BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION TO APPROPRIATE WATER NO. 37-21119 IN THE NAME OF LANE RANCH HOMEOWNERS ASSOCIATION INC.	)	**FINAL ORDER**

STANDARD FOR DECISION

Lane Ranch Homeowners' Association, Inc ("Lane Ranch" or "Applicant") filed application to appropriate water no. 37-21119. Water right applications are processed under Idaho Code § 42-203A, which provides, in part:

> (5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. 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. Provided however, that minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

A water right applicant bears the burden of proof for the factors the Idaho Department of Water Resources ("Department") must consider under Idaho Code §42-203A. See *Shokal v. Dunn*, 109 Idaho 330, 339, 707 P.2d 441, 450 (1985); *Cantlin v. Carter*, 88 Idaho 179, 187, 397 P.2d 761, 766 (1964). The Department has adopted rules setting forth the criteria for evaluating some of the statutory factors. IDAPA 37.03.08.045.

COURSE OF PROCEEDINGS

On June 6, 2003, Lane Ranch submitted application to appropriate water no. 37-21119 with the Department, seeking a surface water right permit for wildlife, recreation, and aesthetic use in the Lane Ranch residential subdivision near Ketchum, Idaho in the Big Wood River drainage. On June 23, 2003, a revised application was filed (hereafter referred to as "the application").

Notice of the application was published in the Wood River Journal on August 18 and 25, 2004. The Department received no protests.

On December 1, 2004, the Department issued a *Preliminary Order* denying the application. On December 17, 2004, Lane Ranch filed a *Petition for Reconsideration; Exceptions to Preliminary Order Denying Application; & Request for Hearing.* On January 7, 2005, the Director of the Department issued an *Order Granting Petition for Hearing* pursuant to Idaho Code § 42-1701A.

On March 14, 2005, the Director of the Department appointed Peter Anderson to be the Hearing Officer for this matter.

On May 20 2005, the Hearing Officer invited Department staff to file, by July 1, 2005, a staff memorandum containing: (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; and (3) a GIS map showing the proposed place of use and point of diversion. A *Scheduling Order* also issued on May 20, 2005, reiterated the July 1, 2005, date for submission of any staff memoranda and directed that, by July 15, 2005, the Applicant was to either reaffirm its request for a hearing or, alternatively, identify a date when it would submit written testimony and exhibits in lieu of a hearing.

On June 27, 2005, Allen Merritt, Southern Region Manager for the Department, submitted a staff memorandum. The staff memorandum is identified as Exhibit 100.

On July 15, 2005,the Applicant reaffirmed its request for a hearing.

On October 27, 2005, the Department conducted a hearing. J. Evan Robertson, attorney at law, represented Lane Ranch. At the conclusion of the hearing, Robertson asked to submit a final legal brief on behalf of Lane Ranch. Lane Ranch was given until November 23, 2005 to submit a brief. On November 23, 2005, Lane Ranch submitted *Applicant's Post-Hearing Brief* and this matter was fully submitted to the Department.

Exhibits offered by Lane Ranch and admitted as part of the record are as follows:

Exhibit 1: Black and white aerial photo dated 8/23/1957.
Exhibit 2: Black and white aerial photo dated 7/2/1964.

Exhibit 3: Black and white aerial photo dated 8/9/1969.
Exhibit 4: Black and white aerial photo dated 9/4/1977.
Exhibit 5: Black and white aerial photo dated 9/2/1984.
Exhibit 6: Portion of 1967 Sun Valley, Idaho quadrangle topographical map.

The Hearing Officer, on his own initiative, admitted the following exhibits:

Exhibit 100: Department staff memorandum dated June 27, 2005.

Lane Ranch called the following witnesses:

Charles L. Brockway
Marc Reinemann

Allen Merritt also testified at the hearing. He was called by the Hearing Officer to testify regarding the staff memorandum. Lane Ranch was afforded an opportunity to cross-examine Allen Merritt.

On January 10, 2006, the Hearing Officer issued a *Recommended Decision and Order* approving application no. 37-21119.

Based on the evidence presented at the hearing, the Director finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application no. 37-21119 proposes the following:

Source of Water:	Elkhorn Creek
Point(s) of Diversion:	SENWSW[1], Section 20, T4N, R18E, Blaine County, Idaho
Use(s):	Wildlife, recreation and aesthetics
Total Quantity:	4.5 cfs
Period of Use:	January 1 – December 31 (year round)
Place of Use:	NESE, SESE, Section 19; NWSW, Section 20; NWNW, Section 29; and the NENE, Section 30; all in T4N[2], R18E, Blaine County, Idaho

[1] The public land survey numeric descriptor "1/4" is assumed to follow each two alpha character public land survey locator when the numeric descriptor is missing. All public land survey descriptions originate from the Boise Meridian, abbreviated "B.M." For instance, in this example, the full description would be the SE1/4NW1/4SW1/4, Section 20, Township 4 North, Range 18 East, Boise Meridian.

[2] The application and the supporting memorandum, written by Charles E. Brockway, locate the place of use in Township 1 North, not in Township 4 North. All other documentation and maps locate the place ofuse in Township 4 North. Lane Ranch Subdivision is located in Township 4 North. The published legal notice only identified the sections within which the place of use is located, not the township or range. The Department can process the application without requiring an amendment.

2. The Lane Ranch Subdivision is a residential subdivision located approximately one mile south of the City of Ketchum. More specifically, the subdivision was developed on lands located between Elkhorn Creek Road on the north, Highway 75 to the west, land owned by the Idaho Foundation for Parks and Lands Inc. to the south, and sharply rising foothills to the east. Lane Ranch is a non-profit corporation whose shareholders are the property owners in the subdivision. Lane Ranch enforces the conditions, covenants, and restrictions for the subdivision and owns and maintains the common areas within the subdivision, including the water amenities flowing through the subdivision.

3. The land currently occupied by the Lane Ranch Subdivision was a farm formerly owned by Pete Lane, who irrigated the land with water diverted from Elkhorn Creek, Big Wood River, and Trail Creek. Elkhorn Creek historically flowed in a natural channel of indeterminate location through what became the irrigated farmland. Sometime prior to approximately 1950, the historic natural channel of Elkhorn Creek was obliterated to "reclaim" the creek channel for farming. Following the change in the natural Elkhorn Creek channel, the water flowing in Elkhorn Creek was either diverted onto the farmland for irrigation or allowed to flow down a channel bypassing the farmland where it eventually discharged into the Big Wood River.

4. Exhibit 1 is a 1957 aerial photograph of Pete Lane's property and other surrounding lands. Beginning in the upper right (northeast) corner of the photograph, Elkhorn Creek flows to the southwest and then to the west. As Elkhorn Creek begins to turn southwest again, a dark line branches to the northwest for a short distance and then turns southwest. This line is the historic irrigation ditch diverting water from Elkhorn Creek to the irrigated farmland. Downstream of the irrigation diversion, Elkhorn Creek continues to meander to the southwest until a straight, artificial channel heads due south in the SWNWSW, Section 20, T4N, R18E. The artificial channel roughly parallels the toe of the foothills east of the irrigated farmland (hereafter referred to as the "toe-of-the-slope channel") until it turns sharply west, where it meets what is perhaps the original Elkhorn Creek channel, and from there flows into the Big Wood River. The former landowner directed Elkhorn Creek flows in excess of those needed for irrigation through the toe-of-the-slope channel. Exhibits 2-5 reveal that this channel configuration at the base of Elkhorn Creek continued through 1992, although at some point a storage reservoir was built at the point of the irrigation diversion on Elkhorn Creek (the "upper reservoir").

5. Sometime in the late 1980's or early 1990's, the historic irrigation diversion and channel system was modified with the construction of the Lane Ranch Subdivision. The developer of the Lane Ranch Subdivision hired Interflue, a firm specializing in riparian enhancement and hydraulics, to design an aesthetically pleasing channel system through the subdivision. Pursuant to the design, the irrigation diversion at the outlet from the upper reservoir and the toe-of-the-slope channel were obliterated and a new, three-channel system was constructed. The three channels will be referred to hereafter as the east channel, the center channel, and the west channel.

6. Currently, all water flowing in Elkhorn Creek passes through the upper reservoir and down the Elkhorn Creek channel[3] below the upper reservoir. In the extreme northeast corner of the NESESE, Section 19, T4N, R18E, Elkhorn Creek water is diverted into the east channel. Diversion into the east channel is regulated by a headgate.

7. Downstream of the east channel diversion, Elkhorn Creek flows into a pond. Approximately one-eighth of a mile from the east channel diversion, a pumping station lifts water from the pond into the west channel (Still within the NESESE, Section 19, T4N, R18E). Diversion into the west channel is limited by the capacity of the pumping station.

8. Elkhorn Creek water discharges out of the pond from which water is pumped into the west channel and flows into the center channel. The flows into the center channel are not controlled by a structure or limited by pumping capacity. As a result, excess undiverted Elkhorn Creek water flows in and through the center channel without control or regulation. The center channel is larger than the east and the west channels. The center channel was designed to accommodate the fluctuating excess flows including higher flows during spring runoff.

9. The east channel discharges back to the center channel in the NENENE, Section 30, T4N, R18E, a little over one-quarter mile south of the east channel point of diversion. . The west channel discharges back to the center channel in the SENENE, Section 30, T4N, R18E approximately three eighths to one-half mile south of the west channel point of diversion. . The center channel carries Elkhorn Creek water through the subdivision to the Big Wood River. *See* Exhibit 100, attachment Exhibit M1.

10 The channels are lined with clay and rocks. Drop structures were constructed in the channels. Irrigation water is diverted from the west channel to the common area irrigation system. Some additional gravity irrigation may occur from the three channels.

11. The channel system is a major amenity of the Lane Ranch Subdivision and is maintained by Lane Ranch. There are seven major ponds in the system as well as smaller ponds along the water channels. Water is conveyed from pond to pond through the channels. The channel system is a breeding, holding, and rearing habitat for wild trout and other wildlife. Lane Ranch also pays to stock swans in the ponds on the channel system. Lots that abut the channel system are more valuable than those that do not.[4]

12. A previously approved transfer, numbered 3609, approved the transfer of three Elkhorn Creek water rights to provide water to the Lane Ranch Subdivision amenities. The transferred water rights authorized use of water as follows:

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[3]The natural channel below the reservoir may have been rebuilt. This is not clear from the record, although the three small ponds on this channel were not present in the historic photographs, Exs. 1-5.

[4]Individual lots now have values in excess of $1.5 million.

Water Right no. 37-82

Source -	Elkhorn Creek
Priority Date -	June 1, 1884
Uses & Quantities -	
Irrigation	0.74 cfs
Aesthetics	1.20 cfs
Recreation	1.20 cfs
Wildlife	1.20 cfs
Total	1.20 cfs

Water Right no. 37-7201

Source -	Elkhorn Creek
Priority Date -	March 21, 1973
Uses & Quantities -	
Aesthetics	1.00 cfs
Recreation	1.00 cfs
Wildlife	1.00 cfs
Total	1.00 cfs

Water Right no. 37-4016

Source -	Elkhorn Creek
Priority Date -	April 1, 1884
Uses & Quantities –	
Diversion to Storage	10.00 cfs (flow rate for one time fill of the reservoirs and ponds in the Lane Ranch Subdivision)
Storage for Aesthetics	17.0 acre-feet
Storage for Recreation	17.0 acre-feet
Storage for Wildlife	17.0 acre-feet
Total Storage	17.0 acre-feet

13. The application for previously approved transfer no. 3609 proposing the above uses described the locations of two points of diversion and the ditches into which water was proposed to be diverted as follows:

NWSW, Section 20, T4N, R18E – Headgate and east ditch [This is not the present location of the east ditch point of diversion].
SESE, Section 19, T4N, R18E – Equalizing pipeline to west ditch, pump.

14. Application for transfer no. 3609 proposed points of diversion from Elkhorn Creek into the east and west ditches at different locations. Application for transfer no. 3609 did not describe the center channel as a delivery canal or ditch.

15. In its *Order* approving transfer no. 3609, dated October 9, 1990, the Department stated: "The place of use and point of diversion for right no. 37-0082 is approved as described in the transfer application." Ex. 100. Transfer no. 3609 approved two points of diversion from Elkhorn Creek, one for the east ditch and one for the west ditch, each at different locations on Elkhorn Creek.

16. The total flow rate authorized for continuous diversion through east and west ditches was 2.2 cfs.

17. Measured water flows in Elkhorn Creek range from a high of approximately eight cfs to a low of approximately one cfs, with average flows of approximately four cfs. Application no. 37-21119 seeks an additional 4.5 cfs for wildlife, aesthetics, and recreation, and is intended to protect the water flows in the Lane Ranch channel system from upstream consumptive uses or upstream bypass, not to authorize the diversion of additional water through that system. All water flowing down Elkhorn Creek already passes through the Lane Ranch system.

18. Dr. Charles E. Brockway testified that Lane Ranch originally applied, as the first attempt for this application, to appropriate six to seven cfs of water from Elkhorn Creek. He testified that the additional six to seven cfs was derived by determining the amount of water turnover in the pools behind drop structures in the center channel to prevent moss and algae growth. The additional water and the reduction in aquatic growth would enhance the appearance of the channel and increase the dissolved oxygen in the water for the benefit of fish.

19. After submitting the original application to the Department, Lane Ranch learned that Rule 40.05.c of the Water Appropriation Rules requires, for all applications seeking to appropriate in excess of 5.0 cfs, the submittal of significant additional information. Some of the additional information that must be submitted includes the coordination with and comments submitted by the Idaho Department of Fish and Game and other government entities. Lane Ranch determined submittal of the additional information was too burdensome, and reduced the flow rate sought to be appropriated to 4.5 cfs to avoid the additional information submittal requirements.

20. The 4.5 cfs sought to be appropriated is not justified by a technical or scientific analysis, but was chosen solely to avoid the additional information requirements of the Water Appropriation Rules. Brockway testified that the additional water would reduce the growth of moss and algae and increase the dissolved oxygen in the water. Dr. Brockway testified, however, that approval of application to appropriate water no. 37-21119 would not increase the amount of water flowing through the center channel.

21. Any upstream demands for this water will likely be for similar aesthetic, recreation, or wildlife uses, or for irrigation uses similar to those of Lane Ranch.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A(5) provides, in part, that:

> 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.

2. Generally, Idaho law requires a physical diversion of water from a public water source in order to appropriate water for a beneficial use. State v. United States, 134 Idaho 106, 112, 996 P.2d 806, 811 (2000); *State Department of Parks v. Idaho Dept. of Water Administration*, 96 Idaho 440, 444-445, 530 P.2d 924, 928-929 (1974). The statutory necessity for a physical diversion of water to create a private water right is derived, in part, from Idaho Code § 42-201, which requires strict compliance with water right permit procedures to acquire a water right, and Idaho Code § 42-202(1)(d), which requires an application for a water right to set forth a point of diversion.

3. The appropriate analysis when determining whether a proposed water use complies with the statutory diversion requirement is whether the applicant intends to separate the water from the public water supply.

4. A stream channel is defined as a "natural watercourse of perceptible extent, with definite beds and banks, which confines and conducts continuously flowing water." Idaho Code § 42-3802(d). Department rules make clear that "[t]he channel referred to is that which exists at the present time, regardless of where the channel may have been located at any time in the past." IDAPA 37.03.07.010.12.

5. The center channel of the Lane Ranch channel system is not regulated and carries Elkhorn Creek water as a natural channel to pass undiverted flows through the subdivision.

6. The application for previously approved transfer no. 3609 did not identify the center channel as an artificial amenity channel for the subdivision. Two points of diversion are identified, one for the east channel diversion and one downstream for the west channel diversion. Lane Ranch was only entitled to divert a fraction of the total Elkhorn Creek water flow. As a result, at the time of transfer approval and construction, Lane Ranch intended to construct a channel through which the natural flows of Elkhorn Creek would discharge. Although artificial, the center channel became the banks and bed of Elkhorn Creek.

7. An application to appropriate water seeking to leave the flow of Elkhorn Creek in its channel without diversion is a minimum stream flow.

8. Idaho Code § 42-222, states, in pertinent part:

> . . . [M]inimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.

9. Chapter 15, Title 42 of the Idaho Code grants exclusive authority to the Idaho Water Resource Board to appropriate water in streams for minimum stream flows without a physical diversion from the water source. In Idaho, individual appropriators are not authorized to appropriate water for a minimum stream flow.

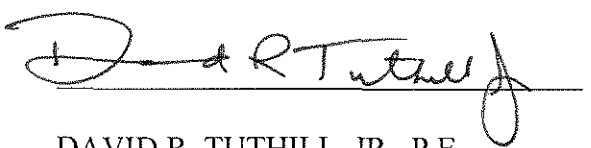
10. Lane Ranch did not justify the need for the appropriation of 4.5 cfs in the center channel for wildlife, recreation and aesthetic purposes.

11. Lane Ranch did not establish how approval of the application would change or improve the present flows in channels located in the Lane Ranch Subdivision.

ORDER

IT IS HEREBY ORDERED that Application to Appropriate Water no. 37-21119 is **Denied**.

DATED this 5th day of January, 2007.



DAVID R. TUTHILL, JR., P.E.
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of January, 2007, I mailed a true and correct copy of the foregoing **FINAL ORDER** on the following persons listed below by U.S. mail, postage prepaid and addressed as follows:

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