

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR)
PERMIT NOS. 85-07583, 86-07318, AND)
86-07345 (CLEARWATER RIVER), TO)
ESTABLISH MINIMUM STREAMFLOWS IN) **FINAL ORDER**
THE NAME OF THE IDAHO WATER)
RESOURCE BOARD)
_____)

On December 13, 1995, the hearing officer for the Idaho Department of Water Resources (“Department”) issued a Recommended Order approving the above captioned applications for permit to appropriate water, numbered in Department records as 85-07583, 86-07318, and 86-07345. The applications filed by the Idaho Water Resource Board (“Board”, “IWRB” or “Applicant”) provide for minimum stream flows in the Clearwater River, located in Clearwater and Nez Perce Counties. No one filed a petition for reconsideration, a brief, or exceptions to the Recommended Order.

Based on the hearing record, evidence taken, and the Director’s understanding of the law, the Director issues the following findings of fact, conclusions of law, and final order.

FINDINGS OF FACT

1. Applications for Permit Nos. 85-07583, 86-07318, and 86-07345, as deemed amended by a letter from the Board described in Finding No. 16, propose establishment of minimum stream flows as follows --

85-07583

Rate of Flow:	3,515 cubic feet per second (“cfs”) from December 1 through July 31; 1,836 cfs from August 1 through November 30.
Location:	Beginning at the confluence of the South Fork Clearwater River and the Middle Fork Clearwater River in Lot 7 (SW ¹ / ₄ NE ¹ / ₄), Section 5, T32N, R4E, B.M. and extending downstream approximately 34 miles to the confluence with North Fork Clearwater River in Lot 8 (NW ¹ / ₄ SE ¹ / ₄ SE ¹ / ₄), Section 33, T37N, R1E, B.M.
Purpose:	Instream use for the protection of fish and wildlife habitat, aquatic life, and recreational uses.
Priority Date:	July 30, 1992.

86-07318

Rate of Flow: 5,750 cfs from November 1 through July 31; 4,350 cfs from August 1 through October 31.

Location: Beginning at the confluence with the North Fork Clearwater River in Lot 8 (NW¹/₄SE¹/₄SE¹/₄), Section 33, T37N, R1E, B.M. and extending downstream approximately 27 miles to the confluence with the Potlatch River in Lot 13 (NW¹/₄SW¹/₄SW¹/₄), Section 7, T36N, R3W, B.M.

Purpose: Instream use for the protection of fish and wildlife habitat, aquatic life, and recreational uses.

Priority Date: July 30, 1992.

86-07345

Rate of Flow: 5,910 cfs from November 1 through July 31; 4,498 cfs from August 1 through October 31.

Location: Beginning at the confluence with the Potlatch River in Lot 13 (NW¹/₄SW¹/₄SW¹/₄), Section 7, T36N, R3W, B.M. and extending downstream approximately 13 miles to the beginning of the backwater from the reservoir behind Lower Granite Dam in Lots 1 and 2 (SW¹/₄NE¹/₄), Section 32, T36N, R5W, B.M.

Purpose: Instream use for the protection of fish and wildlife habitat, aquatic life, and recreational uses.

Priority Date: July 30, 1992.

2. The Board requested that the Idaho Department of Fish & Game (“Fish & Game”) provide specific data pertaining to the Clearwater River to determine the flow rate or rates needed for a minimum stream flow to satisfy biological and aquatic needs.

3. While Fish & Game has not specifically studied the Clearwater River to determine the minimum stream flow required to protect biological and aquatic needs, a study conducted by Donald L. Tennant (“Tennant”), a fisheries biologist employed by the U. S. Fish and Wildlife Service, concluded that based on analyzing several western streams, the percentage of the average annual flow in the stream is related to the quality of the fish and aquatic habitat and the riparian health of the stream. Tennant’s study was submitted as Applicant’s Exhibit No. 2. Table 1 at the top of page 3 of Exhibit No. 2 rates the stream habitat and environmental health quality at various percentages of the mean annual flow.

4. The table on page 3 of Tennant’s report assigns percentages of the mean annual flow for various condition ratings. The percentage of the mean annual flow necessary to maintain a particular condition rating in the stream is different for the October through March

period than it is for the April through September period. During April through September, flows less than 40 percent of the mean annual flow would result in degradation of the fisheries and aquatic condition of the stream. In contrast, during the period of October through March, a flow equal to 40 percent of the mean annual flow is classified as an outstanding flow. A flow equal to 60 percent to 100 percent of the mean annual flow during October through March is classified as an optimum flow.

5. All three minimum stream flow applications seek minimum stream flows equal to 40 percent of the mean annual flow, except when the average monthly flow does not equal or exceed 40 percent of the mean annual flow. For all three minimum stream flows, this period occurs during the months of August through November. During the period when the average monthly flow does not equal or exceed 40 percent of the mean annual flow, the Board seeks minimum stream flows equal to the lowest average monthly flows.

6. Flow data for the Clearwater River is summarized on pages 12 through 23 of Applicant's Exhibit No. 1.

7. Flow data for the upstream reach proposed by Application for Permit No. 85-07583 are depicted on pages 20 through 23 of Applicant's Exhibit No. 1. The graphs are derived from data gathered at a gaging station located near Orofino, Idaho, for the period from 1930 through 1990. Forty percent of the mean annual flow at the Orofino gaging station is 3,515 cfs. During the month of September, however, the average monthly flow is 1,836 cfs. For the months of August through November, the application seeks this lesser flow rate. For the period of December through July, 3,515 cfs is maintainable approximately 70 percent of the time. For the period of August through November, a flow of 1,836 cfs is maintainable approximately 50 percent of the time.

8. Flow data for the reach of the Clearwater River from its confluence with the North Fork Clearwater River to its confluence with the Potlatch River, proposed by Application for Permit No. 86-07318, are depicted on pages 16 through 19 of Applicant's Exhibit No. 1. The graphs are derived from data gathered at a gaging station located near Peck, Idaho. Forty percent of the mean annual flow is 5,750 cfs. During the month of October, however, the average monthly flow is only 4,350 cfs. For the months of August through October, the application seeks this lesser flow rate. During the period of November through July, a flow of 5,750 cfs is maintainable approximately 80 percent of the time. During the period of August through October, a flow of 4,350 cfs is maintainable approximately 70 percent of the time.

9. Flow data for the reach of the Clearwater River from its confluence with the Potlatch River downstream to the beginning of the backwater from the reservoir behind Lower Granite Dam, proposed by Application for Permit No. 86-07345 as deemed amended, are represented by pages 12 through 15 of Applicant's Exhibit No 1. The graphs are derived from data gathered at a gaging station located near Spaulding, Idaho. Forty percent of the mean annual flow is 5,910 cfs. During the month of October, however, the average monthly flow is only 4,498 cfs. As a result, the Board seeks a flow of 4,498 cfs for the months of August through October. During the period of November through July, a flow of 5,910 cfs is maintainable approximately 84 percent of the time. During the period of August through October, a flow of 4,498 cfs is maintainable approximately 60 percent of the time.

10. Fish and Game presented testimony regarding the variety of wildlife and fish along the Clearwater River. The Clearwater River provides habitat for abundant wildlife including waterfowl, songbirds, eagles, osprey, otter, beavers, deer, and moose. In addition rafters, jet boaters, swimmers, and anglers use the river. One of the river's biggest attractions is its steelhead trout. Steelhead up to 20 pounds are common in the river. The Clearwater River is also an important migration corridor not only for steelhead but also for adult and juvenile

Chinook salmon, and the Clearwater River provides spawning and rearing habitat for fall Chinook salmon, which is listed as an endangered species.

11. Applicant's Exhibit Nos. 5, 6, and 7 list junior priority ground water and surface water rights and applications within the Department's administrative basins 84, 85, and 86, with points of diversion located upstream or within the minimum stream flow reaches as originally proposed. One hundred forty-one licenses, permits, and applications bearing priorities later than July 30, 1992, authorize or propose diversions in excess of 99 cfs. Several of the filings propose or authorize diversion for municipal or domestic purposes. Several water rights with later priorities also authorize diversion for industrial, irrigation, fish propagation, recreation, aesthetics, stockwater and wildlife purposes.

12. The most significant filing, is Permit No. 86-07324, held by the City of Lewiston, which authorizes the diversion of 18.60 cfs from the Clearwater River from the lower portion of the minimum stream flow reach originally proposed by Application for Permit No. 86-07345. This permit bears a priority date later than the minimum stream flow.

13. The City of Lewiston and Potlatch Corporation both expressed concern about the minimum stream flow as originally proposed by Application for Permit No. 86-07345. A letter from Don L. Roberts, attorney for the City of Lewiston, submitted to the Department at the hearing, details the City's position and sharply criticizes the minimum stream flows as originally proposed.

14. The letter states that the minimum flows sought exceed the average total flow of the Clearwater River during the months of August, September, and October. Mr. Roberts bases his conclusion on historical records, including those for the time period prior to the construction of Dworshak Dam. Information presented by the Board witness accounted for only the years following the construction of Dworshak Dam and the resulting release of additional water during late summer and fall. The information presented by the Board is more credible regarding the flows that are expected to be available in the future during late summer and fall.

15. The letter from the City of Lewiston raises legitimate concerns about the "impact on the City's ability to grow and to attract new businesses and/or industries." These same concerns were shared by Potlatch Corporation. In addition, there are other communities upstream along the Clearwater River, which may also need additional water for future growth.

16. At the hearing, the parties discussed possible resolution of these issues by terminating the minimum stream flow reach originally proposed by Application for Permit No. 86-07345 at the beginning of the backwater from the reservoir behind Lower Granite Dam. Available evidence does not establish whether the backwater is above or below the points of diversion owned or used by the City of Lewiston and Potlatch Corporation. The backwater of Lower Granite Reservoir is defined by an agreement between the Department and the Idaho Department of Lands as beginning in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 32, T36N, R5W, B.M. This description coincides with Lots 1 and 6 (SW $\frac{1}{4}$ NE $\frac{1}{4}$), Section 32, T36N, R5W, B.M. The Board requested by letter dated November 28, 1995, that the downstream terminus end at this location, effectively amending its original application.

17. The letter from the Board dated November 28, 1995, also requested that any approvals of the three minimum stream flows be conditioned as follows:

This minimum stream flow shall be subject to [subordinate to] future domestic, municipal, commercial and industrial development from the Clearwater River and its tributaries, including ground water, for use within the Clearwater River Basin.

The parties were given a chance to comment regarding the letter.

18. Substantial parcels of privately-owned land parallels the Clearwater River through the proposed minimum stream flow reaches, although the surrounding terrain will not allow large-scale development of these lands.

CONCLUSIONS OF LAW

1. Section 42-1501, Idaho Code, provides that stream flow preservation for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, and water quality, when made pursuant to the minimum stream flow statutes, is in the public interest and is declared to be a beneficial use of such water.

2. Section 42-1503, Idaho Code, sets forth the criteria to be considered by the Department in reviewing an application for minimum stream flow:

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 full, or in part, or upon conditions or rejecting said application. Approval of any such application must be based upon the findings that such appropriation of minimum stream flow:

- (a) will not interfere with any vested right, permit, or water right application with priority of right earlier than the date of receipt in the office of the Director of a complete application for appropriation of minimum stream flow filed under provisions of this act;
- (b) is in the public, as opposed to the 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 gaging stations and bench marks.

3. Tennant's method is not an exact method for determining a minimum stream flow, but provides a reasonable estimate of the minimum flow necessary to sustain stream habitat values.

4. There is development potential for lands located upstream of the proposed minimum stream flows, particularly in the two lower reaches proposed by Applications for Permit Nos. 86-07318 and 86-07345.

5. The downstream end of the minimum stream flow proposed by Application for Permit No. 86-07345 should end at the backwater from the reservoir behind Lower Granite Dam.

Diversion from the Lower Granite Reservoir pool will not conflict with the minimum stream flow.

6. The proposed minimum stream flows should not be used to prevent reasonable and necessary appropriations for municipal purposes, particularly for culinary use, stockwater use, and irrigation of residential lots.

7. Permit No. 86-07324, held by the City of Lewiston, and other permits presently approved for municipal and domestic uses, are of sufficient importance that the development of the permits should be allowed to potentially diminish the proposed minimum stream flows.

8. The Board, as the applicant, requested that if approved the minimum stream flows be subordinate to diversions for domestic, municipal, commercial, and industrial development. The minimum stream flows should be subordinate to these uses as they are defined by the Department in its water appropriation rules.

9. The proposed minimum stream flows should not be used to restrict reasonable development of ground water.

10. The proposed minimum stream flows are necessary for the preservation of fish and wildlife habitat, aquatic life, and recreational uses.

11. The proposed minimum stream flows are the minimum flows and not the ideal or most desirable flows.

12. The proposed minimum stream flows are capable of being maintained as evidenced by flow records.

13. The proposed minimum stream flows will not interfere with any vested water right, permit, or water right application with date of priority earlier than the minimum stream flows.

14. The proposed minimum stream flows are in the public interest.

ORDER

IT IS HEREBY ORDERED that Application for Permit Nos. 85-07583, 86-07318, and 86-07345 are **APPROVED** subject to the following conditions:

1. Approval of Application for Permit Nos. 85-07583, 86-07318, and 86-07345 for minimum stream flows shall not prevent approval of applications for consumptive uses from ground water if the wells are located and constructed to prevent an immediate impact on the river, as determined by the Director.

2. The approved minimum stream flows shall be subordinate to future domestic, stockwater, municipal, commercial, and industrial development from the Clearwater River and its tributaries, including ground water, for use within the Clearwater River Basin where the domestic and stockwater uses are within the limitations of Section 42-111, Idaho Code.

3. The 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 flow rate.

4. Use of water under Permit Nos. 85-07583, 86-07318, and 86-07345 shall recognize and allow the continued beneficial diversion of water under any existing water right established by diversion and application to beneficial use or by an application, permit, or license on file or issued by the Director under the provisions of Chapter 2, Title 42, Idaho Code, with a priority earlier than July 30, 1992.

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

6. Upon further finding and order of the Director that gaging stations are required to maintain the approved minimum flows on the Clearwater River, such measuring devices shall be permanently installed and maintained by the Board as specified by the Director.

7. Proof of instream beneficial use of the minimum stream flow may be submitted immediately upon legislative approval of the permit, but must be submitted no later than March 1, 2006.

IT IS FURTHER ORDERED that the reach of the Clearwater River for Permit No. 85-07583 is described as follows:

Beginning at the confluence of the South Fork Clearwater and the Middle Fork Clearwater River in Lot 7 (SW $\frac{1}{4}$ NE $\frac{1}{4}$), Section 5, T32N, R4E, B.M. and extending downstream approximately 34 miles to the confluence with North Fork Clearwater River in Lot 8 (NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$), Section 33, T37N, R1E, B.M.

IT IS FURTHER ORDERED that the reach of the Clearwater River for Permit No. 86-07318 is described as follows:

Beginning at the confluence with the North Fork Clearwater River in Lot 8 (NW¹/₄SE¹/₄SE¹/₄), Section 33, T37N, R1E and extending downstream approximately 27 miles to the confluence with the Potlatch River in Lot 13 (NW¹/₄SW¹/₄SW¹/₄), Section 7, T36N, R3W, B.M.

IT IS FURTHER ORDERED that the reach of the Clearwater River for Permit No. 86-07345 is described as follows:

Beginning at the confluence with the Potlatch River in Lot 13, (NW¹/₄SW¹/₄SW¹/₄), Section 7, T36N, R3W, B.M. and extending downstream approximately 13 miles to the beginning of backwater from the reservoir behind Lower Granite Dam in Lots 1 and 6 (SW¹/₄NE¹/₄), Section 32, T36N, R5W, B.M.

Dated this 21st day of December, 2001.

Signed

KARL J. DREHER
Director