BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 73-11961 IN THE NAME OF IDAHO POWER COMPANY	))))	**FINAL ORDER**

This matter comes before the Director of the Idaho Department of Water Resources ("Director" or "Department" or "IDWR") as the result of an application by Idaho Power Company ("IPCO" or "Applicant") to appropriate ground water in the Pahsimeroi River drainage for use at the Upper Pahsimeroi Hatchery Facility. The Hearing Officer for the Department conducted hearings on the protested application on September 23-24 and October 3, 2003. The Hearing Officer issued a Recommended Decision and Order in the matter on January 9, 2004. Both the applicant and protestant filed petitions for reconsideration with the hearing officer on January 22, 2004. The Hearing Officer denied the petitions for reconsideration on February 5, 2004, following a hearing.

The Director, having reviewed the Recommended Decision and Order and the record, makes the following Findings of Fact, Conclusions of Law, and Final Order.

FINDINGS OF FACT

I. Course of Proceedings.

1. On March 18, 2002, IPCO submitted an application for a permit to appropriate ground water for the Upper Pahsimeroi Hatchery Facility. The application was assigned identification number 73-11961 (the "Application") and described the proposed water use as follows:

Source of Water:	Ground water
Point(s) of Diversion:	NW¼NE¼NW¼ Sec. 21, T15N, R21E, B.M., Lemhi County, Idaho
Purpose of Use:	Fish propagation
Total Quantity:	14.0 cfs
Period of Use:	January 1 – December 31 (year-round)
Place of Use:	NE¼NW¼ Sec. 21, T15N, R21E, B.M., Lemhi County, Idaho.

2. The Department published notice of the Application statewide in The Idaho Statesman of Boise, the Lewiston Morning Tribune, The Post-Register of Idaho Falls, the

Recorder Herald of Salmon, and the Times-News of Twin Falls, on or about April 4 and 11, 2002. The Department received a timely protest to the Application on April 15, 2002, from Duane Moen.

3. The issue identified by Duane Moen in his protest was concern that the proposed ground water diversion would adversely affect the springs, domestic well, wetlands, and future water supply on the Moen property that is near the well locations proposed for ground water diversion.

4. A prehearing conference was held on the Application and protest on February 6, 2003. After this conference, by Order dated May 5, 2003, Peter Anderson was formally appointed by the Director as Hearing Officer in this matter.

5. A second prehearing conference was held on the Application and protest on June 6, 2003. After this conference, a *Scheduling Order* issued on June 20, 2003, that established a time period for discovery (closing August 15, 2003), provided for the exchange of witness and exhibit lists (August 29, 2003), set a final prehearing conference (September 12, 2003), and set tentative hearing dates (September 24-26, 2003).

6. On June 20, 2003, the Hearing Officer also invited Department staff to file by July 18, 2003, a staff memorandum providing: (1) an analysis by Department staff of whether the Application should be granted and, if so, any proposed conditions; (2) a listing of applicable Department memoranda; (3) an analysis of the availability of ground water at the proposed point of diversion, or analysis of any studies related to the availability of ground water at the proposed point of diversion; and (4) a GIS map showing the proposed place of use and point of diversion. No staff memorandum was submitted.

7. On July 30, 2003, Scott Whitworth filed a document entitled "Notice of Protest." "Petition to Intervene" is handwritten on the bottom of this document. On August 8, 2003, the Custer County Farm Bureau filed a "Petition to Intervene." On August 11, 2003, Water District No. 73 filed a "Petition to Intervene." On August 19, 2003, both Duane Moen and IPCO filed responses to the Water District's Petition to Intervene. On August 28, 2003, the Hearing Officer issued an *Order Denying Petitions to Intervene and Granting Status as Public Witnesses*.

8. The Hearing Officer conducted a final prehearing conference on September 12, 2003. A *Pretrial Order* issued following the conference that provided for final information disclosures prior to hearing and set procedures for the conduct of the hearing.

9. On September 23-24 and October 3, 2003, the Hearing Officer conducted a hearing on the Application. IPCO was present, represented by John K. Simpson. Duane Moen was present, represented by Bruce M. Smith. IPCO and Duane Moen presented their cases during the first two days of the hearing in Boise, Idaho. Public testimony was taken in Challis, Idaho during the final day of the hearing. On October 2, 2003, the Hearing Officer conducted a site visit during which representatives of IPCO and Duane Moen were afforded the opportunity to show the Hearing Officer anything they considered to be of significance.

10. At the conclusion of the hearing, the parties were given until October 24, 2003, to file written closing statements. Both IPCO and Duane Moen filed proposed findings and conclusions. This matter was fully submitted on October 24, 2003.

II. Evidence Considered.

11. Exhibits offered by IPCO and admitted by stipulation of Protestant as part of the record are as follows:

Exhibit 1: Application for Permit No. 73-11961 filed by Idaho Power Company

Exhibit 2: Letter to Norm Young from Ed Squires dated May 11, 2001

Exhibit 3: Letter to Norm Young from Ed Squires dated June 5, 2001

Exhibit 4: Ed Squires, R.P.G. Resume

Exhibit 5: Groundwater Feasibility Study for Idaho Power Corporation's Pahsimeroi Fish Hatchery, Lemhi County, Idaho

Exhibit 6: Hydrogeologic Evaluation of Groundwater Quality and Yield Beneath the Idaho Power Company's Pahsimeroi Fish Hatchery-Upper Facility

Exhibit 7: Memo to Paul Abbott from Ed Squires dated July 10, 2002

Exhibit 8: Letter to Idaho Power Company re: Moen Protest Application

Exhibit 9: Pahsimeroi Fish Hatchery – Proposed Well Information (6/7/2001)

Exhibit 10: Idaho Power Company – Pahsimeroi Valley Upper Facility UF Well #2 Constant Discharge Testing

Exhibit 11: Letter to John Simpson re: Pump Test at Upper Pahsimeroi Hatchery

Exhibit 12: Pahsimeroi Aquifer Test Idaho Power Company Upper Hatchery Facility

Exhibit 13: Memo to Young, Castelin and Anderson re: Pahsimeroi Aquifer Test by Idaho Power at the Upper Hatchery Facility

Exhibit 14: Jonathon C. Bowling, P.E. Resume

Exhibit 15: Upper Pahsimeroi Hatchery Expansion Map

Exhibit 16: Letter to Environmental Protection Agency re: Notice of Intent to Operate Niagara Springs, Rapid River and Pahsimeroi Hatcheries

Exhibit 17: Upper Pahsimeroi Hatchery Expansion Conceptual Design Report

Exhibit 18: Surface Flow/Groundwater Levels (Pahsimeroi)

Exhibit 19: Whirling Disease and Idaho Fisheries.

12. Exhibits offered by Duane Moen and admitted by stipulation of IPCO as part of the record are as follows:

Exhibit 50: Search Results for IDWR Water Right and Adjudication Search for "Duane Moen"

Exhibit 51: Search Results for IDWR Water Right and Adjudication Search for "Moen"

Exhibit 52: Search Results for IDWR Water Right and Adjudication Search for water Right No. 73-92A

Exhibit 53: Search Results for IDWR Water Rights and Adjudication Search for Water right No. 73-41

Exhibit 54: Search Results for IDWR Water Rights and Adjudication Search for Water right No. 73-98

Exhibit 55: Search Results for IDWR Water Rights and Adjudication Search for Water right No. 73-99 (included nos. 73-99A and 73-99B)

Exhibit 56: Search Results for IDWR Water Rights and Adjudication Search for Water right No. 73-100

Exhibit 57: Search Results for IDWR Water Rights and Adjudication Search for Water right No. 73-136

Exhibit 58: Search Results for IDWR Water Rights and Adjudication Search for Water right No. 73-252

Exhibit 59: Search Results for IDWR Water Rights and Adjudication Search for Water right No. 73-257

Exhibit 60: Search Results for IDWR Water Rights and Adjudication Search for Water right No. 73-2157

Exhibit 61: Search Results for IDWR Water Rights and Adjudication Search for Water right No. 73-4007A

Exhibit 62: Search Results for IDWR Water Rights and Adjudication Search for Water right No. 73-10390

Exhibit 63: Search Results for IDWR Water Rights and Adjudication Search for Water right No. 75-2067

Exhibit 64: Search Results for IDWR Water Rights and Adjudication Search for Water right No. 73-7086

Exhibit 65: Water Information Bulletin No. 31, dated June 1973

Exhibit 66: Moratorium Order, dated October 26, 1999

Exhibit 67: Search Results for IDWR Water Rights and Adjudication Search for Basin 73 Applications.

13. The Department, on its own initiative and without objection from the parties, admitted the following exhibits:

Exhibit 100: Letter from Idaho Department of Fish and Game to the Department of Water Resources dated April 3, 2002

Exhibit 101: Letter from Custer County Farm Bureau dated May 19, 2003

Exhibit 103: Letter from the Lemhi County Commissioners to the Department of Water Resources dated September 17, 2003

Exhibit 104: A list of pending applications to appropriate ground water in Basin 73

Exhibit 105: Water right license no. 73-07045, which establishes minimum instream flows for the Pahsimeroi River and is held by the Idaho Water Resource Board

Exhibit 106: Written testimony of Ralph Hatch dated September 30, 2003.[1]

14. The following individuals testified on behalf of IPCO:

a. Jon Bowling, Idaho Power Company Engineer
b. Paul Abbott, Idaho Power Company Biologist

[1] This testimony was also read into the record at the October 3, 2003, hearing in Challis, Idaho.

c. Keith Johnson, PhD, Idaho Department of Fish & Game Fish Pathologist
d. Ed Squires, Hydro Logic, Inc Consulting.

15. The following individuals testified on behalf of Duane Moen:

a. Brit Moen, relative of Protestant
b. Shane Bendixson, Idaho Department of Water Resources
c. Sherl Chapman, ERO Resources.

16. On October 3, 2003, the Hearing Officer allowed public testimony from the following individuals:

a. Dr. Rod Evans, D.V.M.
b. Maria Dowton
c. Jimmie L. Dowton
d. Jim Martiny
e. Rance Bare
f. Jerry Hawkins
g. State Representative Lenore Barrett
h. Scott Whitworth
i. Larry Whittier
j. Ted O'Neal
k. Royden Eaton
l. George Miller
m. Jack Whitworth
n. Richard Bergeman
o. Stephen Bauchman
p. Troy Ziegler
q. Doug Parkinson
r. Sharon Arrizibetta
s. Randy Whittier
t. Norman Wallis
u. State Representative Don Burtenshaw.

17. All parties were afforded the opportunity to cross-examine the opposing side's witnesses and all public witnesses.

III. Intended Water Use under Application No. 73-11961.

18. IPCO owns the Pahsimeroi Fish Hatchery in Lemhi County, Idaho, which consists of two facilities. The 16½-acre Lower Facility is situated on the Pahsimeroi River approximately 4,000 feet upstream from its confluence with the Salmon River. The 10-acre Upper Facility is also on the Pahsimeroi River and about 5½ miles above the confluence with the Salmon River. The Lower Facility currently is the main headquarters for the hatchery and contains adult fish

holding ponds, spawning and incubation facilities, residences, and juvenile fish rearing ponds. The Upper Facility is currently comprised of the final rearing ponds and release station.

19. The Pahsimeroi Fish Hatchery was originally constructed to meet IPCO's obligations pursuant to the 1980 Hells Canyon Settlement Agreement, which sets forth mitigation measures for IPCO's Hells Canyon electric generation complex. The Hells Canyon Settlement Agreement requires IPCO, among other obligations, to provide facilities for the production of one million summer Chinook salmon smolts and to provide spawning and incubation facilities for sufficient steelhead eggs to produce 200,000 pounds of steelhead smolts annually (approximately 1 million eggs). Chinook salmon smolts are raised at the hatchery from eggs to a size where they can be released to the Pahsimeroi River.

20. Although IPCO did not submit deeds or other ownership documents at the hearing, it is undisputed that IPCO owns the entire Pahsimeroi Fish Hatchery. The property owned by IPCO is shown on Figures 3 and 4 of Exhibit 5. The Upper Facility is located primarily in the W½ of the NE¼NW¼, Sec. 21, T15N, R21E, B.M. Lemhi County, Idaho. Although owned by Idaho Power, the hatchery is operated by the Idaho Department of Fish and Game.

21. The Lower Facility has a water right for 40 cfs from the Pahsimeroi River. The Upper Facility has a water right for 20 cfs from the Pahsimeroi River. The Application is for ground water in addition to the existing 20 cfs right for the Upper Facility. The total rights at the Upper Facility would be 34 cfs with approval of the Application.

22. The Pahsimeroi River contains an organism which causes whirling disease in fish, including Chinook salmon and steelhead. This disease is a source of concern to the Idaho Department of Fish and Game and IPCO. Fish with whirling disease can be deformed and are subject to higher mortality rates. Fish exhibit much lower incidence of infection from the disease if they are reared in a pathogen-free water source during the period they are most susceptible to the disease – the period from egg incubation until fingerlings reach a size of 3.55 inches in length. The Applicant in conjunction with the Idaho Department of Fish and Game conducted a feasibility test utilizing ground water from the domestic well at the Upper Facility to determine the biological viability of using ground water for rearing purposes. The test was successful in rearing juvenile chinook salmon disease-free, including whirling disease. This is the purpose for IPCO submitting the Application.

23. The ground water under the Application would be used solely at the Upper Pahsimeroi Hatchery Facility. IPCO submitted a preliminary drawing of the proposed project for the Upper Facility with other sufficient details of the proposed design, construction, and operation of the Upper Facility expansion to allow the water resource impact of the project to be evaluated. Exhibits 15 and 17. IPCO plans to physically expand the Upper Facility to incubate steelhead and Chinook eggs and raise the Chinook eggs to fingerlings on pathogen-free ground water. Ground water would be withdrawn from three wells and conveyed though vertical stack incubators, or rearing raceways, to a settling pond and then discharged to the Pahsimeroi River, approximately 320 yards north of the furthest well. Exhibit 17, Sheet 3. The amount of water required will vary

from a minimum amount of 0.3 cfs in October to a maximum of 14 cfs during the end of the first year brood development in the months of April through June based upon a calculation involving fish weight, fish length, and a flow index determined by the Idaho Department of Fish and Game. Exhibit 17, page 6, Table 2. Based on the projected monthly ground water requirements for the facility, the Applicant would use approximately 6,808 acre-feet of water per year.[2] A negligible amount of the water would be consumed during the fish production process.

24. Fish production would not increase following the proposed facility modifications. IPCO anticipates its level of fish production will remain constant for the life of the new license for the Hells Canyon Complex.

IV. Project Financing.

25. Although IPCO did not submit a financial statement or a financial statement from a lender showing available funds for either the hatchery expansion or the well drilling, it demonstrated its commitment by identifying this project to the Federal Energy Regulatory Commission ("FERC") as a Protection, Mitigation, and Enhancement measure that it will fund as part of obtaining a new operating license for the Hells Canyon Complex.

26. The cost of the Upper Facility project will be from five to eight million dollars ($5,000,000 – $8,000,000). Jonathon C. Bowling, P.E., the Engineering Leader for the IPCO Water Management Department, testified that IPCO reduced its dividend in 2003 in order to retain funds to satisfy budgeting requirements for relicensing projects such as the Pahsimeroi Upper Facility expansion. IPCO also has a line of credit of approximately $800,000,000 available for identified capital projects, including those associated with relicensing of the Hells Canyon Complex. IPCO budgeted over $500,000 in 2004 for well construction.

V. Water Supply and Impact On Water Quantity Under Existing Water Rights.

27. The three ground water wells contemplated by the Application will withdraw water from the Pahsimeroi River drainage, which is designated hydrologic Basin 73 in Department records. The Applicant's wells are proposed to be drilled in the Pahsimeroi Valley Aquifer at a depth not greater than 385 feet and screened between 150 feet and 385 feet. The wells would be constructed within a quarter mile of the Pahsimeroi River. The locations of the proposed wells (wells 2, 3, and 4) are shown on Exhibit 15.

28. Two relevant studies of the basin have been conducted: a 1924 study of ground water by Oscar E. Meinzer and a 1973 study by H.W. Young and W.A. Harenberg entitled "A Reconnaissance of the Water Resources in the Pahsimeroi River Basin, Idaho." Exhibit 65. The Young and Harenberg report in particular was cited, used, and referred to by the experts for both IPCO and Duane Moen, who acknowledged it as being the best source of information on the water resources of the basin.

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[2] This figure can be calculated by multiplying the expected water well flows in Exhibit 17, page 6, Table 2, by the conversion of 1 cfs for 30 days equals 59.502 acre feet.

29. A good general description of the basin is found in Young and Harenberg:

> ... [T]he Pahsimeroi River basin consists of a valley (flat or plain) surrounded by a rim of mountains. ... The basin trends north-northwest and is bounded by the Lemhi Range on the northeast, which rises to an altitude of 10,971 feet, and by the Lost River Range on the southwest, which rises to an altitude of 12,662 feet at Borah Peak, the highest point in Idaho. The divide between the Pahsimeroi and Little Lost River basins is formed by the Donkey Hills which rise to an altitude of 9,550 feet.
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> The valley floor has an average altitude of about 5,500 feet and ranges in width from less than 1 mile near its mouth to over 10 miles at its widest point. The valley is characterized by well-developed alluvial fans that extend from the mountain fronts to near the center of the valley floor where they coalesce.
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> The Pahsimeroi River drains an area of about 845 square miles and is tributary to the Salmon River. The river is about 50 miles long from the point where it meets the valley floor at an altitude of about 7,800 feet to its confluence with the Salmon River at an altitude of about 4,600 feet. Although the Pahsimeroi River is an intermittent stream in some of its upper reaches, ground-water inflow sustains a year-long flow throughout most of its reach.

Exhibit 65 at 6.

30. The upper tributaries of the Pahsimeroi River generally provide water to the coarse alluvium of the valley, which ranges in depth from tens of feet near the mouth to about 3,000 feet in the central part of the basin. The river often dries up completely miles above the Upper Facility and "heads" again in Big Springs, about two miles upstream from the Upper Facility. From there to its confluence with the Salmon River, the Pahsimeroi River is principally a ground water fed stream with maximum mean monthly flows occurring in November and minimum mean monthly flows occurring in May. Ground water levels in the basin respond primarily to seepage from spring runoff and surface irrigation. Highly significant is that the surface and ground water of the basin are "so interrelated that … they constitute a single resource. Any use or control imposed on one is soon reflected in the other." Exhibit 65 at 9.

31. The Pahsimeroi River is, according to all witnesses for both parties and relevant studies, a closed basin. This means that the amount of water within the basin is not significantly influenced by sources of water outside of the basin. Annual precipitation makes up almost all of the available supply, whether from the Pahsimeroi River, ground water, or springs which are found in the basin. The ground water in the basin is recharged by the annual precipitation and return flows from irrigation. Significant amounts of water leave the basin as surface flow in the Pahsimeroi River with only minor amounts leaving as ground water. The surface water leaving the basin is from ground water that has discharged into the Pahsimeroi River in the reach from Big Springs to the confluence with the Salmon River.

32. The basin has undergone significant changes. Irrigation practices have changed, and continue to change, from flood irrigation to the use of sprinkler systems. These changes have altered the amount, source, and timing of surface water and ground water flows in the basin. Also, the area has been subjected to serious drought, especially in the last four years, that has affected the amount of water in the basin as well as many users of water in the basin. A "water budget," detailing water sources and water uses, has not been developed for the Pahsimeroi River Basin. However, even with recent changes, the lowest discharge from the Pahsimeroi River in the last two years was approximately 60 cfs, which represents 60 cfs of ground water discharged from the alluvial valley aquifer into the Pahsimeroi River. Exhibit 18. Because the water proposed to be withdrawn from the aquifer by IPCO will be discharged back into the Pahsimeroi River, the system will rebalance and there will be essentially no increase or decrease in the total amount of water discharged from either the aquifer or the basin as a whole resulting from IPCO's water use.

33. A good general description of the Upper Facility locale is contained in Exhibit 12:

> In the area of the upper facility, the broad alluvial fan of the Morgan Creek drainage extends to the south/southwest nearly to the Pahsimeroi River and the project site. ...[M]aterials comprising the alluvial fan are typically coarse-grained sand and gravel mixtures, with abundant cobble-sized clasts exposed across the surface. ... [S]ediments in the vicinity of the test well are to considerable depth composed primarily of variably cemented permeable to highly permeable materials.
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> Multiple artesian springs arise in an area south and east of the upper facility. Discharge from these sources generally drains via a channel network to the Pahsimeroi River in the vicinity of the upper facility, downstream from the hatchery intake diversion. Lands in the area of the upper facility are primarily managed for livestock grazing and/or cultivation of livestock feed crops, or remain in an undeveloped condition. Irrigation of the developed properties is provided by both groundwater and surface water sources.

Exhibit 12 at 4.

34. IPCO's consultant, Hydro Logic, Inc., drilled a 503-feet deep test well at the Upper Facility. Exhibit 6. Based on the July 2001 investigation, pump test, and analysis by Hydro Logic, Inc., the potential for water production at a depth not greater than 385 feet is at least 17 cfs. Exhibit 6, page 12, and Exhibit 7. The water in the aquifer at the projected well depths has a satisfactory temperature and chemistry for the proposed use. When pumped at 1,000 gallons per minute, the well likely encountered a positive recharge boundary after four hours. The aquifer at the projected well depths is semi-confined, with significant artesian pressure that should inhibit the entry of pathogens from the Pahsimeroi River into the aquifer.

35. IPCO conducted a second pump/aquifer test in September 2002. Exhibit 12. Hydrology staff from the Department reviewed the proposed test procedure and determined the second pump test was appropriately planned to provide the information needed to determine the effect of pumping on the river, springs, streams, and the ground water resources in the immediate

area. Exhibit 11. The wells and other locations monitored as a part of the aquifer testing are found on Figure 1 of Exhibit 12 at 12. The depth of each of the monitored wells is provided for in Exhibit 12 at 8 and Exhibit 5, Figure 5. With the exception of the Last Chance Irrigation well, the Upper Facility Test well, and the Upper Facility domestic monitoring well, the remaining wells monitored were in the shallow, unconfined aquifer drilled to depths of less than 40 feet below ground level. Of the sites monitored by IPCO, the only observed fluctuations correlated with its test pumping were observed in the domestic well owned by IPCO and located on the Upper Facility property.

36. Based upon aquifer characteristics determined from the September 2002 aquifer test, IPCO used several predictive formulas to estimate the effects of pumping the full 14 cfs requested in the Application. Exhibit 12 at 42. The Stallman Forward Solution, which accounts for the cone of depression encountering a recharge boundary, predicted that pumping at the proposed rate of 6,300 gallons per minute (14 cfs) would result in a drawdown in the Upper Facility domestic well of 6.4 to 10.2 feet. The Thiem Method predicted drawdown of the aquifer of 3.6 to 6.6 feet at an approximate radial distance of 3,300 feet from the Upper Facility test well, the approximate distance to the Brit Moen domestic well. This distance is close enough to suggest a possible impact on springs in the vicinity of the Upper Facility and perhaps the water level in Brit Moen's domestic well. However, the presence of intermittent layers or lenses of clay and cemented gravel throughout the shallow aquifer in the Pahsimeroi Valley would inhibit impacts from the proposed wells, which would be drilled into the deeper confined aquifer, on the surrounding springs and wells dependent on the shallow unconfined aquifer.

37. Department staff conducted a hydrologic review of IPCO's aquifer test. Exhibit 13. Department staff interpreted the aquifer test data similarly to IPCO. Drawdown in the vicinity of the proposed water use will likely be limited as a result of a positive recharge boundary (recharge from the Pahsimeroi River). The analysis by Department staff showed that impacts from the proposed use would extend a very limited distance, likely ending at the Pahsimeroi River. Exhibit 13, Attachment 2.

38. The ground water rights nearest to IPCO's proposed wells and the flow of the Pahsimeroi River at the Dowton Lane Bridge were monitored during IPCO's aquifer test. No impact to the wells or the river was detected during the test. The analysis by Department staff indicates that the wells and the Pahsimeroi River upstream from the IPCO Upper Facility are unlikely to be impacted by the proposed use. Further, the ground water gradient should trend towards the Pahsimeroi River and downstream. Impact from the IPCO withdrawal would likewise be greater downgradient. The nearest wells and the Dowton Lane Bridge are upgradient from IPCO's proposed withdrawal.

39. The minimum stream flow water right held by the State of Idaho is downstream of the Upper Facility points of diversion and outside of the zone of impact as shown on Exhibit 13. Further, because the proposed use is non-consumptive, the water withdrawn by IPCO would be discharged back into the stream, nullifying any impact of the withdrawals on stream flow.

40. Protestant Duane Moen submitted Department records of numerous surface water rights owned by him in the general vicinity of the Upper Facility. Exhibits 50-64. All of these

surface water rights are either upstream or upgradient of the Upper Facility and at least one-mile distant. The analysis by Department staff indicates that the proposed use is unlikely to impact the surface water sources at these points of diversion.

41. There was some testimony that livestock utilize springs in bottomlands in close proximity to the Upper Facility. One set of springs, between Brit Moen's home and the Upper Facility, may be impacted by IPCO's proposed withdrawal under the analysis by Department staff. No records of any claims in the Snake River Basin Adjudication were submitted at the hearing for stockwatering rights to these springs, and insufficient evidence was presented to make a determination regarding the parameters of such potential rights.

42. Exhibit 104 identifies the pending water right applications in Basin 73. Three pending ground water applications, for a total of 12.77 cfs, have an earlier priority than the Application. The location of these pending applications is not identified.

VI. Local Public Interest.

43. The Pahsimeroi River is the boundary between Lemhi and Custer Counties at the Upper Facility. The Upper Facility is in Lemhi County. The Lemhi County Commissioners submitted a letter to the Department indicating that the approval of the Application is not in the local public interest. Exhibit 103. Based upon their view that the current, overall supply of water for existing water uses in the Pahsimeroi Basin is extremely precarious, the Lemhi County Commissioners conclude that the possible impacts on the farming and ranching community outweigh their support for IPCO's hatchery program. The Commissioners also expressed concern regarding the impacts on efforts to recover listed salmon and steelhead stocks.

44. The Idaho Department of Fish and Game submitted a letter to the Department supporting the Application, so long as the proposed water use does not reduce surface flows in the Pahsimeroi River or result in detrimental impacts to other water users. The Idaho Department of Fish and Game stated that the proposed ground water use would "provide the hatchery a badly needed disease-free water source." Exhibit 100. Dr. Keith Johnson of the Idaho Department of Fish and Game also testified favorably for the Application, stressing the importance of a whirling disease-free water source for the fish hatchery.

45. No evidence was submitted that the Idaho Department of Environmental Quality reviewed the proposed water use at the Upper Facility. IPCO will discharge the water used under the Application into the Pahsimeroi River. Discharges from the Upper Facility are point source discharges pursuant to the Clean Water Act and require a National Pollution Discharge Elimination System (NPDES) permit. IPCO does hold a valid NPDES permit from EPA to discharge hatchery effluent to the Pahsimeroi River at the Upper Facility as it is currently configured. Exhibit16. It is unclear whether IPCO is authorized under its current NPDES permit to discharge to the Pahsimeroi River the additional 14 cfs to be withdrawn from ground water under the Application.

46. The Custer County Farm Bureau submitted a letter to the Department stating its concerns about the Application. Exhibit 101. The Farm Bureau's foremost concern was the uncertainty regarding the water resource impact of the 14 cfs ground water withdrawal on other water users in the Pahsimeroi River Basin. The Farm Bureau was also concerned that the 14 cfs withdrawal would hasten the removal of that water from the basin, by removing it from the aquifer and discharging it to the Pahsimeroi River. Finally, the Farm Bureau was concerned that the usual protection given to senior water rights from water resource impacts caused by junior priority water rights would be unavailable because of Endangered Species Act protection for fish from the Upper Facility.

47. The concerns of the Custer County Farm Bureau were echoed in a letter from the Advisory Committee for Water District No. 73 and public testimony. Exhibits 102 and 106. Public testimony generally opposed the Application because of believed uncertainty regarding the potential impact of the Application on upgradient ground and surface water rights, the recent history of drought conditions in the Pahsimeroi River Basin with the associated impacts on springs and wells, and the lessening of recharge to the aquifer as a result of conversions from flood to sprinkler irrigation. Current water users in the basin, and their political representatives, are very concerned about the additional water use proposed under the Application with water supplies being very limited in the Pahsimeroi Basin, but did not question the benefit or legitimacy of the water use at Pahsimeroi Fish Hatchery.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and applicable law, the Director makes the following Conclusions of Law.

I. Quantity of Water Under Existing Rights.

1. The prior appropriation doctrine is the foundation of Idaho's water laws. Idaho Const., Art. XV, Sec. 3. The basic formulation of this doctrine is that during times of shortage, a water right with a senior priority date is entitled to its water supply before a water right with a junior priority date. As a consequence, the water permitting statute does not allow a new water right applicant to receive a permit if "it will reduce the quantity of water under existing rights." Idaho Code § 42-203A. In other words, a water user cannot claim there is a sufficient water supply for a new use if the claim is based upon water that is required to satisfy existing water rights. This rule of law is designed to ensure that a new water use will not injure existing rights.

2. Water supplies are variable. A party applying for a permit is not required to show that the water supply will always be sufficient for the proposed use. The allocation of water among existing users during times of shortage is resolved by the application of the priority system. Similarly, in ground water interference cases, the placement of the burden of proof to show or refute interference by a junior ground water user, should ensure that senior water users are not harmed by a junior water user. *See* Martiny v. Wells, 91 Idaho 215 (1966). The Department must determine whether there is a reasonable probability that a sufficient quantity of

water exists for a new proposed use of water without interfering with senior water rights. However, there is no guarantee that if an application for permit to appropriate water is approved, the applicant will never be curtailed to protect senior water rights.

3. Water right applications from the same source generally should be issued in the order the applications were filed. Otherwise, the Department may not be able to properly determine whether there is sufficient water for the later applications, should they be approved out of the order they were received.

4. In the present case, it is unlikely that IPCO's use of water will reduce the quantity of water under existing water rights. Conditions on the permit can address concerns about the priority of senior rights to the use of water in times of shortage and concerns about the burden of proof in case of well interference, as discussed in Conclusion 2. Because the proposed use is non-consumptive, and the ground water to be withdrawn by IPCO will be discharged back into the Pahsimeroi River at the Upper Facility, there should be no impact on downstream surface water rights. Because the amount of water leaving the Pahsimeroi River Basin will not be increased by IPCO's proposed withdrawal, there should be no net loss to the Basin's ground water supply. Thus, the only question is whether the localized impacts of IPCO's withdrawal on the ground water aquifer will reduce the water under water rights within close proximity to the Upper Facility. IPCO's forward-looking analyses, and the concurrence of Department staff in Exhibit 13, establish that it is unlikely that nearby ground water rights will be affected by IPCO's proposed use. Finally, the minimum of 60 cfs leaving the Pahsimeroi River Basin in recent years demonstrates that there is a sufficient ground water supply to satisfy the pending applications for 12.77 cfs, as well as the 14 cfs to be used at the Upper Facility.

II. Adequacy of the Water Supply.

5. IPCO has satisfied its burden to show that the water supply itself is sufficient for the purposes for which it is sought to be appropriated. The feasibility study and pump testing at the Upper Facility performed by Hydro Logic, Inc. show that there is a reasonable probability that IPCO will be able to obtain 14 cfs from the aquifer underlying the Upper Facility. The minimum of 60 cfs discharged from the Pahsimeroi Basin in the last two drought years indicates that there is a net surplus of water that is not consumptively used in the basin. There is no need to prepare a water budget to confirm this conclusion.

6. The water supply is adequate for the intended purpose from a biological and water quality standpoint.

III. Good Faith, Delay, or Speculation.

7. The Department's water appropriation rules provide the following regarding the determination of whether an application is made in good faith, or for delay or speculative purposes:

c. Criteria for determining whether the application is made in good faith. The criteria requiring that the director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence. Speculation does not prevent an applicant from subsequently selling the developed project for a profit or from making a profit from the use of the water. An application will be found to have been made in good faith if:

i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and

ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and

iii. There are no obvious impediments that prevent the successful completion of the project.

IDAPA 37.03.08.045.01.c. Subparagraphs i-iii of this rule provide one method for evaluating the subjective intentions of a water right applicant, but are not an exclusive requirement.

8. IPCO has legal access to the property necessary to construct and operate the proposed project.

9. IPCO has demonstrated its commitment to the completion of this proposed appropriation of ground water by identifying this project to FERC as a Protection, Mitigation, and Enhancement measure that it will fund as part of obtaining a new operating license for the Hells Canyon Complex. Although IPCO did not submit land use permit applications or other documentation that it has complied with all permitting requirements for the Upper Facility expansion, its commitment to FERC encompasses a good faith commitment to take all appropriate steps to complete this project. The first step in that commitment is the most critical – obtaining the permit to appropriate ground water which forms the entire basis for the Upper Facility expansion.

10. IPCO has sustained its burden to show that it intends to appropriate the water needed for the Upper Facility expansion with reasonable diligence, so long as it continues to comply with the requirements of IDAPA 37.03.08.040.05.e.ii.

IV. Sufficiency of Financial Resources.

11. Based upon the testimony of Jonathon C. Bowling, P.E., IPCO has shown that it is reasonably probable that funding is or will be available for the Upper Facility project construction.

V. Local Public Interest.

12. The provisions of Idaho Code § 42-2003A require that the Application be evaluated as to whether it conflicts with the local public interest as defined in Idaho Code § 42-202B as follows:

> "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.

Idaho Code § 202B(3).

13. IPCO submitted sufficient details of the proposed design, construction, and operation of the Upper Facility project, and directly associated operations, to allow the impact of the proposed use on the public water resource to be evaluated.

14. The proposed use of water at the Upper Facility is to provide a source of water for IPCO's hatchery operations in the Pahsimeroi River Basin that is free from whirling disease. The fish that will benefit from this water are endangered steelhead and Chinook salmon. Operation of the Pahsimeroi Fish Hatchery is an existing and long-standing use of water in the local area and the proposed additional water use will improve its operations. Public concern did not focus on the proposed use so much as the adequacy of the water supply.

15. The requested water right would be diverted in an area that depends on irrigated agriculture and ranching to sustain the local economy. These industries depend upon the public water resources of the state to produce agricultural products and grazing lands. Insufficient water supplies are devastating to these water uses. Brit Moen testified as to the potential impacts to his ranch if the water supply were negatively affected. At the hearing in Challis, approximately twenty local residents testified as to the potential impacts to their operations if their water supplies were interrupted.

16. These same witnesses testified as to the decreasing availability of water in the basin, the effects of the severe drought on the basin, and the decreasing amount of ground and surface water available to existing users. These witnesses included local farmers and ranchers and the president and watermaster of the local water district. In addition, local legislative representatives and the Lemhi County Commissioners all testified as to the impacts of the project and the opposition of their constituents to the granting of the Application because of the impacts on the water resource. Although these concerns are understandable and likely will not be assuaged by the conditions imposed on the permit consistent with Conclusion 4, those conditions

are intended to ensure that there will be no impact on existing water users by granting the Application.

17. The Idaho Department of Fish and Game supported the Application and expressed no concerns regarding impacts on the fish and wildlife in the Pahsimeroi River Basin. The proposed water use should improve existing and long-standing hatchery operations regarding endangered Chinook salmon and steelhead.

18. The Idaho Department of Environmental Quality ("IDEQ") did not submit comments regarding IPCO's proposed water use, although there is no evidence in the record that IPCO contacted IDEQ for its comments. IPCO did indicate that it currently has an NPDES permit for the Upper Facility. Fulfilling any new point source discharge or water quality requirements imposed by IDEQ or the EPA will be required before the proposed water use may commence.

19. Based on the determinations set forth in Conclusions 4, 14, 17, and 18, IPCO has satisfied its burden of showing that approving the Application does not conflict with the local public interest.

VI. Conservation of Water Resources.

20. The proposed water use is non-consumptive and will not increase the amount of water leaving the Pahsimeroi River Basin. IPCO has satisfied its burden to show that the proposed water use at the Upper Facility is consistent with the conservation of water resources within the State of Idaho.

ORDER

Based upon these Findings of Fact and Conclusions of Law, the Application is **APPROVED** with 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 **June 1, 2006**.

2. The right holder shall comply with the requirements of IDAPA 37.03.08.040.05.e.ii. by submitting copies of applications for other needed permits, licenses, and approvals, and shall keep the Department of Water Resources apprised of the status of the applications and any subsequent approvals or denials as it develops the proposed water use.

3. The right holder shall comply with any point source discharge or water quality requirements imposed by Idaho Department of Environmental Quality or the United States Environmental Protection Agency before the proposed water use may commence.

4. The right holder shall comply with the drilling permit requirements of Idaho Code § 42-235.

5. The diversion and use of water under this water right shall be subject to all prior rights in accordance with Idaho law.

6. In the event that the holder of a licensed or decreed water right that is senior in priority to this right, including a stockwatering right, diverting water within a radial distance of 3,300 feet of the Upper Facility wells alleges that water is not available to satisfy the senior right because of interference caused by the exercise of this junior priority right at the Upper Facility wells, the holder of this junior priority right shall immediately be required to establish to the satisfaction of the Director of the Department of Water Resources that either:

   a. The unsatisfied senior water right is not being materially affected by the diversion of water under this junior priority water right; or

   b. Other physical factor(s) are present, such as the use of an unreasonable means of diversion, which prevent the senior right from being fully satisfied.

   If either 6a or 6b can not be established to the satisfaction of the Director of the Department of Water Resources, use of water under this right shall be curtailed absent mitigation approved by the Director of the Department of Water Resources.

7. Use of water under this right shall be non-consumptive.

8. The right holder shall install and maintain adequate measuring devices that will measure the rate and volume of water diverted from the wells.

DATED this 11th day of May 2004.

KARL J. DREHER
Director