

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

IN THE MATTER OF APPLICATION	)	
FOR PERMIT NO. 37-21119 IN THE	)	<b>RECOMMENDED DECISION</b>
NAME OF LANE RANCH	)	<b>AND ORDER</b>
HOMEOWNERS ASSOCIATION INC.	)	
_____	)	

**STANDARD FOR DECISION**

This matter comes before the Idaho Department of Water Resources (“IDWR”) on the application of the Lane Ranch Homeowners’ Association, Inc (“Lane Ranch” or “Applicant”) to appropriate surface water in the Big Wood River drainage. Water right applications are processed under Idaho Code § 42-203A, which provides, in part, that:

(5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions. Provided

however, that minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

A water right applicant bears the burden of proof for the factors IDWR must consider under Idaho Code §42-203A. Cantlin v. Carter, 88 Idaho 179, 187 (1964); Shokal v. Dunn, 109 Idaho 330, 339 (1985). IDWR has adopted rules setting forth the criteria for evaluating some of the statutory factors. IDAPA 37.03.08.045.

IDWR, having examined the application and the written record, and having heard the testimony of the Applicant and other witnesses, makes the following findings of fact and conclusions of law:

## **FINDINGS OF FACT**

### **I. Course of Proceedings.**

1. On June 6, 2003, Lane Ranch submitted an application for a surface water right permit for wildlife, recreation and aesthetic use in the Lane Ranch residential subdivision near Ketchum in the Big Wood River drainage. The original application was assigned number 37-21119. On June 23, 2003, a revised application was filed (hereafter, the "Application"). The proposed water use under the Application is described as follows:

Source of Water:	Elkhorn Creek.
Point(s) of Diversion:	SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ in Sec. 20, T4N, R18E, B.M., Blaine County, Idaho.
Use(s):	Wildlife, recreation and aesthetics.
Total Quantity:	4.5 cfs.
Period of Use:	January 1 – December 31 (year round).
Place of Use:	NE $\frac{1}{4}$ SE $\frac{1}{4}$ , SE $\frac{1}{4}$ SE $\frac{1}{4}$ in Sec. 19, the NW $\frac{1}{4}$ SW $\frac{1}{4}$ in Sec. 20, the NW $\frac{1}{4}$ NW $\frac{1}{4}$ in Sec. 29, and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ in Sec. 30, all in T4N, R18E, B.M., Blaine County, Idaho.

2. Notice of the Application was published in the Wood River Journal, on August 18 and 25, 2004. No protests were received by IDWR.

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

4. The Director of IDWR formally appointed Peter Anderson to be Hearing Officer in this matter on March 14, 2005.

5. A prehearing conference was held on the Application on May 13, 2005. In attendance for the Applicant were its attorney, J. Evan Robertson, and consultant, Charles E. Brockway. Allen Merritt, IDWR Southern Region Manager, also attended.

6. Following the prehearing conference, on May 20 2005, the Hearing Officer invited IDWR staff to file by July 1, 2005 a staff memorandum providing: (1) an analysis by IDWR staff of whether the Application should be granted and, if so, any proposed conditions; (2) a listing of applicable IDWR memoranda; and (3) a GIS map showing the proposed place of use and point of diversion. A *Scheduling Order* also issued on May 20, 2005, reiterating the July 1, 2005, date for submission of any staff memoranda and directing that by July 15, 2005, the Applicant was to either request a hearing or provide a date certain when its written testimony and exhibits would be submitted.

7. A staff memorandum from Allen Merritt, Southern Region Manager for IDWR, was submitted on June 28, 2005. Ex. 100. On July 15, 2005, the Applicant submitted its *Request for Hearing*.

8. On July 21, 2005, the Hearing Officer made a site visit to the area involved in the Application. Ken Herich, President of the Lane Ranch Homeowner's Association, and Charles Brockway initially participated on behalf of the Applicant. Mark Reinemann joined the site visit approximately mid-way on behalf of the Applicant. Allen Merritt, IDWR Southern Region Manager, also participated. The Applicant and Mr. Merritt were afforded the opportunity to show the Hearing Officer anything they considered to be of significance to the Application.

9. On October 27, 2005, IDWR conducted a hearing on the Application. Lane Ranch was present, represented by J. Evan Robertson. At the conclusion of the hearing, Mr. Robertson requested the opportunity to submit a final legal brief on behalf of Lane Ranch. Lane Ranch was given until November 23, 2005 to submit any briefing. On November 23, 2005, Lane Ranch submitted its *Applicant's Post-Hearing Brief* and this matter was fully submitted to IDWR.

## **II. Evidence Considered.**

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

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

Exhibit 2: Black and white aerial photo dated 7/2/1964.

Exhibit 3: Black and white aerial photo dated 8/9/1969.

Exhibit 4: Black and white aerial photo dated 9/4/1977.

Exhibit 5: Black and white aerial photo dated 9/2/1984.

Exhibit 6: Portion of 1967 Sun Valley, Idaho quadrangle topographical map.

11. IDWR, on its own initiative, admitted the following exhibits:

Exhibit 100: IDWR Staff Memorandum dated June 27, 2005.

12. Lane Ranch called the following witnesses:

Charles L. Brockway

Marc Reinemann

13. Allen Merritt, Southern Region Manager of the Idaho Department of Water Resources, also testified at the hearing. He was called by the Hearing Officer to testify regarding the Staff Memorandum.

14. Lane Ranch was afforded a reasonable opportunity to cross-examine IDWR staff.

### **III. Applicant and Intended Water Use under Application No. 37-21119.**

15. The Lane Ranch Subdivision is a residential subdivision located approximately one mile south of the City of Ketchum. More specifically, it is located on lands lying between Elkhorn Creek Road on the north, Highway 75 to the West, land owned by the Idaho Foundation for Parks and Lands Inc. to the south, and sharply rising foothills to the east. Lane Ranch is a non-profit corporation, composed of the property owners in the subdivision, which enforces the Conditions, Covenants and Restrictions for the subdivision and owns and maintains the common areas within the subdivision, including the water amenities that are the subject of this matter.

16. The land currently occupied by the Lane Ranch Subdivision was formerly an irrigated farm owned by Pete Lane which utilized irrigation water from Elkhorn Creek, Big Wood River and Trail Creek. Elkhorn Creek historically flowed in a natural channel of indeterminate location through what became the irrigated farmland. Sometime prior to approximately 1950 the historic natural channel of Elkhorn Creek was obliterated to “reclaim” the creek channel for farming. The water flowing in Elkhorn Creek then was either diverted onto

the farmland for irrigation or diverted down a drain channel bypassing the farm land where it flowed eventually into the Big Wood River.

17. Exhibit 1 is an aerial photograph taken in 1957 that reveals this historic development. In that photograph Elkhorn Creek flows to the southwest and then west from the upper right (Northeast) corner. The Creek meanders down a valley until a dark line branches from it to the northwest. This line is the historic irrigation diversion from Elkhorn Creek to the irrigated farmland. The Creek then meanders to the southwest until the meanders cease and a straight, artificial channel heads due south in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , Sec. 20, T4N, R18E, B.M. That artificial channel (the “toe of the slope channel”) roughly parallels the toe of the foothills east of the irrigated farmland until it turns sharply west, where it meets what is perhaps an original Elkhorn Creek channel, and from there flows into the Big Wood River. The toe of the slope channel was used to divert excess Elkhorn Creek flows around the reclaimed farmland. Exhibits 2 – 5 reveal that this configuration of the diversions at the base of Elkhorn Creek continued through 1992, although at some point a storage reservoir was built at the point of the irrigation diversion on Elkhorn Creek (the “upper reservoir”).

18. Sometime after 1992 the historic irrigation diversion and channel system was modified with the construction of the Lane Ranch subdivision. The developer of the Lane Ranch subdivision hired Interflue, a firm that specializes in riparian enhancement and hydraulics, to design an aesthetically pleasing channel system through the subdivision. Pursuant to that design the irrigation diversion at the outlet from the upper reservoir as well as the toe of the slope channel were obliterated and a new, multiple-channel system was constructed.

19. Currently, all water flowing in Elkhorn Creek passes through the upper reservoir and down the natural channel.<sup>1</sup> At the point where excess water historically was diverted from Elkhorn Creek into the toe of the slope channel in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ , Sec. 20, T4N, R18E, B.M., water now flows into a number of artificial channels lined with clay, rocks and drop structures that were constructed through the subdivision. The system of channels through the Lane Ranch Subdivision distributes irrigation water to the common area irrigation system,<sup>2</sup> provides a surface water amenity to the subdivision, and passes Elkhorn Creek water through the subdivision to the Big Wood River. *See* Ex. 100, attachment Exhibit M1.<sup>3</sup>

20. This artificial channel system is a major amenity of the Lane Ranch subdivision and it is owned and maintained by Lane Ranch. There are 7 major ponds in the system as well as smaller ponds along the water channels. Water is conveyed from pond to pond through small channels, approximately 3 feet wide and 0.5 feet deep at low flows. The channel system is a breeding, holding and rearing habitat for wild trout and other wildlife and Lane Ranch also pays to stock swans in the ponds on the channel system. Lots abutting the channel system are more valuable than those that do not.<sup>4</sup>

21. Significantly, in Transfer No. 3609 IDWR approved the diversion of Elkhorn Creek water into the entire Lane Ranch channel system for wildlife, aesthetic and recreation uses.

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

<sup>2</sup>The irrigation system for the common areas within the subdivision includes gravity diversion to ponds from Elkhorn Creek and a pumped diversion from Big Wood River.

<sup>3</sup>Exhibit 100, attachment Exhibit M1, labels one of the artificial channels as "Elkhorn Creek," apparently because it is the largest of the constructed channels. Exhibit M1 uses as a base layer the 1967 USGS Sun Valley quadrangle map for the area in question. The USGS quadrangle shows the toe of the slope channel flowing along the base of the hills east of the Lane Ranch subdivision. Where the channel labeled "Elkhorn creek.shp" splits from the USGS symbol for USGS Elkhorn Creek depiction is the location where the natural Elkhorn Creek channel was obliterated. Downstream of this location the channel labeled "Elkhorn Creek" is an artificial channel.

<sup>4</sup>Individual lots now have values in excess of \$1.5 million.

22. A topographic map with hand drawn markings, which is the fourth page of Exhibit 4 to the Staff Memorandum, Ex. 100, shows the point of diversion applied for by Transfer No 3609 for water right no. 37-00082 to be the location where the natural channel historically was obliterated and Elkhorn Creek water diverted into the toe of the slope channel. This is precisely the point where the Lane Ranch channel system now diverts water from the historic natural channel of Elkhorn Creek. In its *Order* dated October 9, 1990, IDWR stated that: “The place of use and point of diversion for right no. 37-0082 is approved as described in the transfer application.” Ex. 100.

23. Measured water flows in Elkhorn Creek range from a high of around 8 cfs to a low of around 1 cfs, with average flows around 4 cfs. Applicant’s existing water right allow diversion of up to 2.2 cfs from Elkhorn Creek for irrigation, wildlife, aesthetics and recreation. The Application for an additional 4.5 cfs for wildlife, aesthetics and recreation is intended to protect the water flows in the Lane Ranch channel system from upstream consumptive uses, not to authorize the diversion of additional water through that system. All water flowing down Elkhorn Creek already passes through the Lane Ranch system. Very little evidence was presented to justify the 4.5 cfs amount<sup>5</sup>, although Dr. Charles Brockway did indicate that this flow volume would prevent siltification of the ponds on the channel system. Because the channel system is currently operational, no actions are needed to complete this appropriation.

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

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<sup>5</sup>The primary issue at hearing was whether Lane Ranch would divert water under the Application, not the quantity of water to be used.

## CONCLUSIONS OF LAW

Based upon the Findings of Fact, IDWR makes the following Conclusions of Law:

### I. Assessment of the Proposed Use.

1. When considering a water right application Idaho Code § 42-203A(5) provides, in part, that:

The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied.

The facts in this case are undisputed. The primary issue is whether, as a matter of law, the Applicant's channel system "diverts" water to a beneficial use or is an "in-stream" water use. The Lane Ranch channel system carries Elkhorn Creek water both as a beneficial use and acting as a natural channel to pass excess flows through the subdivision. No case or statute appears to directly address the situation whether such a channel system can be both a diversion and natural drainage channel.

2. The answer implicates two lines of authority regarding water "diversions." The first line of legal authority regards the necessity to physically divert water from a public water source in order to appropriate water for a beneficial use. This is not a requirement of the Idaho Constitution, but rather, a statutory requirement. *State Department of Parks v. Idaho Dept. of Water Administration*, 96 Idaho 440, 444-445 (1974). The statutory necessity for a physical diversion of water to create a private water right is derived, in part, from Idaho Code § 42-201, which requires strict compliance with water right permit procedures to acquire a water right, and Idaho Code § 42-202(1)(d), which requires an application for a water right to set forth a point of diversion. The Idaho Supreme Court stated regarding the diversion requirement that it is

“sufficient, for establishing diversion, that the water flows in a different channel than it would have done absent intervention by the appropriator.” *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 680 (1980).

3. Four general purposes can be deduced for the water appropriation diversion requirement. First, a diversion separates the water to be used from the public water supply<sup>6</sup> and reduces it to the possession<sup>7</sup> of the private appropriator.<sup>8</sup> Second, at one time a diversion served as a physical manifestation of an intent to develop a water use and initiate a water right.<sup>9</sup> Third, a diversion served as physical notice to others that a water use has been developed from the public water supply.<sup>10</sup> Fourth, diverting the water from the stream ensured that water was put to an out-of-stream consumptive use and not “wasted” out of the watershed. The second and third purposes for the diversion requirement have been rendered unimportant by the advent of the permit system. The fourth reason has been rejected by the Idaho Supreme Court, *State Department of Parks v. Idaho Dept. of Water Administration*, 96 Idaho 440, 444-445 (1974), and IDWR routinely approves water rights for private, non-consumptive, aesthetic and recreational uses. Thus, the appropriate analysis when determining whether a proposed water use complies with the statutory diversion requirement is whether the applicant intends to separate the water from the public water supply and reduce it to possession by causing it to flow in a different

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<sup>6</sup>Idaho Code § 42-101:

All the waters of the state, when in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose ...

<sup>7</sup>No one can make an appropriation from a reservoir or canal for the obvious reason that the waters so stored or conveyed are already diverted and appropriated and are no longer “public waters.” *Washington County Irrigation Dist. v. Talboy*, 55 Idaho 382, 389-390 (1935).

<sup>8</sup>Weil, *Water Rights in the Western States*, 3<sup>rd</sup> ed., ch. 3 (1911).

<sup>9</sup>See *Sand Point Water & Light Co. v. Panhandle Development Co.*, 11 Idaho 405, 413-414 (1905).

<sup>10</sup>See *Nielson v. Parker*, 19 Idaho 727, 733 (1911).

channel than it would have done absent intervention by the appropriator.

4. The second line of cases are those where water is diverted from a natural stream channel for drainage purposes or for flood protection. When water is diverted for these reasons, the party diverting the water, and its successors, accepts responsibility to ensure that the functions of the natural channel continue. For instance, when the City of Boise diverted Cottonwood Creek to a new channel for flood protection reasons, and a neighbor was then damaged in the course of normal flooding, the City was held liable:

Of course, the City has no control over the elements, and is not responsible for loss occasioned by the act of God, or by the act of the common enemy; yet, having constructed such artificial channel, and having **diverted** said stream from its natural channel, it is under a legal obligation to take care of said artificial channel, and of the waters that naturally flow in said stream, at all seasons.

*Wilson v. Boise City*, 6 Idaho 391, 398 (1899)(emphasis added). The owners of an artificial drain channel, that replaces a natural channel, are also liable to accept foreign drain water into that channel as if it was the natural channel. *Poole v. Olaveson*, 82 Idaho 496 (1960), *see also Harper v. Johannesen*, 84 Idaho 278 (1962). The ability to divert a stream into an artificial channel has been regulated since 1971 by the Stream Protection Act, Title 42, Chapter 38, Idaho Code, which prohibits alteration of a stream channel without receiving a permit to do so. Idaho Code § 42-3803. A stream channel is defined as a “natural watercourse of perceptible extent, with definite beds and banks, which confines and conducts continuously flowing water.” Idaho Code § 42-3802(d). IDWR rules make clear that “[t]he channel referred to is that which exists at the present time, regardless of where the channel may have been located at any time in the past.” IDAPA 37.03.07.010.12.<sup>LFN</sup>

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<sup>LFN</sup> No evidence was offered whether IDWR asserts that Lane Ranch’s channel system falls under this statute.

5. Lane Ranch, by engineering, building and maintaining a private channel system which offers significant private economic benefits to its owners, takes sufficient control of the water in that channel system for that system to be considered a diversion supporting a private water right. When Elkhorn Creek water flows into the Lane Ranch channel system it flows in a different channel than it would have flowed absent the intervention of Lane Ranch. IDWR implicitly recognized that such diversion occurs when it approved Transfer 3609.

6. Lane Ranch's diversion does commingle water diverted for a beneficial use with diverted public water, but commingling water in this way is not absolutely prohibited. *See* Idaho Code § 42-105 (which allows the commingling of public water and diverted water in a natural channel).<sup>11</sup> Further, Lane Ranch's diversion of all of the water of Elkhorn Creek from its natural channel into the artificial channels makes it liable for the public water beyond the normal liability of a person through whose land a natural stream flows. Lane Ranch must exercise reasonable care and diligence to be sure the channels are of sufficient size to carry the volume of water that may be reasonably anticipated to flow down them, and for the maintenance of the same in a reasonably safe condition. *Dunn v. Boise, City*, 48 Idaho 550, 556(1929).

7. The diversion of Elkhorn Creek water into the artificial channel system provides Lane Ranch a private economic benefit and invests in Lane Ranch a degree of control over all the water in that system with the resulting liability, sufficient to be considered a diversion to beneficial use. A proper measuring device located in the SW¼ NW¼ SW¼ , Sec. 20, T4N, R8E, B.M. point of diversion, rather than the head of the upper pond, will allow a determination to be made of the amount of water being used in the channel system under this right.

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<sup>11</sup>The alternative, of course, is that Lane Ranch could create a new bypass channel, perhaps in the form of a buried pipeline, to act as the "natural channel" carrying excess water flows around the subdivision. Ironically, Lane Ranch could then "divert" water from the pipeline into its natural-appearing channel system.

## **II. Quantity of Water Under Existing Rights.**

8. Because the Applicant's water use is non-consumptive and located at the lower end of Elkhorn Creek there is a reasonable probability that Applicant's proposed water use will not reduce the quantity of water under existing water rights.

## **III. Adequacy of the Water Supply.**

9. The Applicant has satisfied its burden to show that the water supply itself is sufficient for the purposes for which it is to be appropriated. IDWR's staff report indicates that there is, at times, sufficient water flowing in Elkhorn Creek to fully satisfy the quantity requested under the Application.

## **III. Good Faith, Delay or Speculation.**

10. This water use for which the Application was filed is currently being made of the water in Elkhorn Creek. One year should be sufficient time to construct required measuring devices.

## **V. Sufficiency of Financial Resources.**

11. It is uncontested that Applicant has the funding to complete this water use.

## **V. Local Public Interest.**

12. The statutory definition for the "local public interest" is:

"Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

Idaho Code § 202B(3).

13. Lane Ranch submitted sufficient information regarding the proposed water use, to allow its water resource impact to be evaluated. The requested water right would be diverted in an area where recreation, subdivision aesthetics and wildlife is an integral part of the local

economy. Water supplies are used extensively to create non-consumptive, aesthetic water features. As a non-consumptive use it will not impact downstream water supplies. Lane Ranch has satisfied its burden of showing that approving the Application does not conflict with the local public interest.

## **VI. Conservation of Water Resources.**

14. The proposed water use will occur in the Big Wood River Basin. Lane Ranch has satisfied its burden to show that the proposed water use is consistent with the conservation of water resources within the state of Idaho.

## **RECOMMENDED ORDER**

Based upon these Findings of Fact and Conclusions of Law the Application is GRANTED. A permit will be issued with the following conditions:

1. IDWR's standard conditions, including the measurement of diversions.
2. The point of diversion shall be the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  , Sec. 20, T4N, R18E, B.M., Blaine Count, at the location where Elkhorn Creek was diverted into the toe of the slope channel.
3. The time period for the completion of this water use shall be one year from the date of issuance of the permit.

## **PROCEDURAL RIGHTS**

This is the Recommended Decision and Order of the Hearing Officer. It will not become final without action of the Director of the Idaho Department of Water Resources. Any party may file a petition for reconsideration of this recommended order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any

petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Section 67-5243(3) Idaho Code.

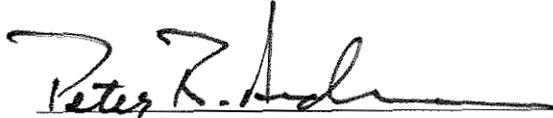
Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the Director or Director's designee on any issue in the proceeding. If no party files exceptions to the recommended order with the Director or Director's designee, the Director or Director's designee will issue a final order within fifty-six (56) days after:

- i. The last day a timely petition for reconsideration could have been filed with the hearing officer;
- ii. The service date of a denial of a petition for reconsideration by the hearing officer; or
- iii. The failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

Written briefs in support of or taking exceptions to this recommended order shall be filed with the Director or Director's designee. Opposing parties shall have fourteen (14) days to respond. The Director or Director's designee may schedule oral argument in the matter before issuing a final order. The Director or Director's designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary

hearings if further factual development of the record is necessary before issuing a final order.

DATED this 10th day of January 2006.

A handwritten signature in black ink, appearing to read "Peter R. Anderson", written over a horizontal line.

PETER R. ANDERSON  
Hearing Officer

## CERTIFICATE OF SERVICE

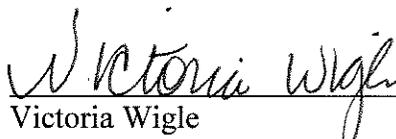
I HEREBY CERTIFY that on this 10<sup>th</sup> day of January 2006, I mailed a true and correct copy of the foregoing **RECOMMENDED DECISION AND ORDER** on the following persons listed below by U.S. mail, postage prepaid and addressed as follows:

LANE RANCH HOMEOWNERS ASSOC INC  
ATTN SUSAN MCBRYANT  
PO BOX 1675  
SUN VALLEY ID 83353-1675

CHARLES E BROCKWAY PE PHD  
BROCKWAY ENGINEERING  
2016 N WASHINGTON ST STE 4  
TWIN FALLS ID 83301

EVAN ROBERTSON  
ROBERTSON HEPWORTH  
PO BOX 1906  
TWIN FALLS ID 83303-1906

IDWR – SOUTHERN REGION  
1341 FILLMORE ST STE 200  
TWIN FALLS ID 83301-3380

  
Victoria Wigle  
Administrative Assistant to the Director  
Idaho Department of Water Resources