BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NOS. 36-08596 AND 36-08793 IN THE NAME OF THE IDAHO WATER RESOURCE BOARD	)))))	**PRELIMINARY ORDER**

The Idaho Water Resource Board ("Board" or "applicant") has filed the above captioned applications for permit with the Department of Water Resources ("Department") seeking establishment of minimum stream flows in Billingsley Creek tributary to the Snake River. The applications were filed pursuant to Chapter 15, Title 42, Idaho Code.

The Department provided notice of the applications describing the proposed appropriations and setting the time and place for hearing. Notice was published on August 22 and 29, 2002 in the Gooding County Leader, Gooding, Idaho. The department also provided a press release of the scheduled hearing.

On September 17, 2002, the Department conducted a public hearing in Hagerman, Idaho for the purpose of eliciting testimony regarding the applications. Jerry Rigby of the Idaho Water Resource Board was present and represented the Board. Bill Graham of the Department of Water Resources provided technical information on behalf of the Board. Cindy Robertson of the Department of Fish and Game ("Fish and Game") testified relative to studies and flows of Billingsley Creek. Kevin Lynott and Mary Lucachick, both of the Idaho Department of Parks and Recreation, testified in support of the proposed minimum streamflows. Jim Scott testified as a public witness in support of the proposed minimum streamflows. There was no testimony opposing the applications.

Based upon his understanding of the law and the facts in this matter, the hearing officer enters the following Findings of Fact, Conclusions of Law and Preliminary Order:

FINDINGS OF FACT:

1. Application for Permit No. **36-08596** was filed on June 24, 1991 seeking establishment of a minimum flow in Billingsley Creek tributary to the Snake River in Gooding County. The application was amended on July 11, 2002 to describe subreaches within the reach and to reduce rates of flow within the subreaches. The reach, subreaches, rates of flow and periods of flow, as amended, are described as follows:

Reach: Beginning at the Buckeye Ditch diversion from Billingsley Creek located in the SE1/4SE1/4NE1/4 Section 11, T7S, R13E, B.M. downstream to the confluence of Billingsley Creek with the Snake River located in NE1/4NW1/4SW1/4 Section 11, T7S, R13E, B.M. The reach is comprised

of the following subreaches with the following requested flow rates:

Subreach 1: 75 cubic feet per second ("cfs") from April 1 to September 30 and 135 cfs from October 1 to March 31 beginning immediately downstream of the Buckeye Ditch diversion from Billingsley Creek located in the SESENE Section 11, T7S, R13E, B.M. downstream to the Padgett Ditch diversion from Billingsley Creek located in the NWSENE Section 11, T7S, R13E, B.M., being a distance of approximately 0.3 miles.

Subreach 2: 50 cfs from April 1 to September 30 and 100 cfs from October 1 to March 31 beginning immediately downstream of the Padgett Ditch diversion downstream to the Idaho Power Company Ditch diversion located in the NWSWNE Section 11, T7S, R13E, B.M., being a distance of approximately 0.4 miles.

Subreach 3: 30 cfs from January 1 to December 31, beginning immediately downstream of the Idaho Power Company Ditch diversion downstream to the confluence of Billingsley Creek with the Snake River located in the NENWSW Section 11, T7S, R13E, B.M., being a distance of approximately 0.5 miles.

The purpose of the application is to provide for wildlife habitat, for fish passage, rearing and spawning habitat for fish, and for aesthetic and recreational purposes.

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

2. Application for Permit No. **36-08793** filed on July 16, 1999 also sought establishment of a minimum flow in Billingsley Creek tributary to the Snake River. The application was amended on July 11, 2002 reducing the requested rate of flow and changing the period of use in Subreach A. The subreaches, rates of flow and periods of flow, as amended, are described as follows:

Subreach A: 26 cfs from March 1 to October 31 and 40 cfs from November 1 to February 29 beginning at the hatchery access bridge in the SENWSW Section 30, T7S, R14E, B.M. downstream to the section line between Sections 19 and 30 (NENWNW Section 30), T7S, R14E, B.M., being a distance of approximately 0.75 miles.

Subreach B: 100 cfs from January 1 to December 31 beginning at the Johnson Grade bridge in the SENWNE Section 13, T7S, R13E, B.M. downstream to the Buckeye Ditch diversion from Billingsley Creek, being a distance of approximately 1.5 miles.

The purpose of the application is to provide for wildlife habitat, for fish passage, for rearing and spawning habitat for fish, and for aesthetic and recreational purposes.

3. Exhibits offered and accepted as a part of the record include the following:

a. Applicant's Exhibit 1 - Power Point presentation (33 slides titled as follows)

Slide 1 - Billingsley Creek Minimum Stream Flow Applications
Slide 2 - Billingsley Creek, Hagerman Valley
Slide 3 - Billingsley Creek Minimum Stream Flow Reaches
Slide 4 - Billingsley Creek Minimum Stream Flow Application Data
Slide 5 - Billingsley Creek Minimum Stream Flow Application Data
Slide 6 - Billingsley Creek Minimum Stream Flow Application Data
Slide 7 - Billingsley Creek Minimum Stream Flow Application Data
Slide 8 - Billingsley Creek Water Rights Summary
Slide 9 - Billingsley Creek Water Rights Summary
Slide 10 - Buckeye Ditch to the Mouth Calculation of Flow Estimates
Slide 11 - Flow Estimates for Buckeye Ditch to Padgett Ditch (Reach 1)
Slide 12 - Exceedance Curve for Buckeye Ditch to Padgett Ditch (Reach 1) - April to October
Slide 13 - Exceedance Curve for Buckeye Ditch to Padgett Ditch (Reach 1) - November to March
Slide 14 - Flow Estimates for Padgett Ditch to IPCO Ditch (Reach 2)
Slide 15 - Exceedance Curve for Padgett Ditch to IPCO Ditch (Reach 2) - April to October
Slide 16 - Exceedance Curve for Padgett Ditch to IPCO Ditch (Reach 2) - November to March
Slice 17 - Flow Estimates for IPCO Ditch to the Mouth (Reach 3)
Slide 18 - Exceedance Curve for IPCO Ditch to the Mouth (Reach 3)
Slide 19 - Idaho Water Resource Board Recommended Changes to Water Right Application Number 36-08596
Slide 20 - Billingsley Creek Minimum Stream Flow Application Data
Slide 21 - Billingsley Creek Minimum Stream Flow Application Data
Slide 22 - Billingsley Creek Water Rights Summary
Slide 23 - Billingsley Creek Water Rights Summary
Slide 24 - Reach A - Calculation of Flow Estimates
Slide 25 - Flow Estimates for Reach A
Slide 26 - Exceedance Curve for Reach A (March to October)
Slide 27 - Exceedance Curve for Reach A (November to February)
Slide 28 - Billingsley Creek Minimum Stream Flow Application Data
Slide 29 - Billingsley Creek Water Rights Summary
Slide 30 - Billingsley Creek Water Rights Summary
Slide 31 - Reach B - Calculation of Flow Estimates
Slide 32 - Flow Estimates for Reach B
Slide 33 - Exceedance Curve for Reach B

b. Applicant's Exhibit 2 - Power Point presentation (11 slides titled as follows)

Slide 1 - Billingsley Creek
Slide 2 - Fish and Wildlife Species in Billingsley Drainage
Slide 3 - Species in Billingsley Creek Drainage
Slide 4 - Fishing Regulations on Billingsley Creek
Slide 5 - Fish Habitat Analysis
Slide 6 - Habitat Modeling Basics
Slide 7 - Suitability Index
Slide 8 - Suitability Index
Slide 9 - Rainbow Trout Habitat in Billingsley Creek - Below Highway 30
Slide 10 - Rainbow Trout Habitat in Billingsley Creek - Below Jones Hatchery
Slide 11 - Bypass Flows

4. The flows requested are based on streamflow measurements taken by Fish and Game during the 1996 to 2001 period and on water right diversion information from the records of the Department of Water Resources. The requested flows sought in the subreaches of Billingsley Creek are equaled or exceeded as shown below:

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Subreach 1 (75 cfs - April through October)	- 66% of the time
Subreach 1 (135 cfs - November through March)	- 60% of the time
Subreach 2 (50 cfs - April through October)	- 55% of the time
Subreach 2 (100 cfs - November through March)	- 80% of the time
Subreach 3 (30 cfs - January through Dec)	- 59% of the time

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Subreach A (26 cfs - March through October)	- 50% of the time
Subreach A (40 cfs - November through February)	- 87% of the time
Subreach B (100 cfs - January through Dec)	- 99% of the time

5. Habitat modeling studies conducted by Fish and Game for rainbow and brown trout in Billingsley Creek, show that optimum habitat in terms of water depth and water velocity occurs at flows of 90 cfs to 150 cfs.

6. All rights acquired under amended Application for Permit No. 36-08596 are for instream non-consumptive uses and are subject to all vested water rights, permits or applications for permit having a date of priority earlier than June 24, 1991.

7. All rights acquired under amended Application for Permit No. 36-08793 also are for instream non-consumptive uses and are subject to all vested water rights, permits or applications for permit having a date of priority earlier than July 16, 1999.

8. Fish and Game testified that fish and wildlife species in the Billingsley Creek drainage include rainbow trout, brown trout, mule deer, pheasants, quail, Canadian geese,

mallard ducks, pintail ducks, gadwall ducks, teal, raptors, coyote, red fox and other assorted wildlife.

9. The applicant changed the requested rates of flow and seasons of use for application 36-08596 in Subreaches 1 and 2. The changes did not enlarge the amount of water sought as minimum streamflows. (See Applicant's Exhibit 1, Slide 19)

10. There are a number of locations along Billingsley Creek in the requested minimum stream flow reaches that provide access to the general public.

11. Public witnesses appearing at the hearing supported the minimum stream flow applications. There was no opposition to the approval of the applications.

CONCLUSIONS OF LAW:

1. Chapter 15, Title 42, 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 this statute, is in the public interest and is declared to be a beneficial use of such water.

2. The proposed minimum stream flows under amended Application for Permit No. 36-08596 and amended Application for Permit No. 36-08793 are for instream non-consumptive uses and are subject to all vested water rights, permits or applications for permit having dates of priority earlier than June 24, 1991 and July 16, 1999, respectively.

3. The flows requested in the applications are the minimum flows required to preserve the existing unique characteristics of the stream for the public benefit, and are not the ideal or most desirable flows that could be utilized for these purposes.

4. The proposed minimum stream flows are in the public, as opposed to private, interest.

5. The minimum stream flows requested in the applications are necessary to protect fish and wildlife habitat and aesthetic and recreational values.

6. The proposed minimum stream flows as approved in this preliminary order are generally capable of being maintained.

7. The Department should approve the applications and should issue water right permits.

ORDER:

IT IS, THEREFORE, HEREBY ORDERED that Applications for Permit Nos. 36-08596 and 36-08793 in the name of the Idaho Water Resource Board are **APPROVED** subject to the following conditions:

1. Use of water under Permit Nos. 36-08596 and 36-08793 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 priority dates earlier than June 24, 1991 and July 16, 1999, respectively.

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

3. Upon the future finding and order of the Director that gaging stations are required to administer the approved minimum stream flows, the right holder shall permanently install and maintain gaging stations as specified by the Department.

4. 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.

5. 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.

6. These minimum stream flows are to provide for wildlife habitat, for rearing and spawning habitat for fish, for fish passage, and for aesthetic and recreational purposes.

7. The reach, subreaches and minimum stream flows of Billingsley Creek hereby approved for Application for Permit No. **36-08596** are described as follows:

Reach: Beginning immediately downstream of the Buckeye Ditch diversion from Billingsley Creek located in the SE1/4SE1/4NE1/4 Section 11, T7S, R13E, B.M. downstream to the confluence of Billingsley Creek with the Snake River located in NE1/4NW1/4SW1/4 Section 11, T7S, R13E, B.M. The reach is comprised of the following subreaches with the following requested flow rates:

Subreach 1: 75 cfs from April 1 to October 31 and 135 cfs from November 1 to March 31 beginning immediately downstream of the Buckeye Ditch diversion from Billingsley Creek located in the SESENE Section 11, T7S, R13E, B.M. downstream to a point immediately upstream of the Padgett Ditch diversion from Billingsley Creek

located in the NWSENE Section 11, T7S, R13E, B.M., being a distance of approximately 0.3 miles.

Subreach 2: 50 cfs from April 1 to October 31 and 100 cfs from November 1 to March 31 beginning immediately downstream of the Padgett Ditch diversion downstream to a point immediately upstream of the Idaho Power Company Ditch diversion located in the NWSWNE Section 11, T7S, R13E, B.M., being a distance of approximately 0.4 miles.

Subreach 3: 30 cfs from January 1 to December 31, beginning immediately downstream of the Idaho Power Company Ditch diversion downstream to the confluence of Billingsley Creek with the Snake River located in the NENWSW Section 11, T7S, R13E, B.M., being a distance of approximately 0.5 miles.

8. The subreaches and minimum stream flows of Billingsley Creek hereby approved for Application for Permit No. **36-08793** are described as follows:

Subreach A: 26 cfs from March 1 to October 31 and 40 cfs from November 1 to February 29 beginning at the hatchery access bridge in the SENWSW Section 30, T7S, R14E, B.M. downstream to the section line between Sections 19 and 30 (NENWNW Section 30), T7S, R14E, B.M., being a distance of approximately 0.75 miles.

Subreach B: 100 cfs from January 1 to December 31 beginning at the Johnson Grade bridge in the SENWNE Section 13, T7S, R13E, B.M. downstream to a point immediately upstream from the Buckeye Ditch diversion from Billingsley Creek, being a distance of approximately 1.5 miles.

9. 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.

10. Proof of instream beneficial use of the minimum flows appropriated ("proof") shall be submitted in a manner approved by the Department on or before **October 1, 2004**. 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.

Dated this ____2nd___ day of _____October_____, 2002.

_____/signed/_____
L. GLEN SAXTON, P.E.
Hearing Officer