receives water from the city of Challis. She does not use water from a private well in the Garden Creek drainage.

21. Jeffrey Yeo owns a domestic well located within NESE Section 3, T13N, R18E, B.M. that is about ¼ mile from the artesian well sought for use by the applicant. The Yeo well was drilled in 1997 to a depth of 104 feet with the static water level in the well about 20 feet below land surface.

22. The aesthetic pond proposed under application 72-16625 is an existing pond located on a ditch that delivers water for irrigation to church camp property. The pond was originally used to water stock and has been converted to aesthetic use. The size of the pond is about 50' x 80' and is about 4 feet deep. The pond has a surface area of about 0.1 acre and holds about 0.4 AF.

23. A rate of diversion of 0.4 cfs from Garden Creek will fill the 0.4 AF aesthetic pond in 12 hours.

24. In the past, when water was delivered for irrigation it passed through the pond. In recent years, the water has been used the same way, but some watermasters have shut off the diversion of irrigation water from Garden Creek to the pond when the priorities of the irrigation rights (1888 and 1890) could not be filled and other watermasters have allowed the diversion to the pond to continue.

25. On behalf of protestant Water District 72-B, Don Rowles expressed the concern that there was no water available for a new appropriation from Garden Creek and that the rate of diversion requested to fill the aesthetic pond is excessive.

CONCLUSIONS OF LAW

1. Section 42-203A, Idaho Code, provides in pertinent part as follows:

> 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... .

2. Section 42-111, Idaho Code, provides in pertinent part as follows:

(1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243 and 42-1401A, Idaho Code, the phrase "domestic purposes" or "domestic uses" means:

> (a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or
>
> ....

(3) Multiple water rights for domestic uses or domestic purposes, as defined in this section, shall not be established or exercised in a manner to satisfy a single combined water use or purpose that would not itself come within the definition of a domestic use or purpose under this section. The purpose of this limitation is to prohibit the diversion and use of water, under a combination of domestic purposes or domestic uses as defined in this section, to provide a supply of water for a use that does not meet the exemption of section 42-227, Idaho Code, and is required to comply with the mandatory application and permit process for developing a right to the use of water pursuant to chapter 2, title 42, Idaho Code.

3. The church camp qualifies for inclusion among the "domestic uses" described in Section 42-111(1)(a), Idaho Code, and may divert up to 13,000 gallons per day from ground water for the church camp without the necessity of filing an application for permit. The use of water from all wells in connection with the "domestic uses" of the church camp, however, cannot exceed a combined total of 13,000 gallons per day under the exemption.

4. There is no evidence to indicate that there is an upper aquifer and a lower aquifer that are separated by a confining layer in the Garden Creek drainage. Hence, ground water depletion in the drainage by the applicant will decrease the amount of surface water available in Garden Creek, since the surface water and ground water are interconnected. (See Protestant's Exhibit A).

5. Use of water by the applicant for the church camp has increased since 1999 and likely will further increase based on the applicant's testimony that he plans to construct additional facilities at the church camp including a cafeteria, activities building and more individual rental units. The applicant has also acquired additional property in the Garden Creek drainage.

6. Use of water as proposed in application 72-16624 will reduce the quantity of water under existing water rights unless the use is adequately mitigated.

7. Diversion of 14.6 AF per year from the aquifer in the Garden Creek drainage for domestic use at the church camp will result in some depletion of ground water and will decrease surface water discharge in Garden Creek. The applicant should be required to mitigate the depletion by ceasing to irrigate 1.5 acres of land that is presently irrigated or by providing other acceptable mitigation as determined by the Department.

8. Use of water as proposed in application 72-16625 will also result in a depletion of water in Garden Creek even though the depletion will be small due to the small surface area of the pond and the relatively short time period when water is not being delivered for irrigation purposes through the pond.

9. Use of water as proposed in the applications will not reduce the quantity of water under existing water rights if the applicant mitigates depletions attributable to the uses.

10. Although there are water shortages in the Garden Creek drainage nearly every year, the water supply itself is sufficient for the purposes intended if the applicant mitigates the uses.

11. Some of the facilities proposed in the applications have already been constructed and are in use. The applications are made in good faith and not for delay or speculative purposes.

12. The applicant has sufficient financial resources with which to complete the projects.

13. The applications do not conflict with the local public interest if the uses are adequately mitigated.

14. The applications are not contrary to the conservation of water resources within Idaho.

15. The Department should approve the applications with conditions requiring the applicant to mitigate depletions associated with the applications.

ANALYSIS

In February 1999, the Department conducted a hearing for application 72-7562 filed in the name of Living Waters Ranch for essentially the same proposal as application 72-16624 and issued a recommended order in the matter. Before the Department issued a final order, however, the applicant withdrew the application and subsequently filed applications 72-16624 and 72-16625.

The applicant's present use of water for domestic purposes at the church camp is less than the maximum of 13,000 gallons per day. Application 72-16224 represents a recording of the total domestic use of water associated with the camp and if perfected into a water right will have a priority as of the date of filing of the application. The domestic "exemption" associated with Sections 42-227 and 42-111, Idaho Code, relates to whether the filing of an application for permit is required, not that there is a grant of so much water for a domestic use.

Statements of the applicant appear to indicate that the applicant believes it has an "entitlement" to 13,000 gallons per day for its church camp use without regard to other water rights and uses. This is not correct, since the domestic use or any other use of water under a water right is subject to all other prior water rights without respect to the nature of use. The oldest water right is the best water right and in times of shortage should be delivered before junior water rights.

Even if there is not sufficient water in a source for a new use, however, an applicant should have the opportunity to mitigate a new use of water in a manner that will not decrease the amount of water in the drainage for prior water rights. Although there are a number of ways to provide mitigation, the most commonly offered and accepted mitigation is to cease an existing use in a magnitude to provide water for the new use. The offer of "paper" water rights that are not being used and that would not compensate for new consumption is not suitable mitigation. The drying up of land that is being irrigated is generally acceptable for mitigation.

The applicant also appears to believe that water used for domestic purposes is

non-consumptive in nature. While there is effluent discharge from most domestic use facilities, domestic use has a consumptive component.

Evaporative losses associated with the applicant's small aesthetic pond or from the ditch to the pond are not large, but are losses that will injure earlier water rights during periods of water shortage. Some flow through the pond is needed to prevent stagnation of the pond, but a flow rate of 0.40 cfs is excessive for this purpose. A flow rate of 0.10 cfs is sufficient to prevent stagnation of water in the pond and is more reasonable.

The Moratorium Order issued by the Department on October 26, 1999, stopped the processing of applications for permit to appropriate surface water or ground water within and tributary to the Selway-Bitterroot Wilderness Area, the Gospel-Hump Wilderness and the Frank Church-River on No Return Wilderness area. The moratorium order, however, allowed the Department to consider an application if the use of water pursuant to the application would have no effect on other water rights due to mitigation provided by an applicant.

ORDER

IT IS THEREFORE hereby ORDERED as follows:

Application for Permit No. **72-16624** in the name of Firstfruits Foundation and Christopher W. James Trust is **APPROVED** subject to the following conditions:

1. Proof of construction of works and application of water to beneficial use shall be submitted to the Department on or before May 1, 2006.

2. The quantity of water diverted under this right shall not exceed 13,000 gallons per day and 14.6 AF per year.

3. To mitigate the depletion of water under this right, the right holder shall not divert water until the right holder completes Option A or Option B below:

   Option A – The right holder shall obtain an approved water right transfer changing the purpose of use of water rights diverted from Garden Creek or its tributaries for the irrigation of 1.5 acres of land to mitigation use and shall cease the use of water under the transferred rights for other than mitigation use.

   Option B – The right holder shall assign 4.5 afa appurtenant to 1.5 acres of irrigated land under water rights diverted from Garden Creek or its tributaries to the water supply bank operated by the Idaho Water Resource Board to be used solely for the purpose of mitigating water use under permit no. 72-16624.

4. Diversion of water from Well #2 located within the NENW Section 2, T13N, R18E, B.M., is not authorized for any use if water is diverted and used from the

artesian well located within the NWSE, Section 3, T13N, R18E, B.M. as authorized by this permit. Upon use of water under this right, the applicant shall abandon or decommission Well #2 and/or its diversion facilities in a manner approved by the Department to assure that water is not diverted from the well.

5. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code, and applicable Well Construction Rules of the Department.

6. Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality standards of the Department of Environmental Quality.

7. Water diverted under this right shall not be used for irrigation purposes.

8. Prior to diversion of water under this right, the right holder shall install a suitable measuring device at the point of diversion to measure the rate of diversion and volume of water diverted and shall report the amounts to the Department at a frequency determined by the Department.

9. Use of water is for domestic purposes in connection with a church camp/conference center.

10. The issuance of this right does not grant any right-of-way or easement across the land of another.

11. The permit holder shall allow access by the watermaster of State Water District 72-B to the measuring device installed at the point of diversion.

12. Failure to comply with these conditions of approval is cause for the Director to void the permit.

IT IS FURTHER hereby ORDERED as follows:

Application for Permit No. **72-16625** in the name of Firstfruits Foundation and Christopher W. James Trust is **APPROVED** subject to the following conditions:

1. Proof of construction of works and application of water to beneficial use shall be submitted to the Department on or before May 1, 2006.

2. Prior to diversion of water under this right, the right holder shall install and maintain measuring devices and lockable controlling works of a type acceptable to the Department as part of the diversion and conveyance works. The devices shall be adequate to determine the rate of diversion from Garden Creek and to quantify any losses associated with the aesthetic use of water in the right holder's pond.

3. Prior to diversion of water under this right, the right holder shall provide

suitable mitigation for losses attributable to the diversion and use of water under this right in accordance with a plan approved in writing by the Department.

4. The diversion of water under this right shall not exceed 0.10 cfs when the applicant's irrigation rights are not also being diverted and conveyed through the pond.

5. Use of water is for aesthetic use in connection with a church camp/conference center.

6. Use of water rights held by the applicant 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 rights of the applicant are within State Water District 72-B.

7. At such times in the future as may be necessary to protect prior rights of other water users, the Director may require determination of the actual rate of loss within the system and may require additional mitigation for all system losses.

8. The right holder is not authorized to divert water to its pond for aesthetic purposes when the applicant's irrigation rights are not being delivered unless the applicant provides suitable mitigation to compensate for system losses.

9. Failure to comply with these conditions of approval is cause for the Director to void the permit.

DATED this 23 day of April, 2004.

L. Glen Saxton

L. GLEN SAXTON, P.E.
Hearing Officer