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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

The IDAHO WATER RESOURCE BOARD, and the IDAHO DEPARTMENT OF FISH AND GAME,

Petitioners,

v.

The IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent.

IN THE MATTER OF APPLICATION FOR PERMIT NO. 74-16187 IN THE NAME OF KURT W. BIRD OR JANET E. BIRD

Case No. CV01-20-09661

Fee Category: L3
Fee Amount: Exempt (I.C. § 67-2301)

NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION

PETITIONERS, the Idaho Water Resource Board ("Board") and the Idaho Department of Fish and Game ("IDFG"), by and through their counsel of record, and pursuant to Idaho Code §§ 42-1701A(4) and 67-5270 and to Rule 84 of the Idaho Rules of Civil Procedure, hereby file this *Notice of Appeal and Petition for Judicial Review of Final Agency Action* to obtain judicial review of a final agency action of the Idaho Department of Water Resources ("IDWR").

STATEMENT OF THE CASE

1. This is a civil action filed pursuant to Idaho Code §§ 42-1701A(4) and 67-5270 and Rule 84 of the Idaho Rules of Civil Procedure for judicial review of the *Order on Exceptions; Final Order* ("*Final Order*") issued on May 21, 2020 by Gary Spackman, the Director of IDWR, in the above-referenced contested case proceeding before IDWR, which was entitled *In the Matter of Application for Permit No. 74-16187 in the Name of Kurt W. Bird or Janet E. Bird.* A copy of the *Final Order* is attached as Exhibit 1.

2. Application for Permit No. 74-16187 ("Application") was filed with IDWR on or about October 12, 2018, and sought a permit to appropriate the public waters of the State of Idaho. Specifically, the Application sought a permit to divert 6.4 cfs of water from Big Timber Creek, a tributary of the upper Lemhi River, to irrigate approximately 320 acres of nearby lands. The Board and IDFG filed protests to the Application, on the basis that the project proposed by the Application is contrary to the "local public interest" associated with efforts to protect and recover populations of certain species of fish listed under the Endangered Species Act ("ESA"). Idaho Code § 42-203A(5)(e). A number of other parties also filed protests to the Application on various grounds, including the "local public interest."

3. A hearing was held on August 28–29, 2019, in Salmon, Idaho. The Hearing Officer issued a *Preliminary Order Approving Application* on January 9, 2020 (*"Preliminary Order"*) that approved the Application, with conditions, including conditions intended to protect the "local public interest." The Applicant filed a petition for reconsideration of *Preliminary Order*, and the Board and IDFG (collectively, "Agencies") filed a petition for clarification or in the alternative reconsideration of the *Preliminary Order*. On February 6, 2020, the Hearing Officer issued an *Order Granting Petitions, In Part,* and an *Amended Preliminary Order Approving Application* (*"Amended Preliminary Order"*) that, among other things, modified the conditions of approval. The Agencies filed exceptions to the *Amended Preliminary Order*, and on May 21, 2020, the Director of IDWR issued the *Final Order,* which denied in part and granted in part the Agencies' exceptions, and further modified the conditions of approval.

4. It is the Agencies' position that the Application should have approved only with certain additional conditions that were not included in the *Final Order*; and that without those additional conditions the *Final Order* is inconsistent with the State Water Plan and conflicts with the local public interest associated with protecting and recovering anadromous fish and bull trout protected by the ESA. This local public interest includes but is not limited to the Agencies' efforts to protect and recover the listed fish species and thereby reduce the risk of federal actions to enforce the ESA that would adversely affect the local economy.

JURISDICTION AND VENUE

5. The *Final Order* is a final agency action that is subject to judicial review pursuant to Idaho Code § 67-5270(3).

6. This petition is authorized by Idaho Code §§ 42-1701A(4) and 67-5273, and Rule 84 of the Idaho Rules of Civil Procedure.

7. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1701A(4) and 67-5270–67-5279.

8. Venue lies in this Court pursuant to Idaho Code § 67-5272(b)–(c). The *Final Order* was issued by the Director of IDWR at IDWR's state office, which is located in Ada County. The Board's principal place of business is located at IDWR's state office, in Ada County. IDFG's state office is also located in Ada County.

9. Pursuant to the Idaho Supreme Court's *Administrative Order* issued on December 9, 2009, a copy of which is attached as Exhibit 2, "all petitions for judicial review of any decision regarding the administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." The *Administrative Order* authorized the Snake River Basin Adjudication District Court "to develop the procedural rules necessary to implement this order." The Snake River Basin Adjudication District Court issued an order adopting such procedures, a copy of which is attached as Exhibit 3, on July 1, 2010. This order instructs the clerk of the district court in which a petition for judicial review of an IDWR decision is filed to issue a *Notice of Reassignment* that assigns the matter to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings. A copy of the Snake River Basin Adjudication District Court's *Notice of Reassignment* form is included in Exhibit 3.

PARTIES

10. Petitioner the Idaho Water Resource Board is the "State Water Resource Agency" authorized by the Idaho Constitution. Idaho Const. art. XV § 7; Idaho Code § 42-1732. The Board's main office and principal place of business are located at 322 East Front Street, Boise Idaho.

11. Petitioner the Idaho Department of Fish and Game is an executive department of the government of the State of Idaho. Idaho Code § 36-101. IDFG's state office and principal place of business are located at 600 South Walnut Street, Boise, Idaho.

12. Respondent the Idaho Department of Water Resources is an executive department of the government of the State of Idaho. Idaho Code § 42-1701(1). IDWR's state office and principal place of business are located at 322 East Front Street, Boise Idaho.

STATEMENT OF INITIAL ISSUES

13. Pursuant to I.R.C.P. 84(c)(5), the Petitioners assert the following initial issues for judicial review:

a. Whether the *Final Order* is "consistent" with the Idaho State Water Plan, Idaho Code § 42-1734B(4);

b. Whether the *Final Order* is contrary to and undermines the Board's Water Transactions Program;

c. Whether the *Final Order*, by approving the Application with conditions that allow flows secured by the Board's Water Transaction Program to be "counted" for purposes of administering the so-called "bypass flow" conditions, conflicts with the local public interest and:

i. Violates constitutional or statutory provisions;

ii. Is in excess of IDWR's statutory authority;

iii. Is made upon unlawful procedure;

iv. Is not supported by substantial evidence in the record as a whole; and

v. Is arbitrary, capricious, or an abuse of discretion.

d. Whether the *Final Order*, by approving the Application without conditions prohibiting diversions during periods of so-called "peak flows," and without conditions prohibiting the diversion of so-called "high flows" onto the permitted place of use, conflicts with the local public interest and:

i. Violates constitutional or statutory provisions;

ii. Is in excess of IDWR's statutory authority;

iii. Is made upon unlawful procedure;

iv. Is not supported by substantial evidence in the record as a whole; and

v. Is arbitrary, capricious, or an abuse of discretion.

e. Whether the *Final Order*, by approving the Application without a condition requiring administration at the "field headgate" rather than the "point of diversion," conflicts with the local public interest and:

i. Violates constitutional or statutory provisions;

ii. Is in excess of IDWR's statutory authority;

iii. Is made upon unlawful procedure;

iv. Is not supported by substantial evidence in the record as a whole; and

v. Is arbitrary, capricious, or an abuse of discretion.

Pursuant to I.R.C.P. 84(c)(5), the Agencies reserve the right to assert other or additional issues that may be discovered.

AGENCY RECORD

14. Petitioners seek judicial review of the *Order on Exceptions; Final Order* ("*Final Order*") issued on May 21, 2020 by the Director of IDWR in the contested case proceeding entitled *In the Matter of Application for Permit No. 74-16187 in the Name of Kurt W. Bird or Janet E. Bird.*

15. Pursuant to Idaho Code §§ 67-5275(1)(b) and 67-5249 and I.R.C.P. 84(f)(1)(A), the agency record in this case consists of:

a. all notices of proceedings, pleadings, motions, briefs, petitions, and intermediate rulings;

b. evidence received or considered;

c. a statement of matters officially noticed;

d. offers of proof and objections and rulings thereon;

e. the record prepared by the presiding officer under the provisions of section 67-5242, Idaho Code, together with any transcript of all or part of that record;

f. staff memoranda or data submitted to the presiding officer or the agency head in connection with the consideration of the proceeding; and

g. any recommended order, preliminary order, final order, or order on reconsideration.

16. Petitioners have contacted IDWR regarding the estimated fee for preparation of the agency record and will pay to IDWR the estimated fee, as provided by IDWR, in accordance with I.R.C.P. 84(f).

17. IDWR held a hearing on the Application and the protests in Salmon, Idaho, on August 28–29, 2019. Hearing Officer James Cefalo presided over the hearing. Audio recordings of the hearing were made by Sharla Cox of IDWR, and stored as audio computer files, which were subsequently made available to the parties. Ms. Cox has since retired and it is believed that either the Hearing Officer or the Director is in possession of the original audio recordings. The Hearing Officer's office is located in IDWR's Eastern Regional Office, 900 North Skyline Drive, Suite A, Idaho Falls, Idaho. The Director's office is located at 322 East Front Street, Boise Idaho.

18. Petitioners have contacted IDWR and requested that a transcript of the hearing of August 28–29, 2019, be prepared pursuant to Idaho Code § 67-5249(2)(e) and I.R.C.P. 84(c)(6). IDWR will provide its audio recordings of the hearing to M&M Court Reporting, and Petitioners will remit the required deposit to M&M Court Reporting and request that it prepare a transcript of the hearing in accordance with I.R.C.P. 84(g).

19. Service of this *Notice of Appeal and Petition for Judicial Review of Agency Action* has been made, at the time of its filing, upon the Respondents and upon all other parties to the contested case before IDWR, as indicated in the attached certificate of service.

DATED this 18th day of June 2020.

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LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division

/s/ Michael C. Orr
MICHAEL C. ORR
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of June 2020, I caused to be served a true and correct copy of the foregoing document by the methods indicated:

GARRICK BAXTER IDAHO DEPARTMENT OF WATER RESOURCES322 E. FRONT STREET, SUITE 648 BOISE, ID 83720-0098	☒ U.S. Mail, postage prepaid ☒ Email: garrick.baxter@idwr.idaho.gov
ROBERT L HARRIS HOLDEN, KIDWELL, HAHN & CRAPO PLLC 1000 RIVERWALK DR., STE 200 P.O. BOX 50130 IDAHO FALLS, ID 83405	☒ U.S. Mail, postage prepaid ☒ Email: rharris@holdenlegal.com
TRAVIS L THOMPSON BARKER ROSHOLT & SIMPSON LLP 163 SECOND AVE WEST P.O BOX 63 TWIN FALLS, ID 83303-0063	☒ U.S. Mail, postage prepaid ☒ Email: tlt@idahowaters.com
MARIE CALLAWAY KELLNER MATTHEW A NYKIEL IDAHO CONSERVATION LEAGUE P.O. BOX 884 BOISE, ID 83701	☒ U.S. Mail, postage prepaid ☒ Email: mkellner@idahoconservation.org mnykiel@idahoconservation.org
JAMES CEFALO IDAHO DEPARTMENT OF WATER RESOURCES 900 N. SKYLINE DR., STE A IDAHO FALLS, ID 83402-1718	☒ U.S. Mail, postage prepaid ☒ Email: james.cefalo@idwr.idaho.gov

PURCELL RANCH PARTNERSHIP KERRY PURCELL 98 PURCELL LAND LEADORE, ID 83464	☒ U.S. Mail, postage prepaid
KERRY PURCELL 1774 LEE CREEK ROAD LEADORE, ID 83464	☒ U.S. Mail, postage prepaid
PENNY JANE OGDEN-EDWARDS 2330 S 350 W PERRY, UT 84302	☒ U.S. Mail, postage prepaid

I further certify that M&M Court Reporting has been paid the estimated fee for preparation of the transcript requested in the foregoing.

/s/ Michael C. Orr
MICHAEL C. ORR

EXHIBIT 1

Order on Exceptions; Final Order

In the Matter of Application for Permit No. 74-16187
in the Name of Kurt W. Bird or Janet E. Bird

(IDWR) (May 21, 2020)

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 74-16187 IN THE NAME OF KURT W. BIRD OR JANET E. BIRD	**ORDER ON EXCEPTIONS; FINAL ORDER**

PROCEDURAL HISTORY

On October 12, 2018, Kurt W. Bird and Janet E. Bird (collectively "Applicants" or "Bird") filed Application for permit 74-16187 ("Proposed Permit 74-16187") with the Idaho Department of Water Resources ("Department"). The application was protested by Idaho Conservation League, Idaho Department of Fish & Game ("IDFG"), Beyeler Ranches LLC, High Bar Ditch Association, Carl Ellsworth, Purcell Ranch Partnership, Kerry Purcell, Penny Jane Ogden-Edwards, Lemhi Irrigation District, Lemhi Soil & Water Conservation District, and Idaho Water Resource Board ("IWRB").

On July 30, 2019, IWRB and IDFG (collectively "Agencies") filed a *Joint Motion by IWRB and IDFG for Partial Summary Judgment* ("Motion"). On August 13, 2019, Bird filed *Applicant's Response to Joint Motion by IWRB and IDFG for Partial Summary Judgment*. Oral argument on the Motion occurred on August 20, 2019. The hearing officer granted the Motion, in part, on August 21, 2019, and adopted three conclusions of law related to local public interest factors.

On August 28 and 29, 2019, an administrative hearing for the protested application was held in Salmon, Idaho. Bird was represented by attorney Robert Harris. The Agencies were represented by attorney Michael Orr from the Idaho Office of the Attorney General. Beyeler Ranches LLC, High Bar Ditch Association, Carl Ellsworth, Lemhi Irrigation District and Lemhi Soil & Water Conservation District (collectively "Irrigators") were represented by attorney Travis Thompson. Idaho Conservation League was represented by attorney Matthew Nykiel. Protestants Penny Jane Ogden-Edwards, Purcell Ranch Partnership and Kerry Purcell represented themselves.

Exhibits offered by Bird, the Agencies, and the Irrigators were admitted into the administrative record.[1] Kurt Bird, James Whittaker, Derek Papatheodore, Cindy Yenter, Jeff Diluccia ("Diluccia"), Cynthia Bridge-Clark, Amy Cassel, Matthew Nykiel, Penny Jane Ogden-

[1] The following exhibits were admitted into the record: 1-12, 13 (limited to Figures 9 & 10 and Att. B), 14-18, 20-29, 183, 183A, 187, 189, 190, 193-196, 198, 199 (limited to cover letter and pages 11-16, 22-23, 28, 30, 65 and 100-103), 201, 202, 203 (limited to cover pages and Executive Summary (pg. i) and pages 1-8, 18-22, 24-26, 28-29, 44-48, 54-57, 70-76, 85-88, 102-103 and 117), 204 (limited to cover letter and pages 11, 166-170, 175 and 218-236), 205, 206A, 206B, 210, 212, 213, 215, 219-225, 232, 233, 235, 236 and 301-310.

Edwards, Carl Ellsworth, Merrill Beyeler, Carl Lufkin, R.J. Smith and Bruce Mulkey, offered testimony at the hearing. Bird, the Agencies, and the Irrigators filed post-hearing briefs.

Prior to the hearing, the hearing officer took official notice of documents from the Department's records pursuant to IDAPA 37.01.01.602. For ease of reference, these documents were assigned exhibit numbers IDWR1 through IDWR20. During the hearing, the hearing officer also took official notice of historical streamflow records for the Lemhi River.

On January 9, 2020, the hearing officer issued a *Preliminary Order Approving Application*. On January 23, 2020, Bird filed *Applicant's Petition for Reconsideration*. Also, on January 23, 2020, the Agencies filed *IWRB's & IDFG's Joint Petition for Clarification or in the Alternative Reconsideration*. These petitions were granted, in part, resulting in an *Amended Preliminary Order Approving Application* ("Amended Preliminary Order") issued February 6, 2020.

On February 20, 2020, IWRB and IDFG submitted *IWRB's and IDFG's Exceptions to Amended Preliminary Order Approving Application and Memorandum in Support* ("Agencies' Exceptions") to the Director. On March 5, 2020, Bird filed *Applicant's Response to Exceptions*[2] ("Bird Response") with the Department.

The Director reviewed the exceptions to the Amended Preliminary Order, as discussed in detail below. The Director now largely adopts the hearing officer's findings of fact and conclusions of law. However, the Director concludes the Amended Preliminary Order should be modified to address the exceptions and his own review of the Amended Preliminary Order. Accordingly, the Director modifies the Amended Preliminary Order. This document will first analyze the Agencies' Exceptions. Following analysis of the Agencies' Exceptions, the findings of fact, analysis, and conclusions of law contained in the hearing officer's Amended Preliminary Order have been amended and are now reissued by the Director.

ANALYSIS ON EXCEPTIONS

The Agencies' Exceptions requested changes to the hearing officer's reasoning regarding local public interest in the analysis portion and in conditions of the Amended Preliminary Order. In summary the Agencies requested:

> (1) limited modifications to certain conditions of approval that are intended to protect the "local public interest" in maintaining and recovering fish species listed under the Endangered Species Act ("ESA") and their critical habitat; and (2) deletion or modification of a portion of the Amended Preliminary Order's

[2] The Bird Response attempted to incorporate by reference "arguments set forth in Applicant's [Bird's] Petition for Reconsideration concerning conditions 8, 9, 10, 11, 12, and 13 ['Bird Petition for Reconsideration']." *Bird Response* at 3-4. Bird cannot raise new issues in a response to another parties' filed exceptions. Bird did not file exceptions to the Amended Preliminary Order. Bird's arguments in his Petition for Reconsideration will not be considered here.

discussion regarding "minimum stream flows" under Chapter 15, Title 42, Idaho Code.

Agencies' Exceptions at 2.

The Agencies' specific exceptions, and Bird's responses thereto, are addressed below.

I. Whether the Final Order should require that any flows the Agencies have secured, or will secure in the future, for purposes of reconnecting Big Timber Creek to the Lemhi River not be counted in determining whether the 18 cfs bypass flow requirement at the Lower Big Timber Creek Gage (Conditions 8 and 9) has been satisfied.

The hearing officer conditioned the proposed permit to allow diversion at the Lower BTC Gage when flows are greater than 18 cfs and flows at the proposed, to-be-constructed Bird Gage are greater than 54 cfs. *Amended Preliminary Order* at 21 and 34 (Conditions 8 and 9). The hearing officer concluded these flow thresholds "will support the streamflow needed to provide optimum habitat and fish passage for adult salmonids throughout Big Timber Creek." *Amended Preliminary Order* at 32. These conclusions were based on the U.S. Bureau of Reclamation's ("USBR") report titled *Instream Flow Assessment Big Timber Creek, Idaho* ("USBR Study"). The hearing officer, in his *Order Granting Petitions, in Part*, concluded relevant local public interest concerns are addressed whenever there is 18 cfs of flow in lower Big Timber Creek, regardless of how or why the flow is present in the creek. *Order Granting Petitions, in Part* at 12.

Agencies Argument

The Agencies argued the "Amended Preliminary Order does not, but the Final Order should, require that any flows the Agencies have secured, or will secure in the future, for the purposes of 'reconnecting' Big Timber Creek to the Lemhi River will not be 'counted' in determining whether the 18 CFS 'bypass' flow requirement at the Lower Big Timber Creek Gage (Conditions 8 and 9) has been satisfied." *Agencies Exceptions* at 2.

Specifically, the Agencies argued, but for the 7.3 cfs of reconnect flows secured by the IWRB through its Water Transaction Program ("WTP"), the lower reach of Big Timber Creek "would be completely dewatered for most of the irrigation season." *Amended Preliminary Order* at 5-6, 20. As a result, the Agencies argued

> for exactly the same reasons that requiring an 18 CFS "bypass" flow at the Lower Big Timber Creek Gage is in the local public interest, it is contrary to the local public interest to "count" the "reconnect" flows for purposes of administering the 18 CFS "bypass" flow requirement. This is not equivalent to arguing that a "bypass" flow of more than 18 CFS is necessary for fish passage, as the Hearing Officer incorrectly concluded. Rather, it is an argument that applicants for new

> water rights may not rely upon "reconnect" flows that would not be there but for the IWRB's efforts, and that were secured specifically to help offset and remedy the effects of existing diversions, rather than to facilitate or support new diversions. . . . The local public interest in recovering the listed fish species and their habitat in the Lemhi River basin would be undermined by allowing the "reconnect" flows to be "counted" towards the 18 CFS "bypass" flow requirement."

Agencies Exceptions at 12.

Bird Response

Bird argued that because the bypass flow was based upon fish passage, it does not matter why the water is present in the creek channel as the fish cannot tell a difference. *Bird Response* at 4. Bird argued the hearing officer's imposition of a bypass flow is actually a minimum flow that should have been permitted under Idaho Code § 42-1501 *et seq.* *Id.*

The Director's Conclusion

The Director determines the USBR Study is reliable, convincing scientific evidence establishing flow rates necessary to maintain anadromous fishery values in various reaches of Big Timber Creek. The Director also determines maintenance of the anadromous fishery values in Big Timber Creek is in the local public interest. The hearing officer determined, based on the USBR Study, that a flow rate of 18 cfs is necessary in Reach 1 of Big Timber Creek.[3] The Director agrees.

The Agencies argued the Final Order should require that any flows the Agencies have secured, or will secure in the future, for the purposes of reconnecting Big Timber Creek to the Lemhi River not be counted in determining whether the 18 cfs bypass flow requirement at the Lower Big Timber Creek Gage (Conditions 8 and 9) has been satisfied.

The Director recognizes the Agencies' efforts to protect Big Timber Creek flows through the WTP program. IDWR must evaluate Proposed Permit 74-16187 and ensure that Bird does not deplete the 18 cfs streamflow the USBR Study identified as necessary in Reach 1. The fact that the WTP secures water specifically to help offset and remedy the effects of existing diversions is irrelevant to IDWR's consideration of Proposed Permit 74-16187. In other words, in this particular contested case, Bird should not be able to deplete flows with a new diversion below 18 cfs in Reach 1. If Bird is not exercising Proposed Permit 74-16187, however, IDWR's decision in this matter does not protect the 18 cfs bypass flow and IDWR's decision in this matter does not protect the water acquired by the WTP from diversion by holders of existing water rights.

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[3] For a description of how the USBR Study divided Big Timber Creek into reaches, *see infra*. Findings of Fact 32-34, and the USBR Study at pages 4-7.

Requiring Bird not to divert until there is 18 cfs plus an additional amount equal to what the Agencies have secured in the river is not supported by the record. The USBR Study establishes that 18 cfs is necessary. Protection of a flow in excess of, or separate from, 18 cfs is not supported in the record. If the proposed permit is conditioned to not deplete the streamflows set forth in the USBR Study when Bird is exercising Proposed Permit 74-16187, IDWR has addressed the local public interest requirement for Proposed Permit 74-16187.

The Director concludes the 18 cfs bypass flow requirements of Condition 8 and Condition 9 are reasonable conditions protecting the local public interest and the conditions will not be altered or amended below.

II. Whether the Final Order should protect a flow rate exceeded once every four years or five years, with a duration of 10 or 16 days.

The hearing officer concluded it is in the local public interest to preserve the periodic high flow events that maintain the Big Timber Creek stream channel morphology. *Amended Preliminary Order* at 24. He concluded:

> Based on the monthly exceedance flows set forth in the USBR Study, the flow at the Upper BTC Gage should exceed 284 cfs one year out of five years, on average. The monthly exceedance flows are consistent with actual stream flow records for Big Timber Creek (Upper BTC Gage, 2006-2016). In 2009, the flow at the Upper BTC Gage met or exceeded 284 cfs for ten days during the snowmelt runoff period. The peak flows during the 2009 snowmelt runoff period were sufficient to maintain the Big Timber Creek channel.

Id. at 24. In determining the flow at the Bird Gage, the hearing officer assumed a high flow of 284 cfs from the USBR Study at the Upper BTC Gage, and calculated a corresponding flow at the to-be-constructed Bird Gage of 217 cfs by deducting irrigation diversion rates between the Upper BTC Gage and the to-be-constructed Bird Gage. *Id.* at 24-25.

As a result, the hearing officer conditioned the permit as follows: "Condition 10: 'The right holder shall cease diversion under this right when the flow at the Bird Gage is greater than 217 cfs. Diversion under this right may resume when the flow at the Bird Gage drops below 217 cfs or has exceeded 217 for at least ten days in the current irrigation season.'" *Id.* at 34.

Agencies Argument

The Agencies argued the administrative record does not support the Hearing Officer's determination that the "peak" flow is the flow that will be exceeded in one year out of every five, on average. *Id.* "[T]he evidence does not support interpreting 'three to five years, on average' as meaning 'five years, on average.'" *Id.* Instead, the Agencies argued, the "peak" flow is the flow that would be exceeded once every four years, on average. *Id.* As a result, the Agencies appear

to have attempted to calculate a 25% exceedance flow of 261 cfs at the Upper Big Timber Creek Gage, and 194 cfs at the Bird Gage. *Id.*

Similarly, the Agencies argued Condition 10 should be modified "to provide that in years when there are 'peak' flows in excess of 194 CFS, the Applicant may begin diverting after sixteen (16) days of such flows," rather than 10. *Id.* At 14. The Agencies argued that because the hearing officer used 2009 to represent "peak stream flows" and there were sixteen days during 2009 when flows at the Upper Big Timber Creek Gage site met or exceeded 261 cfs, Condition 10 should be modified to provide that diversions may resume after 16 days of peak flows (flows of 194 cfs or more as measured the Big Timber Creek Gage) rather than 10. *Id.*

Bird Response

Bird argued: (1) the Agencies should not now contest the condition because they did not request it in the first place; (2) the Agencies own expert testified 10 days was sufficient; (3) 2009 was a very high flow year; (4) using historic flow records to address the duration needed for channel-forming is misplaced; and (5) if allowed to remain as a condition in any form, the duration should be ten days. *Bird Response* at 6.

Director's Conclusion

The Director declines to adopt the hearing officer's proposed Condition 10. Diluccia's testimony broadly established the worth of high flows and that, based on his personal observation, 2009 flows were sufficiently high to beneficially "carve" or "shape" an unknown but limited portion of the physical channel of Big Timber Creek. Diluccia also opined that these high flows are needed every three to five years. However, the record lacks sufficient technical evidence to support a conclusion that a high flow of 284 cfs or greater is necessary for channel shaping and channel gravel recruitment to sustain anadromous fisheries habitat in Big Timber Creek.

Diluccia testified qualitatively that channel-improving flows may be needed every three to five years. However, IDFG has not quantified the high flow events needed to maintain optimum stream channel characteristics for Big Timber Creek. IDFG has not quantitatively determined a required frequency. Diluccia Test. (Day 2, Track 4, 24:00 – 29:00). While the hearing officer linked his finding that 284 cfs is sufficient to maintain the Big Timber Creek channel to the USBR Study exceedance regression equations, the USBR Study did not "estimate flow or habitat needs of downstream migrants or spring runoff conditions necessary for maintenance of channel morphology or riparian zone functions." Ex. 202 at 26. There is insufficient evidence in the record to quantify and protect these periodic high flow events. This conclusion will be addressed in more detail below.

III. Whether the Final Order should require Conditions 8, 9, 10, and 12, be administered and enforced at the field headgate for the place of use rather than the point of ESA listed fish species.

In his *Order Granting Petitions, in Part*, the hearing officer denied the Agencies' request that Proposed Permit 74-16187 be administered and enforced at the field headgate for the specific place of use, with a lockable isolation valve or headgate installed in either the pipeline or ditch serving the place of use authorized under the permit. The hearing officer declined to impose such a condition, concluding "[i]ssues related to beneficial use and unauthorized acres fall within the Department's enforcement authority (described in Idaho Code § 42-351)." *Order Granting Petitions, in Part* at 12.

Agencies Argument

The Agencies argued Conditions 8, 9, 10, and 12, are unique, and require administration and enforcement on a real-time basis. *Agencies Exceptions* at 16. They argued this cannot occur at the existing point of diversion on Big Timber Creek as a result of other water rights diverting from the same point without similar conditioning related to fish habitat. *Id.* at 16. Without real-time administration and enforcement, the Agencies argue there is the real potential for water diverted under Bird's existing water rights to unlawfully be delivered to the authorized place of use under Proposed Permit 74-16187 after it falls out of priority. *Id.* at 16. The Agencies argued "because the permit will be in priority for an average of only about twenty days a year" real-time administration and enforcement will not be unduly burdensome to Bird. *Id.* at 16. The Agencies further argued Bird has already agreed to administration of the permit at the field headgate. *Id.* In the alternative, the Agencies proposed a telemetry-capable measuring device could be installed, meaning the watermaster would not have to physically visit the headgate for administration. *Id.* at 16-17.

Bird Response

Bird argued the Agencies' request is "extraordinary," especially in recommending telemetry-capable measuring at the field headgate. *Bird Response* at 6. Bird views the request as unlawful and unnecessary because "the issuance of a water right permit is not a license for the Department to single out a permit holder and subject him or her to additional water administration requirements when the water district—an instrumentality of the Department—already has the authority to enforce water rights under Idaho Code § 42-351." *Id.* at 6.

Director's Conclusion

The Director trusts the Water District 74W watermaster is capable of administering Proposed Permit 74-16187 properly and in priority. There is precedent on Big Timber Creek for administration of a water right conditioned with bypass flows. As discussed below, water right 74-15613, which is conditioned with a 13 cfs bypass flow, has been administered by the watermaster for Water District 74W without issue since 2011. The relevant point of diversion is

already equipped with measuring devices and monitored and regulated by the watermaster during the irrigation season.

Proposed Permit 74-16187 will be administered as any other water right. If Bird is diverting water in excess of his rights, out of priority, or irrigating lands not authorized by water rights, notice of these activities should be conveyed to IDWR's Water Compliance Bureau.

IV. Whether the Final Order should clarify that Big Timber Creek has not been fully reconnected to the upper Lemhi River for purposes of recovering ESA listed fish species.

The Amended Preliminary Order contains three statements relevant to the reconnection of Big Timber Creek to the Lemhi River. First, at Finding of Fact 28: "These projects have reconnected Big Timber Creek to the Lemhi River during the irrigation season and generally provides an instream flow of 7.3 cfs in lower Big Timber Creek." *Amended Preliminary Order* at 6. Next, at Finding of Fact 30: "Now that Big Timber Creek has been reconnected to the Lemhi River, IDFG biologists expect more salmon juveniles from the Lemhi River to use the habitat available in Big Timber Creek." *Id.* Finally, in his conclusions, the hearing officer stated: "Now that Big Timber Creek has been reconnected to the Lemhi River, the habitat function of Reach 1 should improve and the flow needed to support optimum fish habitat should be preserved." *Id.* at 20.

Agencies Argument

The Agencies argued Big Timber Creek has historically been dewatered during the irrigation season. *Agencies Exceptions* at 17. Reconnection for ESA recovery has been a high priority, and through the WTP, "reconnect" projects have restored approximately 7.3 cfs of "reconnect" flows in the lower reach of Big Timber Creek. However, the Agencies argued the record establishes these flows are insufficient to fully reconnect Big Timber Creek to the Lemhi River for fish passage and habitat. *Id.* at 17. Therefore, the Agencies argued it is incorrect for the hearing officer to state or imply that Big Timber Creek has been fully reconnected to the Lemhi River. *Id.* The Agencies argued it remains in the local public interest to "reconnect" Big Timber Creek to the Lemhi River for ESA anadromous fish recovery and asked the Director to clarify that Big Timber Creek "has not been fully 'reconnected' to the upper Lemhi River for purposes of recovering the listed fish species and their habitat." *Id.* at 18.

Bird Response

Bird argued the Agencies are using a distinct definition of the term "reconnect" which "refers to whether the water flowing into the Lemhi River is enough to support ESA recovery." *Bird Response* at 6. Bird argued the Director should use the more commonly understood definition of reconnect, which is that water is flowing into the Lemhi River from Big Timber Creek. *Id.*

Director's Conclusion

The hearing officer's language in describing reconnection of Big Timber Creek could be interpreted to conclude that Big Timber Creek has been "fully" reconnected to the Lemhi River. The Director has amended Findings of Fact 28-30 below to clarify certain references to reconnection.

V. Whether the section of the Amended Preliminary Order "Minimum Stream Flows" should be deleted or replaced with language proposed by the Agencies.

The hearing officer generally discussed minimum stream flows on pages 25-27 of the Amended Preliminary Order, concluding that if the

> Agencies believe a minimum stream flow should be created to protect fish habitat and aquatic life and promote recovery of ESA-listed species, the Agencies should file an application for a minimum stream flow . . . [i]nstead of protesting every application for permit filed in the Lemhi River Basin . . . [as] the present contested case does not provide the proper venue to establish a minimum stream flow.

Amended Preliminary Order at 26.

Ultimately, the hearing officer concluded the bypass conditions, while having similar effect, are not minimum stream flows because

> the streamflow thresholds included in the conditions for the proposed permit do not limit or restrict any other water rights and only apply when the water right is being exercised. If Bird chooses not to divert water for irrigation under the proposed permit, then the streamflow thresholds described above do not need to be satisfied.

Id. at 27.

Agencies Argument

The Agencies argued the section of the Amended Preliminary order titled "Minimum Stream Flows," at pages 25-27, be deleted and replaced with alternative language. The Agencies argued this matter is an application for a permit to divert water under Idaho Code § 42-202, not for a minimum stream flow application under Chapter 15, Title 42, Idaho Code. *Agencies Exceptions* at 18.

The Agencies acknowledged IWRB's minimum stream flow on the lower Lemhi River (Water Right No. 74-14993), but argued that right was decreed in the SRBA and subject to the "separate streams" provision of the Basin 74 General Provisions, "which provides that new appropriations on Big Timber Creek . . . 'are not considered subject to prior downstream rights

on the Lemhi River proper.'" *Id.* at 18 *citing* Ex. 188 at 1-2. Therefore, the hearing officer's discussion of minimum stream flows: (1) is irrelevant to resolving any of the issues presented in this matter; (2) is unnecessary as IWRB has sole authority and discretion whether to seek Chapter 15 minimum stream flows; and (3) is beyond the scope of the issues presented. *Id.* At 19.

The Agencies also argued the requirements of Chapter 15 are intended to protect minimum flows, not "bypass flows" and "peak" flows. *Id.* 19-20. The Agencies argued there is nothing in the record or law to support a conclusion that new IWRB minimum stream flow rights "are an appropriate or viable means of protecting the local public interest in recovering the listed fish species and their habitat in the Lemhi River basin." *Id.* at 19-20.

Bird Response

Bird argued "it is clear that the parasitic condition at least functions like a minimum stream flow right and therefore implicates the provisions of Chapter 15 of Title 42 of the Idaho Code. The *Applicant's Petition for Reconsideration* makes this clear, and while we understand why the Agencies do not like discussion of it in the Preliminary Order, it is disingenuous to argue that it is not relevant or necessary to the discussion." *Bird Response* at 7.

Director's Conclusion

The record is replete with evidence and argument related to the distinctions between the proposed conditions of the permit and minimum stream flows under Chapter 15. However, the Final Order need not include dicta about what the parties should do related to minimum stream flows. Based on their filings in the record, the Agencies clearly understand their rights and responsibilities under Chapter 15. Accordingly, the hearing officer's analysis of minimum stream flows has been modified below.

The Director agrees with the hearing officer that the bypass flow conditions will only affect Proposed Permit 74-16187. If Bird chooses not to exercise Proposed Permit 74-16187, there will be no required bypass flow of 18 cfs in Reach 1 and 54 cfs in Reach 5 of Big Timber Creek. There is a bypass flow requirement of 13 cfs in Reach 1 for water right 74-15613 in the name of James Whittaker ("Whittaker"). However, if Whittaker chooses not to exercise water right 74-15613, and Bird is not exercising Proposed Permit 74-16187, no bypass flow is required in Reach 1.

The Director disagrees with certain statements of the hearing officer related to the administration of high flow uses. Specifically, in statements on pages 23 and 28 of the Amended Preliminary Order, the hearing officer determined bypass flow requirements of water right 73-15613 (Whittaker) and Proposed Permit 74-16187 reduce the quantity of high flow water available for diversion.

On page 23, the hearing officer wrote:

> Because high flow uses can only occur after existing water rights are fully satisfied, the high flow uses on Big Timber Creek are now subject to the 13 cfs bypass condition included on water right 74-15613. High flow cannot be diverted until there is at least 13 cfs in lower Big Timber Creek.

There are two problems with this statement. First, if Whittaker is not diverting water as authorized by water right 74-15613, there is no protection for 13 cfs in Reach 1 against diversions of high flow. If the 13 cfs were protected against diversion of high flow even when Whittaker is not diverting water, the bypass flow would be a de facto minimum stream flow.

The hearing officer also wrote on page 28 of the Amended Preliminary Order:

> Prior to the approval of water right 74-15613, water users on Big Timber Creek could have diverted all of the water in the creek under existing water rights and high flow uses. Now, during periods of high flow, there is at least 13 cfs left un-diverted in Big Timber Creek. Water right 74-15613 has, in effect reduced the water available for high flow uses by 17 cfs (13 cfs as bypass flow and 4 cfs for irrigation use under the water right). This does not mean that the 17 cfs would have actually been diverted by high flow uses. It only means that the amount of water available for high flow uses has been reduced by 17 cfs. As described above, in order to optimize the amount of fish habitat in lower Big Timber Creek (Reach 1), there must be a bypass flow of at least 18 cfs. Therefore, the proposed permit, in combination with water right 74-15613, will reduce the water available for high flow usage by 28.4 cfs (18 cfs as bypass flow and 10.4 cfs for irrigation use under the water rights), thereby satisfying the optimum habitat thresholds set forth in the USBR Study.

Again, the Director disagrees with the hearing officer. If Bird does not exercise Proposed Permit 74-16187, and Whittaker does not exercise water right 74-15613, there is no requirement for a bypass flow in Reach 1. The condition requiring a bypass flow is only operative during times when Bird and/or Whittaker are diverting water pursuant to the specific permit or water right containing the bypass flow conditions.

Second, questions related to when water users may divert high flows are questions of administration and not properly before the hearing officer. The hearing officer's analysis has been amended below.

The following findings, analysis, and conclusions have been modified according to the Director's analysis on exceptions.

FINDINGS OF FACT

1. Proposed Permit 74-16187 proposes to divert 6.4 cfs from Big Timber Creek for the irrigation of 320 acres. Ex. IDWR1. Big Timber Creek is a tributary of the Lemhi River. *Id.*

2. The proposed point of diversion is an existing ditch known as "BT12" or the "Home Ditch."[4] Kurt Bird Test.; Ex. 28. The Home Ditch is an authorized point of diversion for Bird's water rights 74-32, 74-34, 74-7165 and 74-15930. Ex. 309. These four water rights, in combination, authorize the diversion of 18.15 cfs. *Id.*

3. The proposed point of diversion is located on property owned by Tom Carlson. Ex. IDWR1. Proposed Permit 74-16187 included a letter from Tom Carlson granting Bird access to the proposed point of diversion. *Id.*

4. The authorized combined place of use for Bird's water rights 74-32, 74-34, 74-7165, and 74-15926 through 74-15931 includes a portion of the proposed place of use described in Proposed Permit 74-16187. Ex. 309. If Proposed Permit 74-16187 is approved, Bird will move the existing water rights off of the proposed place of use prior to development of the proposed permit. Kurt Bird Test.

5. Water rights on Big Timber Creek are administered by the watermaster for Water District 74W. Ex. 13 at Att. B; Ex. 28. The Home Ditch is equipped with a lockable headgate and measuring device and is regulated by Water District 74W. Exs. 23 and 24.

6. The proposed permit would be the most junior water right on Big Timber Creek and would only be available during the snowmelt runoff period. Exs. 10 and IDWR19.

7. Even though the proposed permit would only be available for a portion of the irrigation season, Bird proposes to irrigate pasture grass for cattle grazing, augmenting the natural precipitation to increase the productivity of the pasture area. Kurt Bird Test. This will allow the Applicants to keep cattle on their property later in the year, thereby reducing or eliminating the need to rent pasture ground from neighboring landowners. *Id.* Bird will be able to obtain financing to complete the proposed project. Ex. 16 (letter from Zions Bank confirming Bird's ability to obtain financing for the proposed project).

8. Bird intends to irrigate the proposed place of use using pivots and sprinklers. Exs. 2-4 (depicting pipeline to be constructed to provide gravity pressurized water for sprinkler irrigation). Bird proposes to convey water in the Home Ditch for approximately 0.75 miles, then convey water in a pipeline for approximately one mile to the proposed place of use. *Id.*

9. The Home Ditch diversion is located approximately 1.5 miles upstream of the confluence of Little Timber Creek and Big Timber Creek. Ex. 2. There is only one ditch located between the Home Ditch diversion and the inflow from Little Timber Creek. *Id.* This ditch, known

[4] In his testimony, Kurt Bird also referred to the ditch as the "Home Place Ditch."

as "BT11" or "Bob Ditch," is an authorized point of diversion for Bird's water right 74-32 (3.24 cfs). Ex. 28; Ex. 309 at 3.

10. The Lemhi River and some of its tributaries, including Big Timber Creek, provide habitat for Snake River steelhead, spring Chinook salmon and Columbia River bull trout. Ex. 210 at 1-2; Ex. 201 at 1. These species are currently listed as "threatened" under the Endangered Species Act ("ESA"). *Id.* "Historically, the [Lemhi River] basin supported robust populations of anadromous, migratory, and resident salmonids . . . ." Ex. 198 at 2.

11. Under Section 6 of the ESA, local landowners can enter into a conservation agreement ("Section 6 Agreement") with the U.S. Fish & Wildlife Service ("USFWS"). Diluccia Test. A Section 6 Agreement protects local landowners from federal enforcement for the take of an ESA-listed species. *Id.*

12. In the early 2000's, the State of Idaho, local water users, and USFWS attempted to negotiate a Section 6 Agreement. Diluccia Test. The negotiations broke down, however, due to disagreements about the instream flows needed to recover the ESA-listed species. *Id.* In the absence of a Section 6 Agreement, local water users are at risk of enforcement under the ESA if there is a take of an ESA-listed species. *Id.*

13. As part of the Section 6 Agreement negotiations, the parties to those proceedings prepared a set of conservation measures to be included in the agreement. Ex. 198 (draft conservation measures dated Sep. 7, 2007). IDFG and IWRB, in coordination with other state agencies, have moved forward with implementing many of the draft conservation measures even though the Section 6 Agreement was never finalized. Diluccia Test.

14. The draft conservation measures were intended to "improve survival of . . . incubating eggs, rearing juveniles, downstream migrating juveniles, and adults holding prior to spawning" and to "increase survival of salmon and steelhead while they are in the Lemhi River drainage and improve access to habitat in tributary streams." Ex. 198 at 1.

15. Significant amounts of money and resources have been invested to increase streamflow in the Lemhi River Basin and to improve spawning and rearing habitat for ESA-listed species. Ex. 193 at 1-2; Ex. 194 at 1-3; Ex. 201 at 22-26. This investment of money and resources has been made to avoid ESA-based enforcement by the federal government against the State of Idaho or its citizens. Exs. 206A, 206B, 193 and 194.

16. Fish biologists have determined that the Lemhi River basin, during certain times of the year, does not currently have the amount of high-quality fish habitat needed to achieve recovery goals for ESA-listed species. Ex. 201 at 6-7; Ex. 203 at 54-57 (Lemhi River Basin does not currently have the habitat capacity for summer parr and winter presmolt life stages of spring Chinook salmon needed to achieve ESA delisting).

17. "Habitat quality in the upper Lemhi River is in fair to good condition for a number of parameters including pool habitat, spawning gravels for anadromous and resident fish, rearing habitat, riparian condition and channel sinuosity." Ex. 196 at 5. The upper Lemhi River, from Hayden Creek upstream to Leadore, "contains important spawning and rearing habitat for Chinook salmon and also supports resident coldwater fish (e.g., cutthroat trout, bull trout, rainbow/steelhead/redband trout)." *Id.*

18. Big Timber Creek flows into the Lemhi River near the town of Leadore. Ex. 202 at 5. Big Timber Creek has unique characteristics (substrate composition, woody debris, wood cover, limited solar exposure, temperature) that make the creek ideal habitat for multiple life stages of ESA-listed fish species. Ex. 201 at 7, 11-15; Ex. 202 at 9 (abundance of bull trout in the Big Timber Creek watershed confirms high quality fish habitat).

19. The quality and quantity of fish habitat is directly correlated to streamflow. Ex. 201 at 8-9; Diluccia Test. "Streamflow throughout the Lemhi River drainage is reduced by water diversions." Ex. 199 at 22. "Water uses include domestic and livestock watering, but the vast majority of water diverted is used for irrigation." *Id.* Streamflow in the upper Lemhi River Basin, upstream of the inflow from Hayden Creek, is affected by irrigation diversions. *Id.* at 23.

20. "Magnitude and timing of flows can influence instream and riparian habitat, and natural flow regimes are important in formation and maintenance of instream and floodplain habitats." Ex. 198 at 4 (citations omitted). Periodic peak flows or high volume flows help "maintain the complexity of stream channels important for fish spawning, rearing, and survival by creating riffles and pools, depositional zones, and undercut banks." *Id.* at 40.

21. "Spring runoff due to snowmelt that typically redistributes substrate, removes fine sediments, and creates pools and other complex habitats has not been available in the upper reaches of the Lemhi River due to early [irrigation] season water withdrawals." Ex. 198 at 26, 39; Ex. 196 at 7; Ex. 203 at 86-88 (irrigation diversions during dry years can create an inverted hydrograph for the upper Lemhi River, where the lowest streamflow occurs during the runoff period). "As a result, the amount of off channel habitat for fish and the interchange of nutrients between aquatic and terrestrial/riparian environments has been significantly reduced." *Id.*

22. IDFG has not yet quantified the high flow events needed to maintain optimum stream channel characteristics for Big Timber Creek. Diluccia Test. (Day 2, Track 4, 24:00 – 29:00).

23. Spring Chinook salmon typically migrate from the ocean to their natal streams from April to July and spawn in August and September. Ex. 199 at 11. The timing of migration and spawning makes the spring Chinook salmon "especially vulnerable to streamflow reductions caused by irrigation diversions." *Id.* All of the spring Chinook salmon populations in the upper Salmon River basin "are at high risk of extinction due to low population size and low population productivity, but the Lemhi River population appears to be at the highest risk." *Id.* at 12; Ex. 204 at 168-169.

24. Snake River Basin steelhead migrate into fresh water sources in the summer and fall and spawn during the early spring, when streamflows are high. Ex. 199 at 12. Because of this timing, irrigation diversions have less of an impact on steelhead spawning. *Id.*

25. The State of Idaho (through IWRB) holds water right 74-14993, which establishes a minimum stream flow of 35 cfs for the Lemhi River, extending from the L-6 Diversion on the Lemhi River downstream to the confluence with the Salmon River. Ex. IDWR15; Idaho Code § 42-1506. Water right 74-14993 bears a priority date of April 12, 2001. Delivery of water right 74-14993 is measured at the USGS Lemhi River Below L5 Diversion near Salmon gage ("Lower Lemhi River Gage"). *Id.* Water right 74-14993 is the only minimum stream flow established by IWRB in the entire Lemhi River drainage.

26. IWRB administers the WTP to facilitate projects that "improve flows to tributary streams and rivers in the Upper Salmon River Basin." Ex. 212. The WTP reconnects tributaries to the Lemhi River that have been functionally disconnected from the river during the summer months. *Id.* Reconnecting tributary streams provides benefits to both anadromous and resident fish species. Ex. 198 at 10-11.

27. During the irrigation season (3/15 – 11/15), most of the total flow in Big Timber Creek is diverted for irrigation use. Ex. 202 at 10, 15; Exs. 10 and IDWR18 (authorized diversion rates under existing water rights exceed the total flow in Big Timber Creek except during the snowmelt runoff period). In the absence of reconnect projects, the most-downstream section of Big Timber Creek would be completely dewatered for most of the irrigation season. *Id.* Big Timber Creek would only connect to the Lemhi River during the snowmelt runoff period. *Id.*

28. In recent years, the WTP has facilitated projects on Big Timber Creek which have moved points of diversion for Big Timber Creek irrigation water rights to pumping stations on the Lemhi River. Exs. 17 and 18. These projects have reconnected Big Timber Creek to the Lemhi River at the confluence of Big Timber Creek and the Lemhi River during the irrigation season and generally restored a flow of 7.3 cfs in lower Big Timber Creek. Ex. 201 at 21.

29. Big Timber Creek was one of the highest priority creeks for reconnection because it was the largest disconnected tributary stream in the Lemhi River Basin and would provide a significant amount of spawning and rearing habitat for Chinook salmon and steelhead if it were reconnected. Ex. 196 at Framework pg. 13; Ex. 198 at 13; Ex. 201 at 20-21.

30. Because of past, current, and future efforts by the WTP to reconnect Big Timber Creek to the Lemhi River, IDFG biologists expect more salmon juveniles from the Lemhi River to use the habitat available in Big Timber Creek. Ex. 201 at 2.

31. In June 2004, the USBR Study summarized the results of a flow characterization study for Big Timber Creek. Ex. 202. The USBR Study was completed to identify the streamflow needed to support the relevant life stages of spring Chinook salmon, steelhead and bull trout in Big Timber Creek. *Id.* at 2. The USBR Study "may be used by the public, State, and Federal agencies

to direct management actions addressing stream flow needs of ESA-listed anadromous and resident native fish." *Id.* at 2-3.

32. The USBR Study area "encompassed the mainstem Big Timber Creek from its confluence with the Lemhi River upstream to Basin Creek." Ex. 202 at 4. The study area was divided into seven reaches based on "differences in stream channel morphology and locations of major [irrigation] diversions." *Id.* at 4-7. The seven reaches were situated in numerical order from Reach 1 (the most downstream reach, "[extending] from the confluence with the Lemhi River upstream to the first major diversion") to Reach 7 (the most upstream reach, extending upstream of the upper-most large diversion on Big Timber Creek and meant to represent natural flow conditions without the influence of irrigation diversions). *Id.*

33. The stream section identified as Reach 5 is located between the Home Ditch (the proposed point of diversion) and the confluence with Little Timber Creek (located approximately 1.5 miles downstream of the Home Ditch). Ex. 202 at 6; Ex. 2. This reach is characterized by "beaver dams mixed with riffle, run, and pool habitats." Ex. 202 at 6.

34. USBR used a physical habitat simulation model to evaluate the flow requirements at each of the seven designated stream reaches. Ex. 202 at 15-26. For each of the reaches, the USBR determined "the discharge at which habitat is optimized for adult, spawning, or juvenile life stages for the fish species analyzed in this study (salmon, steelhead, and bull trout)."[5] *Id.* at 25. "These optimized values . . . rarely coincide among life stages for any one species." *Id.* "Furthermore, adult, spawning, and juvenile life stages for salmon, steelhead, and bull trout occur at different times of the year." *Id.*; *IWRB Post-Hearing Brief* at 5 ("The amount of instream flow necessary for [fish habitat] varies, depending on factors such as life stage, life activity, location, channel characteristics, and time of year."). The flows identified in the USBR Study are the "points above which greater amounts of flow only provide minor gains in usable habitat." Ex. 202 at 25 (emphasis added).

35. The USBR Study also evaluated the flow required to provide fish passage for adult populations of Chinook salmon, steelhead and bull trout in each of the seven reaches. Ex. 202 at 22-23, 41-43. According to the USBR Study, fish passage should be the highest priority when making management decisions about optimum streamflow. *Id.* at 26.

36. The USBR Study did not "estimate flow or habitat needs of downstream migrants or spring runoff conditions necessary for maintenance of channel morphology or riparian zone functions." Ex. 202 at 26.

[5] The USBR Study cautions that the flow recommendations for juvenile habitat are likely inaccurate due to modeling constraints. The flow recommendations for juvenile habitat are often lower than summer base flows (without the effects of irrigation diversions). Therefore, the recommended flows for juvenile habitat set forth in the USBR Study will not be considered as part of this order.

37. The following table summarizes the recommended flow rates from the USBR Study for maintaining the optimum levels of habitat for spawning and adult populations of spring Chinook salmon, steelhead and bull trout and the recommended flow rates for fish passage:

	Reach 1	Reach 2	Reach 3	Reach 4	Reach 5	Reach 6	Reach 7
Flow rate (cfs) required for optimum spawning habitat	14	15	21	29	42	49	60
Flow rate (cfs) required for optimum adult habitat	18	15	16	27	36	35	40
Flow rate (cfs) required for passage of adult fish	13	13	9	19	54	11	15

Ex. 202 at 41-43.

38. During times when the proposed permit would be available (April – July), Big Timber Creek provides habitat for adult salmon, steelhead and bull trout. Ex. 202 at 23. IDFG has not observed any spawning activity by salmon or steelhead in Big Timber Creek. Ex. 201 at 2. IDFG has documented spawning by small sized bull trout in the upper reaches of Big Timber Creek. *Id.*

39. As a result of irrigation diversions, upstream reaches in Big Timber Creek generally have higher instream flows than downstream reaches during the irrigation season. Ex. 202 at 24.

40. A stream gage ("Upper BTC Gage") on Big Timber Creek upstream of the major irrigation diversions on the creek has been in operation since 2003. Water flow measurements from 2006 through 2016 were received into evidence. Ex. IDWR18. Except for a few small upstream diversions, this gage site represents the unimpaired flow of Big Timber Creek at that location. *Id.*

41. According to the Department's water right database, the following irrigation water rights from Big Timber Creek have authorized points of diversion upstream of Reach 5 (including water rights associated with the Home Ditch) but downstream of the Upper BTC Gage: 74-32, 74-34, 74-39B, 74-53, 74-1619, 74-7165, 74-14980, 74-15003, 74-15926, 74-15927, 74-15928, 74-15929, 74-15930, 74-15931, 74-16187[6] Ex. 28. These rights, in combination authorize the diversion of 63.95 cfs, which will be rounded up to 64 cfs for purposes of technical analysis.

42. According to the USBR Study, a flow of 54 cfs is required to maintain passage for adult salmon, steelhead and bull trout through Reach 5. Ex. 202 at 42. If the water rights with authorized points of diversion between the Upper BTC Gage and Reach 5 were diverted at their full authorized rate, and assuming no instream losses, there would need to be at least 118.1 cfs (which will be

[6] Because this Order approves Proposed Permit 74-16187 it should be included in the list of existing water rights in this stretch of Big Timber Creek.

rounded to 118 cfs for purposes of technical analysis at the Upper BTC Gage) to maintain 54 cfs of flow in Reach 5.

43. The following table lists the days, between 2006 and 2016, when the flow in Big Timber Creek at the Upper BTC Gage was greater than 118 cfs.

Year	Days (between 3/15 and 7/31) when the flow at Upper BTC Gage was greater than 118 cfs	# of Days
2006	May 18-May 28, June 5-June 12	19
2007	May 18-20	3
2008	May 19-24, June 1-7, June 15-July 3	32
2009	May 19-July 6	49
2010	June 4-July 3	30
2011	June 7-July 15	39
2012	May 17-18, June 2-7	8
2013	none	0
2014	May 24-June 8	16
2015	May 27 - June 12	17
2016	May 19-22, June 1-14	18

Ex. IDWR18.

44. On April 22, 2005, James and Paula Whittaker ("Whittaker") filed Application for Permit 74-15613, seeking a permit to divert water from Big Timber Creek for irrigation use. Ex. 5 at 3. Application 74-15613 was protested by Lemhi Irrigation District, Ellsworth Angus Ranch, IDFG and the U.S. Bureau of Land Management. *Id.* at 1.

45. The Department conducted an administrative hearing for the protested application on February 6 and 7, 2007. *Id.* The Department issued a Final Order approving Permit 74-15613 with limiting conditions on May 10, 2011. *Id.* at 11. The Department determined that Whittaker's proposed water use should not impair the 13 cfs required for adult fish passage in Reach 1 as described in the USBR Study. Ex. 5.

46. Water right 74-15613, as licensed, bears a priority date of April 22, 2005 and authorizes the diversion of 4.00 cfs from Big Timber Creek and the irrigation of 200 acres. Ex. 9. Water right 74-15613 is currently the most junior irrigation right on Big Timber Creek (Ex. 10) and includes the following conditions:

> At any time the flow rate in Big Timber Creek is greater than 13 cfs at all locations from the confluence of Little Timber Creek and Big Timber Creek down to the confluence of Big Timber Creek and the Lemhi River, the right holder may divert water under this right at a flow rate equal to the difference between the measured flow and 13 cfs, but not exceeding the flow rate authorized by this right.

> The right holder shall cease diverting water under this right if the flow of Big Timber Creek is 13 cfs or less at any location between the point of diversion and the confluence of Big Timber Creek and the Lemhi River.
>
> To determine whether water can be diverted under this right, the right holder and/or the watermaster shall measure the flows in Big Timber Creek at an existing measuring station near the Townsite of Leadore, located in the NENWNW, Section 31, T16N, R22E. The Department retains jurisdiction to require the right holder to install and maintain additional measuring sites to insure [sic] required bypass flows are maintained during diversions under this right.

Ex. IDWR16.

47. Bird has stipulated to the inclusion of these same conditions, with some modifications,[7] on the proposed permit. *Applicant's Post Hearing Brief* at 20-22.

48. Two stream measurement sites have been maintained on Big Timber Creek downstream of the irrigation diversions on the creek. One measurement site, the Whittaker flume, was installed to aid the watermaster in the delivery of water right 74-15613. Exs. 25-26. The Lower BTC Gage has been maintained by IWRB as part of the WTP. Ex. 27.

49. According to the USBR Study, a flow of 18 cfs is required to provide the optimum level of habitat for adult salmonids in Reach 1 (the most downstream reach of Big Timber Creek). Ex. 202 at 41. The following table lists the days, between 2006 and 2016 when the flow in Big Timber Creek at the Lower BTC Gage was greater than 18 cfs during the snowmelt runoff period (3/15 – 7/31)[8]:

[7] Bird contends that there is an error in the legal description for the Big Timber Creek measurement site near the town of Leadore and asserts that the error should be addressed if the proposed permit is approved with the same conditions as water right 74-15613. *Applicant's Post-Hearing Brief* at 21.

[8] For the period of record for the Upper BTC Gage (2006-2016), the snowmelt runoff period (represented by high flows in Big Timber Creek upstream of the major irrigation diversions on the creek) never extended beyond July 31. Ex. IDWR18.

Year	Days (between 3/15 and 7/31) when the flow at Lower BTC Gage was greater than 18 cfs	# of Days
2006	May 19-28, June 9-10	12
2007	none	0
2008	March 17, March 22, March 30-April 2, April 5-May 10, May 19-May 22, June 17-24	54
2009	March 27-28, April 13-14, April 21-24, May 6, May 25-July 2 and July 4	49
2010	June 4 to July 7	34
2011	March 17-18, March 21, March31-April 5, April 7-April 11, April 13-18, May 14-16, June 7-10, June 12-July 25	71
2012	March 31-April 5, April 10-13, April 22-May 4, June 3-8	29
2013	none	0
2014	May 22-June 1, June 3-6	15
2015	May 16, May 26-June 13	20
2016	April 21-27, May 7-11, May 15-24, June 1-16	38

Ex. IDWR19.

50. Water rights 75-13316 and 77-11941 (collectively "water right 75-13316"), known as the Salmon River Wild and Scenic water rights, are federal reserved water rights held by the U.S. Forest Service. Ex. IDWR13. Delivery of water right 75-13316 is quantified at the USGS Salmon River near Shoup gage ("Shoup gage"). *Id.* at 2.

51. Water right 75-13316 includes the following provisions:

> [T]his water right is subordinated to the following water rights and uses that are junior to this federal reserved water right and that have points of diversion or impoundment and place of use within the Salmon River Basin upstream from [the Shoup gage]:
>
> . . .
>
> (6)(A) Water rights other than those described in paragraphs (3) through (5) above claimed or applied for after the effective date of the Stipulation:
>
> (i) with a total combined diversion of 150 cfs (including not more than 5,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre), when the mean daily discharge at the Shoup gage is <1,280 cfs. . . .
>
> (ii) an additional diversion of 225 cfs (including up to an additional 10,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre) when the mean daily discharge at the Shoup gage is ≥ 1,280 cfs.

52. Between 2006 and 2016, the flow at the Shoup gage was less than 1,280 cfs during the irrigation season (3/15-11/15) on the days noted in the following table:

Year	Days (between 3/15 and 11/15) when the flow at the Shoup gage was less than 1,280 cfs	# of Days	Overlap Days[9]
2006	Aug 6-Sep 18,	44	0
2007	Jul 22-26, Jul 30-Sep 22	60	0
2008	Aug 20-Sep 21, Sep 29-Oct 2	37	0
2009	Sep 13-16, Sep 18-29	16	0
2010	April 11, Aug 28	2	0
2011	none	0	0
2012	Aug 16-21, Aug 23-Sep 24	39	0
2013	July 23-Sep 25	65	0
2014	Sep 10-12, Sep 15-19	8	0
2015	Aug 2-Aug 9, Aug 12-Sep 16, Sep 28, Oct 1	46	0
2016	July 30-Sep 22	55	0

Ex. IDWR20.

53. On April 3, 2012, the presiding judge in the Snake River Basin Adjudication ("SRBA") issued a partial decree for the General Provisions in Basin 74 ("Basin 74 General Provisions"). Ex. 11. Basin 74 is comprised of the Lemhi River and its tributaries.

54. The Basin 74 General Provisions are applicable to all water rights in Basin 74 and state, in pertinent part:

> The following water rights from the following sources of water in Basin 74 shall be administered separately from all other water rights in Basin 74 in accordance with the prior appropriation doctrine as established by Idaho law:
>
> . . .
>
> 21. Timber Creek (Big & Little) and tributaries;
>
> . . .
>
> Future appropriations of water on the above streams are not considered to be subject to prior downstream rights on the Lemhi River proper. Future appropriations of water on any other water source or stream in the Lemhi River Basin, however, are considered to be tributary to the Lemhi River for purposes of distribution.

[9] Overlap days are those days streamflow at the Shoup gage was lower than 1,280 cfs at the same time Proposed Permit 74-16187 would be available for diversion on Big Timber Creek.

. . .

The following general provision shall govern the use of "High Flow" surface water for irrigation use within the Lemhi Basin:

The practice of diverting high flows in the Lemhi Basin, in addition to diverting decreed and future water rights that may be established pursuant to statutory procedures of the State of Idaho, is allowed provided:

(a) the waters so diverted are applied to beneficial use.
(b) existing decreed rights and future appropriations of water are first satisfied.

Ex. 11.

55. Water users on Big Timber Creek, including Bird, and water users on the Lemhi River divert high flows when the available water supply exceeds the demand under existing water rights. Test. of Kurt Bird, James Whittaker, Carl Ellsworth, Merrill Beyeler, Carl Lufkin, R.J. Smith, and Bruce Mulkey. "Diversions of high waters or flood waters for irrigation purposes within the [Lemhi River Basin] have been practiced in an effort to hold or store water underground within the basin, which later contributes to the flow of the streams and river, and has the effect of augmenting or supplementing this flow during the latter portion of the irrigation season." Ex. 189 at 7 (quoting Revised Finding of Fact 7 from the 1982 Lemhi Decree).

56. In the mid-1970's, Sherl Chapman, a professional geologist, conducted an investigation "to determine the relationship between the surface water and ground water systems in the Lemhi River Basin." Ex. 12 at Report pg. 1 (Introduction).

57. The valley floor and terraces (bench lands) of the basin are primarily composed of coarse gravel, sand and silt. *Id.* at Report pg. 4 (Geology). "The generally coarse nature of these deposits provides great permeability . . ." *Id.*

58. Streamflow in the Lemhi River and its tributary creeks generally peaks in early June as a result of snowmelt runoff. *Id.* at pg. 5 (Hydrology). Peak discharge may only last two weeks, but higher than normal flows may last for ten to twelve weeks. *Id; see also* Ex. 18 (streamflow records from Upper BTC Gage confirm described flow pattern).

59. Surface water sources and ground water are directly connected in the Lemhi River Basin. Ex. 12 at Report pg. 10 (Ground Water – Surface Water Relationship). Tributary streams contribute to ground water levels as water sinks in the coarse gravels of the stream beds. *Id.* at Report pg. 11. Irrigation water applied in excess of the consumptive use requirements of the crops also contribute to ground water levels. *Id.*

60. "[P]ractically all the water which percolates into the ground moves toward the river and reappears in numerous seeps and springs in the flood plain of the Lemhi River." *Id.* (quoting a 1965 report by E.G. Crosthwaite and R.S. George). This hydrologic system, where surface water enters the local aquifer through instream seepage and irrigation practices and is ultimately returned to the Lemhi River through seeps and springs, "increases the lag time between runoff and the availability of water at any downstream point." *Id.* at Report page 10 (Ground Water).

61. "[T]he diversion of high waters or flood waters onto the benches and the application of irrigation water to the crop land provides recharge to the aquifers in the Lemhi River Basin and subsequently contributes to the stream flow during the late summer and fall months." *Id.* at Report pg. 16 (Conclusions and Recommendations); *see also* Ex. 203 at 88 (confirming the relationship between diversions for irrigation use and ground water discharge into the Lemhi River).

62. Although the water diverted for irrigation, which is not consumed by plants, contributes to flows in the Lemhi River during the late summer and early fall, the early-season diversions for irrigation use can also have negative impacts on the watershed. Ex. 203 at 102. Irrigation diversions, including high flow usage, "have nearly eliminated an important intermittent disturbance regime associated with the spring freshet and channel-forming flows." *Id.* Irrigation diversions have also "[altered] the timing and spatial distribution of groundwater recharge." *Id.*

ANALYSIS

Idaho Code § 42-203A(5) 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 . . . 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.

The applicant bears the burden of proof for elements (a) through (d) in Idaho Code § 42-203A(5). IDAPA 37.03.08.040.04. All parties bear the burden of coming forward with evidence about any factor affecting local public interest of which they are knowledgeable. *Id.* The applicant bears the ultimate burden of persuasion for all of the elements in Idaho Code § 42-203A(5), including the local public interest element. *Id.*

Injury to Existing Water Rights

Rule 45.01.a of the Department's Water Appropriation Rules sets forth the criteria used to determine whether a proposed use of water will reduce the quantity of water under an existing water right:

> A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:
>
> > i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.
> >
> > . . .
> >
> > iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.

IDAPA 37.03.08.045.01.a.

Injury to Existing Water Rights on Big Timber Creek

If approved, the proposed permit would become the most junior water right in the Big Timber Creek drainage. Water rights on Big Timber Creek are currently administered by the watermaster for Water District 74W. Most irrigation diversions in the district, including the Home Ditch, are equipped with measuring devices and are monitored and regulated by the watermaster during the irrigation season. Exs. 28, 23 and 24 (headgate and weir already in place at the proposed point of diversion).

Water right 74-15613 is currently the most junior irrigation right on Big Timber Creek. The water right includes a condition which requires a bypass flow of 13 cfs in lower Big Timber Creek before the right can be exercised. Water right 74-15613 has been administered by the watermaster for Water District 74W without issue since 2011. If approved, Proposed Permit 74-16187 could also be administered by the watermaster in priority, thereby preventing injury to senior water rights on Big Timber Creek. Proposed Permit 74-16187 would be junior to Whittaker's water right 74-15613. Therefore, if Whittaker is exercising water right 74-15613, Bird could not divert water pursuant to proposed permit 74-16187 unless flows exceed the amount called for by Whittaker and any required bypass flows. Under the above conditions, Bird's diversion of water authorized by Proposed Permit 74-16187 would not injure existing water rights on Big Timber Creek.

Impact on High Flow Uses

The Basin 74 General Provisions authorize water users to divert high flows from the Lemhi River or its tributaries under certain conditions. During the hearing, there was some discussion about whether high flows diverted under the Basin 74 General Provisions could only be applied to lands covered by existing, recorded water rights. That issue, however, is not before the Director and a determination is not needed to reach a decision in the pending contested case.

Idaho Code § 42-203A(5)(a) and Rule 45.01.a of the Department's Water Appropriation Rules mandate that IDWR consider injury to water rights. High flow uses are not water rights. *See In Re SRBA, Subcase Nos. 74-15051 et al.* (January 3, 2012). Questions of when water users may divert high flows are questions of administration and are not appropriate for this proceeding.

Injury to Lemhi River Water Rights

The Basin 74 General Provisions include a section commonly referred to as the "separate streams provision," which states that future water rights on certain designated tributary streams are not subject to senior water rights on the Lemhi River. Ex. 11. Big Timber Creek is one of the streams identified in the separate streams provision. Therefore, the proposed permit is not subject to downstream water rights on the Lemhi River bearing priority dates earlier than priority dates for water rights authorizing diversion of water from Big Timber Creek.

Injury to the U.S. Forest Service's Salmon River Wild & Scenic Water Right (75-13316)

The partial decree for water right 75-13316 includes a provision subordinating the water right to certain junior water rights, including future water rights developed on upstream sources. Specifically, water right 75-13316 is subordinated to 150 cfs of junior water rights (including not more than 5,000 irrigated acres), "when the mean daily discharge at the Shoup gage is < 1,280 cfs." Ex. IDWR13 at 6. Further, water right 75-13316 is subordinated to an additional 225 cfs of junior water rights (including up to 10,000 irrigated acres) "when the mean daily discharge at the Shoup gage is ≥ 1,280 cfs." *Id.* According to streamflow records for Big Timber Creek and the Salmon River (Shoup gage), the proposed right would almost never be available during times when the mean daily discharge at the Shoup gage is less than 1,280 cfs.[10] Consequently, the proposed permit would be part of the 225 cfs of water rights that receive subordination protection under the terms of water right 75-13316. As of today, no portion of the 225 cfs has been allocated. Therefore, the proposed right would qualify for subordination protection under, and could not injure, senior water right 75-13316

[10] As discussed in the local public interest section of this order, in order to protect habitat and passage for ESA-listed fish species, the proposed right may only be diverted when streamflow at the Bird Gage in Reach 5 exceeds 54 cfs. There is no historical streamflow information at the Bird Gage site. In order to compare streamflow data from the Shoup gage to streamflow data from the nearest gage on Big Timber Creek (the Upper BTC Gage), one must account for the 64 cfs of existing water rights between the Upper BTC Gage and the proposed Bird Gage. Between 2006 and 2016, there was never a time when flow at the Upper BTC Gage was greater than 118 cfs and flow at the Shoup gage was less than 1,280 cfs.

Sufficiency of Water Supply

Rule 45.01.b of the Department's Water Appropriation Rules sets forth the criteria used to determine whether the water supply is insufficient for a proposed project: "The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible . . . ." IDAPA 37.03.08.045.01.b.

The proposed permit would only be available during the snowmelt runoff period. As described below, in order to address local public interest concerns, the proposed permit may only be diverted when flow at the Lower BTC Gage is greater than 18 cfs and flow at the to-be-constructed Bird Gage is greater than 54 cfs. These flow thresholds are only satisfied during the snowmelt runoff period. According to streamflow records for Big Timber Creek, the snowmelt runoff period does not extend past July 31st, even in years of above average runoff. Ex. IDWR 18. In order to simplify the administration of the proposed permit, the season of use should be limited to 3/15 – 7/31.

Streamflow data from the Upper BTC Gage establishes how many days, on average, the proposed permit may be available. Assuming a stream flow threshold of 118 cfs at the Upper BTC Gage between 2006 and 2016,[11] the proposed permit would have been available 17 days per year, on average. Because of irrigation diversions and high flow usage in lower Big Timber Creek, the Lower BTC Gage is less reliable in quantifying the available water supply for a junior water right. The streamflow data for the Lower BTC Gage confirms that the flow at that gage is usually greater than 18 cfs when flow at the Upper BTC Gage is greater than 118 cfs. Therefore, the proposed permit would be available for approximately 17 days per year, on average. In 2009, the proposed permit was available for 49 days. In some years the proposed permit may not be available at all. Bird proposes to divert water for irrigation of pasture land. Water diverted under the proposed permit would augment natural precipitation to increase the productivity of pasture, reducing or eliminating the need to rent pasture from neighboring landowners. Bird has demonstrated that the water supply is sufficient for an adequate time interval and in sufficient quantities to make the project economically feasible.

Lack of Good Faith / Speculation

Rule 45.01.c of the Department's Water Appropriation Rules sets forth the criteria used to determine whether an application is filed in good faith and not for speculative purposes. An application is made in good faith when an applicant has "legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority

[11] There is no historical streamflow data for the proposed Bird Gage site in Reach 5 of Big Timber Creek. To use the Upper BTC Gage as a reference for evaluating sufficiency of water supply, one must account for the 64 cfs of water rights between the Upper BTC Gage and the proposed Bird Gage. The flow threshold changes from 54 cfs to 118 cfs.

to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way." IDAPA 37.03.08.45.01.c.i. An applicant must also demonstrate that the applicant is "in the process of obtaining other permits needed to construct and operate the project" and that there are no obvious legal impediments to prevent successful completion of the project. IDAPA 37.03.08.045.01.c.ii-iii.

The proposed point of diversion is on property owned by Tom Carlson. The proposed point of diversion and a portion of the conveyance system is already in place and is used to convey existing water rights held by Bird. The application included a short letter from Carlson, authorizing Bird to access the ditches and headgates needed for the proposed permit. Bird does not need other permits to construct and operate the project. Bird has demonstrated that the application was filed in good faith and not for speculative purposes.

Sufficient Financial Resources

Rule 45.01.d of the Department's Water Appropriation Rules sets forth the criteria used to determine whether an applicant has sufficient financial resources to complete a project. "An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director." IDAPA 37.03.08.045.01.d.ii.

The application included a letter from Zions Bank stating that Bird would be able to obtain the financing needed to complete the proposed project. The Applicants have demonstrated that it is reasonably probable they will be able to obtain the financing needed to complete the proposed project.

Conservation of Water Resources

During oral argument for the Agencies' *Motion*, there was some discussion about the scope of review under the conservation of water resources element set forth in Idaho Code § 42-203A(5)(f). The conservation of water resources review is meant to be separate and distinct from the local public interest review under Idaho Code § 42-203A(5)(e). Therefore, the term "conservation of water resources" does not mean reserving water from appropriation or setting water aside for instream uses such as fish habitat. These topics and issues are encompassed by the local public interest review and should be weighed against all other local public interest factors.

Diverting water from creeks and streams for irrigation use is an accepted common practice in Idaho. Bird proposes to irrigate using pipelines, sprinklers and pivots, which constitutes a conservative use of water when compared to other irrigation methods.

The Wild & Scenic water rights held by the U.S. Forest Service describe multiple classes or groups of water rights in the Salmon River drainage that are protected from a delivery call issued by the Wild & Scenic water rights. Two of these groups are relevant to the pending contested case. The first group (described in Paragraph 10(b)(5)(A)(i)) is limited to 150 cfs and receives

subordination protection regardless of the flows in the Salmon River. The second group (described in Paragraph 10(b)(6)(A)(ii)) is limited to 225 cfs and only receives subordination protection when flows in the Salmon River at the Shoup gage meet or exceed 1,280 cfs. Based on streamflow records for the Shoup gage, the Wild & Scenic water rights are usually only satisfied during the snowmelt runoff period. Therefore, these two protected quantities of water reserved for future appropriation represent a critical water supply for future development in the Salmon River drainage. The Department has a duty to allocate these limited water resources in a manner that optimizes the value of the available water supply.

The Department should only allocate water from the 150 cfs supply (Paragraph 10(b)(6)(A)(i)) to water rights that could be diverted when flow at the Shoup gage is less than 1,280 cfs. Stated differently, the Department should only allocate water from the 150 cfs supply to water rights that will actually benefit from the additional subordination protection. Allocating water from the 150 cfs pot to water rights that do not benefit from the additional protection is not consistent with the conservation of water resources within the state of Idaho.

The relevant evidence in the record (streamflow records for the Salmon River and Big Timber Creek) show that streamflow at the Shoup gage always exceeds 1,280 cfs when the proposed permit would be available for diversion on Big Timber Creek. Therefore, the proposed permit should be allocated water under Paragraph 10(b)(6)(A)(ii) – the 225 cfs supply – rather than Paragraph 10(b)(6)(A)(i) – the 150 cfs supply. Bird had ample opportunity to provide technical analysis comparing streamflows on the Salmon River to streamflows on Big Timber Creek. Bird declined to offer any such analysis at the hearing. In the absence of any technical evidence to the contrary, the hearing officer must rely on the streamflow data in the record.

Bird has demonstrated the proposed project will be efficient and a conservative use of water. If the proposed permit includes a condition noting that the permit benefits from the subordination described in Paragraph 10(b)(6)(A)(ii) of water right 75-13316, Bird has demonstrated that the proposed permit is consistent with the conservation of water resources within the state of Idaho.

Local Public Interest

The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a) and the conservation of water resources analysis under § 42-203A(5)(f). 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 § 42-202B(3).

Idaho Code § 42-203A "places upon the Director [of the Department] the affirmative duty to assess and protect the public interest." *Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 441, 448 (1985). "The relevant elements [of the local public interest] and their relative weights will vary with local needs, circumstances, and interests." *Dunn*, 109 Idaho at 339, 707 P.2d at 450. "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to [the Department's] sound discretion." *Id.* Permit conditions arising from

the local public interest review should be based on specific information in the record, not on speculation or assertions of indeterminate impacts. *See Hardy v. Higginson*, 123 Idaho 485, 491, 849 P.2d 946, 952 (1993) (case remanded to Department because of insufficient evidence in the record to support permit conditions attempting to address local public interest issues).

It is in the local public interest to divert water for irrigation. Irrigation of agricultural lands supports the local economy and is critical for the survival of rural communities like Leadore. Kurt Bird Test. Bird will derive real and substantial benefits by irrigating the proposed place of use, even if only for a short period of time. *Id.*

On August 21, 2019, the hearing officer granted, in part, the *Motion* filed by the Agencies and adopted the following local public interest conclusions based on similar conclusions set forth in the *Final Order* approving water right 74-15613:

> 1. It is in the local public interest to maintain the anadromous fisheries in Big Timber Creek and in the Lemhi River drainage.
>
> 2. It is in the local public interest to reconnect Big Timber Creek to the Lemhi River and to recover fish species listed under the Endangered Species Act (ESA), because those efforts contribute to the development of a cooperative conservation agreement intended to promote conservation of listed species and to provide local people with protection from incidental take liability under the ESA.
>
> 3. It is in the local public interest to maintain a portion of the unappropriated water in streams supporting anadromous fish for the protection of fish habitat.

These conclusions about local public interests are fully supported by the administrative record for this contested case, as described in the findings of fact set forth above. During the hearing, the parties offered additional evidence about high flow usage on Big Timber Creek and the Lemhi River, the current status of ESA-listed species, aquatic habitat and fish passage on Big Timber Creek and the Lemhi River, efforts to recover ESA-listed species, and instream flows. Some of these topics are already addressed by the local public interest conclusions adopted by the hearing officer on August 21, 2019. The remaining topics and local public interest issues are addressed below.

Big Timber Creek Habitat and Fish Passage

The Agencies contend that all of the remaining unappropriated water in Big Timber Creek is required to maintain fish passage and fish habitat in the creek. Diluccia Test. This contention, however, is not supported by the technical information in the record. The USBR Study was conducted for the primary purpose of determining the streamflows required for optimum fish habitat and fish passage. The USBR Study did not conclude that the full flow of the creek, no matter how high,[12] was required for fish habitat and fish passage. Instead, the

[12] The USBR Study did not address the peak flows needed to maintain channel morphology or riparian area stream

USBR Study established discrete streamflows that would achieve those objectives "above which greater amounts of flow only provide minor gains in usable habitat." Ex. 202 at 25. Therefore, if the proposed permit is conditioned to not infringe on the discrete streamflows set forth in the USBR Study, the proposed permit will have little or no impact on fish habitat or fish passage for ESA-listed species on Big Timber Creek.

In the most downstream reach of Big Timber Creek, identified as Reach 1, the USBR Study concluded that 18 cfs is required to provide optimum fish habitat for adult populations of ESA-listed species. The proposed permit should not be diverted if flows in Reach 1 are less than 18 cfs.

Data collected at the Lower BTC Gage, currently supported by the IWRB WTP, can be used by the watermaster for Water District 74W to monitor the streamflow in Reach 1. Ex. 27. If the Lower BTC Gage is removed or discontinued, Bird must install a measurement device at the same location, acceptable to the watermaster and IDWR.

The reach designated as Reach 5 in the USBR Study is a critical reach. It is the reach of Big Timber Creek immediately downstream of the proposed point of diversion and immediately upstream of the confluence with Little Timber Creek, which contributes additional flow to Big Timber Creek during the snowmelt runoff period. According to the USBR Study, a flow of 36 cfs is required to provide optimum habitat for adult fish in Reach 5 and a flow of 54 cfs is required to provide passage for adult fish throughout Reach 5.

To ensure that the proposed permit does not diminish the 54 cfs required for adult fish passage through Reach 5 or the 36 cfs required for optimum fish habitat, the proposed permit cannot be diverted when flow in Reach 5 is less than 54 cfs. Presently, there are no stream gages in Reach 5. To properly evaluate the streamflow in this critical reach and to determine whether water can be diverted under the proposed permit, Bird must construct, maintain and operate a stream gage in Reach 5. This new gage, referred to as the "Bird Gage" in this order, should be located in the SESW of Section 8, T15N, R26E, downstream of the Bob Ditch and upstream of the confluence with Little Timber Creek.

Based on the technical data available in the record, to protect the local public interest of maintaining critical habitat for ESA-listed species in all reaches of Big Timber Creek and maintaining fish passage for adult populations of ESA-listed species, the following limiting conditions should be included on the proposed permit:

> **This right is only available when flow at the Bird Gage (to be constructed in the SESW of Section 8, T15N, R26E) is at least 54 cfs and flow at the Lower Big Timber Creek Gage (at the Highway 20 Bridge in the SWNW of Section 28, T16N, R26E) is at least 18 cfs.**

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functions. Periodic high volume flows help "maintain the complexity of stream channels important for fish spawning, rearing and survival by creating riffles and pools, depositional zones, and undercut banks." Ex. 198 at 40. High volume flows are addressed separately below.

The right holder shall cease diversion under this right if the flow of Big Timber Creek is less than 54 cfs at the Bird Gage or is less than 18 cfs at the Lower Big Timber Creek Gage.

To facilitate delivery of this right, the right holder shall install, operate and maintain physical devices or structures that can accurately measure streamflow at the Bird Gage site and the Lower Big Timber Creek Gage site. Any measurement device or structures must satisfy federal and state fish passage standards. Measurement data must be available to the watermaster on a real-time basis. The right holder may rely on streamflow data collected for state or federal agencies to satisfy this measurement condition.

Upper Lemhi River Habitat

Currently, there is a lack of suitable fish habitat in the upper Lemhi River Basin. Ex. 203 at 54-57. Increasing the amount of suitable habitat in the upper Lemhi River Basin will require a substantial amount of stream channel work to restore and reconfigure the stream channels in the upper basin. *Id.* Increasing the amount of suitable habitat will also require maintenance and improvement of instream flow and tributary stream connections to the mainstem Lemhi River. *Id.* The Agencies contend that new appropriations for irrigation use in the Lemhi River Basin will impair fish recovery efforts in the basin. Ex. 201 at 16. The U.S. National Marine Fisheries Service ("NMFS") shares this concern. Ex. 199 at 101 and Ex. 204 at 232.

The Agencies argue that all unappropriated flow in the Lemhi River Basin, no matter the quantity, is required to provide habitat for ESA-listed species. *IDFG's Post-Hearing Brief* at 20 However, based on the evidence in the record, this argument is not persuasive. The administrative record does not include any flow characterization studies or instream flow recommendations for the upper Lemhi River. While IDFG presented extensive evidence about the importance of instream flows in the upper Lemhi River, it did not provide any technical information about the specific streamflows needed to maintain optimum levels of fish habitat in the upper Lemhi River during the snowmelt runoff period (when the proposed permit would be available). Ex. IDWR3. The only flow characterization study in the record, the USBR Study, states there is a threshold where additional flow in Big Timber Creek does not translate into a significant amount of additional or higher quality fish habitat. It follows that the Lemhi River would also have a threshold where additional flow in the river would not translate into a significant amount of additional or higher quality fish habitat.

In the absence of target flows or specific data identifying the streamflow needed to provide optimum fish habitat in the upper Lemhi River, it would not be appropriate to impose a bypass flow condition for the upper Lemhi River on Proposed Permit 74-16187. As described above, the proposed permit should be conditioned to require a bypass flow of 18 cfs in lower Big Timber Creek. This may result in more water from Big Timber Creek entering the upper Lemhi River during the snowmelt runoff period.

High Flows for Stream Channel Maintenance

In addition to the streamflow needed to provide optimum habitat and fish passage for ESA-listed fish species, testimony was presented that periodic high flow events maintain the stream channel morphology and improve anadromous fish habitat. IDFG has not yet quantified the high volume flow events needed to maintain optimum stream channel characteristics for Big Timber Creek. Diluccia Test. (Day 2, Track 4, 24:00 – 29:00). While Diluccia testified the high flows occurring in 2009 were sufficient to maintain the stream channel on Big Timber Creek and high flow events occur every three to five years, on average, there is no specific, quantifiable evidence in the record to establish high flow events needed to maintain optimum stream channel characteristics for Big Timber Creek. Specifically, the USBR Study did not "estimate flow or habitat needs of downstream migrants or spring runoff conditions necessary for maintenance of channel morphology or riparian zone functions." Ex. 202 at 26. There is insufficient evidence in the record to require Bird to cease diversion under Proposed Permit 74-16187 to protect high flows events in Big Timber Creek.

Minimum Stream Flows

The proposed permit does not constitute a minimum stream flow. A minimum stream flow right would protect a flow from all future water right appropriations. In contrast, the Director's condition that Bird not divert water from Big Timber Creek if flows decline below 18 cfs and 54 cfs, respectively, is specific to Bird's proposed use of water. The streamflow thresholds included in the conditions for the proposed permit do not limit or restrict any other water rights and only apply when Bird's water right is being exercised. If Bird chooses not to divert water for irrigation under the proposed permit, then the bypass conditions described above do not need to be satisfied.

IWRB Water Transactions Program

The proposed permit will have no direct effect on the existing IWRB WTP contracts. The record contains extensive documentation of IWRB's efforts to maintain flows in the Lemhi River drainage and to reconnect tributaries that were previously dewatered during the irrigation season. The proposed permit would only be available during times when the flow at the proposed Bird Gage is at least 54 cfs. This threshold is only satisfied during times when streamflows are high across the entire region. Based on streamflow records for Big Timber Creek and the Lemhi River between 2006 and 2016, the lowest recorded flow rate for the Lower Lemhi River Gage when the proposed permit would be available was 416 cfs (on June 14, 2016), which is more than ten times higher than the target flow (35 cfs) maintained by IWRB through its Water Transactions Program. The proposed permit is very junior on Big Timber Creek and would be curtailed long before flows at the Lower Lemhi River Gage would drop to 35 cfs.

In an effort to reconnect Big Timber Creek to the Lemhi River during the irrigation season, IWRB has facilitated an exchange of water rights where certain Big Timber Creek rights

are now diverted from a pump station on the Lemhi River. This reconnect project is intended to restore 7.3 cfs through lower Big Timber Creek throughout the irrigation season. As described above, to maintain adequate fish habitat in the lower reach of Big Timber Creek, the proposed permit can only be exercised if there is at least 18 cfs at the Lower BTC Gage. The Big Timber Creek reconnect project could not be affected by the proposed permit.

The Agencies argue that even though the proposed permit will not diminish the quantity of water under the WTP contracts, it will diminish the effectiveness of those contracts, by further reducing the flows needed to sustain habitat for the fish benefitting from the minimum stream flows and reconnects. This assertion is not supported by the technical information in the record. If the proposed permit is conditioned as described above, it will not diminish the streamflow needed to maintain optimum fish habitat and fish passage in Big Timber Creek set forth in the USBR Study. There is no specific technical information in the record about the target streamflows needed to maintain optimum fish habitat in the upper Lemhi River.

High Flow Uses

Consistent with the Basin 74 General Provisions, water users in the Lemhi River Basin divert high flows for irrigation of growing plants. Therefore, the beneficial use and primary purpose of high flow use is irrigation. High flow use also provides secondary or incidental public benefits. The conveyance losses and excess irrigation water (the water not consumed by the irrigated plants) infiltrates into the ground and replenishes the local aquifers in the basin. The infiltrated water returns to the Lemhi River through springs and seeps later in the irrigation season, increasing base flows of the river and providing additional water for irrigators and fish habitat. The diversion of high flows from Big Timber Creek directly benefits the local ground water aquifer at Leadore and augments streamflow in the upper Lemhi River during the late summer.

Pursuant to the Basin 74 General Provisions, high flow uses are allowed provided existing quantified water rights, including future appropriations of water, are first satisfied. Therefore, high flow use cannot be protected against diminishment (reduction in flow) caused by future water rights. This limit on high flow uses has been reinforced by the SRBA Court. Water users in the Lemhi River Basin filed claims in the SRBA in an attempt to obtain recorded water rights for their high flow uses. As part of the review of those high flow claims, the SRBA District Court addressed a proposal to make high flow uses subject to only those future water rights located within the Lemhi River Basin. In other words, the proposal would have protected high flow uses from being subject to future, downstream (out-of-basin) water rights. The court rejected the proposal:

> This court has already determined that the high flow general provision in the *Lemhi Decree*, based on its express language, was not intended to create a water right. . Therefore, both factually and as a matter of law, the high flow general provision in this case did not create a water right. The direct consequence of limiting the application of the subordination provision to water rights within the

> Lemhi Basin *de facto* elevates the status of the high flow use to that of a water right as between in-basin and out-of-basin water users. Since the use of high flow water does not create a water right high flows are therefore unappropriated water.

Ex. 189 at 25 (*In Re SRBA, Subcase Nos. 74-15051 et al.* (January 3, 2012) (citations omitted)).

The SRBA Court concluded the use of high flow water is subordinate to all future and existing water rights, both in-basin or out-of-basin, because the high flows are unappropriated water. The reasoning and conclusion of the SRBA Court is binding. Pursuant to the Basin 74 General Provisions and the related decision from the SRBA Court, high flow uses cannot restrict future appropriations based on the argument that the future appropriations will reduce the quantity of water available for high flow uses, because doing so would elevate the status of the high flow use to that of a water right.[13]

The Irrigators argue that high flow uses in the Lemhi River Basin provide important public benefits that should be protected through the local public interest review. These public benefits (aquifer recharge, temporary storage of snowmelt runoff, streamflow augmentation in the late summer) are secondary or incidental benefits arising from the high flow irrigation use. The Irrigators' local public interest argument is not persuasive. The use of high flows is only allowed if existing quantified water rights, including future appropriations of water, are satisfied. High flow use is subordinate to new water rights established through administrative appropriation. Therefore, the protection of high flows is not an issue in this administrative hearing.

Cumulative Impacts

During the hearing, Idaho Conservation League asked the hearing officer to consider the cumulative impacts of all of the eighteen applications currently pending before the Department, which propose irrigation use in the Lemhi River Basin. There are circumstances when the Department is required to consider cumulative impacts of pending applications. For example, Idaho Code § 42-203C(1) states that the Department must consider the cumulative effects of all existing uses and those likely to exist within twelve months when evaluating applications to appropriate trust water. However, Idaho Code § 42-203A(5), which governs Proposed Permit 74-16187, does not require a cumulative impacts analysis.

There are a number of reasons why the proposal to conduct a cumulative impact analysis should be rejected. First and foremost, the administrative record is insufficient to complete a cumulative impacts analysis. An administrative record is created based on the contested case which is the subject of the administrative hearing. An applicant bears the burden of addressing

[13] The general provision about high flow use lacks the essential elements needed to create a water right under Idaho law. Ex. 189 at 9-11 (*In Re SRBA, Subcase Nos. 74-15051 et al.* (January 3, 2012)). The general provision did not set forth a priority date, quantity, point of diversion or place of use for the high flow uses and, therefore, high flow uses are not water rights. *Id.*

the elements set forth in Idaho Code § 42-203A(5), which does not include any reference to other pending applications. Therefore, applicants generally present evidence about their own proposed water development, not the other proposed projects in the basin. In this case, for example, the record includes evidence related to Bird's Proposed Permit 74-16187, but contains almost no information about the seventeen other applications pending in Basin 74. There is no information in the record about the proposed points of diversion, the proposed sources of water, the interaction of the proposed sources with the Lemhi River, or the suitability of the proposed sources to provide habitat for ESA-listed species. If the Department were to complete a cumulative impacts analysis, it could only be completed by using information outside of the administrative record.

Second, there is no guarantee that any of the other pending applications in Basin 74 will be approved. Every application must be evaluated on its own merits. There may be evidence presented or information discovered during the review of the other applications that would lead to the applications being denied. It would be unfair to restrict or deny Application 74-16187 based on a cumulative impacts analysis which includes information about applications that may ultimately be denied.

Finally, a cumulative impacts analysis under Idaho Code § 42-203A(5) infringes on the prior appropriation doctrine. In Idaho, a water right with a senior priority date has advantages over water rights with junior priority dates. When a watermaster delivers a limited amount of water on a stream, the watermaster does not lump all water rights together, regardless of priority date, and declare that there is not enough water for everyone so no one gets any water. On the contrary, the watermaster allocates water to the water rights according to priority until the available supply is exhausted. The same should be true for pending applications. One application may satisfy the elements of Idaho Code § 42-203A(5), but a subsequently-filed application may not be able to satisfy those same elements because of an increasingly-limited water supply. A cumulative impacts analysis would lump all applications together, regardless of the date they were filed. That type of analysis must be rejected. The prior appropriation doctrine must be allowed to govern all aspects of the water rights process, even the review of pending applications.

For these reasons, it is not appropriate to conduct a cumulative impacts analysis. The applications currently pending in Basin 74, including Proposed Permit 74-16187, will be evaluated individually, on their own merits.

Local Public Interest Summary

It is in the local public interest to divert water for irrigation use. Irrigation of agricultural lands supports the local economy and is essential for the survival of rural communities like Leadore. Kurt Bird Test Bird will derive real and substantial benefits by irrigating the proposed place of use, even if only for a short period of time. *Id.*

It is in the local public interest to maintain the anadromous fisheries in Big Timber Creek and in the Lemhi River drainage.

It is in the local public interest to reconnect Big Timber Creek to the Lemhi River and to recover fish species listed under the Endangered Species Act (ESA), because those efforts contribute to the development of a cooperative conservation agreement intended to promote conservation of listed species and to provide local people with protection from incidental take liability under the ESA.

It is in the local public interest to maintain a portion of the unappropriated water in streams supporting anadromous fish for the protection of fish habitat. Further, it is in the local public interest to protect the streamflow and habitat needed to recover ESA-listed species.

Diversion of high flows for flood irrigation provides multiple incidental public benefits in the Lemhi River Basin. It increases water levels in local aquifers and augments the streamflow in the Lemhi River during the late summer. Diversion of high flows as described in the Basin 74 General Provisions, however, is not a protectable interest in the evaluation of new appropriations.

The Director must weigh these public interests and the technical information in the record to determine whether the proposed permit can be approved. In this case, the local public interests associated with the recovery of ESA-listed species outweigh the local public interests associated with Bird's proposed development. The State of Idaho and its citizens have invested a significant amount of money and other resources to the recovery of ESA-listed fish species. Until these species reach population recovery thresholds, the people in the Salmon River Basin, in the Lemhi River Basin, and, more narrowly, water users holding Big Timber Creek water rights, are under threat of enforcement under the ESA. Therefore, in the absence of certain conditions which would protect the habitat and stream passage of ESA-listed fish species, the proposed permit would be denied. Based on the technical information in the record, there are permit conditions that will prevent the proposed permit from diminishing the habitat and stream passage for ESA-listed fish species.

In this case, the proposed permit, if properly conditioned, will not diminish the local public interests described above. The proposed permit should be conditioned to only be available when the flow at the Lower BTC Gage is at least 18 cfs and flow at the proposed Bird Gage is at least 54 cfs. These flow thresholds will support the streamflow needed to provide optimum habitat and fish passage for adult salmonids throughout Big Timber Creek. When Proposed Permit 74-16187 is being exercised, these flow thresholds will reduce the amount of water available for diversion on Big Timber Creek by 18 cfs during certain times of the early irrigation season. When the 18 cfs bypass flow is in effect, the water will flow out of the Big Timber Creek drainage and will increase streamflow and fish habitat in the upper Lemhi River, a reach that can experience reduced flows during the snowmelt runoff period.

This order only decides a contested application for permit before the Department. It does

not constitute a mitigation plan or a recovery plan for ESA-listed species. Compliance with the local public interest conditions listed on the approved permit does not insulate Bird or other water users on Big Timber Creek from the enforcement provisions of the ESA.

CONCLUSIONS OF LAW

The Applicants have satisfied their burden of proof for the elements set forth in Idaho Code § 42-203A(5). They have demonstrated that the proposed permit will not reduce the quantity of water under existing water rights, that the water supply is sufficient for the proposed use, that the application was filed in good faith, and that they have sufficient financial resources to complete the project. The Applicants have also demonstrated that the proposed permit, if properly conditioned, is not contrary to the conservation of water resources in the state of Idaho and will not conflict with the local public interest.

ORDER

IT IS HEREBY ORDERED that Application for Permit 74-16187 in the name of Kurt W. Bird or Janet E. Bird is APPROVED with the following elements and limiting conditions:

Current Owner: Kurt W. Bird or Janet E. Bird
Priority Date: October 12, 2018
Source: Big Timber Creek tributary to Lemhi River
Beneficial Use: Irrigation
Season of Use: March 15 – July 31
Diversion Rate: 6.40 cfs
Point of Diversion: NWNW, Section 20, T15N, R26E (Home Ditch)
Place of Use: 320 acres
SWSE, SESE, Section 8, T15N, R26E
SW1/4, Section 9, T15N, R26E
NENE, NWNE, Section 17, T15N, R26E.

Conditions of Approval:

1. Subject to all prior rights.

2. Proof of application of water to beneficial use shall be submitted on or before June 1, 2023.

3. Use of water under this right may 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 Districts 170 and 74W.

4. Prior to the diversion and use of water under this right, the right holder shall install and maintain acceptable measuring device(s), including data logger(s), at the authorized point(s) of diversion and in accordance with Department specifications, or shall obtain an approved variance from the Department to employ an alternative method to determine and record the amount of water diverted.

5. Prior to diversion of water under this right, the right holder shall install and maintain a locking controlling works, subject to the approval of the Department, in a manner that will provide suitable control of the diversion.

6. When notified by the Department or by a watermaster with regulatory authority over this right, the right holder shall report the amount of water diverted in connection with this right. The report shall be submitted in the manner and frequency specified by the Department or the watermaster.

7. This right does not grant any right-of-way or easement across the land of another.

8. This right is only available when flow at the Bird Gage (to be constructed in the SESW of Section 8, T15N, R26E) is at least 54 cfs and flow at the Lower Big Timber Creek Gage (at the Highway 28 Bridge in the SWNW of Section 28, T16N, R26E) is at least 18 cfs

9. The right holder shall cease diversion under this right if the flow of Big Timber Creek is less than 54 cfs at the Bird Gage or is less than 18 cfs at the Lower Big Timber Creek Gage.

10. To facilitate delivery of this right, the right holder shall install, operate and maintain physical devices or structures that can accurately measure streamflow at the Bird Gage site and the Lower Big Timber Creek Gage site. Any measurement device or structures must satisfy federal and state fish passage standards. Measurement data must be available to the watermaster on a real-time basis. The right holder may rely on streamflow data collected for state or federal agencies to satisfy this measurement condition.

11. This right benefits from the subordination described in Paragraph 10(b)(6)(A)(ii) of water rights 75-13316 and 77-11941 and may only be diverted when the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 cfs.

12. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the place of use.

13. Prior to the diversion and use of water under this approval, the right holder shall comply with all federal and state fish screening and/or fish passage requirements.

14. 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 the permit holder had no control.

Dated this 21st day of May 2020.

Gary Spackman
Director

CERTIFICATE OF MAILING

I hereby certify that on the 21st day of May 2020, I mailed a true and correct copy of the foregoing ORDER ON EXCEPTIONS; FINAL ORDER, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:

US MAIL
RE: APPLICATION FOR PERMIT 74-16187

Kurt W and Janet E Bird
56 Lower Texas Creek Rd
Leadore, ID 83464

Kerry Purcell
1774 Lee Creek Road
Leadore, ID 83464

Robert Harris
Holden Kidwell Hahn & Crapo
PO Box 50130
Idaho Falls, ID 83405

Penny Jane Ogden-Edwards
2330 S 350 W
Perry, UT 84302

Idaho Conservation League
Matt Nykiel
PO Box 844
Boise, ID 83701

Deputy Attorney General
Michael Orr
PO Box 83720
Boise, ID 83720-0010

Travis Thompson
Barker Rosholt & Simpson LLP
PO Box 63
Twin Falls, ID 83303-0063

Purcell Ranch Partnership
Kerry Purcell
98 Purcell Lane
Leadore, ID 83464

Kimberle English
Kimberle English
Paralegal

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) The petition for reconsideration is disposed of; or
(b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

EXHIBIT 2

Administrative Order

In the Matter of the Appointment of the SRBA District Court to Hear all Petitions for Judicial Review from the Department of Water Resources Involving Administration of Water Rights

(Supreme Court of the State of Idaho) (Dec. 9, 2009)

In the Supreme Court of the State of Idaho

IN THE MATTER OF THE APPOINTMENT OF THE SRBA DISTRICT COURT TO HEAR ALL PETITIONS FOR JUDICIAL REVIEW FROM THE DEPARTMENT OF WATER RESOURCES INVOLVING ADMINISTRATION OF WATER RIGHTS	**ADMINISTRATIVE ORDER**

WHEREAS pursuant to I.C. § 42-1701A any person who is aggrieved by a final decision or order of the Director of the Department of Water Resources is entitled to judicial review, and

WHEREAS there is a need for consistency and uniformity in judicial decisions regarding the administration of water rights, and

WHEREAS the Idaho Supreme Court has a constitutional responsibility to administer and supervise the work of the district courts pursuant to Art. V, § 2 of the Idaho Constitution, and

WHEREAS the Snake River Basin Adjudication District Court of the Fifth Judicial District has particular expertise in the area of water right adjudication,

IT IS HEREBY ORDERED that all petitions for judicial review of any decision regarding the administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District. Review shall be held in accord with Title 67, Chapter 52 of the Idaho Code, except that, once filed, all petitions for judicial review shall be forwarded to the clerk of the Snake River Basin Adjudication District Court of the Fifth Judicial District.

IT IS FURTHER ORDERED that the Snake River Basin Adjudication District Court is authorized to develop the procedural rules necessary to implement this order.

IT IS FURTHER ORDERED that this order shall be effective the 1st day of July, 2010.

DATED this 9 day of December 2009.

By Order of the Supreme Court

Daniel T. Eismann, Chief Justice

ATTEST:

Stephen W. Kenyon, Clerk

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 12/10/09

STEPHEN W. KENYON Clerk

By: Deputy

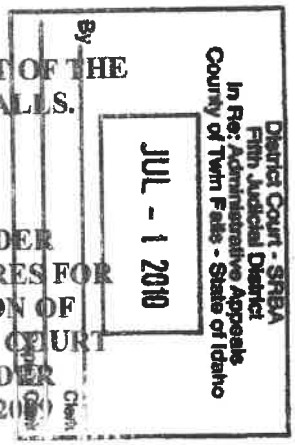
EXHIBIT 3

Administrative Order Adopting Procedures for the Implementation of the Idaho Supreme Court Administrative Order Dated December 9, 2009

Re: Rules of Procedure Governing Petitions for Judicial Review of Actions for Declaratory Judgment of Decisions from the Idaho Department of Water Resources

(District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls) (Jul. 1, 2020)

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS.



RE: RULES OF PROCEDURE GOVERNING PETITIONS FOR JUDICIAL REVIEW OR ACTIONS FOR DELCARATORY JUDGMENT OF DECISIONS FROM THE IDAHO DEPARTMENT OF WATER RESOURCES	)	**ADMINISTRATIVE ORDER ADOPTING PROCEDURES FOR THE IMPLEMENTATION OF THE IDAHO SUPREME COURT ADMINISTRATIVE ORDER DATED DECEMBER 9, 2009**

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, declares that all petitions for judicial review made pursuant to Idaho Code § 42-1701A of any decision from the Department of Water Resources be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District, and

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, vests in the Snake River Basin Adjudication District Court of the Fifth Judicial District the authority to adopt procedural rules necessary to implement said Order.

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

1. **Filing of Petition for Judicial Review or Declaratory Judgment Action.** Pursuant to Idaho Code § 67-5272(1), any party filing a petition for judicial review pursuant to Idaho Code § 42-1701A, or an action for declaratory judgment, of any decision from the Department of Water Resources shall file the same, together with applicable filing fees, in the district court of the county in which:

(a) the hearing was held; or

(b) the final agency action was taken; or

(c) the aggrieved party resides or operates its principal place of business in Idaho; or

(d) the real property or personal property that was the subject of the agency decision is located.

The filing party shall also serve a courtesy copy of the petition for judicial review or action for declaratory judgment with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707. Upon receipt by the Department of Water Resources of a petition for judicial review or action for declaratory

judgment, the Department shall review the certificate of mailing and in the event it does not show that a courtesy copy of the same was filed with the Snake River Basin Adjudication District Court, then the Department shall forthwith forward a copy of the petition or action for declaratory judgment to the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707.

2. **Reassignment.** Upon the filing of a petition for judicial review pursuant to Idaho Code § 42-1701A, or an action for declaratory judgment, of any decision from the Department of Water Resources, the clerk of the district court where the action is filed shall forthwith issue, file, and concurrently serve upon the Department of Water Resources and all other parties to the proceeding before the Department of Water Resources, an *Notice of Reassignment* (copy attached hereto), assigning the matter to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings.

Also upon issuance of the *Notice of Reassignment*, the clerk of the district court where the action is filed shall forward a copy of the file to the clerk of the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707.

3. **Case Number.** All cases assigned to the Snake River Basin Adjudication District Court of the Fifth Judicial District as described herein shall retain the case number and caption assigned to them by the district court where the petition for judicial review or action for declaratory judgment is originally filed.

4. **Subsequent Filings.** Following the issuance of the *Notice of Reassignment*, all further documents filed or otherwise submitted, and all further filing fees filed or otherwise submitted, shall be filed with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho 83303-2707, provided that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

5. **Lodging of Transcript and Record.** Following the preparation and settlement of the agency transcript and record, the Department of Water Resources shall transmit the settled transcript and record, in both paper and electronic form on CD ROM, to the clerk of the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin

Falls, Idaho 83303-2707 within forty-two (42) days of the service of the petition for judicial review or action for declaratory judgment.

6. **Participation in Hearings by Telephone and Video Teleconferencing (VTC).** Unless otherwise ordered by the Snake River Basin Adjudication District Court of the Fifth Judicial District, telephone participation and/or VTC will be allowed in all hearings, except as follows:

(a) The court may require in person or VTC attendance as circumstances may require.

(b) The court's notice setting hearing will specify participation restrictions, telephone conferencing numbers and participant codes and/or location of regional VTC facilities.

(c) Speakerphones and cell phones often pick up background noise and/or cause interference with sensitive courtroom equipment. Therefore, the use of speakerphones and cell phones are discouraged.

(d) Place your call to the court a few minutes prior to the scheduled start of your hearing so that the clerk of the court may identify who is participating by telephone.

7. **Resolution.** This court will notify the clerk of the district court where the petition for judicial review or action for declaratory judgment was originally filed of the completion of the case upon the happening of either:

(a) the expiration of the time to appeal any decision of this court if no appeal to the Idaho Supreme Court is filed; or

(b) the filing of the remittitur from the Idaho Supreme Court or Idaho Court of Appeals with this court in the event that an appeal to the Idaho Supreme Court is timely filed following a decision of this court.

8. **Other Procedural Rules.** Any procedure for judicial review not specified or covered by this Order shall be in accordance with Idaho Rule of Civil Procedure 84 to the extent the same is not contrary to this Order.

DATED this 1 day of July, 2010.

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF _____.

RE: PETITIONS FOR JUDICIAL REVIEW OR ACTIONS FOR DECLARATORY RELIEF OF DECISIONS FROM THE IDAHO DEPARTMENT OF WATER RESOURCES	)	**CASE NO. _____**
	)	**NOTICE OF REASSIGNMENT**

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, declares that all petitions for judicial review made pursuant to I.C. § 42-1701A of any decision from the Department of Water Resources be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District, and

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, vests in the Snake River Basin Adjudication District Court the authority to adopt procedural rules necessary to implement said Order, and

WHEREAS on July 1, 2010, the Snake River Basin Adjudication District Court issued an Administrative Order regarding the Rule of Procedure Governing Petitions for Judicial Review or Actions for Declaratory Relief of Decisions from the Idaho Department of Water Resources.

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

1. The above-matter is hereby assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings.

2. All further documents filed or otherwise submitted in this matter, and all further filing fees filed or otherwise submitted in this matter, shall be filed with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho

83303-2707, provided that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

DATED this ___ day of _____, 2010.

CLERK OF THE DISTRICT COURT

By:_____
Deputy Clerk