

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

IN THE MATTER OF)	
APPLICATION FOR PERMIT)	AMENDED PRELIMINARY ORDER
NO. 74-16187 IN THE NAME OF)	APPROVING APPLICATION
<u>KURT W. BIRD OR JANET E. BIRD</u>)	

PROCEDURAL HISTORY

On October 12, 2018, Kurt W. Bird and Janet E. Bird (collectively “Applicants” or “Bird”) filed Application for 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* (“Response”). The parties participated in oral arguments on the *Motion* 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, the Department conducted an administrative hearing for the protested application 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

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.

Diluccia (“Diluccia”), Cynthia Bridge-Clark, Amy Cassel, Matthew Nykiel, Penny Jane Ogden-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 certain documents from the Department’s records pursuant to IDAPA 37.01.01.602. For ease of reference, these official notice 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 this *Amended Preliminary Order Approving Application*.

After carefully considering the evidence in the record, the hearing officer for the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application 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.”² 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. Application 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 Application 74-16187. Ex. 309. If Application 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.

² In his testimony, Kurt Bird also referred to the ditch as the “Home Place Ditch.”

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 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 land owners 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 land owners from federal enforcement for the take of an ESA-listed species. *Id.*

12. In the early 2000s, 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. High volume flow events occurring once every three to five years are sufficient to accomplish the stream channel maintenance functions required for optimum fish habitat. Diluccia Test. Based on regional streamflow regression equations, the unimpaired flow in Big Timber Creek, upstream of the major irrigation diversions, should exceed 284 cfs one year out of five years, on average. Ex. 202 at 11.

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 a Water Transactions Program to facilitate projects that “improve flows to tributary streams and rivers in the Upper Salmon River Basin.” Ex. 212. IWRB uses the Water Transactions Program to reconnect 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 Water Transactions Program 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 during the irrigation season and generally provide an instream 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. 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. Ex. 201 at 2.

31. In June 2004, the U.S. Bureau of Reclamation (“USBR”) issued a report titled *Instream Flow Assessment Big Timber Creek, Idaho* (“USBR Study”), summarizing 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).”³ *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.

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.

³ 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.

40. A stream gage (“Upper BTC Gage”) on Big Timber Creek upstream of the major irrigation diversions on the creek was in operation from 2006 to 2016. 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, 74-63, 74-1619, 74-7165, 74-14980, 74-15003, 74-15926, 74-15927, 74-15928, 74-15929, 74-15930, 74-15931, 74-16187⁴ and 74-16188.⁵ Ex. 28. These rights, in combination authorize the diversion of 66.85 cfs.

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 121 cfs at the Upper BTC Gage to maintain 54 cfs of flow in Reach 5. 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 121 cfs but less than 284 cfs (the peak flow needed to maintain the stream channel):

Year	Days when flow at Upper BTC Gage was at least 121 cfs but less than 284 cfs	# of Days
2006	May 18-28, June 7-12	17
2007	May 19-20	2
2008	May 19-24, June 2-4, June 7-19, June 24 - July 6	30
2009	May 19-28, June 9-15, June 26 - July 7	39
2010	June 4 - July 3	30
2011	June 7 - July 15	39
2012	May 17, June 2-7	7
2013	None	0
2014	May 24 - June 8	16
2015	May 27 - June 14	19
2016	May 20-23, June 3-14	16

Ex. IDWR18.

⁴ Because this order approves the proposed permit, it should be included in the list of existing water rights in this stretch of Big Timber Creek.

⁵ Application 74-16188 is a contested application for permit currently pending before the Department. It shares the same priority date as Application 74-16187. Application 74-16188 proposes to divert 2.90 cfs from Big Timber Creek for irrigation use. The Department has not conducted an administrative hearing for the contested case and, at this point, it is unknown whether Application 74-16188 will be approved. For purposes of evaluating the flows needed to protect fish habitat and fish passage on Big Timber Creek, however, the Department must account for the diversion rate proposed in Application 74-16188 (2.90 cfs).

43. 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.

44. 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.

45. 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 required bypass flows are maintained during diversions under this right.

Ex. IDWR16.

46. Bird has stipulated to the inclusion of these same conditions, with some modifications,⁶ on the proposed permit. *Applicant’s Post Hearing Brief* at 20-22.

47. Two stream measurement sections have been maintained on Big Timber Creek downstream of the irrigation diversions on the creek. One measurement section, the Whittaker flume, was installed to aid the watermaster in the delivery of water right 74-15613. Exs. 25-26.

⁶ 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.

The other measurement section (“Lower BTC Gage”) has been maintained by IWRB as part of its Water Transactions Program. Ex. 27.

48. 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 2018, 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)⁷:

Year	Days (between 3/15 and 7/31) when flow at Lower BTC Gage was greater than 18 cfs	# of Days
2006	May 19-28, June 9-10	12
2007	None	0
2008	Mar 18, Mar 23, Mar 31 - April 3, April 6 - May 11, May 20-23, June 18-25	54
2009	Mar 27-28, Apr 13-14, Apr 21-24, May 6, May 25 - July 2, July 4	49
2010	June 4 - July 7	34
2011	Mar 17-18, Mar 21, Mar 31 - Apr 5, Apr 7-11, Apr 13-18, May 14-16, June 7 - June 10, June 12 - July 25	71
2012	Mar 31 - Apr 5, Apr 10-13, Apr 22 - May 4, June 3-8	29
2013	None	0
2014	May 22 - June 1, June 3 - June 6	15
2015	May 16, May 26 - June 13	20
2016	Apr 21-27, May 7-11, May 15-24, June 1-16	38
2017	Mar 15-26, May 6 - July 4	71
2018	Mar 15, Mar 22-25, Mar 27 - Apr 1, Apr 6-8, Apr 11, Apr 23, Apr 26 - June 30	82

Ex. IDWR19.

49. 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. Generally, water right 75-13316 is only satisfied during the snowmelt runoff period in the spring and early summer. Exs. IDWR13 and IDWR20.

50. 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]:

⁷ 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.

...

(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 \geq 1,280 cfs.

51. Between 2006 and 2018, 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 flow at the Shoup gage was less than 1,280 cfs
2006	Aug 6 - Sep 18
2007	July 22 - July 26, July 30 - Sep 22
2008	Aug 20 - Sep 21, Sep 29 - Oct 2
2009	Sept 13 - Sep 16, Sep 18 - Sep 29
2010	Apr 11 ⁸ , Aug 28
2011	None
2012	Aug 16 - Aug 21, Aug 23 - Sep 24
2013	July 23 - Sep 25
2014	Sept 10 - Sep 12, Sep 15 - Sep 19
2015	Aug 2 - Aug 9, Aug 12 - Sep 16, Sep 28, Oct 1
2016	July 30 - Sep 22
2017	None
2018	Sep 5 - Sep 14, Sep 19, Sep 20

Ex. IDWR20.

52. 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.

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

⁸ April 11, 2010 represents the only day from 2006 to 2018 when the Shoup gage dropped below 1,280 cfs between March 15 and July 15. The flow at the Shoup gage on April 11, 2010 was 1,270 cfs.

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.

...

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.

54. 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).

55. In the mid-1970s, 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).

56. 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.*

57. 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).

58. 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.*

59. “[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).

60. “[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).

61. 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, the proposed permit could also be administered by the watermaster in priority, thereby preventing injury to senior water rights on Big Timber Creek. The proposed permit would be junior to water right 74-15613 and, therefore, could not be diverted unless water right 74-15613 was fully satisfied. Therefore, the proposed permit would also become subject to the 13 cfs bypass flow described in water right 74-15613 and would not injure existing water rights on Big Timber Creek.

Injury to 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 hearing officer and a determination of that issue is not needed to reach a decision in the pending contested case.

There are water users on Big Timber Creek, including Bird, and water users on the Lemhi River who divert high flows (above and beyond existing, recorded water rights) during the snowmelt runoff period. The Basin 74 General Provisions clearly state that high flows can only be diverted after “existing decreed rights and future appropriations of water are first satisfied.” Ex. 11. Stated differently, water users diverting high flows cannot make a delivery call against future water rights, issued after the date of the Basin 74 General Provisions decree (April 3, 2012). For purposes of water right administration, high flow uses are subject to future appropriations. Therefore, the proposed permit cannot injure high flow uses on Big Timber Creek or the Lemhi River.

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 prior downstream water rights on the Lemhi River.

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. More 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 \geq 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.⁹ 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.

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 Bird Gage (to be constructed) is greater than 54 cfs but less than 217 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 provides a good approximation of how many days, on average, the proposed permit may be available. Assuming streamflow thresholds of 121 cfs and 284 cfs at the Upper BTC Gage between 2006 and 2016,¹⁰ the proposed permit would have been available 20 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

⁹ 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 67 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 121 cfs and flow at the Shoup gage was less than 1,280 cfs.

¹⁰ 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 67 cfs of water rights between the Upper BTC Gage and the proposed Bird Gage. The flow thresholds change from 54 cfs and 217 cfs to 121 cfs and 284 cfs respectively.

flow at that gage is usually greater than 18 cfs when flow at the Upper BTC Gage is greater than 121 cfs. Therefore, the proposed permit would be available for approximately 20 days per year, on average. In good water years, the proposed permit may be available for as many as 40 days and 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 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 that they will be able to obtain the financing needed to complete the proposed project.

Conservation of Water Resources

During the oral arguments 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)(6)(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 that the proposed project will be efficient and a conservative use of water. As long as 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,¹¹ was required for fish habitat and fish passage. Instead, the USBR Study set forth 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. Until recently, Reach 1 was regularly dewatered by upstream irrigation diversions. Ex. 202 at 6. Consequently, Reach 1 has little existing riparian vegetation. Ex. 203 at 117. 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. Therefore, 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 IWRB Water Transactions Program, 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 section at the same location. The other stream gage in lower Big Timber Creek, used to regulate Whittaker’s water right 74-15613, is located approximately ½ mile upstream of

¹¹ The USBR Study did not address the peak flows needed to maintain channel morphology or riparian area stream functions. Periodic high volume flows, also known as peak 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. Peak flows are addressed separately below.

the Lower BTC Gage and is therefore less reliable at ensuring bypass flow levels are satisfied throughout the entirety of Reach 1. Further, the existing gage used to regulate water right 74-15613 does not appear to have the capacity to measure flows of 18 cfs. Exs. 25, 26.

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.

In order 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. In order to properly evaluate the streamflow in this critical reach, 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, in order 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 28 Bridge in the SWNW of Section 28, T16N, R26E) is at least 18 cfs.

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 section constructed must satisfy NOAA 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 habitat, particularly for juvenile fish, in the upper Lemhi River Basin (between Hayden Creek and Leadore). 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.* (2019 habitat assessment recommends “increas[ing] habitat complexity by creating multi-threaded channels, narrow width-to-depth ratios, stable banks, and willow-dominated riparian areas”). 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 (If additional permits are approved in the Lemhi River Basin, “the resulting diversions would have adverse effects on the capacity and quality of critical habitat for ESA-listed fish species, and would tend to undermine existing and planned efforts to provide sufficient flows to support recovery and de-listing of [ESA-listed species]”). The U.S. National Marine Fisheries Service (“NMFS”) shares this same concern. Ex. 199 at 101 (“If the State does appropriate additional water for irrigation, productivity of the Lemhi River Chinook salmon and steelhead populations will likely decline.”); Ex. 204 at 232 (“Because instream flows are already low due to irrigation withdrawals, new water development for agriculture or other purposes would further threaten spring/summer Chinook salmon habitat.”).

On February 11, 2019, NMFS sent a letter to the Department, opposing the approval of Application 74-16187 and raising the following concerns:

Issuance of 74-16187 would . . . likely reduce flow in the mainstem Lemhi River, downstream from Big Timber Creek. . . . Reducing flow in this reach of the Lemhi River would harm Chinook salmon, steelhead, designated critical habitat for both species, and would negate some of the habitat improvements that have been achieved.

NMFS feels that approval of water right application 74-16187, without provisions to protect fishes and their habitat, would reduce value of completed and ongoing habitat restoration, and would likely impair future restoration efforts.

Ex. 205.

The administrative record does not include any flow characterization studies or instream flow recommendations for the upper Lemhi River. According to IDFG, it participated in the pending contested case “to assist [the Department] in the decision-making process” and “to provide technical information regarding the potential effects of the proposed water right on [fish and wildlife] resources and assess how any adverse effects can be avoided, minimized or mitigated.” Ex. IDWR3. IDFG presented extensive evidence about the importance of instream

flows in the upper Lemhi River but 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).

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 (“From a conservation and recovery perspective, there simply is no water available in the Lemhi River Basin for new irrigation water rights.”). Based on the evidence in the record, this argument is not persuasive. The one flow characterization study in the record (the USBR Study) states that 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 2007 (during the creation of the draft conservation measures), IDFG determined that there was some correlation between flow in the upper Lemhi River and the productivity of spring Chinook salmon. Ex. 198 at 38. At that time, IDFG felt that “more data is needed to inform future decisions regarding flow regimes in the upper Lemhi basin.” *Id.* In fact, the 2007 draft conservation measures describe a 10-year study to be performed on the upper Lemhi River to determine the relationship of flow and salmon productivity. *Id.* at 6-7. The proposed study would “evaluate potential surface flows under a range of environmental conditions, determine how irrigation practices affect these flows, determine how habitat characteristics are influenced by flow, and describe the response of fish to variable flows.” *Id.* at 37. The information collected in the proposed study would be “used in the adaptive management process to consider the range of target flows that will benefit fish for the duration of the plan period.” *Id.*

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 the proposed permit. Diluccia testified that specific streamflow recommendations for the upper Lemhi River may be available in the future. If such streamflow recommendations become available, they may constrain future appropriations in the upper Lemhi River Basin.

The proposed permit, with bypass flow conditions for Big Timber Creek, may result in increased flows in the upper Lemhi River. Prior to the approval of water right 74-15613, water users on Big Timber Creek could divert the entire flow of the creek under the high flow authorization in the Basin 74 General Provisions. In 2006 and 2007, for example, there was very little water passing the Lower BTC Gage, even during the snowmelt runoff period. Ex. IDWR19. The entire flow of the creek was diverted under existing water rights or high flow uses. 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. Water right 74-15613 has, therefore, created a regular flow of 13 cfs from Big Timber Creek into the upper Lemhi River during the snowmelt runoff period.

As described above, the proposed permit should be conditioned to require a bypass flow of 18 cfs in lower Big Timber Creek. This will result in more water from Big Timber Creek entering the upper Lemhi River during the snowmelt runoff period. Although the amount of water (18 cfs) is small compared to the flows in the upper Lemhi River, this additional flow will help to reduce the negative impacts of high flow diversions on stream channel function in the upper Lemhi River. An 18 cfs bypass flow in lower Big Timber Creek would increase the flow of the upper Lemhi River during a critical time of the year. Ex. 204 at 227 (noting that the number of juvenile Chinook salmon migrating downstream and returning from the ocean is strongly correlated to the early rearing streamflow in May).

Peak Flows for Stream Channel Maintenance

In addition to the streamflow needed to provide optimum habitat and fish passage for ESA-listed fish species, it is also in the local public interest to preserve the periodic high flow events that maintain the stream channel morphology. These stream-altering events (known as peak flows or high volume flows) do not occur every single year, even on streams with no irrigation diversions.

IDFG has not yet quantified the peak flow events needed to maintain optimum stream channel characteristics for Big Timber Creek. Diluccia Test. (Day 2, Track 4, 24:00 – 29:00). The high flows occurring in 2009 were sufficient to maintain the stream channel on Big Timber Creek. *Id.* According to Diluccia, peak flow events occurring every three to five years, on average, would maintain the stream channel characteristics of Big Timber Creek ideal for fish habitat. *Id.*

The USBR Study included monthly exceedance flows for Reach 7 on Big Timber Creek based on USGS regional regression equations. Ex. 202 at 11. Reach 7 is upstream of the major irrigation diversions on Big Timber Creek and includes the Upper BTC Gage. 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. Diluccia Test.

Ideally, any condition created to preserve the peak flows would be measured upstream of the major irrigation diversions on Big Timber Creek. The Upper BTC Gage is upstream of the major irrigation diversions, but is not currently active and is not located on property owned by Bird. As described above, the bypass flows required for fish habitat and fish passage will be measured at the Lower BTC Gage and the Bird Gage (to be constructed on the Bird property between the Bob Ditch and the confluence with Little Timber Creek). It is possible to translate the peak flow value at the Upper BTC Gage to a peak flow value at the new Bird Gage by

accounting for the irrigation diversions between the two locations. A peak flow of 284 cfs at the Upper BTC Gage would translate to a peak flow of 217 cfs at the Bird Gage.

The proposed permit should not be exercised when the flow on Big Timber Creek is at peak, stream-altering levels. The benefits of the peak flows can be achieved in ten non-consecutive days during a peak flow year. Even if the proposed permit is conditioned to protect peak flows, the peak flows may nevertheless be captured by other water right holders on Big Timber Creek. It is not possible to impose a peak flow condition on the proposed permit that would constrain other existing water rights. Therefore, a condition limiting the exercise of the proposed permit will not guarantee that the peak flows will accomplish the desired stream maintenance on Big Timber Creek or the Lemhi River. In order to prevent the proposed permit from diminishing peak, stream-altering flows, the following limiting condition should be included on the proposed permit:

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.

Minimum Stream Flows

Idaho Code § 42-1501 states:

The legislature of the state of Idaho hereby declares that the public health, safety and welfare require that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality. The preservation of the water of the streams of this state for such purposes when made pursuant to this act is necessary and desirable for all the inhabitants of this state, is in the public interest and is hereby declared to be a beneficial use of such water. . . . It is, therefore, necessary that authority be granted to receive, consider, approve or reject applications for permits to appropriate water of the streams of this state to such beneficial uses to preserve such water from subsequent appropriation to other beneficial uses under the provisions of chapter 2, title 42, Idaho Code.

IWRB asserts that “any additional depletions of existing instream flows in the Lemhi River Basin would adversely affect the critical habitat and populations of ESA-listed fish species that are already at ‘high risk’.” *IWRB Post-Hearing Brief* at 4. IWRB believes, therefore, that all remaining unappropriated water in the Lemhi River Basin should be dedicated to instream flows to provide habitat for ESA-listed species. IWRB has taken no action, however, to establish additional minimum stream flows on the Lemhi River or any of its tributaries. Water right 15-14993 is the only minimum stream flow in the entire Lemhi River Basin. Water right 15-14993

(which authorizes a minimum stream flow of 35 cfs on the Lemhi River) would be fully satisfied during all times when the proposed permit would be available on Big Timber Creek.

IDFG takes the same position as IWRB with regards to new appropriations: “From a conservation and recovery perspective, there simply is no water available in the Lemhi River Basin for new irrigation water rights.” *IDFG Post-Hearing Brief* at 20. Idaho Code § 42-1504 states, in pertinent part: “Any person, association, municipality, county, state or federal agency may, in writing, request that the board consider the appropriation of a minimum stream flow of the unappropriated waters of any stream.” There is no evidence in the record that IDFG has ever requested that IWRB establish a minimum stream flow on the Upper Lemhi River, Big Timber Creek, or any of the other tributaries to the Lemhi River.

Section 3, Article XV of the Idaho Constitution states, in pertinent part: “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes.” It is undisputed that there is unappropriated water in the Lemhi River Basin. Every year, tens of thousands of acre-feet of water flow out of the Lemhi River Basin during the snowmelt runoff period. Currently, there is no moratorium on processing and approving new water rights in the Lemhi River Basin.

Chapter 15, Title 42, Idaho Code, is clear that if water is to be reserved or withheld from appropriation for instream uses (including fish habitat, aquatic life and water quality) it should be reserved through an appropriation of a minimum stream flow. This would provide a public forum (a public hearing) where all interested parties would be able to provide evidence and testimony in support of or against the proposed minimum stream flow. *See* Idaho Code § 42-1503. 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 as contemplated by Idaho Code § 42-1503. Instead of protesting every application for permit filed in the Lemhi River Basin,¹² which could result in numerous, nearly-identical hearings, the Agencies could instead participate in a single public hearing for each proposed minimum stream flow to determine the appropriate protected flow rates. The present contested case does not provide the proper venue to establish a minimum stream flow.

Appropriating minimum stream flows in the upper Lemhi River or on tributary streams such as Big Timber Creek would address two of the primary concerns raised by the Agencies. First, minimum stream flows would limit future development on the streams, making it more difficult for applicants to satisfy the sufficiency of water supply element in Idaho Code § 42-203A(5)(b). Second, minimum stream flows would reduce or eliminate the high flow usage in the basin. Because high flow uses, by decree, are subject to future water rights, they would also be subject to minimum stream flows. Reducing or eliminating high flow use in the Lemhi River

¹² Currently, there are eighteen applications proposing irrigation uses in the Lemhi River Basin. The Agencies have protested sixteen of the eighteen applications.

Basin would restore the natural hydrograph for the Lemhi River and its tributaries, thereby improving the habitat functions of the stream channels.

Although the bypass conditions included on the proposed permit may have similar effects to a minimum stream flow, the proposed permit does not constitute a minimum stream flow. The proposed permit conditions will affect high flow usage like a minimum stream flow. Water cannot be diverted for high flow uses unless the proposed permit is fully satisfied. Unlike a minimum stream flow, however, 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.

IWRB Transactions Program

The proposed permit will have no direct effect on the existing IWRB Water Transactions Program 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 meant to deliver 7.3 cfs through lower Big Timber Creek throughout the irrigation season. As described above, in order 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. This means that 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 Water Transactions Program 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, to provide water to 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.

Any water right on Big Timber Creek with a bypass flow requirement, such as the 13 cfs bypass required under Whittaker's water right 74-15613, will reduce the amount of water available for high flow diversions on Big Timber Creek. By decree, high flow use can only occur after all water rights, including future appropriations, are satisfied. Currently, high flow cannot be diverted from Big Timber Creek until water right 74-15613 is satisfied. Water right 74-15613 cannot be diverted until there is at least 13 cfs flowing from lower Big Timber Creek into the Lemhi River.

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.

Pursuant to the Basin 74 General Provisions, high flow uses are subject to future appropriations and, therefore, cannot be protected against injury (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 explained that high flow uses could not restrict any future appropriations, 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. As described above, the high flow users cannot protect their irrigation use (their primary use of the water) from diminishment by future irrigation water rights. If the primary purpose of the high flow use cannot restrict future water rights, then the Department should not allow the secondary or incidental benefits derived from high flow irrigation to restrict future water rights. If high flow uses were allowed to restrict the appropriation of unappropriated water on Big Timber Creek, even as part of a local public interest analysis, the high flow uses would operate as water rights, which, according to the SRBA Court, was not the intent of the Lemhi Decree, the SRBA Decree, or the Basin 74 General Provisions.

Even if the incidental benefits of high flow use could be protected as part of a local public interest review, streamflow data for Big Timber Creek and the Lemhi River indicates that the proposed permit will have little or no impact on the high flow uses on the Lemhi River. As described above, in order to preserve the public interest related to fish habitat on Big Timber Creek, conditions will be added to the proposed permit restricting diversion under the right to times when the flow at the proposed Bird Gage exceeds 54 cfs and flow at the Lower BTC Gage exceeds 18 cfs. Between 2006 and 2016, on days when these streamflow thresholds were

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.*

satisfied,¹⁴ the flow at the Lower Lemhi River Gage (water flowing out of the basin) always exceeded 400 cfs. The proposed permit will have some impact on high flow uses on Big Timber Creek, but the effect may be less than expected by the Irrigators. Between 2006 and 2016, on days when the flow at the Upper BTC Gage was between 121 cfs and 284 cfs, the flow at the Lower BTC Gage was often greater than 30 cfs.

To summarize, high flow use, as a matter of law, cannot restrict the appropriation of water in the Lemhi River Basin, under an injury analysis or under a local public interest analysis. In this case, because of the streamflow thresholds imposed on the proposed permit as part of the local public interest review, the proposed permit will likely have no impact on high flow usage on the Lemhi River and may only partially reduce the amount of water available for high flow uses on Big Timber Creek on a fraction of the days when the proposed permit would be available.

Using High Flow at the Proposed Place of Use

Bird testified that the proposed place of use has been irrigated in the past with high flows under the Basin 74 General Provisions. The language of the Basin 74 General Provisions is broad enough that Bird might be able to irrigate the proposed place of use with high flow diversions even when the proposed permit is not available (because the flow thresholds are not met). For example, the proposed permit would not be available when flow at the Bird Gage is greater than 217 cfs. In that circumstance, Bird would not be allowed to irrigate the proposed place of use under the permit, but might try to irrigate the proposed place of use with high flows under the Basin 74 General Provisions. If Bird were allowed to circumvent the local public interest conditions by irrigating under the guise of high flow use, then the local public interest conditions become meaningless. In order to maintain the integrity of the local public interest conditions, the proposed permit must include a condition prohibiting the use of high flows under the Basin 74 General Provisions on the proposed place of use.

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 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. The code section which governs the pending application, Idaho Code § 42-203A(5), does not require an analysis of the cumulative impacts of pending applications.

¹⁴ 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 impacts to high flow rights, one must account for the 61 cfs of water rights between the Upper BTC Gage and the proposed Bird Gage.

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 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, 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 even 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, she 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 Application 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 hearing officer 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 citizens of the State of Idaho, including water users on Big Timber Creek, are under threat of enforcement under the ESA. Therefore, in the absence of conditions which would protect the habitat and stream passage of ESA-listed fish species, the proposed permit must be denied. Based on the technical information in the record, there are permit conditions that can be adopted to 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. The 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. Further, in order to protect the high volume flows needed to maintain stream channels and riparian areas, the proposed permit should not be allowed to divert water during times when the flow at the Bird Gage exceeds 217 cfs.

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 March 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. 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.
11. 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 section constructed must satisfy NOAA 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.
12. The right holder is prohibited from irrigating the authorized place of use for this right with high flows as described in the Basin 74 General Provisions.

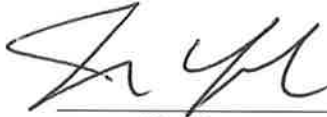
13. This right benefits from the subordination described in Paragraph 10(b)(6)(A)(ii) of water rights 75-13316 and 77-11941 and may only be diverted when the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 cfs.

14. 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.

15. Prior to the diversion and use of water under this approval, the right holder shall comply with all fish screening and/or fish passage requirements of the Idaho Department of Fish and Game.

16. 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 6th day of February, 2020.



James Cefalo
Hearing Officer

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

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.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of February 2020, I mailed a true and correct copy of the foregoing AMENDED PRELIMINARY ORDER APPROVING APPLICATION, 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 - CERTIFIED

RE: APPLICATION FOR PERMIT 74-16187

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