BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS TO APPROPRIATE WATER NOS. 11-7481 AND 11-7491 IN THE NAME OF SAM'S HOLLOW WATER COMPANY	**)**	**AMENDED PRELIMINARY ORDER**

On October 8, 2003, a hearing was conducted by the Idaho Department of Water Resources (IDWR) for the contested case created by protests filed against the above applications to appropriate water. After considering the testimony, the exhibits, and additional information in the files of IDWR, the hearing officer ordered that the record be augmented with additional information about availability of water in Fish Haven Creek delivered by the Fish Haven Water Users Company, and also the means of measurement and administration of future water diversions and deliveries for mitigation. Sam's Hollow Water Company (Sam's Hollow) submitted additional information.

On April 23, 2004, IDWR issued a Preliminary Order regarding application to appropriate water nos. 11-7481 and 11-7491. Sam's Hollow filed a timely petition for reconsideration of the preliminary order on May 6, 2004.

The petition challenges findings of fact, conclusions of law, and portions of the order. Each challenge will be restated and addressed in the following section. The restatement of the challenge refers to the decision paragraph in question. The response follows the restatement.

PETITION FOR RECONSIDERATION

Finding no. 25 issue: Finding of Fact 25 incorrectly states that the applicant's mitigation plan proposes "a measurement of surface water diverted and delivered to the subdivision."

Response: As per the applicant's representation, measurement of surface water supply is not proposed as part of the mitigation plan, and the reference will be stricken.

Finding no. 26 issue: Finding of Fact 26 should contain additional flow data measured by Dr. Robert W. Hill (Hill). IDWR should conclude that these measurements establish "it is highly unlikely available summer flows in Fish Haven Creek would be much if ever less than 5.0 cfs, far in excess of water is needed to meet full mitigation requirements."

Response: Flow data submitted by Hill and Dr. Charles E. Brockway (Brockway) were submitted to IDWR in response to the order requiring augmentation of the record. The petition for reconsideration mentions the flow data submittal in reference to finding no. 26 and findings 48 and 49.

The flow data submitted by Hill and Brockway is contained in a table on page 4 of the *Applicant's Response to Order for Augmentation of the Record*. On April 23, 2002, C.E. Brockway measured 3.70 cfs in the "No 3" ditch, presumably the #3 North Ditch. On June 26, 2003, C.E. Brockway measured 4.3 cfs in the "Lower South" ditch, presumably the #2 South Ditch. No other flows were measured on these days, and there is no other indication in the record whether water was flowing in any of the other ditches.

On October 8, 2003, Hill recorded information about the Upper North Ditch, the #3 North Ditch, and the #1 North Ditch. Two flow values are recorded for the Upper North Ditch. One flow value is recorded for the #3 North Ditch and one flow value is recorded for the #1 North Ditch. The third column of the table is titled "Flume and Head." The column boxes for the #3 North Ditch and the #1 North Ditch both contain the words "dry" and "high water." The narrative following the table discusses determination of flows using "high water marks on the flumes." Without any additional information, the most logical conclusion is that Hill determined the head in a dry measuring flume based on a high water mark at the approximate point of measuring head. There was probably no water in the flumes at the time of the reading.

Interpretation of the Upper North Ditch readings is more troubling. The first box in the "Flume and Head" column for the Upper North Ditch describes the flume and a measured head in the flume. There is no indication whether the recorded flow is based on a measurement of actual water head in the flume. The second box in the "Flume and Head" column for the Upper North Ditch uses the words "high water" and specifies an increased head of water. If water was flowing in the measuring flume during the first measurement, it is possible that the headgate could have been adjusted to divert additional "high water." It is more likely, however, based on the pattern of dry, high water estimates in the #3 North and the #1 Ditches that Hill also measured a high water mark above the observed flow in the flume and calculated the maximum flow based on the dry high water mark, not actual flow.

The narrative following the table states that Hill estimated that "there appeared to be about half as much flow in the creek, downstream of the Upper North Diversion, as in the Upper North flume." The remaining flow in the stream was not measured, however. The narrative states that "about 5.0 cfs (3.3 + 1.7) cfs was in the stream below the Upper North Diversion." This statement is not consistent with the prior statement. The measured flow in the Upper North Ditch was 3.3 cfs, leaving an estimated 1.7 flowing in Fish Haven Creek. The narrative states that there was some water in one of the south ditches that was not measured, and Fish Haven Creek was dry "at the highway crossing." The flow in Fish Haven Creek was 3.3 cfs plus some additional unknown amount. There may not have been any more water available for beneficial

use. At best, the information marginally corroborates the Fish Haven Creek measurement by Hill in July 2003, and may actually reflect declines in the Fish Haven Creek flows.

There was no measurement of Fish Haven Creek flows, and one cannot add 3.3 cfs, 5.3 cfs, and 5.3 cfs, and conclude that there was 13.9 cfs flowing in the three north ditches on October 8, 2003.

Gaps or conflicts in the tabular and narrative explanations of the data raise enough doubts about the data that it was not used in the original preliminary order. Again, at best, the information reflects a flow rate of from 3.2 to possibly 5.0 cfs in all of Fish Creek on October 8, 2003.

Finding no. 27 issue: Characterization of Leon Howell's testimony as "information about historic flows" should be "clarified that Howell has taken no measurements, has no historic flow data, and provided general testimony concerning historic flows based only upon his visual observation of creek flows."

Response: Howell's long time acquaintance with flows of Fish Haven Creek and his many years as a water user and an officer of the Fish Haven Water Users Company qualify him to testify about historical water availability. The discounting language requested is not accepted by the hearing officer.

Finding no. 30 issue: Finding 30 should clarify that a full amount of water to all the ditches all the time means five cfs for all five ditches.

Response: Finding 30 is almost a direct quote of Howell's testimony. The intent of the statement is not different from the clarification offered by counsel. The quantity of 5.0 cfs for each of the five ditches (25.0 cfs total) is an approximation because water flows in the ditches have not been measured historically. The additional clarifying language is added as an approximation of the flow that the Fish Haven Water Users Company tries to divert to the ditches when there is sufficient water to supply the flow.

Finding no. 32 issue: The hearing officer should expressly discount the testimony of Leon Howell by finding that his testimony was only based on "visual observation," he "never performed any measurements," he "has no education or experience as an engineer or hydrologist," and he is "unfamiliar with and did not understand the terms 'consumptive use' or 'depletion.'

Response: Howell's qualifications and the reasons for accepting his testimony are explained in finding of fact 29. The reason for Howell's expression of concern about sufficiency of water is contained in the second sentence of finding of fact no. 32, which restates Howell's testimony almost verbatim that "during some years, water was taken out of the upper ditches, and the *upper north* and upper south *ditch*es *received absolutely no water the entire year*." The hearing officer listened to this part of the record several times, listened to the cross examination of Howell, and the testimony of other witnesses who might have known or contributed

information related to Howell's testimony about water availability. His testimony was unchallenged in cross-examination and it was uncontroverted in the record. The majority of the shares held by Johnson on behalf of Sam's Hollow are associated with the Upper North Ditch. It is not clear in the record why the water was not delivered to the Upper North Ditch during some years, but it was not. Nondelivery of water for shares associated with the Upper North Ditch would jeopardize the ability of Sam's Hollow to fully mitigate after substantial build out. The finding of fact will stand without amendment.

Finding no. 37 issue: The hearing officer improperly discounted the weight that should be given to the affidavits of Dunford and Transtrum.

Response: The hearing officer in any contested matter is responsible for weighing the evidence. In assigning more or less weight to evidence, the hearing officer should explain the reasons for the weight given. The decision states that the affidavits can be reconciled with Howell's testimony but gives greater weight to Howell's testimony about historical availability of water. Finding of fact 37 explains the reasons for the assignment of weight. Finding of fact 37 will not be amended.

Finding no. 38 issue: Finding of fact 38 is inconsistent with finding of fact 30 because it doesn't absolutely establish the flows in a good water year as water in all of the ditches all of the time at a rate of 5.0 cfs for each of the five ditches.

Response: Finding of fact 38, along with findings of fact 39 and 40 attempt to generally discuss three groupings of water years: good water years, typical water years, and poor water years. These groupings are not absolute. Howell's estimate of a good water year "once in every 20 years" is not absolute either. Nonetheless, the reference in finding of fact no. 38 to a 20-year "good water year" recurrence is redundant, and will be eliminated.

Finding no. 40 issue: The determination of water availability during poor water years should expressly discount testimony of Howell by stating that it was based on "his visual observation, not based upon any measurements or flow data." The reference to water unavailability in the Upper South Ditch is irrelevant.

Response: The basis for the determination of water availability and the weight given to Howell's testimony is explained in the decision and previous responses. No further discussion of Howell's testimony is necessary in Finding of fact 40. The reference to the Upper South Ditch will be eliminated.

Finding no. 45, 46, and 47 issue: The findings misinterpret the evidence and testimony of Brockway and therefore are clearly erroneous.

Response: The hearing officer reviewed the testimony of Brockway about Applicant's Exhibit no. 13 twice after hearing the testimony first-hand. Despite reviewing the testimony, the hearing officer could not reconcile the computations in the exhibit with the testimony of Brockway and other witnesses given at the hearing. Confusion about Applicant's Exhibit 13 was

one of the main reasons the hearing officer asked that the record be augmented. The modifications to Applicant's Exhibit No. 13 did not reconcile the conflicts. The confusion is explained in findings of fact nos. 46 and 47. In addition, the computations are based primarily on assumed numbers and some information gleaned from Leon Howell prior to the hearing, a witness whose testimony the applicant is attempting to discredit. Finding of fact nos. 45, 46, and 47 will not be amended.

Finding no. 48 & 49 issue: Brockway's assumption of 0.59 cfs is approximately 10 percent of the flow measured in Fish Haven Creek by Hill in July 2003 and the 13.9 cfs he measured in October of 2003, and even at these low flow rates, there is sufficient water to satisfy the mitigation requirement 100% of the time.

Response: Hill's measurements have previously been discussed. There is no evidence that 13.9 cfs was measured and flowing in Fish Haven Creek in October 2003. Howell testified that there were years when no water was delivered to the Upper North Ditch during the entire irrigation season. While 0.59 cfs is a smaller flow rate of water than those previously assumed, delivery of 0.59 cfs still assumes continuous flow in all three north ditches for the entire irrigation season without rotation from ditch to ditch and does not take into account Howell's testimony about a shortage of water in some years for the Upper North Ditch. The addition of the reduced, but assumed, flow rate does not sufficiently rehabilitate Applicant's Exhibit no. 13.

Finding no. 50 issue: A statement about the tolerance of domestic users to curtailment is in error and is not supported by the evidence.

Response: The purpose of administrative law is to bring the expertise of the agency to bear on the decision making process. In reviewing the sufficiency of water and public interest issues, IDWR should determine whether an approval that will result in curtailments because water is not always available would serve the public interest. Sensitivity to curtailment should be a factual issue considered by IDWR in determining whether an application should be approved. Applicant's Exhibit no. 13 does not accurately predict water deliveries during a poor water year. The decision will be amended, however, to reflect that the exhibit does establish water availability during most years.

Finding no. 51 issue: Finding of fact no. 51 is a conclusion of law because it determines that water is available in most years. The finding should state that water is "sufficient in all years."

Response: Finding of fact no. 51 is a fact determined by the hearing officer after considering the testimony and evidence presented. The related conclusion of law is set forth in the Conclusions of Law portion of the decision.

Finding no. 53 issue: The equation used for determining draw down effects of the Sam's Hollow wells should be titled "Theis" not "Tyce."

Response: The misspelling is corrected.

Finding no. 59 issue: The testimony of Con Gerdis is accurate in a general sense, but additional language, as set forth in the petition, should be added.

Response: The suggested text may be accurate but adds no definitive information valuable for the decision.

Conclusion no. 10 issue: The conclusion should state that there are always sufficient surface water flows to provide mitigation. This argument is supported by previously stated arguments about the findings of fact.

Response: Conclusion of Law 10 is based on findings of fact previously discussed. The conclusion of law will not be amended.

Conclusion no. 11 issue: A conclusion that domestic users of water do not tolerate curtailment of their domestic uses of water is not accurate and cannot be supported by facts at the hearing.

Response: The conclusion of domestic sensitivity to curtailment has been previously discussed and will not be amended.

Conclusion no 12 issue: Conclusion no. 12 improperly states there is a lack of certainty about sufficient mitigation water. Even if there is uncertainty, the mitigation plan provides for addressing the uncertainty.

Response: The reasons for the lack of certainty have already been explained in the findings and the above text. Additional conditions are necessary to address uncertainty and to force attention to the supply side of the proposed mitigation.

Conclusion no. 13 issue: Forecasting water supply is an uncertain endeavor that is rarely accurate. Sam's Hollow should not be required to forecast stream flows in Fish Haven Creek.

Response: The term "forecast" refers to a determination of availability of surface water in Sam's Hollow Creek based on some scientific analysis or historical record. During the early years of development, a determination of water availability may be very simple. As the subdivision continues to develop, additional data can be gathered to more accurately predict water availability. As the development approaches full build out, this additional data can be used to predict any possible water shortages. Forecasting, as explained, is not an onerous burden, but simply requires Sam's Hollow to review indicators of water availability and apprise its users of possible shortages during the upcoming water use period.

Conclusion no. 14, 15, 16, and 17 issue: These quotations of statutory language are unnecessary.

Response: The quotes are statutes, and are relevant to conditions in the Order. The conditions will be discussed later.

Conclusion no. 18 issue: Curtailment of a statutory claim is "inconsistent with historical administration of water in the Bear River Drainage by the Water Master."

Response: Nonregulation of the tributaries to the Bear River in the past is not, by itself, protection against regulation as required by statute.

Order Condition no. 3 issue: There is no legal basis for IDWR to "impose a condition mandating that 'project construction shall commence within one year,' or requiring that construction 'proceed diligently to completion.'"

Response: Idaho Code § 42-204 states:

> Every holder of a permit which shall be issued under the terms and conditions of an application filed hereafter appropriating twenty-five (25) cubic feet or less per second must, within one (1) year from the date upon which said permit issues from the office of the department of water resources, commence the excavation or construction of the works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted through no fault of the holder of such permit by circumstances, over which he has no control.

Order Condition no. 4(a) and (b) issue: Forecasting of water availability is not necessary and unduly burdensome.

Response: Forecasting will focus early attention on the possible need for conservation and possible curtailment.

Order Condition no. 4(c),(d),(e),(f),(g) issue: The provisions for curtailment, responsibility for oversight and curtailment, design and location of measuring devices and delivery works, and the frequency of measuring and reporting are contained in the mitigation plan, and the requirement that these be included in a water management and operation plan is redundant and burdensome.

Response: The mitigation plan generally describes these activities, but does not provide sufficient detail for future subdivision activities and IDWR review. The water management and operation plan will provide this additional detail.

Order Condition no. 7 issue: There is no need to seek IDWR approval of a transfer for mitigation or placing water in the water supply bank for mitigation.

Response: Diversion of water for a mitigation use under an irrigation water right is not

authorized by the water rights. The diversion of water for mitigation purposes must be recognized by the beneficial use description of the water right.

Order Condition no. 10 issue: An owner of a lot or several lots should be entitled to irrigate the lot(s) even though no home is built on the lot(s).

Response: IDWR has applied the definition of domestic contained in Idaho Code § 42-111. Irrigation beyond the domestic limitations should be described as an irrigation use component in the water right. Idaho Code § 42-111 allows the diversion of up to 2,500 gallons per day for irrigation not associated with a home. The condition will be changed to allow irrigation of ½ acre per day associated with a constructed home on a single lot, or a total use of 2,500 gallons per day for all uses by a single landowner regardless of the number of lots owned or whether a home is built.

Based on the above analysis, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application to appropriate water no. 11-7481 was filed with IDWR by Sam's Hollow Water Company (Sam's Hollow) on November 8, 2001. The application seeks the appropriation of ground water for domestic, commercial, and irrigation purposes for Phase I of the Bear Lake Haven Subdivision (the subdivision), located on the up-sloping foothills just west of Fish Haven, Idaho.

2. Application to appropriate water no. 11-7481 proposes the following:

Flow Rate:		**Uses**:		
Domestic	1.33 cfs	Purpose of Use:		Domestic
Commercial	0.02 cfs	Purpose of Use:		Commercial
Total:	1.35 cfs	Period of Use:		Year-round
Points of Diversion:		SWSE	Section 10	T16S, R43E
		SESW	Section 11	
		NWNE	Section 15	
Domestic Place of Use:		S1/2SE	Section 10	T16S, R43E
		SWSE, S1/2SW	Section 11	
		NWNE	Section 14	
		NE1/4	Section 15	
Commercial Place of Use:		SWSE	Section 11	T16S, R43E
		NWNE	Section 14	

3. After publication, application no. 11-7481 was protested by PacifiCorp, the United States Fish & Wildlife Service, and Leon Howell.

4. Because of a larger dispute about the conjunctive management of ground water and surface water in the Bear River Basin, and protests filed against many applications to appropriate water, IDWR encouraged the existing water right holders and potential future water

users to propose a management plan for the administration of existing water rights and the processing of new applications to appropriate water in the Bear River Basin. The IDWR delayed processing of application no. 11-7481 while the Bear River Management Plan was being developed.

5. On January 11, 2002, Sam's Hollow filed application to appropriate water no. 11-7491. Application no. 11-7491 proposes additional diversion of ground water for domestic use in Phase II of the subdivision.

6. Application no. 11-7491 proposes the following:

Flow Rate: 1.22 cfs	**Purpose of Use**: Domestic		
Period of Use: Year-round			
Points of Diversion:	NWSW	Section 2	T16S, R43E
	SWNE	Section 10	
	NWNW	Section 11	
Place of Use:	NWSE, SW1/4	Section 2	T16S, R43E
	NE1/4	Section 10	
	W1/2NE, N1/2NW	Section 11	

7. Application no. 11-7491 was not immediately published because of the pending proposal for and adoption of the management plan.

8. On February 24, 2003, IDWR adopted a management plan for the Bear River Basin. The Bear River Management Plan (hereinafter referred to as "the management plan") is made a part of the hearing record, and is incorporated therein.

9. The management plan provides that existing applications will be considered by IDWR if the applicant submits a mitigation plan for depletions of Bear River Basin water. A simplified method of satisfying mitigation requirements is detailed on page 7 of the plan. For domestic and commercial uses, a cited standard for determining depletions for domestic and commercial uses is "Procedures for Estimating Depletions in the Bear River Basin in Idaho" prepared by Robert W. Hill (Hill) of Utah State University. This document, referred to in the management plan, was amended after the management plan was adopted by IDWR. The latest version of the procedural guidelines for determining depletions is dated January 27, 2003, and was received into evidence as Applicant's Exhibit No. 18.

10. Sam's Hollow filed a plan of mitigation to satisfy the additional requirements of the management plan. The plan of mitigation followed the guidelines for submitting a simplified plan.

11. After adoption of the management plan, IDWR published notice of application no. 11-7491. After publication, application no. 11-7491 was protested by PacifiCorp, Bear Lake Watch, Inc., Leon Howell, and the St. Charles Irrigation Company.

12. A hearing was conducted on October 8, 2003 for the contested case. Prior to commencement of the hearing, Bear Lake Watch, Inc. withdrew its protest to application no. 11-7491 and the U.S. Fish & Wildlife Service withdrew its protest to application no. 11-7481.

13. The following exhibits were received into evidence at the hearing, unless otherwise noted below. The applicant was the only party that offered exhibits.

Applicant's Exhibit No.	Description of the Exhibit
1	Articles of Incorporation of Sam's Hollow Water Company
2	Internal Revenue Service Tax Exemption Letter for Sam's Hollow Water Co.
3	Development and Operating Agreement between Sam's Hollow Water Co. and C. Howard Johnson
4	Agreement between Fish Haven Water Users Co., Sam's Hollow Water Co., and C. Howard Johnson
5	Plats, maps, and aerial photos of the proposed development
6	Application for Permit no. 11-07481 and supporting documents
7	Application for Permit no. 11-07491 and supporting documents
8	Affidavit of Glen Transtrum
9	Affidavit of Hulme Dunford
10	Guidelines for Mitigation of New Groundwater Development in the Lower Bear River Basin in Idaho
11	Well Pumping Test Reports
12	*Not offered into Evidence*
13	Fish Haven Water Users Co. Water Shares & Water Availability
14	Depletion Analysis and Narrative
15	*Not offered in evidence*
16	Letter Requesting Change of Ownership of Stock Certificates
17	Settlement Agreement
18	Procedures for Depletion by Robert W. Hill, January 27, 2003

14. At the hearing, PacifiCorp executed a settlement agreement with Sam's Hollow that resulted in a withdrawal of its protest. Nonetheless, the parties agreed that PacifiCorp could present expert testimony at the hearing that would corroborate some of the information presented by the applicant. The settlement agreement was received into evidence as Applicant's Exhibit No. 17.

15. Connie Gerdis (Gerdis), a partner in the Bear Lake Haven development, estimated that total build-out of the proposed development will take approximately 20 years. Gerdis also stated, however, that total build-out may take longer than 40 years.

16. Gerdis testified that C. Howard Johnson (Johnson), his partner and principal developer of the subdivision, owns approximately 700 acres on the slopes west of Fish Haven that are proposed for the Bear Lake Haven development. He also testified that Johnson owns 140.5 shares of stock in the Fish Haven Water Users Company. The Fish Haven Water Users Company is a non-profit corporation that delivers surface water diverted from Fish Haven Creek

to its shareholders. The Fish Haven Water Users Company claims it perfected a right through beneficial use of the water from Fish Haven Creek. The company filed a statutory claim for its use of water, numbered in IDWR files as 11-4022.

17. Statutory claim no. 11-4022 was filed by Fish Haven Water Users Company under Idaho Code § 42-243 as a water right perfected by beneficial use. Claim no. 11-4022 asserts a right to divert 29.6 cfs from Fish Haven Creek and a spring tributary to Fish Haven Creek for the irrigation of 1212 acres. The lands proposed for development in the subdivision lie within the area served by Fish Haven Water Users Company.

18. Dr. Charles Brockway (Brockway) testified that approximately 120 acres are irrigated with Fish Haven Water Users Company water within 700 acres owned by Johnson, and proposed for development. Johnson owns approximately 1.1 shares per irrigated acre.

19. The mitigation plan offered by Sam's Hollow proposes retirement of irrigated acreage as the proposed subdivision develops. The portion of Johnson's Fish Haven Water Users Company water that would have irrigated the retired acreage will be delivered to Bear Lake.

20. Sam's Hollow, Fish Haven Water Users Company, and Johnson, executed an agreement in which Fish Haven Water Users Company consents to the use of a portion of its water right for mitigation purposes. The agreement was received into evidence as Applicant's Exhibit No. 4. The agreement requires that any water used for mitigation must continue to be diverted through the ditches of the Fish Haven Water Users Company as the water has traditionally been delivered and that Johnson must follow the traditional scheme of rotation. Once the mitigation water has been diverted through the Fish Haven Water Users Company ditches, it will be delivered to Bear Lake.

21. Fish Haven Water Users Company delivers water to its shareholders through five ditches. The locations of the ditches are depicted on Applicant's Exhibit No. 5. Three ditches divert water from the north bank of Fish Haven Creek. The northern ditches in upstream-to-downstream order are: Upper North Ditch, #1 North Ditch, and #3 North Ditch. Two ditches divert water from the south bank of Fish Haven Creek. The southern ditches in upstream-to-downstream order are: Upper South Ditch, and #2 South Ditch.

22. Water delivered to Johnson is diverted from the north side of the creek through the Upper North Ditch, the #1 North Ditch, and the #3 North Ditch. Johnson owns shares associated with each ditch as follows:

Upper North Ditch	99.5 shares of stock
#1 North Ditch	20 shares of stock
#3 North Ditch	21 shares of stock

23. At full build-out, Brockway determined that Sam's Hollow must reduce its consumption of surface water by 110 acre-feet. Based on the procedures for estimating

depletions developed by Hill, Sam's Hollow would be required to cease irrigating 90 of the 120 acres presently irrigated.

24. The mitigation plan offered by Sam's Hollow contemplates a staged retirement of irrigated acreage and delivery of surface water to Bear Lake to compensate for the staged development. As additional homes are built, and the diversion of ground water increases, additional surface water will be delivered to Bear Lake.

25. The mitigation plan proposes measurement of ground water diverted to the developed portion of the subdivision and measurement of the amount of water delivered to Bear Lake for purposes of mitigation.

26. Robert W. Hill (Hill) testified that on July 30, 2003, he measured the flow in Fish Haven Creek above all diversions. The measured flow was 5.39 cubic feet per second.

27. Information about historical flows and patterns of diversion was presented from four sources: Leon Howell, Glenn Transtrum (Transtrum), J. Hulme Dunford (Dunford), and Brockway. Leon Howell testified directly from his personal knowledge and observations. Information from Transtrum and Dunford was submitted as affidavits. The affidavits were received into evidence after the protestants stipulated to their admission. Transtrum and Dunford did not testify. Finally, Brockway testified about historical flows and patterns of delivery after talking to Leon Howell and other shareholders or officers of Fish Haven Water Users Company.

28. Dunford farmed and irrigated the Johnson property from 1982 through 1997. Transtrum farmed and irrigated the Johnson property from 1998 through 2003. Both affidavits contain verbatim statements about historical flows and patterns of diversion:

> The number of water turns available throughout the summer varied depending on the amount of water available in Fish Haven Creek based on runoff conditions. In good years, the Company was able to keep all ditches full and there was ample water to supply irrigation needs. During poor years and particularly during the later summer months as the water dropped, the available water would be rotated or alternated through the various ditches so shareholders would receive their proportionate share.

29. Leon Howell (Howell) is a lifelong resident of Fish Haven and is a user of water delivered by Fish Haven Water Users Company. Howell has been acquainted with water deliveries in Fish Haven Water Users Company for approximately 70 years. Howell currently serves as the secretary of the Fish Haven Water Users Company.

30. Howell testified that, historically, water was only available to deliver the full amount of water to all the ditches for the entire irrigation season approximately one year in every twenty years. He testified that, at the beginning of the irrigation season, Fish Haven Creek water is initially delivered to one ditch. When flows in Fish Haven Creek begin to rise, water is turned into two ditches, then three ditches, and so on, until all the ditches are receiving sufficient water.

Fish Haven Creek Water Users Company attempts to deliver approximately 5.0 cfs to each of the ditches when water is available.

31. Howell testified that, as flows in Fish Haven Creek decline, water is no longer delivered to all the ditches. Depending on available flow in Fish Haven Creek, diversion of water into one, two, three, or four ditches may be cut off. Water is rotated between the ditches when there is insufficient flow in Fish Haven Creek to fill all five ditches.

32. Howell expressed concern that there will not be sufficient water to mitigate for the water uses of the subdivision. Howell testified that, during some years, water was taken out of the upper ditches, and the upper north and upper south ditches received absolutely no water the entire year.

33. Howell testified that, when water is delivered to a ditch operated by the Fish Haven Water Users Company, the water users who receive water from the ditch each divert the entire flow of the ditch for three hours for every share they own that is designated to that ditch. When one of the water users finishes irrigating for the allotted time based on the number of shares he owns in the ditch, the next water user, in turn takes all the water in the ditch for his allotment.

34. Howell testified that during 2003, the water users were able to fully rotate the water four times. He testified that in 2002, the water users were only able to fully rotate the water three times.

35. Howell testified that, during the 2003 irrigation season, Fish Haven Water Users Company diverted water in all of its ditches for 17 days. Water was rotated between the ditches the remainder of the irrigation season.

36. Howell's testimony indicated that the season for irrigation begins as early as April 15th, and extends until approximately October 15th.

37. The affidavits of Dunford and Transtrum can probably be reconciled with the testimony of Howell. Nevertheless, the hearing officer finds that the affidavits reflect optimism about the water supply not portrayed in Howell's testimony. To the extent there is any conflict between Howell's testimony and the statements of Dunford and Transtrum, the hearing officer finds Howell's testimony more persuasive because: (a) the statements of Dunford and Transtrum were verbatim, indicating that they did not individually write the language, (b) there is no evidence that Dunford and Transtrum have the intimacy and exposure to the delivery system that Howell has, (c) the statements by Dunford and Transtrum lacked the specificity of Howell's testimony, and (d) Dunford and Transtrum did not testify and were not subject to examination.

38. During good water years, water flows in Fish Haven Creek are sufficient to deliver water in all of the ditches simultaneously for most or all of the irrigation season.

39. During typical water years, water is delivered simultaneously through all five

ditches during the high spring runoff, and when the high flows diminish, water diverted from Fish Haven Creek is rotated between the five ditches, sometimes several at a time, and sometimes one at a time.

40. During some poor water years, flows in Fish Haven Creek may be so low that the Upper North Ditch does not receive any water and the other ditches may have a very limited water supply.

41. Howell testified that the organizers of the Fish Haven Water Users Company intended to issue one share of stock for each of 1,426 acres.

42. Leon Howell testified that assessments were paid in 2003 for the following shares of stock dedicated to the following ditches:

Upper North Ditch	249.5 shares
#3 North Ditch	255.42 shares
#1 North Ditch	133.75 shares
Upper South Ditch	325.84 shares
#2 South Ditch	318.51 shares
Total Assessed Shares	1,283.02 shares

43. Brockway prepared Applicant's Exhibit No. 13 to estimate the availability of water in Fish Haven Creek. Applicant's Exhibit No. 13 was revised in response to the order to augment the record. In computing the estimates, Brockway used information gleaned from discussions with officers of, or water users of water delivered by Fish Haven Water Users Company, or his own field reconnaissance observations. No numerical data was gathered or measured to compute values in Applicant's Exhibit No. 13.

44. In the amended Applicant's Exhibit No. 13, Brockway uses the value of three hours of water delivery to each shareholder and the number of assessed shares assigned to each ditch as a basis to compute total time for all the water users diverting water from one of the ditches to rotate through one cycle of deliveries on the ditch. Brockway used the number of

Johnson's shares allocated to each ditch to compute the time Johnson would be entitled to receive water during a rotation cycle in each ditch. Finally, Brockway also conservatively used an irrigation season of 150 days, which is well within the irrigation season estimated by Howell.

45. Other assumptions are not clear, however. Brockway states "Rotation Schedule 31 days to rotate to all users." The information submitted to augment the record implies that the 31 days is an approximate rotation period if water is being diverted into all the ditches. This implication is also supported by the 31.19 days of rotation for the Upper North Ditch and the 31.93 days of rotation for the #3 Ditch. The exclusion of the south ditches also implies that Brockway's calculations assume all of the ditches are receiving water simultaneously.

46. The rotation period for one cycle in #1 North Ditch is 16.72 days, approximately half the time of the rotation cycles for the other northern ditches. If the assumption is that all of the ditches are receiving water, then the water users receiving water in the #1 North Ditch would receive approximately twice as much water over the irrigation season per share of stock as a water user owning shares in the Upper North Ditch and the #3 North Ditch. This disparity is reflected in Brockway's calculations of the time Johnson is entitled to water in the #1 North Ditch and the volume of water he is entitled to receive during an irrigation season.

47. Brockway's computations do not take into account Howell's testimony that: (a) the water is rotated between ditches in low water years, (b) in 2002, the water was rotated three times for all the users and four times in 2003, and (c) there are some years when there is no water delivered to the Upper North Ditch.

48. Finally, Brockway assumes flow rates for each of the north ditches to calculate possible total annual volumes of water. In the amended Applicant's Exhibit No. 13, he introduced a flow rate of 0.59 into each ditch to show that, even at a significantly reduced flow rate, there would be sufficient water volume for mitigation proposed by Sam's Hollow.

49. Brockway's estimates may be within reasonable ranges for a high water year or even a typical year. The hearing officer finds that the Applicant's Exhibit No. 13 does not reasonably estimate water availability for low water years because the estimates assume: (a) there is flow in all of the ditches all of the time, (b) some shares of stock are entitled to significantly more water over the course of the irrigation season than other shares of stock, (c) the number of rotations in his calculations exceed the number of rotations during the past two years, and (d) the testimony of Howell that water is sometimes not delivered at all to the Upper North Ditch.

50. Domestic water users are the least tolerant of all water users in accepting water shortages. As a result, water availability, both for the ground water supply and the surface water mitigation, should approach certainty. Estimates of water availability for mitigation should be based on the minimum available water. Applicant's Exhibit No. 13 does not adequately estimate these minimum values. The hearing officer finds that Applicant's Exhibit No. 13 does not establish sufficient certainty of flows in Fish Haven Creek for mitigation in poor water years.

51. Nonetheless, the hearing officer finds that Johnson owns sufficient shares of stock in Fish Haven Water Users Company to deliver the quantity of water needed for mitigation in most years. This conclusion is based on the testimony of Howell and the affidavits of Dunford and Transtrum.

52. Sam's Hollow drilled two test wells within the proposed Phase I of the subdivision. Brockway tested both of these wells by conducting a step-interval pump test. By measuring drawdowns in the wells and corresponding drawdowns in a well near well number one, Brockway estimated the characteristics of the aquifer and the impacts on other wells.

53. Brockway testified that the nearest domestic well is 1,000 feet away, and according to computations using the Theis equation, the draw down impacts on this and other wells would be negligible.

54. Brockway testified that the aquifer in the area is similar to the aquifers south of the proposed development in the Bear Lake West Subdivision. Based on his analysis and experience with the Bear Lake West wells, Brockway testified that the aquifer at the location of the proposed wells would produce sufficient water to supply the quantities for the purposes sought by the applications.

55. Gerdis testified that he and his partner, Johnson, own the land upon which the development is proposed without debt or encumbrance, and that Johnson and he have sufficient cash to develop the property.

56. The Bear Lake Haven Subdivision has been presented to the Bear Lake County Planning and Zoning Commission for a conditional use permit under the Bear Lake County zoning ordinances. The planning and zoning commission has expressed favorable support for the subdivision. Acquisition of the water right is the final step for approval of the conditional use permit.

57. A portion of the subdivision is located within the Fish Haven Sewer District. The portion of the subdivision within the sewer district most closely borders U.S. Highway 89, approximately one-quarter mile west of the north-south highway. Homes within the sewer district will be served by the sewer district. The sewage from residences outside the sewer district will be discharged to septic systems. The lot sizes of homes outside the sewer district will all exceed three acres. The residential lots must be at least ½ acre in surface area for septic tank approval, and then only if soil conditions are favorable.

58. Gerdis and Alex Hudson, an engineer hired to track the development, both testified that the subdivision and the additional homes would economically benefit Bear Lake County and the surrounding area.

59. Gerdis testified that Sam's Hollow would be controlled and operated by Johnson until it can be turned over to a homeowners association. After the corporation is turned over to the association, the association will be responsible for the monitoring and mitigation required by the offered mitigation plan.

60. Howell and Glen Rich both expressed concern about the ability of the homeowners association to properly measure, monitor, repair the measuring devices, record the measurements, and properly report them. They expressed concern that the homeowners association would not be willing to curtail water use to the domestic units during times of shortage, and that IDWR would not have the resources to administer in times of shortage.

61. Water District No.11, Bear River, was created to administer and regulate the waters of the Bear River. Fish Haven Creek is included in Water District No. 11 as a stream tributary to the Bear River.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A states in pertinent part:

> 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.

2. The applicant bears the burden of proof for the factors IDWR must consider in Idaho Code § 42-203A.

3. The drawdown analysis and evaluation of the aquifer by Charles Brockway established that the proposed appropriations of ground water would not injure other water rights authorizing the use of ground water in the Fish Haven area.

4. The evaluation of water availability in the aquifer by Charles Brockway established that there is sufficient ground water to supply the quantities of water sought by the applications.

5. Based on the testimony of Connie Gerdis, the applicant has sufficient financial resources to complete the project.

6. The applicant has expended significant resources in acquiring the property, surveying, preparing proposed development documents, and submitting the documents to the Bear Lake County authorities. The application is not filed for purposes of delay or in bad faith.

7. The effects on the public water resource of supplying ground water for domestic purposes related to recreational properties in Bear Lake County is consistent with the local public interest as defined by Idaho Code § 42-202B(3).

8. Sam's Hollow will employ methods of water application that will conserve the waters of the state of Idaho.

9. The Bear River Management Plan requires that an applicant mitigate the general Bear River hydrologic system for depletions to the surface water sources in the drainage.

10. The mitigation plan proposed by Sam's Hollow satisfies the general requirements of the management plan. Assumptions underpinning the plan are overly optimistic, however. The proposed mitigation plan assumes an adequate supply of surface water in Fish Haven Creek to supply the 120 acre-feet to Bear Lake after full build-out. The testimony of Leon Howell and Stan Rich established that, during low water years, there might not be sufficient surface water to mitigate fully for depletions caused by the proposed ground water withdrawals.

11. Domestic users of water do not tolerate curtailment of their domestic uses of water. The domestic user's expectation of a continuous water supply increases the level of certainty when IDWR considers whether the water supply is sufficient for the purpose sought.

12. Lack of certainty of mitigation supply water is not a cause for rejection of the application, however, greater certainty can be established by conditions of approval.

13. Certainty can be provided by requiring early forecasting and forced curtailment based on the forecasts. Certainty can also be provided by preparation of a water management and operation plan for the development and the homeowner's association.

14. Idaho Code § 42-108 authorizes a change in nature of use of a water right. Section 42-108 states, in pertinent part:

> Any person desiring to make such change of . . . nature of use of water shall make application for change with the department of water resources under the provisions of section 42-222, Idaho Code. After the effective date of this act, no

> person shall be authorized to change the . . . nature of use . . . of water unless he has first applied for and received approval of the department of water resources under the provisions of section 42-222, Idaho Code.

15. Idaho Code § 42-222 describes the details of an application for transfer and the factors that must be considered by IDWR in reviewing a proposed transfer.

16. Idaho Code § 42-1764(1) states that "[t]he approval of a rental of water from the water supply bank may be a substitute for the transfer proceeding requirements of section 42-222, Idaho Code.

17. Idaho Code § 42-607 states, in pertinent part:

> It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply; provided, that any person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated or decreed right therein, or right therein evidenced by permit or license issued by the department of water resources, shall, for the purposes of distribution during the scarcity of water, be held to have a right subsequent to any adjudicated, decreed, permit, or licensed right in such stream or water supply, ...

18. If the claim to water right no. 11-4022 were regulated by the watermaster of the Bear River, all permitted, licensed, and decreed water rights bearing priority dates later than the priority date asserted by claim no. 11-4022 would be delivered before any water would be delivered for claim no. 11-4022. In times of shortage and regulation of water rights in the Bear River Basin, water right no. 11-4022 could be curtailed.

ORDER

IT IS HEREBY ORDERED that applications to appropriate water nos. 11-7481 and 11-7491 are **APPROVED** subject to the following conditions:

1. Proof of application of water to beneficial use shall be submitted on or before **May 1, 2009.**

2. Subject to all prior water rights.

3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.

4. Prior to diversion of water under this right and prior to construction of any additional wells a water management and operation plan for Sam's Hollow and any successor must be submitted in writing and approved in writing by IDWR. The water management and operation plan shall contain the following components: (a) a description of a method for forecasting flows in Fish Haven Creek using measured Fish Haven Creek data or data from a comparable basin; (b) a fixed date each year, no later than April 1, when the volume of water to be diverted under this right during the upcoming year is declared and the forecasted streamflows will be compared to projected water use within the subdivision and; (c) a description of curtailment or other water conservation measures that will be employed in times of mitigation water shortages, and how water users will be notified prior to May 1 about restricted water use in the year of predicted shortage; (d) a description of how the curtailment and conservation measures will be monitored and enforced; (e) a description of the entire flow path of mitigation water, including ditches, pipes, culverts, control structures, and how the system will operate, beginning at the diversion from the Upper North Ditch, the #1 North Ditch, and the #3 North Ditch, and ending at the discharge to Bear Lake; (f) a specific description and the location of each measuring device and how each measuring device will be installed and maintained; (g) a description of the frequency of measuring, comparing, and reporting; (h) a list of those to whom the reports will be submitted; (i) the identity of the specific officer, by title, in the association or corporate organization, that will be responsible for the oversight of system operation; and (j) an alternate plan for mitigation water or curtailment should statutory claim no. 11-4022 ever be curtailed by the watermaster of the Bear River. In addition, the water management and operation plan shall also contain an operations manual for the benefit of employees working for Sam's Hollow that describes duties relative to operation, monitoring, and reporting.

5. The water management and operation plan must incorporate the components of the Settlement Agreement with PacifiCorp, dated October 7, 2003, related to water delivery, measurement, reporting, and retirement of irrigated acreage as the Bear Lake Haven Subdivision develops.

6. The provisions of the water management and operation plan will be incorporated as conditions of the permit to appropriate water. Failure of the permit holder to adhere to the provisions of the water management and operation plan, including having an active and available officer of the association assigned to oversee the water management and operations plan, is cause for IDWR to issue a notice of violation and/or cease and desist order to the permit holder, and to cancel the permit to appropriate water. The provisions of the water management and operation plan may be amended without amending the water right permit under Idaho Code § 42-211, but all changes must be approved in writing by IDWR.

7. The use of water diverted by Fish Haven Water Users Company under water right

no. 11-4022 for mitigation purposes must be represented by (a) an approved transfer recognizing the change in nature of use from irrigation to mitigation, or (b) an approved lease of a portion of water right no. 11-4022 to the Idaho Water Supply Bank for mitigation purposes. Diversion and use for mitigation without written approval by IDWR will be an illegal diversion of water.

8. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 11.

9. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.

10. The irrigation occurring under this domestic use shall not exceed ½ acre within each platted subdivision lot upon which a home has been constructed. Alternatively, an owner of property may divert and use no more than 0.04 cfs and 2,500 gallons per day for all uses he may make on all property he may own in the subdivision. This right does not provide for irrigation of common areas.

11. Domestic use is for 63 homes, 256 condominium units, and 4 commercial units under water right no. 11-7481, and 241 homes under water right no. 11-7491.

Dated this __24th___ day of May, 2004.

___ Signed___
Gary Spackman