BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION NOS. 36-8347 & 36-8670 IN THE NAME OF THE IDAHO WATER RESOURCE BOARD FOR A MINIMUM STREAM FLOW IN NIAGARA SPRINGS AND NIAGARA SPRINGS CREEK	)	**PRELIMINARY ORDER**

On August 11, 2004, the Idaho Department of Water Resources (IDWR) conducted a hearing for applications to appropriate water nos. 36-8347 and 36-8670. The Idaho Water Resource Board (IWRB) filed the applications seeking minimum streamflows in Niagara Springs and Niagara Springs Creek. The hearing was conducted as required by Idaho Code § 42–1503.

Prior to the hearing, notice of the applications was published statewide. The notice described the time and place for the hearing, and required the filing of a notice of appearance by any persons or entities desiring to appear formally as parties. IDWR received notices of appearance from the Idaho Department of Parks and Recreation (Parks & Recreation), the Idaho Department of Fish and Game (Fish & Game), and Rim View Trout Company (Rim View). A formal hearing was scheduled to begin at 2:00 p.m. on August 11, 2004 at the Hagerman Valley Senior Citizen Center. An informal session of the hearing was scheduled that evening at 7:00 p.m. at the same location.

At the beginning of the formal hearing, staff from the Southern Regional Office of IDWR delivered a letter to the hearing officer from Charles Honsinger, an attorney representing Rim View. The letter stated Rim View would not appear at the hearing and requested the letter be made a part of the record.

The letter from Rim View refers to the "Niagara Springs Agreement," a stipulation signed by Rim View and other water users. The Niagara Springs Agreement describes water rights and water right permits authorizing diversion from Niagara Springs or Niagara Springs Creek and applications proposing diversion from Niagara Springs and Niagara Springs Creek. The Niagara Springs Agreement also describes the administration of the various existing or prospective water rights. The letter argues that processing of the applications for minimum streamflow is premature, and that the Niagara Springs

Agreement provides that IDWR must process Rim View's application to appropriate water no. 36-7791 prior to processing the IWRB minimum streamflow applications. The letter requests that processing of the minimum streamflow applications cease "and that no permits for such applications be issued until IDWR meets its obligations under the Niagara Springs Agreement, and issues a permit for water right no. 36-7791."

The letter written by Honsinger will be included in the record of the minimum streamflow hearing. In addition, the hearing officer will review the Niagara Springs Agreement, and the issues raised by Honsinger will be addressed. Nevertheless, Rim View did not appear at the hearing. Furthermore, the issues raised by Honsinger in the letter could have been raised at any time prior to the date of the hearing. The nonappearance by Rim View, and the untimeliness of the arguments presented by Rim View dictate that Rim View no longer is considered a party. As a result, the hearing officer holds that Rim View is no longer a formal party to the proceeding and does not have the right to post-hearing remedies of review by IDWR and the courts.

At the hearing, C. Nicholas Krema, Deputy Attorney General, represented Parks & Recreation and David J. Barber, Deputy Attorney General, represented Fish & Game.

FINDINGS OF FACT

1. Application to appropriate water no. 36-8347 proposes the following:

Purpose of Use:	Recreation, aesthetics, fish and wildlife.
Source:	Niagara Springs Creek, tributary to the Snake River.
Priority Date:	January 29, 1988
Period of Use:	Year-round

The application describes subreaches of the Niagara Springs outflow stream

Subreach A:	Beginning at the third (last) Idaho Power Company diversion, located in Lot 1 (NE1/4NE1/4), Section 10, Township 9 South, Range 15 East, Boise-Meridian, Gooding County, and extending downstream approximately one-eighth (1/8) of a mile to a point in Lot 11 (SW1/4NW1/4), Section 11, Township 9 South, Range 15 East, Boise-Meridian, Gooding County, where the outflow stream widens into the Niagara Springs Estuary. The downstream terminus of Subreach A is approximately located at the outflow of the Idaho Power Fish Hatchery.
Rate of flow for Subreach A:	45 cubic feet per second ("cfs") year-round

Subreach B:	Beginning at a point where the Niagara Springs outflow stream widens into an estuary located in Lot 11 (SW1/4NW1/4), Section 11, Township 9 South, Range 15 East, Boise-Meridian, Gooding County (at the approximate location of the outlet of the Idaho Power Fish Hatchery), and extending downstream to the confluence of the Niagara Springs Estuary and the Snake River, all located within Lot 11, Section 11, Township 9 South, Range 15 East, Boise-Meridian, Gooding County.
Rate of flow for Subreach B:	110 cubic feet per second ("cfs") year-round.

2. Application to appropriate water no. 36-8670 proposes the following:

Purpose of Use:	Aesthetics and recreation
Source:	Niagara Springs and its creeks tributary to the Snake River.
Season of Use:	Year-round
Priority Date:	March 24, 1992
Reach:	Beginning at the head of Niagara Springs located in Lot 1 (NE1/4NE1/4), Section 10, Township 9 South, Range 15 East, and Lot 3 (NW1/4NW1/4), Section 11, Township 9 South, Range 15 East, Boise-Meridian, Gooding County, and continuing downstream to the Rim View Diversion located within Lot 1 (NE1/4NE1/4), Section 10, Township 9 South, Range 15 East, Boise-Meridian, Gooding County.
Rate of flow:	264 cubic feet per second ("cfs") year-round.

3. Rim View, Fish & Game, and Idaho Power Company (Idaho Power) hold water rights describing Niagara Springs and Niagara Springs Creek as a source of water. After the right holders filed claims for water rights in the Snake River Basin Adjudication (SRBA), IDWR recommended the water rights to the SRBA Court. Rim View, Idaho Power, and Fish & Game objected to the recommendations. Rather than litigate the objections, the water right holders entered into a stipulation known as the "Niagara Springs Agreement." Following execution of the agreement the SRBA Court issued a partial decree for each of the following water rights summarized below by order of priority date:

Water Right No.	Owner	Date of Priority	Flow Rate	Purpose of Use
36-4020A	Idaho Dept. of Fish & Game	3-15-1912	8.72 cfs	Irrigation, Wildlife & Domestic
36-4032A	Rim View Trout Co.	3-15-1912	10.0 cfs	Fish Propagation
36-4032B	Rim View Trout Co.	4-1-1951	10.0 cfs	Fish Propagation & Domestic
36-4032C	Rim View Trout Co.	4-1-1952	5.0 cfs	Fish Propagation
36-2711	Idaho Dept. of Fish & Game	10-23-1956	0.24 cfs	Irrigation & Domestic
36-4020B	Idaho Dept. of Fish & Game	3-15-1959	1.28 cfs	Irrigation
36-4032D	Rim View Trout Co.	12-1-1962	15.0 cfs	Fish Propagation
36-2704	Idaho Power Co.	1-31-1966	120.0 cfs	Fish Propagation, Irrigation, Domestic & Fire Protection
36-2680	Rim View Trout Co.	6-6-1966	60.0 cfs	Fish Propagation
36-7167	Rim View Trout Co.	3-18-1971	50.0 cfs	Fish Propagation
36-15221	Idaho Power Co.	3-3-1982	0.04 cfs	Domestic
36-4020C	Idaho Dept. of Fish & Game	6-7-1983	8.70 cfs	Wildlife & Wildlife Storage

4. In addition to the water rights decreed by the SRBA Court, the following table lists permits approved by IDWR or applications to appropriate water pending before IDWR. The permits and applications are also sorted in order by priority date:

Water Right No.	Applicant	Priority Date	Flow Rate	Purpose of Use
Permit 36-7200	Idaho Dept. of Parks & Recreation	7-12-1971	264.0 cfs	Instream Flow
Application 36-7628	Rim View Trout Co.	6-15-1976	115 cfs (20.0 cfs of new fresh water)	Fish Propagation

Water Right No.	Applicant	Priority Date	Flow Rate	Purpose of Use
Permit 36-7789	Rim View Trout Co.	3-15-1978	90.30 cfs	Fish Propagation
Application 36-7791	Rim View Trout Co.	3-17-1978	90.0 cfs	Fish Propagation
Application 36-7983	Idaho Power Co.	5-5-1987	290 cfs	Hydropower
Permit 36-8597	Rim View Trout Co.	8-12-1991	150 cfs	Hydropower

5. The Niagara Springs Agreement: (a) recognizes existing water rights, future development for existing permits, and future development for some pending applications, including the minimum streamflow applications, and (b) describes how the water rights will be administered when development is complete based on water availability. The following are details of the agreement relevant to this decision:

A. The agreement establishes base flows (or perhaps better characterized as reference flows) for the entire flow of Niagara Springs and Niagara Springs Creek, including gains to Niagara Springs Creek below the spring headwaters. The base flow is the flow rate needed to satisfy agreed-to diversions by Idaho Power, Fish & Game, and Rim View. These base flows range from 217 cfs during periods of low outflow to 230 cfs during periods of high outflow.

B. The agreement establishes flows that must be maintained in Niagara Springs Creek for Subreach A and Subreach B. These flows remaining in Niagara Springs Creek will be referred to as instream flows to distinguish them from the minimum streamflows sought by the two minimum streamflow applications. The following are instream flows established by the agreement:

i. Subreach A:
May - September 15.0 cfs
October - March 5.0 cfs
April 10.0 cfs

ii. Subreach B
May - September 70.0 cfs
October - April 60.0 cfs

When the flows in Niagara Springs Creek are less than the stipulated base flows the instream flows established by the agreement must be maintained in Subreach A. Idaho Power, Fish & Game, and Rim View share the remaining water based on a mathematical algorithm described by the Niagara Springs Agreement. Instream flows in Subreach B may also be reduced proportionately during periods of shared flow allocations. (See Niagara Springs Agreement 2(d) and 3(b)(iv)).

C. When the flows in Niagara Springs Creek exceed the base flows established by the agreement, the water rights of the parties, including any future perfected permits or applications to appropriate water, will be administered based on priority date

D. In section 4 of the agreement, titled "Pending Applications for Permits," the parties to the agreement consent to the processing of the two applications to appropriate water for a minimum streamflow that are the subject of this decision, and also consent to the processing of application nos. 36-7628 (Rim View) and 36-7791 (Rim View).

E. Section 6 of the agreement provides that "approval and issuance of a permit under application 36-7791 with no conditions imposed except those consistent in all respects with this agreement...." is a "material term of this agreement."

F. Section 4 of the agreement states that "all other applications filed by the parties and pending before IDWR shall be withdrawn." As a result, Idaho Power's application to appropriate water no. 36-7983 should be considered withdrawn by Idaho Power.

6. The Niagara Springs Agreement also states that the base flows in Niagara Springs Creek have not been satisfied during the past several years

7. Discharge of water from Niagara Springs fluctuates seasonally during the year. The springs discharge more water during late summer and fall, and the spring flows diminish during the winter, spring, and early summer

8. Application for minimum streamflow no. 36-8670 describes the upper reach of Niagara Springs. The flows from the springs exceed the minimum flow of 264 cfs in most years. However, during low flow periods, the average spring flow is less than 264 cfs.

9. The IWRB adopted a policy that a minimum streamflow must be capable of being maintained at least fifty-percent of the time. When daily flows of Niagara Springs are averaged for each day for the period of recorded flows, there are more days for which flows exceed 264 cfs than days when flows are less than 264 cfs. In short, 264 cfs is maintainable more than fifty-percent of the time. (See graph depicted on Applicant's Exhibit no. 1, page 8, slide 15.)

10. Application for minimum streamflow no. 36-8347 proposes a minimum streamflow beginning at the last Idaho Power diversion from Niagara Springs Creek and extending to the mouth of Niagara Springs Creek at the Snake River. The minimum streamflow reach is divided into two subreaches, identified as Subreach A and Subreach B.

11. Subreach A proposes a minimum streamflow of 45 cfs during the entire year. The subreach begins at the Wing Dam, also known as the third or last Idaho Power diversion. Subreach A terminates where Niagara Springs Creek widens into a larger channel. The application refers to the portion of the stream where it widens as the "Niagara Springs Creek Estuary."

12. The seasonal fluctuations of flow in Subreach A do not mirror the natural seasonal fluctuations exhibited above the diversions. The diversion of water from Niagara Springs and Niagara Springs Creek by existing water right holders above Subreach A at greater or lesser quantities during the year influence the flows in Subreach A.

13. Flows in Subreach A were measured from 1996 through 2003. The results are graphically depicted on Applicant's Exhibit no. 1, page 9, slide 17. All of the measured flows from January through the middle of April were less than the proposed minimum streamflow of 45 cfs. Starting the middle of April, most of the measured flows exceeded 45 cfs through the remainder of the year.

14. Measured flows in Subreach A from 1996 through 2003 exceeded the proposed minimum streamflow of 45 cfs 42 percent of the time. The flow rate corresponding with fifty-percent exceedance is approximately 38 cfs. (See Applicant's Exhibit no. 1, page 9, slide 18.)

15. The flows from Niagara Springs and other springs emitting from the Snake River Canyon in the Thousand Springs Complex peaked during the middle part of the 1900's. The flows of the springs declined during the latter part of the 1900's, and have continued to decline in recent years. Water flows in Niagara Springs were measured from 1996 through 2003. Historic higher water flow rates during earlier years were not measured, however.

16. The extended drought in Southern Idaho during the last decade diminished spring flows of Niagara Springs. Increased ground water pumping, reduced surface water irrigation, and increased irrigation efficiency also diminished the flows of the springs.

17. While several years of wetter climatic conditions might improve the flows of the springs, there is no assurance that spring flow reductions caused by other factors will be arrested or reversed.

18. The Niagara Springs Agreement recognizes the earlier prospective priority of application to appropriate water no. 36-7628 filed by Rim View. The parties to the agreement stipulated they would not protest issuance of a water right permit authorizing appropriation of 20.0 cfs of fresh water under application no. 36-7628. If application 36-7628 is approved, an additional 20.0 cfs could be diverted upstream from the minimum streamflow reach. This could result in an additional depletion to flows in Subreach A.

19. Subreach B of application for minimum streamflow no. 36-8347 begins where the channel of Niagara Springs widens (referred to as the "Niagara Springs Creek Estuary") at the approximate location of the Idaho Power return flow pipe outlet, and extends downstream to the mouth of Niagara Springs Creek at the Snake River. Application no. 36-8347 seeks a minimum streamflow of 110 cfs in Subreach B.

20. The seasonal fluctuations of flow in Subreach B of Niagara Springs Creek more closely mirror the natural seasonal fluctuations of Niagara Springs above all diversions. (See Applicant's Exhibit no. 1, page 10, slide 20.) The only exception is during late winter and early spring, when the flow fluctuation patterns are dissimilar. Instead of declining in late winter and early spring, the flows in Subreach B peak in approximately March of every year.

21. Some of the flow measurements in Subreach B are suspect. Referring to slide 20, page 10 of Applicant's Exhibit no. 1, the direction of all annual flows in December at the end of the graph is downward. All but two of the lines immediately uptake in January and steadily increase to a peak in March. There is no explanation for this discontinuity in the record.

22. The proposed minimum streamflow of 110 cfs is exceeded at least 62 percent of the time in Subreach B. A flow of approximately 120 cfs can be maintained more than fifty-percent of the time.

23. The Niagara Springs Agreement recognizes application to appropriate water no. 36-7791 filed by Rim View. The application seeks appropriation of 90 cfs of water from the outfall of Idaho Power's return flow pipeline. If Rim View diverts water from Idaho Power's outfall pipe to Rim View's raceways, the water will not return to Niagara Springs Creek, but will discharge to the Snake River downstream of the mouth of Niagara Springs Creek. The diversion of an additional 90 cfs from the Idaho Power outfall will reduce the flow of water in Subreach B.

24. In addition, the diversion of an additional 20 cfs as proposed by application no. 36-7628 will further reduce the flow of water in Subreach B.

25. At present spring flows, if the full amount of water represented by applications held by Rim View are developed, the water available for minimum streamflow may be limited to the lesser quantities spelled out in the Niagara Springs Agreement, and set forth in finding of fact no. 5.

26. Nonetheless, there is uncertainty about the amount of water that will be beneficially used by Rim View under its applications once they are perfected.

27. Subreaches A and B described by application for minimum streamflow no. 36-8347 are habitat for rainbow trout in all stages of lifecycle. The portions of Niagara

Springs Creek sought for minimum streamflow also provide spawning habitat for rainbow trout.

28. Habitat for juvenile rainbow trout increases as flows increase to approximately 45 cfs. In addition, habitat for adult rainbow trout increases steeply with flow increases up to approximately 45 cfs. Habitat for adult rainbow trout continues to increase at a slower rate up to and beyond 110 cfs.

29. The minimum streamflow sought for application no. 36-8347 is the minimum streamflow necessary to sustain viable trout habitat. Flow beyond the minimums sought would continue to enhance adult rainbow trout habitat to more optimum conditions.

30. Niagara Springs Creek is a significant fishery for put-and-take trout fishing. An average of 5,000 to 6,000 catchable rainbow trout were stocked annually in Niagara Springs Creek over the past decade.

31. The flows of Niagara Springs as they emit from the Snake River Canyon wall are one of the few undisturbed spring headings in the Thousand Springs Complex. The area offers recreationalists a view and feel of the springs as they existed prior to diversion and development for commercial purposes. Many people visit the Niagara Springs area to view the springs in their natural state.

32. The lower portions of Niagara Springs Creek are widely used for a variety of purposes. In addition to fishing, people regularly swim and wade in the cool, clean water. Public parks are located next to the stream, allowing the public to recreate both in the stream and within the parks.

ANALYSIS

The minimum streamflow sought by application no. 36-8670 is maintainable, is desirable for preservation because of uniqueness, and there is a significant public interest in maintaining the spring flows in their pristine state.

Future maintainability of the minimum streamflow sought by application no. 36-8347 is very uncertain. The flows of Niagara Springs will probably never recover to historical highs. Contemplated development will diminish the flows in both Subreach A and Subreach B. If Rim View fully completes the development proposed by its applications, the minimum streamflow sought will almost surely not be maintainable. Nonetheless, at present flow rates, the minimum streamflow for Subreach A is maintainable 42 percent of the time, and the minimum streamflow for Subreach B is maintainable in excess of 50 percent of the time. The permits should be approved with a condition that flows in Subreach A and Subreach B must continue to be monitored, and that, at the end of the permit period, these measurements will be used to determine the minimum stream flows that will be granted in a license. Some additional measurement may be required after the expiration of the permit development period if necessary to

gather more data The IWRB may seek multiple extensions of time to submit proof of beneficial use

Although the IWRB's fifty percent exceedance minimum threshold was offered as a standard at the hearing, the IWRB had the ability to reduce the applied-for flow rates prior to or at the hearing. If the IWRB wants to follow its policy, it can act to reduce the minimum streamflows to the 50 percent exceedance values presented at the hearing by relinquishing a portion of the flow rate sought and approved.

The Niagara Springs Agreement does not prohibit IDWR's consideration of the minimum streamflow applications prior to approval of Rim View's application no. 36-7791 Rim View is adequately protected by recognition of future depletions to permit no. 36-8347 caused by Rim View's development proposed by application no. 36-7791.

CONCLUSIONS OF LAW

1. Idaho Code Section 42-1503 states, in pertinent part:

> Upon the conclusion of the hearings and completion of any investigation conducted by the director, he shall enter his findings in writing approving the application in whole, or in part, or upon conditions or rejecting said application. Approvals of any such application must be based upon a finding that such appropriation of minimum stream flow:
> (a) will not interfere with any vested water right, permit or water right application with priority of right date earlier than the date of receipt in the office of the director of a complete application for appropriation of minimum stream flow filed under the provisions of this act;
> (b) is in the public as opposed to private, interest;
> (c) is necessary for the preservation of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of the stream;
> (d) is the minimum flow or lake level and not the ideal or most desirable flow or lake level; and
> (e) is capable of being maintained as evidenced by records of stream flows and water levels and the existing or future establishment of necessary gauging stations and benchmarks

2. The minimum streamflow sought will not interfere with any vested water right, permit, or water right application with a priority date earlier than the date of receipt of the minimum streamflow application. Specifically, these minimum streamflow applications are subject to depletions by any permits approved for application to appropriate water nos. 36-7628 and 36-7791 held by Rim View Trout Company.

3. Application for minimum streamflow nos. 36-8347 and 36-8670 are in the public as opposed to the private interest

4. Application for minimum streamflow nos. 36-8347 and 36-8670 are necessary for the preservation of fish and wildlife habitat, aquatic life, recreation, and aesthetic beauty.

5 The minimum streamflows sought by application nos. 36-8347 and 36-8670 are the minimum flows and not the ideal or most desirable flows in Niagara Springs and Niagara Springs Creek

6. The minimum streamflow sought by application to appropriate water no. 36-8670 is capable of being maintained.

7. The minimum streamflows sought by application no. 36-8347 for Subreach A and Subreach B are presently capable of being maintained. The flows in Niagara Springs Creek may be diminished significantly by additional development proposed by application to appropriate water nos. 36-7628 and 36-7791. As a result, additional monitoring and analysis must be conducted during the pendency of the permit.

ORDER

IT IS HEREBY ORDERED that application to appropriate water nos. **36-8347 and 36-8670** are **APPROVED** subject to the following conditions:

1 Subject to all prior water rights

2 Proof of instream beneficial use of the minimum flows appropriated ("proof") shall be submitted in a manner approved by the Department on or before April 1, 2010. As a part of the proof, the permit holder shall submit representative measurements and/or supporting information to show that the requested minimum flows have been available from the date of permit issuance to the date that proof is due.

3. This right shall be administered by the watermaster of Water District no. 130.

4. Use of water under Permit nos. 36-8347 and 36-8670 shall recognize and allow the continued beneficial diversion of water under any existing water right established by diversion and application to beneficial use or any existing or future water right established by an application, permit, or license on file or issued by the Director under the provisions of Chapter 2, Title 42, Idaho Code, with priority dates earlier than January 29, 1988 and March 24, 1992, respectively.

5 Use of water under the permits shall be non-consumptive.

6 The Idaho Water Resource Board, upon receiving a request or upon its own initiative, may petition the Director for an amendment to the permit or license The petition must set forth any significant change in circumstances and evidence of the public interest supporting the proposed amendment The Director will notify the general public and specific persons or known interested parties of the proposed change, and conduct a hearing for the purpose of determining whether the permit or subsequent license should be amended in the public interest. The burden of proof at the hearing shall be upon the persons or parties seeking the amendment to establish that the amendment of the permit or license would be in the public interest. An amendment cannot increase the authorized flow rate.

7. The applications hereby approved by the Director shall be submitted to the Idaho Legislature by the fifth day of the next regular legislative session and the Director's approval shall not become finally effective until approved by the legislature pursuant to provisions of Section 42-1503, Idaho Code

8. These minimum stream flows shall be junior and subordinate to all consumptive use rights diverted from ground water within the Snake River Aquifer tributary to Thousand Springs, held in trust by the State of Idaho, that may be approved or diverted later in time than the priority of these rights. Approval of these minimum stream flow rights shall not give rise to any right or claim against any future rights to the consumptive use of ground water held in trust by the state of Idaho initiated later in time than the priority of these rights to the extent that such uses are within the limits established pursuant to the Swan Falls Agreement, the Idaho State Water Plan and Chapter 2, Title 42, Idaho Code.

IT IS FURTHER ORDERED that water right no **36-8347** is also subject to the following conditions:

9. The right holder shall measure and record the flow rate in both Subreach A and Subreach B at least quarterly during each year of the duration of the life of the permit, unless the right holder can show that a less frequent measurement period is sufficient. The flow data shall be submitted to IDWR at or about the time proof of beneficial use is submitted.

10. The licensed minimum streamflows for Subreach A and Subreach B shall be limited to the flows measured in the reaches after expiration of the periods for development and beneficial use for any permit issued to Rim View Trout Company as proposed by application nos. 36-7628 and 36-7791. The right holder may seek multiple extensions of time until expiration of the development and beneficial use period for permits proposed by application nos. 36-7628 and 36-7791, and after the full effect of any development is reflected by the measurements.

IT IS FURTHER ORDERED that Rim View Trout Company is not a party to the contested case created by the minimum streamflow hearings and cannot participate in any post-hearing process before IDWR.

DATED this 1st day of November, 2004.

Gary Spackman
Hearing Officer