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

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| **IN THE MATTER OF APPLICATION FOR PERMIT NO. 74-16187 IN THE NAME OF KURT W. BIRD OR JANET E. BIRD** | **IWRB'S & IDFG'S JOINT RESPONSE TO APPLICANT'S PETITION FOR RECONSIDERATION** |

The Idaho Water Resource Board and the Idaho Department of Fish and Game (collectively, "Agencies"), by and through their counsel of record, hereby respond to the *Applicant's Petition for Reconsideration* (Jan. 23, 2020) ("*Petition*"). The *Petition* raises many challenges to the "local public interest" Conditions required by the *Preliminary Order Approving Application* ("*Preliminary Order*"). Most of these arguments share a central theme or legal premise. In the interest of brevity, this joint response briefly addresses only the arguments the Agencies view as central to the *Petition*.[1]

[1] This should not be construed to mean that the Agencies have conceded any arguments, contentions, or assertions not addressed herein. The Agencies also reserve their position and arguments that the Application should have been denied. *See, e.g., IWRB's and IDFG's Joint Petition for Clarification or in the Alternative Reconsideration* at 8 n.6.

Relying primarily upon the decision in *N. Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 376 P.3d 722 (2016) ("*North Snake*")[2] The *Petition*'s main argument is that the "local public interest" conditions (Conditions 8, 9, 10, 11, and 12) violate certain constitutional and statutory provisions. The *Petition*'s argument, however, wholly mischaracterizes the issues and holdings in the *North Snake* case. The *North Snake* case is relevant to the *Preliminary Order* only in that *North Snake* expressly recognizes that IDWR may deny or condition a permit application to protect the "local public interest," provided the cited interests fall within the statutory definition of the "local public interest." As discussed below, Conditions 8, 9, 10, 11, and 12 fall well within the statutory definition of the "local public interest." Further, nothing in *North Snake* or any reported Idaho decision, or any Idaho statute, supports the *Petition*'s argument the Agencies must protect the "local public interest" in fish and fish habitat by entering a "race," i.e., by filing a water right application for a minimum stream flow pursuant to Chapter 15, Title 42, Idaho Code ("Chapter 15").

1. **Protection of Fish and Fish Habitat is Within the "Local Public Interest."**

The *Petition* argues that the fish and fish habitat interests protected by Conditions 8, 9, 10, 11 and 12 do not fall within the statutory definition of the "local public interest," because (1) that definition must be narrowly construed and does not expressly refer to "fish," and (2) the minimum streamflow provisions of Chapter 15 are the exclusive means for protecting fish and fish habitat. These arguments lack merit.

The term "local public interest" is not defined by listing the individual interests that qualify, but rather by a description: "the interests that the people in the area directly affected by a

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[2] In this response, the term *North Snake* refers to both the District Court and Idaho Supreme Court decisions, unless otherwise indicated.

proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-202B(3)) (underlining added). Further, the Idaho Supreme Court has consistently held that the term "'[l]ocal public interest' should be read broadly so as to secure the greatest possible benefit." *Chisholm v. IDWR*, 142 Idaho 159, 164, 125 P.3d 515, 520 (2005); *Shokal v. Dunn*, 109 Idaho 330, 338, 707 P.2d 441, 449 (1985). Thus, "the determination of which local public interests are impacted and balancing those impacts is left to the sound discretion of IDWR." *Chisholm*, 142 Idaho at 164, 125 P.3d at 520; *Shokal,* 109 Idaho at 338–39, 707 P.2d at 449–50.

IDWR's Water Appropriation Rules require consideration of effects on "fish and wildlife resources in the local area affected by the proposed use" when evaluating the "local public interest" evaluation. IDAPA 37.03.08.045.01.e.ii. This provision is consistent with (1) Idaho Code § 42-202B, and (2) the intent of the Legislature. As the Idaho Supreme Court stated in *Shokal*, "clearly" the Legislature intended the term "local public interest" to include "fish and wildlife habitat." *Shokal*, 109 Idaho at 338, 707 P.2d at 449; *see also Hardy v. Higginson*, 123 Idaho 485, 489, 849 P.2d 946, 950 (1993) (citing *Shokal* for the same conclusion).

Contrary to the *Petition*'s argument, *Shokal* did not state or imply that the Legislature intended the minimum streamflow provisions of Chapter 15 to be the sole or exclusive means for protecting the local public interest in fish and fish habitat. Further, as *Shokal* pointed out, the Legislature approved Chapter 15 and the "local public interest" provision of section 42-203A "on the *same day*." *Shokal,* 109 Idaho at 338, 707 P.2d at 449 (italics in original). Had the Legislature intended Chapter 15 to be the exclusive means for protecting the "local public interest" in fish and fish habitat, this intent certainly would have been plainly stated, either at that time, or in 2003 when the Legislature narrowed the statutory definition of the "local public interest." *Petition* at 9. There is nothing in Chapter 15, in section 42-203A(5), or in section 42-

202B(3), that states or implies Chapter 15 is the sole or exclusive means for protecting the "local public interest" in fish and fish habitat.

Thus, and contrary to the *Petition*'s arguments, Idaho Code § 42-203A authorizes IDWR to condition or deny a permit application as necessary to protect the "local public interest" in fish and fish habitat. Idaho Code § 42-203A(5). Conditions 8, 9, 10, 11, and 12 are within this authority. *Preliminary Order* at 17-30.

**2. The "Local Public Interest" Conditions are Constitutional.**

The *Petition* argues the "local public interest" Conditions violate Article XV § 3 of the Idaho Constitution for the same reasons IDWR's denial of a permit application was held contrary to this constitutional provision in *North Snake*. This argument mischaracterizes the issues and holdings in the *North Snake* case.

a. *North Snake* is Distinguishable.

*North Snake* did not raise or decide the question of whether protection of fish and fish habitat falls within the "local public interest," and did not interpret or apply Chapter 15. Further, in *North Snake* the Director of IDWR denied a permit application, partly on "local public interest" grounds the District Court and the Idaho Supreme Court both held to be clearly outside the statutory definition of the "local public interest." *Id.* at 524-25, 376 P.3d at 728-29. In this case, however, the *Preliminary Order* approved the permit application, and the Conditions are based on factors that clearly fall within the statutory definition of the "local public interest."

Moreover, while the *North Snake* case involved a "race" between competing applications for the same water, nothing in *North Snake* states or implies that the "local public interest" in fish and fish habitat can only be protected through a Chapter 15 application. *North Snake* does not

even remotely support the *Petition*'s argument that the Agencies must or should "join the race" by filing a Chapter 15 application. *Petition* at 15.

b. *North Snake* Recognizes IDWR's Authority to Deny Permit Applications.

The *Petition* argues as if *North Snake* held that the Idaho Constitution flatly prohibits the Director from denying a permit application whenever unappropriated water is available. This characterization is incorrect: the District Court expressly recognized that "the Director has discretion to deny an otherwise complete application to appropriate unappropriated water," although "his discretion is not unbridled."[3] The Idaho Supreme Court also expressly recognized this authority: "Idaho law allows the Director to deny an application to appropriate water in a variety of circumstances . . . . Idaho law allows the Director to deny an application to appropriate water where the proposed use 'will conflict with the local public interest' as defined in section 42-202B, Idaho Code.'" *North Snake*, 160 Idaho at 522, 524, 376 P.3d at 726, 728 (quoting Idaho Code § 42-203A(5)(e)); *see also Shokal*, 109 Idaho at 337 ("the Director '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.'") (quoting Idaho Code § 42-203A(5)(e)).

Thus, the Idaho Supreme Court has upheld a denial of a request to appropriate unappropriated geothermal water for irrigation purposes when the request was found to be contrary to the "local public interest." *In the Matter of Application for Permit No. 47-7680 (Collins Bros. Corp. v. IDWR)*, 114 Idaho 600, 759 P.2d 891 (1988). The Idaho Supreme Court

[3] *Memorandum Decision and Order* at 5, Case No. CV-2015-08 (Aug. 7, 2015). The *Petition* refers to this as the "*Wildman Decision*," and to avoid confusion the Agencies will use the same shorthand. As the *Petition* notes, the *Wildman Decision* is decision is available for viewing on IDWR's website. *Petition* at 9 n.2.

also upheld an IDWR decision to limit diversions under a permit in order to protect the "local public interest" in fish habitat (sculpin pool). *Hardy*, 123 Idaho 485, 849 P.2d 946.

Consistent with these decisions, *North Snake* held the Director is authorized to deny or condition a permit application in order to protect the "local public interest," so long as the cited interests are within the statutory definition of the "local public interest." *See Wildman Decision* at 11-13 (holding the Director "exceeded his authority under Idaho Code §§ 42-203A(5)(e) and 42-202B(3)" by considering factors that were clearly outside the scope of the statutory definition of the "local public interest.")[4] *See also North Snake*, 376 Idaho at 524, 376P.3d at 728 (describing the District Court's "local public interest" analysis). The Agencies do not dispute that IDWR's "local public interest" analysis must be within the scope of the statutory definition; and the *Preliminary Order*'s analysis clearly is within that scope, as discussed above.

c. Idaho Law Requires IDWR to Deny or Condition a Permit Application if Necessary to Avoid Conflict With the State Water Plan.

IDWR's statutory authority to deny or condition a permit application on "local public interest" grounds is also supported by Article XV § 7 of the Idaho Constitution ("Section 7") and the statutes enacted to implement it. Section 7 authorizes a "state water resource agency" that "shall have power to formulate and implement a state water plan for optimum development of water resources *in the public interest*." Id. Const. Art. XV § 7 (underlining and italics added). This provision was adopted in 1964 to provide the legal basis to plan for the development of Idaho's "surplus" water. *Idaho Power Co. v. IDWR*, 104 Idaho 570, 571, 661 P.2d 736, 737

[4] The District Court also held that a "preference" for the more junior of the two applications involved was "implicit" in the Director's "local public interest" analysis. The Court held that this "preference" violated the constitutional principle that "[p]riority of appropriation shall give the better right as between those using the water," not that it was flatly unconstitutional to deny or condition an application under the "local public interest" factor of Idaho Code § 42-203A(5)(e). *Id.* at 12.

(1983). The IWRB is the "state water resource agency" authorized by this constitutional provision. Idaho Code § 42-1730(1). As such, the IWRB is specifically authorized to "progressively formulate, adopt, and implement a comprehensive state water plan for conservation, development, management and optimum use of all *unappropriated* water resources and waterways of this state in the public interest." Idaho Code § 42-1734A(1) (underlining and italics added). The Legislature has also specifically provided that "[a]ll state agencies *shall* exercise their duties in a manner consistent with the comprehensive state water plan. These duties include but are not limited to the issuance of permits, licenses, and certifications[.]" Idaho Code § 42-1734B(4) (underlining and italics added). Under Idaho law, therefore, the "local public interest" analysis must take into account any applicable policies of the State Water Plan.

The State Water Plan's policies for the Salmon River Basin emphasize the importance of conserving, protecting, and restoring ESA-listed fish species and their habitat in these areas. Ex. 21 at 71-74; *see also id.* at 25-27 (discussing "Federally listed and other aquatic species" and referring to "flow-related limiting factors in the Lemhi and Pahsimeroi rivers"). In short, the constitutionally and statutorily authorized state water plan for optimum development of Idaho's unappropriated waters in the public interest specifically recognizes the need for conservation and recovery of ESA-listed fish species and their habitat in the Lemhi River Basin. IWDR is statutorily required to take these policies into account and take action "consistent" with them when considering new permit applications in the Lemhi River Basin. Idaho Code § 42-1734B(4). Under Idaho Code § 42-203A(5), such actions include "reject[ing]" the application and "refus[ing] issuance of a permit," partially approving the application and "grant[ing] a permit for a smaller quantity of water than applied for," or "grant[ing] a permit upon conditions."

The Director's statutory authority to deny or condition a permit application based on the "local public interest" is affirmatively supported by Section 7 and the statutes that implement it.

d. There is no "Race," and a "Race" is Not Required.

The *Petition* argues that the Conditions intended to protect the "local public interest" in protecting fish and fish habitat violate Section 3 of Article XV of the Idaho Constitution ("Section 3) because these "local public interest" concerns must or should be protected only through an application filed under Chapter 15. This argument has no merit because it is contrary to the statutory definition of "local public interest" and the Idaho Supreme Court's decisions in *Shokal, Hardy*, and *Collins Bros. Corp.* It also relies upon on a mischaracterization of the issues and holdings in the *North Snake* case.

The District Court's decision in *North Snake* is inapposite here precisely because there is no "race" between competing permit applications. There is only one application, which has been protested by the Agencies and a number of other parties pursuant to Idaho Code § 42-203A(4)-(5). The *Petition* nonetheless attempts to create a "race," and thereby make *North Snake* applicable, by arguing the Agencies could have and should have filed applications for minimum streamflow water rights under Chapter 15 rather than protesting the Application on "local public interest" grounds. But as previously discussed, there is nothing in Chapter 15, Idaho Code §§ 42-203A and 42-202B, or applicable decision of the Idaho Supreme Court, that states or implies that Chapter 15 is the sole or preferred statutory avenue for addressing the public interest in fish and fish habitat. There is no requirement of holding a "race" to protect the "local public interest" in fish and fish habitat, nor any requirement that the Agencies "join" an existing "race."

Moreover, Chapter 15 is not the sole authority under which the IWRB is authorized to ensure protection of the public interest in the development of the State's unappropriated water.

As discussed above, the IWRB is constitutionally and statutorily charged with developing and formulating the state water plan for optimum development of Idaho's unappropriated waters in the public interest, and IDWR *must* take the State Water Plan into account in evaluating permit applications. Idaho Code § 42-1734B(4). The process for formulating and implementing the State Water Plan provides a "public forum" that is much more comprehensive and inclusive than a Chapter 15 proceeding, *Preliminary Order* at 24, and provides multiple opportunities for "all interested parties to provide evidence and testimony" regarding concerns over development of Idaho's unappropriated water for purposes such as irrigation or protection of fish and fish habitat. *Id.*; Idaho Code §§ 42-1734A, 42-1775. Moreover, the IWRB has broad statutory authority and discretion to raise or address issues of the public interest in fish and fish habitat under either, or both, Chapter 15 and Idaho Code § 42-203A(5).[5] Idaho law does not require the IWRB to address the "local public interest" in fish and fish habitat through a "race" between competing permit applications.

**3. The "Local Public Interest" Conditions Are Not An "Implied Water Right."**

Much of the *Petition* is based on the contention that Conditions 8, 9, 10, 11, and 12 constitute an "implied water right" for "maximum/minimum" flow that is held by the Agencies. This contention lacks both legal and factual merit.

The Agencies did not file permit applications but rather filed "protests" based on the "local public interest," as specifically authorized in Idaho Code § 42-203A(4)-(5). These provisions authorize IDWR to approve a permit with limiting conditions, including for "a smaller quantity of water than applied for." Such conditions are simply limitations on diversion under

[5] While the Hearing Officer stated that "the Agencies should file an application for a minimum stream flow as contemplated by Idaho Code § 42-1503" rather than by protesting an application, the statutory authority and discretion to make this determination resides with IWRB, not IDWR.

the permit approved in the applicant's name, and the fact that they can be enforced against the permit holder does not create an "implied water right" in favor of a protestant.

The only "water right" conferred by the *Preliminary Order* is the one awarded to the Applicants by virtue of approving a permit in their names. The fact that the Agencies raised "local public interest" concerns that the *Preliminary Order* addresses through limitations on the permit does not vest the Agencies with a "water right" in form or substance. Idaho law clearly allows the Agencies and other interested parties to seek enforcement of the permit conditions, if necessary, or to rely upon the *Preliminary Order*'s "local public interest" findings and conclusions in future proceedings, for whatever persuasive effect or factual relevance they may have. But that does not mean the Agencies hold an "implied water right."

The *Preliminary Order* also expressly distinguished the Conditions from minimum stream flow water rights, and the mere fact that Chapter 15 authorizes the IWRB to apply for minimum stream flow water rights does not transform the Agencies' protests into water right applications, or the "local public interest" Conditions into an "implied water right." Chapter 15 is not the exclusive means for protecting the "local public interest" in fish and fish habitat, and the Agencies have ample statutory authority and discretion to file protests rather than seek to establish minimum streamflow water rights.

**4. The "Local Public Interest" Conditions are Supported by Substantial Evidence.**

The *Petition* asserts the Conditions are not supported by substantial evidence, simply because the Agencies argued for the application to be denied rather than approved with conditions. This contention incorrectly equates "evidence" and "argument." They are two

different things,[6] and "'[s]ubstantial evidence' is 'relevant evidence that a reasonable mind might accept to support a conclusion.'" *North Snake*, 160 Idaho at 522, 376 P.3d at726 (citation omitted). While it is true that the Agencies argued for denial of the Application on "local public interest" grounds, this does not mean, *ipso facto*, that the record lacks "'relevant evidence that a reasonable mind might accept to support a conclusion'" that Conditions 8, 9, 10, 11, and 12 are necessary to protect the "local public interest" in fish and fish habitat. To the contrary, the record includes an abundance of such evidence. *Preliminary Order* at 3-10, 13, 17-30.[7]

The *Petition*'s specific contention that the 237 CFS "peak flow" of Condition 10 is not based on "actual measured flows," *Petition* at 20, is incorrect. The *Preliminary Order* based the 237 CFS "peak flow" on three things: (1) DiLuccia's testimony that peak flows occurring once every three to five years, on average, would be beneficial for maintaining stream channel function and characteristics; (2) the PHABSIM's exceedance flow table for the uppermost reach of Big Timber Creek (Reach 7); and (3) actual gage data from the Upper BTC Gage. Ex. IDWR 18; *Preliminary Order* at 5, 6, 7, 22-23. Further, the Hearing Officer was within his authority and discretion in deriving the 237 CFS "peak flow" using linear interpolation between different exceedance flows in the PHABSIM.[8] *See* Idaho Code § 67-5251(5) ("The agency's experience,

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[6] *Compare, e.g.,* Black's Law Dictionary 114 (defining "argument" as a "statement that attempts to persuade, especially the remarks of counsel in pointing out or repudiating a desired inference, for the assistance of a decision-maker"), *with id.* 595 (defining "evidence" as "Something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact") (parenthetical in original). Black's Law Dictionary 8th ed. (2004).

[7] The Agencies reserve all of their positions and arguments regarding whether the Conditions are adequate to protect the "local public interest" in fish and fish habitat, and whether the Conditions must be clarified or amended. *See generally IWRB's & IDFG's Joint Petition for Clarification or in the Alternative Reconsideration.*

[8] *Preliminary Order* at 23 n. 10.

technical competence, and specialized knowledge may be utilized in the evaluation of the evidence."); *Collins Bros. Corp*, 114 Idaho at 605, 759 P.2d at 896 (same). Finally, and contrary to the *Petition*'s assertions, data in the record show that flows at the Upper BTC Gage have exceeded 237 CFS during the period of record. Ex. IDWR 18.

**5. Condition 10 Is Not Unreasonable or Excessive.**

The *Petition*'s assertion that Condition 10 goes beyond evidence in the record and is unreasonable lacks merit for the reasons discussed immediately above. Substantial evidence in the record supports including a "peak flow" condition in the permit, and the 237 CFS "peak flow" was derived from a reasoned analysis of the factual and technical evidence. *Preliminary Order* at 4, 8, 12, 19 n.9, 22-23. Condition 10 is narrowly tailored to conform to substantial evidence in the record regarding the "local public interest" in "peak flows" for the protection of fish and fish habitat.[9]

The *Petition* nonetheless argues that Condition 10 is excessive or unreasonable because: (1) the Applicant's existing "physical" use of water "will not change" and must be protected; (2) Condition 10 does not address the risk of flooding; and (3) Condition 10 is inconsistent with a stipulated "peak flow" condition to be included on a recharge permit to be issued to the City of Gooding. These arguments are without merit.

a. Condition 10 Should Not Be Modified or Removed to Protect Existing "High Flow" Diversions onto the Proposed Place of Use.

[9] The Agencies do not agree, however, that Condition 10 is adequate to address the role of "peak flows" for purposes of the "local public interest" in preserving and recovering the ESA-listed fish species in Big Timber Creek and the upper Lemhi River Basin, or the "local public interest" in protecting local landowners and water users from federal enforcement of the ESA. *See, e.g., IWRB and IDFG Petition for Clarification or in the Alternative Reconsideration* at 8-9.

The *Petition* argues the Applicant "has historically diverted high flows" onto the proposed place of use as "already authorized under the Basin 74 general provisions," and therefore the diversion and use of water "will not change." *Petition* at 21. This argument is contrary to the record. The record establishes that the Applicant's "high flow" diversions are for flood irrigation, while sprinklers will be used under the new permit; and that there is a significant difference between flood irrigation and sprinklers in terms of the amount of consumptive use (and thus differences in return flows and/or incidental recharge, as well). Moreover, there is no quantitative data in the record to support the contention that the amount of water diverted "will not change." *Id.*; *see also IWRB's Post-Hearting Brief* at 19 (discussing the Applicant's testimony regarding existing "high flow" use).

Further, as the *Preliminary Order* and the *Petition* both recognize, there is evidence in the record that "high flows" may be applied only "to lands covered by existing, recorded water rights," *Preliminary Order* at 15, and most of the proposed place of use is not covered by existing water rights. The *Preliminary Order* concluded, however, that the question of whether the Applicant's existing "high flow" uses are authorized by the Basin 74 General Provisions is beyond the scope of this proceeding and therefore did not address that question. Thus, the record does not support the assertion that the Applicant's use of water "will not change" because "high flow" diversions onto the proposed place of use are "already authorized."[10]

The *Petition*'s attempt to justify removing Condition 10 based on potentially unauthorized "high flow" uses, *Petition* at 21, also is legally flawed. Even if the Application's

[10] Should the Hearing Officer conclude that he must address the question of whether the "high flows" general provision authorizes the Applicant's existing use of "high flows" on the proposed place of use, the administrative record should be re-opened, discovery authorized, and an additional hearing held, to ensure that the parties have an adequate opportunity to develop the necessary record, and present evidence and argument.

existing diversions "will not change," any existing diversions that are not authorized by the general provision cannot be accepted as a lawful basis for approving the Application, for reasons discussed in *IWRB's Post-Hearing Brief* (pages 20-21). The *Petition*'s argument that Condition 10 should be removed to protect the Applicant from the possibility that his existing "high flow" diversions ultimately may be found to be unauthorized, *Petition* at 21-22, puts the cart before the horse. Unauthorized diversions are not protectable, Idaho Code § 42-201, and the question of whether these "high flow" diversions actually are authorized by the general provision must be determined before considering any assertion that existing "high flow" diversions onto the proposed place of use are entitled to protection. *Supra* note 10.

b. Condition 10 Does Not Create or Add to Flood Risks.

The *Petition* argues Condition 10 should be removed, or amended "to provide an exemption in the event that it is necessary to divert water to prevent flooding," because "[t]here was no evidence placed in the record that the channel of Big Timber Creek has capacity to contain 237 cfs," and "the 237 cfs was not measured but only calculated." *Petition* at 22-23. These contentions are contrary to the record because the 237 CFS "peak flow" figure for Reach 7 was derived from actual gage data, and Exhibits IDWR 18 and 19 show that flows of 237 CFS and higher have occurred at both the upper gage and the Leadore gage during the period of record. Nothing in the record suggests that these flows have caused damaging floods.[11]

[11] The *Petition*'s inclusion of a newspaper article in which DiLuccia was reported to have discussed flood damage in the lower Lemhi River Basin in 2018 is an impermissible attempt to augment the administrative record, which is closed. Moreover, the article is hearsay and the accuracy, relevance, and reliability of the reporting in the article have not been addressed or established. Even taking the article at face value, its relevance to the flooding concerns raised in the *Petition* is marginal at best.

Moreover, Condition 10 does not apply to existing water rights held by the Applicant or anyone else on Big Timber Creek. Even under the Agencies' interpretation of the Basin 74 General Provision, therefore, Condition 10 does not restrict the Applicant, or any other holder of an existing water right, from diverting as much "high flow" water as their diversion works can carry if flows in Big Timber Creek are so high as to create a risk of damaging floods. Moreover, "[e]ven if the proposed permit is conditioned to protect peak flows, the peak flows may nonetheless be captured by other water right holders on Big Timber Creek." *Preliminary Order* at 23. Condition 10 does not create or add to the risk of damaging floods.

Further, the record does not contain the information or data necessary to determine what flow level(s), and at what measurement locations, water must be diverted from Big Timber Creek to prevent damaging floods. The *Petition*'s proposal to address this deficiency via a vague "exemption" to divert as "necessary" to "prevent flooding," *Petition* at 23, should be rejected. It would undermine the purpose of the Condition 10 by making it so ambiguous as to be virtually unenforceable. It would also have the effect of indirectly appending an additional purpose of use—"flood control"—to the Permit.

c. The Stipulated Condition in the City of Gooding Permit Does Not Support Amending Condition 10.

The *Petition* argues Condition 10 is excessive and not narrowly tailored because, unlike a stipulated condition to be included in a recharge permit issued to the City of Gooding (37-23059), Condition 10 applies "every year and with no limit on the number of days the channel-forming flows must be present." *Petition* at 23. This argument is incorrect because the 237 CFS "peak flow" of Condition 10 was derived from actual gage data for the Upper BTC gage, and the Reach 7 exceedance flow table in the PHABSIM. By definition, the 237 CFS "peak flow"

provides for "peak flows" of every three years, on average, and the upper BTC gage data shows these flows are usually of short duration, and in most years do not occur all. Ex. IDWR 18.

Further, the *Petition*'s reliance on the stipulated condition in the City of Gooding permit should be rejected as an impermissible attempt to introduce new evidence into the administrative record, which is closed. Moreover, the question of whether the stipulated condition in the City of Gooding permit in the Little Wood River basin is applicable or appropriate to the facts and circumstances of Big Timber Creek and the upper Lemhi River Basin has not been probed or established via examination or documents in this case, and arguments by counsel in a petition for reconsideration are no substitute. Finally, the condition in the City of Gooding permit was not derived from evidence adduced at a hearing, but rather was agreed to via a stipulation executed before the hearing (which has been vacated). The *Petition*'s argument that the City of Gooding condition "is more narrowly and properly tailored to address IDFG's concerns" is contradicted by the stipulation itself:

> 5. **Reservation of Rights**. The Parties agree and acknowledge that this Stipulation only resolves the protest to 37-23059, and that the Protestants reserve all rights to protest other applications for ground water recharge permits, transfers, and any other proceedings that may be initiated (such as those referenced in paragraph 3 above in the future). The Parties shall not use this Stipulation in any other administrative or judicial proceedings for any purpose, other than an action to enforce its terms as provided in paragraph 9 below.

As this passage shows, IDFG viewed the stipulation as compromise, just as the City of Gooding did. *Petition* at 23. The City of Gooding condition was never intended as a "peak flow" template for all other permit applications. The *Petition*'s arguments that the City of Gooding condition should be used in place of Condition 10 lacks support in the record, and the Hearing Officer should reject the *Petition*'s attempt to characterize a limited compromise in an unrelated matter as precedent for how "peak flows" should be addressed in this and future cases.

6. **Condition 11 Is Not an Unconstitutional "Taking".**

There is no merit in the *Petition*'s argument that Condition 11 is an unconstitutional taking of the Applicant's "right to divert high flows as decreed in the Snake River Basin Adjudication proceeding." *Petition* at 35-36. As the *Preliminary Order* recognizes, the Presiding Judge of the SRBA was clear that the language of the "high flow" general provision "was not intended to create a water right" and "did not create a water right." *Preliminary Order* at 26-27. The SRBA Court also held that "high flows" are "unappropriated water." Ex. 189 at 25. It follows that the Applicant does not have any compensable property interest in "high flow" diversion onto the proposed place of use,[12] and hence Condition 12 does not work a "taking." *See, e.g., State, Idaho Transp. Bd. v. HI Boise, LLC*, 153 Idaho 334, 341–43, 282 P.3d 595, 602–04 (2012) (affirming dismissal of a claim for compensation when there "no compensable property right").

Further, the "high flow" general provision did not, and as matter of law could not, limit IDWR's "affirmative duty" to condition new permits as necessary to protect the "local public interest." *Shokal*, 109 Idaho at 337, 707 P.2d at 448. This authority is specifically provided by statute, Idaho Code § 42-203A(5), and the SRBA is limited to adjudicating water rights that are claimed to have come into existence on or before November 19, 1987. *Final Unified Decree* at 1. When adjudicating and decreeing water rights in the SRBA, the District Court lacks jurisdiction and statutory authority to preclude IDWR from exercising its express statutory duty to condition or deny new permit application as necessary to avoid conflict with the "local public interest." Moreover, the *Preliminary Order*'s determination that "high flow" use should not be

[12] Even if "high flow" use were considered to be an integral component of an existing or "base" water right, there are no existing water rights for all but 20 acres of the 320-acre proposed place of use. *IWRB's Post-Hearing Brief* at 19.

allowed on the permitted place of use because that would allow the Applicant "to circumvent the local public interest conditions," *Preliminary Order* at 28, is supported by the record and is well within IDWR's statutory authority. *See Hardy*, 123 Idaho at 489, 849 P.2d at 950 (holding that a "prospective water user" should not be allowed "to circumvent" the "local public interest" criterion).

7. **The 54 CFS Condition is Supported by Substantial Evidence and Can be Measured Directly in Reach 5.**

The *Petition* argues the Upper BTC Gage flow of 115 CFS referenced in Conditions 8 and 9 lacks support in the record, and is contrary to law (for a variety of reasons, some of which have been addressed above[13]). These contentions should be rejected.

The 115 CFS flow at the Upper BTC Gage is intended to assure a flow of 54 CFS in Reach 5, the reach that includes the Applicant's point of diversion. The *Petition* argues the 54 CFS flow figure, which was taken from the PHABSIM, is "suspect," "unreliable," "illogical," and "an outlier" that "should not have been relied upon." *Petition* at 27-28. These assertions are not based on any factual testimony or expert analysis in the record, but are simply counsel's attempt to interpret and critique a technical document. The Applicant had the opportunity to offer or adduce expert testimony for this purpose but did not; to the contrary, the Applicant pointedly relied upon the PHABSIM. The *Petition*'s unsupported attempt to undermine the PHABSIM should be disregarded.

The *Petition*'s arguments that the 54 CFS flow should not be measured indirectly by requiring 115 CFS at the Upper BTC Gage does not support eliminating the 54 CFS flow requirement in Reach 5. The only change to the *Preliminary Order* these arguments support is a

[13] For instance, the arguments that the Conditions violate various constitutional and statutory provisions, constitute "implied" water rights for minimum flows, etc.

modification to Conditions 8, 9, and 11 to require that the 54 CFS flow be measured directly, within Reach 5. The Agencies have no objection to requiring that the 54 CFS be measured directly within Reach 5 rather than by requiring 115 CFS at the Upper BTC Gage.[14] But if so, the Applicant should be required to make arrangements for installing and maintaining a "measurement section" within Reach 5 that provides timely and reliable stream flow data,[15] and no diversions should be allowed under the new Permit until this requirement is satisfied. *IWRB's and IDFG's Joint Petition for Clarification or in the Alternative Reconsideration* at 2-4, 6-8.

**8. Condition 11 is Necessary, Supported by the Record and Does Not Impose Unlawful Burdens on the Applicant.**

The *Petition* argues that Condition 11 should be removed, or modified to make installation and maintenance of the "measurement sections" located at the Upper and Lower BTC Gage sites the responsibility of Water District 74-W. Removing Condition 11 would be contrary to, and could effectively nullify, the Conditions intended to protect the "local public interest" in fish and fish habitat. These Conditions are linked to flow levels at the sites of the existing Upper and Lower BTC Gages. The Permit must be conditioned to require that if the existing gages are removed or de-activated, or their data cannot be accessed in a timely and

[14] Making measurements only within Reach 5 would not, however, be sufficient to ensure administration of Conditions 8 and 9. As discussed in the *IWRB's and IDFG's Joint Petition for Clarification or in the Alternative Reconsideration*, these Conditions (and Conditions 10 and 12), should also require "field headgate" administration. Otherwise these Conditions are not administrable or enforceable, because a number of existing water rights are also diverted through BT12 and the Home Ditch.

[15] The Applicant's point of diversion is on property owned by Tom Carlson, *Preliminary Order* at 2, which suggests that the Applicant has permission to use Mr. Carlson's property for this purpose. This fact may make it easier for the Applicant to make arrangements to install and maintain a gage in Reach 5 than at the Upper BTC Gage site.

reliable manner for purposes of administration,[16] then no diversions may take place under the Permit until new gages are installed, or the existing gages are repaired or upgraded. Otherwise the "local public interest" Conditions could easily become a dead letter.

The *Petition* argues the Applicant lacks statutory authority to install and maintain streamflow gages on property owned by others, and that gaging should be the responsibility of Water District 74-W rather than the Applicant. This argument is not a reason to remove or modify Condition 11. The Applicant can obtain the authority to install and maintain any necessary gages by negotiating with other landowners and water users on Big Timber Creek, and/or with Water District 74-W, or through other negotiated, cooperative, or voluntary means. For instance, the Applicant has secured permission from Mr. Carlson to use his property for purposes of diverting and conveying water from Big Timber Creek to the Applicant's property. The *Petition*'s contentions that it is legally impossible for the Applicant to comply with Condition 11 are contrary to the record and lack credibility.

DATED this 31st day of January, 2020.

LAWRENCE G. WASDEN
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[16] *IWRB's and IDFG's Joint Petition for Clarification or in the Alternative Reconsideration* at 2-4.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 31st day of January 2020, I caused the original of the foregoing to be filed with the Idaho Department of Water Resources, and copies to be served upon the following, in the manner listed below:

1. Original to:

| | |
|---|---|
| JAMES CEFALO<br>IDAHO DEPARTMENT OF WATER RESOURCES<br>900 N. SKYLINE DR., STE A<br>IDAHO FALLS, ID 83402-1718 | ☒ U.S. Mail, postage prepaid<br>☐ Hand Delivery<br>☐ Federal Express<br>☒ Facsimile: 208-525-7177<br>☒ Email: james.cefalo@idwr.idaho.gov |
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2. Copies to the following:

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