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

IN THE MATTER OF PERMIT TO  
APPROPRIATE WATER NO. 74-16187  
IN THE NAME OF KURT W. BIRD and  
JANET E. BIRD

**APPLICANT'S  
POST-HEARING BRIEF**

Applicants Kurt W. Bird and Janet E. Bird, (hereinafter collectively "Bird" or the "Applicant"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submit *Applicant's Post-Hearing Brief*. Application for Permit No. 74-16187 (hereinafter simply "74-16187") is a contested case before the Idaho Department of Water Resources ("IDWR" or "Department"). The contested case hearing for 74-16187 was held on August 28-29, 2019 in Salmon, Idaho.<sup>1</sup> At the conclusion of the hearing, counsel for the Idaho Department of Fish and Game and the Idaho Water Resource Board requested the ability to submit post-hearing briefing,

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<sup>1</sup> There is no official transcript of the hearing associated with 74-16187. Bird has made some effort to transcribe portions of the hearing recording, and where the hearing has been transcribed, Bird will quote from the record. Otherwise, Bird has referred to his notes and recollection from the hearing and cite generally to the testimony provided at the hearing.

## I. BACKGROUND

Bird’s permit application for 74-16187 seeks a permit for 6.4 cfs to be diverted from an existing point of diversion on Big Timber Creek (a tributary to the Lemhi River) for the irrigation of 320 acres—acres that historically have had Basin 74 “high flows” (discussed in further detail below) applied to them. The existing point of diversion, existing delivery system, and proposed place of use are depicted on Exhibit 2, and were described by Kurt Bird (along with the proposed additions to the delivery system) at the hearing:

[illegible]

74-16187 was protested by (1) the Idaho Department of Fish and Game (“IDFG”); (2) the Idaho Water Resource Board (“IWRB” or simply the “Board”); (3) the Lemhi Irrigation District (“LID”); (4) Beyeler Ranches LLC (“Beyeler”); (5) the Idaho Conservation League (“ICL”); (6) the Lemhi Soil and Water Conservation District (“LSWCD”); (7) Penny Jane Odgen-Edwards (“Odgen-Edwards”); (8) Purcell Ranch Partnership and (9) Kerry Purcell (collectively with Purcell Ranch Partnership “Purcell”); (10) High Bar Ditch Association (“High Bar”); and (11) Carl Ellsworth<sup>2</sup> (“Ellsworth”). IDFG, IWRB, LID, Beyeler, ICL, LSWCD, Odgen-Edwards, Purcell, High Bar, and Ellsworth are referred to collectively in this brief at the “Protestants.”

The prehearing conference for 74-16187 was held on April 16, 2019. It was clear at the prehearing conference—and confirmed at the hearing by testimony from Kurt Bird—that Bird has already stipulated to inclusion of certain conditions included on a water right previously issued to and developed by James Whittaker (74-15613, which is now a licensed water right). Stated another way, Bird had no intention of attacking or challenging the imposition of these same conditions or in any way seeking more favorable conditions that would place 74-16187 in a better position than Whittaker’s more senior water right (74-15613). Those conditions are:

7. 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.
8. 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.
9. 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.
10. 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.

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<sup>2</sup> Ellsworth is also the Chairman of LID.

On July 30, 2019, a *Joint Motion By IWRB And IDFG For Partial Summary Judgment* (the “Motion”) was filed. The self-stated purpose of the Motion was a “narrow motion” which “seeks only to affirm certain important legal conclusions regarding the ‘local public interest’ reached in the Department’s proceedings on [Water Right No.] 74-15613 (the ‘Whittaker case’) will continue to apply in this case.” Motion at 6. Because the Motion only selectively quoted from the final order in the Whittaker case, Bird opposed the Motion, but overall agreed that the “local public interest” criterion of Idaho Code § 42-222 already includes fish and wildlife and aquatic life considerations. *See Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 441, 448 (1985) (the legislature “must have included the public interest on the local scale to include the public interest elements listed in section 42-501[,]” which included “**fish and wildlife habitat, aquatic life**, recreation, aesthetic beauty, transportation and navigation values, and water quality.”).

In the hearing officer’s *Order Granting Joint Motion for Partial Summary Judgment, in Part*, (“Order”), he concluded that the term “dewatered” as it was proposed in the Motion “appear[ed] to be no longer accurate.” *Id.* at 3. Based on proposed hearing exhibits, the hearing officer explained that “the lower section of Big Timber Creek has had flowing water throughout the entire irrigation season,” and as a result, the hearing officer concluded that the IWRB/IDFG proposed fact “does not constitute an accurate, undisputed fact” and partial summary judgment on that fact was “not appropriate.” Order at 5-6.

Bird raised concerns with the Motion because it failed to include a portion of the final order in the Whittaker case which concluded that “[i]rrigation is a **beneficial use of water, and is a traditional use of water that gives rise to a presumption of public interest**. The benefits that can be derived from diversion of water and irrigation as proposed by Whittakers, even for a short period of time, are real and substantial.” *Final Order* (74-15613) at 7-8 (emphasis added). In light

of this, the hearing officer held that while fish and wildlife considerations are in the local public interest, “Bird is not precluded from offering evidence on other local public interest factors and the hearing officer is allowed to weigh all the local public interest factors in the ultimate determination of the pending contested case.” Order at 5. Further, the hearing officer held “[t]he proposed conclusions do not refer to other local public interest factors and do not attempt to compare the factors addressed against other local public interest factors.” *Id.*

Relative to the other proposed facts asserted by the IWRB and IDFG—with some restating/rewording of the proposed facts—the hearing officer granted the motion and issued the following order:

#### **ORDER**

IT IS HEREBY ORDERED that the *Motion* filed by the Agencies is GRANTED, IN PART. The hearing officer concludes, as a matter of law, in the pending contested case that:

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.

Order at 5.

## II. WATER RIGHT APPLICATION EVALUATION CRITERIA AND BURDEN OF PROOF STANDARDS

Idaho Code § 42-203(A)(5) sets forth the water right permit application process, and if a protest or protests are filed in response to an application for water right permit, a hearing is held in order to consider the following issues<sup>3</sup>:

### ISSUES

Applications to appropriate the water of the state of Idaho are referred to as applications for permit, and are for the development of new water rights. Section 42-203A, Idaho Code, requires the department to consider the following issues in connection with an application for permit:

1. Will the proposed appropriation reduce the quantity of water under existing water rights?
2. Is the water supply sufficient for the purpose for which it is sought to be appropriated?
3. Was the application made in good faith or for delay or speculative purposes?
4. Does the applicant have sufficient financial resources with which to complete the proposed project?
5. Will the proposed use conflict with the local public interest, where local public interest is defined as 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?
6. Will the proposed use be contrary to the conservation of water resources within the State of Idaho?
7. Will the proposed use adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates?

Relative to these questions, the burden of proof at the hearing is allocated between an applicant and protestants as follows:<sup>4</sup>

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<sup>3</sup> This is taken from the standard letter to a water right permit applicant informing him/her that the application has been protested, a copy of which Bird was sent in a letter dated January 28, 2019 as contained in the water right backfile for 74-16187.

<sup>4</sup> The burdens of proof described here are set forth by administrative rule:

**IDAPA 37.03.08.40.04.b.ii:** The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criteria (a) through (d) of Section 42-203A(5), Idaho Code.

### **BURDEN OF PROOF**

The applicant has the initial burden of proof for issues 1, 2, 3, 4, 6, and 7 above and must provide evidence for the department to evaluate these criteria.

The initial burden of proof on issue 5, if applicable, lies with both the applicant and protestant as to factors of which they are most knowledgeable and cognizant. The applicant has the ultimate burden of persuasion, however, for these issues.

Relative to each of the seven issues described above, Idaho administrative rules providing more detail as to how these issues are evaluated have been adopted. The applicable rules, under each statutory criterion, are:

**(a) that it will reduce the quantity of water under existing water rights, or**

**IDAPA 37.03.08.045.01.a:** Criteria for determining whether the proposed use will reduce the quantity of water under 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 recorded rights, whichever is less.
- ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. . .  
.; or
- iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.
- 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.

**(b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or**

**IDAPA 37.03.08.40.05.d:** Information relative to sufficiency of water supply, Section 42-203A(5)(b), Idaho Code, shall be submitted as follows:

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**IDAPA 37.03.08.40.04.c:** The applicant has the ultimate burden of persuasion for the criteria of Section 42-203A, Idaho Code, . . .

- i. Information shall be submitted on the water requirements of the proposed project, including but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that the water is required, and the volume of water that will be consumptively used per year.
- ii. Information shall be submitted on the quantity of water available from the source applied for, including, but not limited to, information concerning flow rates for surface water sources available during periods of peak and average project water demand, information concerning the properties of the aquifers that water is to be taken for groundwater sources, and information on other sources of supply that may be used to supplement the applied for water source.

**(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**

**IDAPA 37.03.08.40.05.e:** Information relative to good faith, delay, or speculative purposes of the applicant, Section 42-203A(5)(c), Idaho Code, shall be submitted as follows:

- i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project facilities and the place of use or if such action can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest. Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code.
- ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of the applications and any subsequent approvals or denials.

**(d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or**

**IDAPA 37.03.08.40.05.f:** Information Relative to Financial Resources, Section 42-203A(5)(d), Idaho Code, shall be submitted as follows:

- i. The applicant shall submit a current financial statement certified to



show the accuracy of the information contained therein, or a financial commitment letter along with the financial statement of the lender or other evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed.

- ii. The applicant shall submit plans and specifications along with estimated construction costs for the project works. The plans shall be definite enough to all of the determination of project impacts and implications.

**(e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or**

**IDAPA 37.03.08.40.04.b.ii:** The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criteria (e) of Section 42-203A(5), Idaho Code, as to any factor affecting local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall bear the initial burden of coming forward with evidence for those factors relevant to criterion (e) of Section 42-203A(5), Idaho Code, of which the protestant can reasonably be expected to be more cognizant than the applicant.

**IDAPA 37.03.08.40.04.g:** Information Relative to Conflict with the Local Public Interest, Section 42-203A(5)(e), Idaho Code, shall be submitted as follows: The applicant shall seek comment and shall submit all letters of comment on the effects of the construction and operation of the proposed project from the governing body of the city and/or county and tribal reservation within which the point of diversion and place of use are located, the Idaho Department of Fish and Game, the Idaho Department of Environmental Quality, and any irrigation district or canal company within which the proposed project is located and from other entities as determined by the director.

**(f) that it is contrary to conservation of water resources within the state of Idaho, or**

**(g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates.**

Against this legal backdrop, the hearing for 74-16187 was held where testimony and documentary evidence was taken and submitted into the administrative record. Each of these criteria are discussed in further detail below. For the reasons set forth below, Bird has satisfied

the burdens of a water right permit applicant. Based on the evidence presented at the hearing, a permit for 74-16187 should be issued with the stipulated conditions described above, along with other standard conditions typically included in water right permits, but without any other imposed conditions.

### III. ARGUMENT

#### A. 74-16187 will not reduce the quantity of water under existing water rights.

1. **Protestants with water rights on the Lemhi River cannot suffer legal injury from the exercise of 74-16187 because of the Basin 74 general provisions and because there is sufficient available water available under the Wild and Scenic Agreement for 74-16187 to be issued with full subordination protection.**

There are two significant nuances that exist for water right administration in the Lemhi River Basin critical to the evaluation of protests to 74-16187 relative to whether this application will reduce the quantity of water under existing water rights.

First, water right administration in the Lemhi River basin is subject to two general provisions which were decreed in the Snake River Basin Adjudication (“SRBA”). These general provisions are referred to in a shorthand manner in this brief as (1) the “separate streams general provision;” and (2) the “high flows general provision.” See Exhibit 11.

The separate streams general provision provides that tributary streams to the Lemhi River, specifically including Big Timber Creek, “shall be administered separately from all other water rights in Basin 74 . . . Future appropriations of water on the above streams [including Big Timber Creek] are not considered to be subject to prior downstream rights on the Lemhi River proper.” *Id.*

The high flows general provision, in its entirety, provides:

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.

Exhibit 11.<sup>5</sup>

Second, despite the separate streams general provision, new water right appropriations on the listed tributary streams **are subject** to the provisions of the partial decree for two federal reserved water rights on the main stem of the Salmon River, WR 75-13316 and WR 77-11941. IDWR Exhibit 13. This partial decree and the agreement associated with this partial decree (IDWR Exhibit 14) is referred to in a shorthand manner as the "Wild and Scenic Agreement." The documents speak for themselves, but briefly, the Wild and Scenic Agreement establishes certain minimum flow amounts for different time periods during a calendar year to satisfy the federal minimum stream flow rights decreed as 75-13316 and 77-11941.

However, despite the priority date of 75-13316 and 77-11941 (July 23, 1980), these rights are subordinated to all water rights decreed in the SRBA; applications for permit with a proof due date after November 19, 1987 (the commencement date of the SRBA) that are ultimately licensed; water right licenses with proof due dates after November 19, 1987 on file with IDWR as of

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<sup>5</sup> The Board and IDFG introduced testimony at the hearing attempting to interpret the high flow general provision with a position that high flows can only applied to lands with existing water rights. Testimony of Cindy Yenter. When the issue of interpretation of the high flows general provision was raised at the end of the hearing to be addressed by the Board and IDFG in post-hearing briefing, the hearing officer stated his belief that the interpretation of the high flows general provision was not an issue before him as a hearing officer. We agree that the interpretation of the high flows general provision is not before the hearing officer and should not be addressed based on this administrative record. If the Board and IDFG attempt to argue this issue, it should be disregarded.

effective date of the Wild and Scenic Agreement; domestic uses; stockwater uses; certain municipal use; and—of importance to the proceedings associated with 74-16187—new water rights, all with a total combined diversion of 150 cfs (including no more than 5,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre). As to these new water rights, IDWR has tracked these new appropriations with a spreadsheet. See Exhibit 20 (IDWR spreadsheet with information rearranged by Bird separating existing water rights and permits from only applications for permit). Based on the latest iteration of this spreadsheet, only 61.2 cfs has been debited against the 150 cfs. This leaves sufficient water under the Wild and Scenic Agreement for Bird to develop the 6.4 cfs requested under 74-16187.

Relative to the issue of injury to water rights asserted against 74-16187, water right owners that divert from the Lemhi River (such as LID) or who possess a minimum stream flow right on the Lemhi River (such as the Board's WR 74-14993) cannot as a legal matter suffer injury because of the separate streams general provision where 74-16187 is administratively divorced from all other water sources within Basin 74. This historic administration was stated well by Robert Loucks in an affidavit submitted in the SRBA individual high flow claims litigation:

The WD74 water master has no authority on these "separate" tributaries and no call for water can be made from those sub-basins to deliver water to WD74.

At no time during my time living in the Lemhi River Basin, including both before and after the issuance of the Lemhi Decree, have any water rights in the Basin been administered together with water rights downstream on the Salmon River. To my knowledge the United States has never called for water from the Lemhi River Basin or any other tributary to satisfy its Wild & Scenic water right downstream on the Main Salmon River.

Exhibit 22 at 3-4 (¶¶10,13).

Consequently, on this issue of injury to their water rights, mainstem Lemhi River water users have no standing to make such assertion because they cannot show an "injury in fact," the

first requirement of standing:

“Idaho has adopted the constitutionally based federal justiciability standard.” *ABC Agra, LLC v. Critical Access Grp., Inc.*, 156 Idaho 781, 783, 331 P.3d 523, 525 (2014); *Koch v. Canyon Cnty.*, 145 Idaho 158, 161, 177 P.3d 372, 375 (2008) (“When deciding whether a party has standing, we have looked to decisions of the United States Supreme Court for guidance.”). Under U.S. Supreme Court jurisprudence, to establish standing “a plaintiff must show (1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between the injury and the conduct complained of,’ and (3) a ‘like [lihood]’ that the injury ‘will be redressed by a favorable decision.’ ” *Susan B. Anthony List v. Driehaus*, — U.S. —, —, 134 S.Ct. 2334, 2341, 189 L.Ed.2d 246, 254–55 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 2136–37, 119 L.Ed.2d 351, 363–64 (1992)). An injury sufficient to satisfy the requirement of an injury in fact “must be ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’ ” *Id.* (internal quotations omitted) (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136, 119 L.Ed.2d at 363).

*State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015). Without a legal right to assert against Bird, mainstem Lemhi River water users have no standing to assert injury even if diversions by Bird reduce the flows in Big Timber Creek that would otherwise make its way to the mainstem of the Lemhi River to satisfy water rights on the Lemhi River. *See, e.g., McVicars v. Christensen*, 156 Idaho 58, 62, 320 P.3d 948, 952 (2014), as corrected (Feb. 20, 2014) (“Generally, ‘every man may regulate, improve, and control his own property, may make such erections as his own judgment, taste, or interest may suggest, and be master of his own without dictation or interference by his neighbors, so long as the use to which he devotes his property is not in violation of the rights of others, however much damage they may sustain therefrom.’”). This lack of standing includes assertions made at the hearing that use of water under 74-16187 instead of for high flows will impact or injure others because of reduced recharge and resulting reach gains to the Lemhi River.

Despite the foregoing, but for the sake of argument, even if it is assumed that there is standing on the issue injury of water rights to mainstem Lemhi River water right holders, in terms

of actual water use, Kurt Bird testified that he has no plans to alter, enlarge, or change the diversion works at the existing point of diversion and the amount of water diverted will not change from its historical diversion amounts because he already diverts high flows under the Basin 74 general provisions onto the proposed place of use. Testimony of Kurt Bird; See also Exhibits 23-24. Stated another way, Bird already has the legal right to divert high flows under the high flows general provision. Development of 74-16187 will merely convert the non-water-right nature of this water entitlement to a vested water right.

In short, mainstem Lemhi River water right holders—such as those users who are members of LID and the Board—have no standing to assert injury to their Lemhi River water rights because of the separate streams general provision. Water users, such as Bird, have a right under the Wild and Scenic Agreement to develop a water right where the federal wild and scenic water rights are subordinated to it. Based on the evidence in the administrative record, Bird has satisfied his burden of proof on the issue of injury to other water rights authorized to divert on the mainstem Lemhi River.

**2. Protestants with water rights on Big Timber Creek will not suffer injury to their water rights from the exercise of 74-16187 because of priority administration and the active nature of Water District No. 74W.**

The State of Idaho, including the Board, fought long and hard to arrive at the conditions contained in the Wild and Scenic Agreement entered into a mere 15 years ago in 2004, including the preservation of 150 cfs of new water right development not subject to the priority date of the wild and scenic rights and 225 cfs of new water right development that is subject to the priority date of the wild and scenic rights. 74-16187 is nothing more than an action to develop a portion of this preserved water negotiated for by the State of Idaho for the benefit of its residents, like Bird.

Of course, like all new water rights, 74-16187 will still fall into the priority ladder and be junior to all other existing Big Timber Creek water rights and be subjected to priority administration. There are already 109.96 cfs of existing Big Timber Creek water rights, and Bird fully expects that if a permit is issued, he will be regulated in priority just as existing water rights on Big Timber Creek have been regulated for decades by active watermasters in Water District No. 74W. *See* Exhibit 10; *See also* Exhibit 13 (watermaster records showing later-priority water rights being curtailed while water is delivered to senior priority rights). Both Kurt Bird and Derek Papatheodore, the current 74W watermaster, testified that there is no special or secret agreement where 74-16187 would be delivered out of priority to the injury of existing water rights.<sup>6</sup>

As described above, Kurt Bird testified that he has no plans to alter, enlarge, or change the diversion works at the existing point of diversion and the amount of water diverted will not change from historical amounts because he already diverts high flows under the Basin 74 general provisions onto the proposed place of use. Testimony of Kurt Bird. Several Protestants own water rights authorized to divert from Big Timber Creek, but none of them presented any evidence that the amount of water available under their rights will be reduced below the amount available to their more senior rights or the historically available amount of water for their beneficial use. No testimony was presented concerning dissatisfaction with the 74W watermaster failing to perform his required functions or evidence that Bird has adjusted his headgate to take water out-of-priority. In fact, Bird—a water user—does not have authority to regulate the point of diversion authorized to divert water under his own water rights. Rather, it is the State of Idaho’s sole and exclusive responsibility to regulate those diversions, a responsibility which it cannot delegate to private

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<sup>6</sup> It is also worth noting that a watermaster—an employee of the State of Idaho—who fails to perform his duties is subject to being unelected at the next annual water district meeting or even removed under the provisions of Idaho Code § 42-605.

persons or entities under Idaho law. *See* Idaho Code § 42-602 (Director of IDWR controls the distribution of water from all natural water sources, and shall distribute water in water districts in accordance with the prior appropriation doctrine). Both Kurt Bird and Derek Papatheodore testified that it is the watermaster who adjusts his headgate and measures flow at his weir when the stream is in regulation. *See* Exhibit 23 and 24 (photographs of headgate and six-foot Cipplletti weir where measurement is taken).

It was also asserted at the hearing by some of the Protestants that approval of 74-16187 would somehow impact water rights owned by individuals that currently benefit from the Board's Idaho Water Transactions Program and have previously had their water rights amended to allow water to bypass their historic Big Timber Creek points of diversion and flow into the Lemhi River to then be pumped from the Lemhi River—with power paid for by the Board and from other funding sources—to their places of use. *See* Exhibits 17 and 18 (Beyeler Ranches and Leadore Land Partners Ltd Partnership transfer approval documents adding points of diversion on the Lemhi River). Based on the priority dates of Beyeler's and Leadore Land's water rights, which are early on the priority ladder, evidence was presented at the hearing that water available under these rights has bypassed their historical points of diversion and is measured at the Lila Livingston weir when Beyeler and Leadore Land Partners are calling for their water. This weir is also the location where Whittaker's 13 cfs flow condition is measured before he is entitled to divert under 74-15613. Photographs from August 22, 2019 showing water at this weir were introduced at the hearing. *See* Exhibits 25 and 26. These photos showed flows measured at 5 on the staff gage, which translates into a flow of 5.7 cfs as confirmed by testimony from Derek Papatheodore.<sup>7</sup>

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<sup>7</sup> Mr. Papatheodore also testified that 7.9 on the staff gage translates to a flow of 11.8 cfs. The weir was designed and installed by IDFG, and it is unclear why it was not sized sufficiently to even measure 13 cfs.



Based on the priority of Big Timber Creek water rights, 74-16187's October 12, 2018 priority date would not be in priority once Big Timber Creek is on regulation, which means that there is no possible way that diversion of water under 74-16187 could affect these rights that benefit from the Board's Idaho Water Transactions Program. If these rights are calling for their water because they need to apply the water for beneficial use,<sup>8</sup> there will always be water bypassing their historical diversion locations which will connect Big Timber Creek to the Lemhi River. This reality was confirmed by the hearing officer in his *Order* who explained that "[i]n recent years, however, the lower section of Big Timber Creek has had flowing water throughout the entire irrigation season." *Order* at 3-4.

The reality is that, given the late priority date of 74-16187, the water rights that have the greatest effects on flows in Big Timber Creek are the **existing** water rights, not future water rights such as 74-16187 that merely try to use water available at the peak of a stream's hydrograph that would otherwise be unused and flow out of Idaho and into the Columbia River. Testimony from Kurt Bird, James Whittaker, Derek Papatheodore, and others confirmed that as a general matter, there is a precipitous drop-off in flows once the spring run-off ceases, and high flow diversions and late priority Big Timber Creek water rights are generally curtailed at virtually the same time. This testimony was confirmed with empirical data in the form of flow measurements in Big Timber Creek. *See, e.g.*, Exhibit 13 (particularly IWRB Big Timber Creek flow charts).

The Board introduced Exhibit 236 at the hearing, which is a chart summarizing measured flows on Big Timber Creek (at the Highway 28 gage) from October 15<sup>th</sup> through November 1,

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<sup>8</sup> It is important to remember that the priority determination made by a watermaster is made by comparing the water available for delivery with the water being called for by water right holders. "After the natural flow has been determined, the watermaster must compute the allocation of flow to the respective users. In general, this is done by deducting the various amount of the water rights **calling for water** (ranked from senior to junior) from the amount of the natural flow until the entire natural flow has been allotted." Watermaster Handbook at 23 (emphasis added) (available at <https://idwr.idaho.gov/files/districts/20130701-Watermaster-Handbook.pdf>).

2018. The chart depicts that flows beginning on October 18<sup>th</sup> were reduced to almost zero. It initially appeared that the Board submitted this information to insinuate that this condition was created by irrigation water right holders such as Bird, and that issuance of a permit for 74-16187 would contribute to his condition. This argument, however, is without merit. The irrigation season of use for Big Timber Creek irrigation rights ends on November 15<sup>th</sup>, and as a practical matter, given the high elevation of the lands irrigated with Big Timber Creek rights, irrigation diversions cease much earlier than October 18<sup>th</sup>. It is more likely that the reduced flows can be explained to have been caused by stockwater right holders who began diverting water under their rights. However, 74-16187 has no stockwater beneficial component to it. *See* IDWR Exhibit 1 (74-16187 application for permit only describing irrigation as a proposed nature of use). Accordingly, the Board's attempts to tie the information depicted on Exhibit 236 to diversions under 74-16187 is unavailing.

Furthermore, as to the question of injury to Big Timber Creek water rights, several Protestants asserted that if a permit for 74-16187 were issued, it would impact or injure high flow use under the Basin 74 general provisions and the resulting positive recharge benefits from utilization of those high flows. However, Bird testified that he intended to still divert high flows on the proposed place of use through an open ditch system, which means that the resulting benefits of diverting high flows will continue to be realized with perhaps only a slight reduction in return flows because the water will be used to grow spring pasture at the proposed place of use.

More importantly, however, as a legal matter, the diversion and use of high flows as described in the plain language of the Basin 74 general provisions is explicitly subject and subordinate to future water rights: "The practice of diverting high flows in the Lemhi Basin, . . . is allowed provided: . . . (b) existing decreed rights **and future appropriations of water are first**

**satisfied.”** Exhibit 11 (emphasis added). A subordinated right to use water cannot legally suffer injury to a water right it is expressly subordinated to. There is no ambiguity in the Basin 74 general provisions, and it was not argued at the hearing that “future appropriations of water” as used in the Basin 74 general provisions is ambiguous. Accordingly, the high flows general provision should be interpreted in accordance with Idaho law:

When interpreting a water decree this Court utilizes the same rules of interpretation applicable to contracts. *Id.*, 153 Idaho at 523, 284 P.3d at 248. If a decree's terms are unambiguous, this Court will determine the meaning and legal effect of the decree from the plain and ordinary meaning of its words. *Cf. Sky Canyon Props., LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013) (“If a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law to be determined from the plain meaning of its own words.”). A decree is ambiguous if it is reasonably subject to conflicting interpretations. *Cf. Huber v. Lightforce USA, Inc.*, 159 Idaho 833, 850, 367 P.3d 228, 245 (2016) (“Where terms of a contract are ‘reasonably subject to differing interpretations, the language is ambiguous....’ ” (quoting *Clark v. Prudential Prop. and Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003))). Whether ambiguity exists in a decree “is a question of law, over which this Court exercises free review.” *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016) (quoting *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011)).

*City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017).

There is no ambiguity in the plain language of the Basin 74 general provisions that diversion of high flows are only authorized if “future appropriations of water” are first satisfied.

Finally, under the IDAPA rules relevant to evaluating the injury to existing water rights criteria, it only applies to water rights evidenced “by permit, license, decree or valid claim.” Use of high flows is not any of these. The hearing officer is well familiar with the history of how the high flows general provision came to be decreed, including a time when hundreds of individual high flow claims were filed in the SRBA and eventually disallowed. The authorization to use high flows under the Basin 74 general provisions decreed in the SRBA remains a right to use water, but

it is not a permit, license, partial decree, or water right claim. Accordingly, the relevant IDAPA rules on this issue do not by their plain language apply to diversion of high flows.

For all the above reasons, Bird has met the burden of proof under Idaho law on the issue of injury to other Big Timber Creek water rights.

- 3. No evidence was presented by the Protestants that the holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right if a permit for 74-15613 is issued.**

As explained above, Kurt Bird testified that he has no plans to alter, enlarge, or change the diversion works at the existing point of diversion that diverts some of his other decreed Big Timber Creek water rights (74-32, 74-34, 74-7165, and 74-15930). Testimony of Kurt Bird; See also Exhibits 23-24. Given the status quo in terms of Bird maintaining his current diversion works, no water right holder will be forced to an unreasonable effort or expense to divert his or her water right because no changes to the diversion system will be made. No evidence was presented to the contrary. Bird has therefore met the burden of proof on this issue under Idaho law.

- 4. No evidence was presented by the Protestants that the quality of the water available to the holder of an existing water right will be made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.**

Water quality concerns relative to water right holders were not raised as an issue of protest or concern relative to 74-15613. Bird has therefore met the burden of proof on this issue.

- 5. Because injury to other water rights will not occur, the hearing officer should only include the same conditions for 74-16187 that were included in Whittaker's 74-15613 to not place Bird in a better position than Whittaker. Other than these conditions, and any other standard IDWR conditions, no additional conditions should be included in the permit for 74-16187.**

In accordance with IDAPA rules and Idaho law, a hearing officer can include conditions to protect against injury to other water rights. IDAPA 37.03.08.045.01.a.iv. James Whittaker, who testified in favor of 74-16187, is the owner of 74-15613, which is now a licensed water right.

Bird has already stipulated to the inclusion of these same conditions<sup>9</sup> that were included on 74-15613:

7. 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.
8. 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.
9. 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.
10. 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.

The explanation of why the 13 cfs minimum flow amount should remain the same as to quantity is discussed in more detail below. Additionally, there was some suggestion by those testifying on behalf of IWRB and IDFG that the location where the 13 cfs is measured should be moved to the Highway 28 bridge for measurement, which is approximately 0.7 miles down Big Timber Creek. However, this should not be done as it would change the historical location of this measurement without justification for the change. There is no evidence that there are issues with accessing the weir, and the device itself was designed by IDFG and installed by Carl Lufkin (the-then ranch manager of Leadore Land Partners). It has a staff gage with a rating chart and is viewed regularly by the watermaster. And it is the location near where the historic diversion location was for at least some of the water rights now benefitting from the Board's Idaho Water Transactions program. Identifying a different measurement location would place the burden of conveyance losses in the 0.7-mile section on Bird, and furthermore, would make the measurement location for

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<sup>9</sup> The only change to these conditions is the need to correct a typographical error with the legal description in condition no. 10 for the measuring device on the Lila Livingston property. That legal description should be the NENWNW, Section 33, T16N, R26E.

74-16187 inconsistent with Whittaker's 74-15613, which would lead to potential difficulties and more work for the watermaster administering both rights. For all the above these reasons, no change to the measurement location of the 13 cfs flow condition should be made.

Finally, some of the Protestants suggested that Bird should not enjoy the subordination protections for new water rights under the Wild and Scenic Agreement. *See, e.g.* IDWR Exhibit 4 (Beyeler suggesting that 74-16187 not receive subordination protection). However, no evidence was presented as to why 74-16187 should be treated differently than any other water right already developed under the Wild and Scenic Agreement (see Exhibit 20), which do enjoy subordination protection. The assertion for a condition providing that 74-16187 should not receive subordination protection is punitive without any basis for such treatment of Bird and 74-16187. There is nothing different about the irrigation right Bird seeks from other water rights in the Lemhi River basin. The Protestants did not present any evidence otherwise. For these reasons, no conditions should be imposed stripping Bird of the subordination protections he is entitled to under the Wild and Scenic Agreement.

**B. The water supply for 74-16187 is sufficient for the purpose for which Bird is seeking the appropriation.**

Bird testified at the hearing why he filed the application for 74-16187. He wants to raise spring pasture for his cattle, and even with a limited time that 74-16187 may be available, it will allow him to grow some early grass pasture and potentially use the property later in the summer and fall for cattle grazing, all of which saves costs he currently incurs leasing other pasture. Testimony of Kurt Bird. Bird understands he may not be able to use water under 74-16187 as much as earlier priority rights, but it still makes economic sense to pursue 74-16187 because he believes it will supply him with approximately 20-40 days of water. This water, even if it is only available for a short period of time, will provide benefits that are real and substantial. *See* Final

Order (74-15613) at 7-8. None of the Protestants presented evidence to the contrary on the issue of lack of water availability for 74-16187.

The diversion rate sought of 6.4 cfs sought under 74-16187 is at the standard of .02 cfs per acre in accordance with Idaho Code § 42-202. Bird is not seeking any additional water for ditch losses (even though some exists), and because of proposed efficient pivot irrigation, the 6.4 cfs amount will be sufficient to meet the water requirements of his pasture irrigation plans.

Based upon IDWR's standardized information for consumptive use, found at the ET Idaho website (<http://data.kimberly.uidaho.edu/ETIdaho/>), the anticipated consumptive use for the project is based on values from the Leadore weather station for grass hay (<http://data.kimberly.uidaho.edu/ETIdaho/stcwrstats.py?station=69&cover=4&stats=Deficit>).

The evidence presented at the hearing is that "high flow" water is generally available beginning around the first part of May and continuing until around the first of July for some amount of days within those months—typically 20-40 days. Assuming an above-average water year of 60 days of water availability, based on the ETIdaho numbers of 1.43 mm/day for May and 4.51 mm/day for June, the total consumptive use for May is 0.15 AF per acre and 0.45 AF per acre for June.<sup>10</sup> For 320 acres, the consumptive use will therefore be 48 AF for May and 144 AF for June, for a total of 192 AF.

There is enough water in Big Timber Creek to supply this amount of water to Bird. Flow data introduced at the hearing on Big Timber Creek show a relatively consistent spring runoff amount measured in upper Big Timber Creek that is near to or exceeds the 109.96 cfs of existing water rights on Big Timber Creek. See Exhibit 13. This data demonstrates that in most years there

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<sup>10</sup> The calculation to convert the mm/day to AF per acre is done by taking the mm/day multiplied by the number of days in the month. The result is then divided by 25.2 (the number of millimeters in an inch) to get to inches of water, then divide this amount by 12 to convert the amount to acre-feet.

is an adequate supply in the Big Timber Creek basin to support 74-16187 for some period of time. In fact, based on watermaster records for Whittaker's 74-15613—which 74-16187 would be administered virtually identical to—between 2011 and 2018 (covering both good and bad water years), water is available for 28 days per season. *Id.* For the past two years, the average is 58 days—or approximately two months. This empirical evidence of water availability is consistent with eyewitness testimony from Kurt Bird, James Whittaker, and others.

The Protestants did not present contrary flow records or other evidence that Big Timber Creek flows would be insufficient for the purpose for which Bird is seeking the appropriation, which is irrigation of land for spring pasture. On this issue, we concur with Director Spackman who held in the proceedings on Whittaker's 74-15613 that “[i]rrigation is a beneficial use of water, and is a traditional use of water that gives rise to a presumption of public interest. The benefits that can be derived from diversion of water and irrigation as proposed by Whittakers, even for a short period of time, are real and substantial.” Final Order (74-15613) at 7-8.

IDFG and the Board did assert in this matter that they want all unappropriated water all of the time—no matter the quantity—to flow into the Lemhi River, but that argument is more an issue under raised under the local public interest and is addressed below. As to the issue of water availability in Big Timber Creek, Bird submitted convincing evidence under Idaho law and met his burden of proof.

**C. 74-16187 was submitted in good faith and was not made for delay or speculative purposes.**

If approved, Bird testified that he would move to develop 74-16187 as soon as possible with the installation of necessary pipes and pivots. In fact, his application only seeks a development period of three years, when he could have sought up to five, IDWR Exhibit 1, and he has already discussed financing of the project with Zions Bank, his financing institution. Exhibit



16. Bird already owns the location where the place of use is located, and as for easements for the diversion structure and associated ditch, he already delivers existing water rights through that system. His application contains a statement from Tom Carlson (the owner of the property where the point of diversion and a section of the ditch are located) concerning access to these facilities that have existed for decades by virtue of a prescriptive easements.

No contrary evidence was presented by the Protestants that 74-16187 was submitted in bad faith or was submitted for delay or speculative purposes. Accordingly, Bird has met his burden under Idaho law as to the issue of good faith submission of 74-16187.

**D. Bird has sufficient financial resources with which to complete the work involved with development of 74-16187.**

Bird offered testimony and presented evidence depicting and explaining his plans for the irrigation system associated with 74-16187, which will utilize a portion of an existing ditch and pipeline system and will require installation of some additional piping to feed water to the center points of the proposed center pivots. See Exhibits 1-4. Kurt Bird testified that the system improvements would cost approximately \$175,000. Testimony of Kurt Bird. In accordance with IDAPA 37.03.08.40.05.f.i., Bird submitted “other evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed” with Exhibit 16. None of the Protestants presented evidence that Bird does not have sufficient financial resources with which to develop 74-16187. Accordingly, Bird has satisfied the burden of proof for this criterion under Idaho law.

**E. Issuance of permit for 74-16187 is in the local public interest as defined in section 42-202B, Idaho Code.**

As is typically the case in contested water right permit application hearings, the primary criterion asserted by the Protestants under Idaho Code § 42-203A(5) is whether the proposed

appropriation is in the local public interest. Because the local public interest encompasses many things to different people, in a contested case before the Department, it is typical that there will be competing local public interest issues that a hearing officer must weigh and consider.

Idaho Code § 42-202B currently defines the local public interest 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.” In 1978, the local public interest review requirement was added by the Idaho Legislature to the statutory review criteria of the Director required for approval of appropriations of new water rights. 1978 Idaho Sess. Laws, ch. 306, § 1 (codified as amended at Idaho Code §§ 42-203B(3), 42-203A(5)(e)). As originally enacted, the provision stated:

[W]here the proposed use is such . . . that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, . . . the director of the department may reject such application . . . .

1978 Idaho Sess. Laws, ch. 306, § 1 (codified as amended at Idaho Code §§ 42-203B(3), 42-203A(5)(e)).

As described above, the burden of proof on the local public interest criterion is shared between the applicant and protestant(s). As to the local public interest benefits 74-16187 brings to the table, the starting point is well-stated by Director Spackman who held in the 74-15613 proceedings that “[i]rrigation is a beneficial use of water, and is a traditional use of water that **gives rise to a presumption of public interest**. The benefits that can be derived from diversion of water and irrigation as proposed by Whittakers, even for a short period of time, are real and substantial.” Final Order (74-15613) at 7-8 (emphasis added). Additionally, as testified by Kurt Bird and Whittaker, the local ranchers are important for the local economy and social fabric of the Leadore area because it supports ranching—particularly family ranching—in a community that has had its population decrease due to limited economic opportunities and consolidation of smaller ranches

into large ranches. Exhibit 15; Testimony of James Whittaker and Kurt Bird.

As to 74-16187, evidence in the administrative record is clear that it is in local public interest as the Protestants have not met their burden of proof on this issue.

After reviewing the hundreds of pages of documents submitted by the Board and IDFG and hours of testimony from their witnesses, it appears that the hearing for 74-16187 was primarily used as a forum for the Board and IDFG and those in support of their positions to again publicly show to the water user community the importance of fish and wildlife concerns. It was a showing where the Board's and IDFG's participation could be pointed to by the State of Idaho in its future interactions with federal agencies and other water users that it is actively opposing actions that may be perceived by federal employees (who may be unfamiliar with Idaho water law and water distribution in Idaho) and others as detrimental to fish recovery efforts. *See, e.g.*, Testimony of Amy Cassel (after stating that "this job is so much about optics," she later explains that her initial understanding that some water users would not enter into agreements with the Board was not based on what others said, but was based upon her impressions of what they thought.).

We reach this conclusion because after a review of the evidence, there is no connection to how the exercise of a late-priority water right like 74-16187 that can legally be developed under the Wild and Scenic Agreement could either legally or physically interfere with anadromous fish recovery efforts. Just because an application may look bad to federal regulators or others who may not understand how water right priority administration works, that is not a basis under the local public interest to deny issuance of a water right permit.

This is not to say that Bird does not understand or appreciate the implications of the Endangered Species Act (the "ESA")—particularly as applied to him and other farmers and ranchers in the Leadore area. That is why Bird has not protested or otherwise opposed the transfers

approved for Beyeler and Leadore Land Partners to allow them to fully participate in the Idaho Water Transactions Program. Nor has Bird objected to or opposed the installation of new diversion structures, such as Big Timber Creek Diversion #2 that was finally removed in 2018. Exhibit 201 at 20. Mr. Diluccia testified that Mr. Bird has been good to work with on fish passage issues on Big Timber Creek. Testimony of Jeff Diluccia. In fact, Bird has specifically told IDFG—as far back as 2015—that he would support and work with IDFG to alter his Carey Act diversion located closer to the headwaters of Big Timber Creek to allow for fish passage at this diversion. Testimony of Kurt Bird. Bird maintains this position, even though nothing has been done by IDFG or others to date at the Carey Act diversion. Bird's actions are also consistent with non-opposition to the portion of the Board's and IDFG's Motion that anadromous fish recovery is in the local public interest, which resulted in the following order:

#### **ORDER**

IT IS HEREBY ORDERED that the *Motion* filed by the Agencies is GRANTED, IN PART. The hearing officer concludes, as a matter of law, in the pending contested case that:

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.

In addition to the local public interest values described above, the exercise of 74-16187 is also in the local public because it will not interfere with or negatively impact anadromous fish

recovery efforts. If anything, exercise of 74-16187 will result in irrigation where some portion of the irrigation water—estimated to be 15% based on 85% pivot efficient—will return to the local aquifer and provide cool temperature base water flows beneficial for fish in August (during spawning period for Chinook salmon) and thereafter. The relationship of diversion of water and its later return to the Lemhi River is supported by the Sherl Chapman report and testimony of LID representatives and other water users provided at the hearing. Exhibit 12; Testimony of Carl Lufkin; Testimony of Carl Ellsworth.

In response to these benefits, the Board and IDFG nevertheless want the application for 74-16187 denied. This position is based largely on the items raised in Jeff Diluccia's expert report found at Exhibit 201.<sup>11</sup> Mr. Diluccia concludes "that if the application is approved the resulting diversions would have adverse effects on ESA-listed fish species, and would tend to undermine existing and planned efforts to promote recovery and delisting of the ESA-listed fish species." Exhibit 201 at 1. Based upon our reading of this expert report, this conclusion is based upon the following assertions which we have distilled from the report and supporting documents, each of which is addressed below:

1. "More water means more fish" because it improves stream habitat. *Id.* at 8.
2. Increased flow can stabilize stream temperatures. *Id.* at 9.
3. Flow in excess of 13 cfs "may be necessary at times to meet the minimum requirements to improve rearing conditions for salmon, steelhead, and bull trout," perhaps as high as 23 and 49 cfs. *Id.*

It is undisputed that neither the IDFG nor the Board has petitioned IDWR to issue a moratorium on new appropriations in the Lemhi River basin, and yet, they assert in this contested case that they want all water in the upper Lemhi Basin to flow into the Lemhi River to improve

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<sup>11</sup> Based on the content of this expert report and its entirely negative conclusions as to 74-16187, IDFG's assertion that its protest that it neither supports or opposes 74-16187 is disingenuous. There is no analysis in the expert report of return flows to the Lemhi River from diversion of high flows or from 74-16187 that are beneficial for fish. Even Mr. Diluccia initially testified that IDFG opposes 74-16187 before redirect questions from his counsel.

stream habitat. This change in position is remarkable. As recently as 2016, the Board took the position that the 150 cfs preserved for future development under the Wild and Scenic Agreement was so important that it protested a water right permit application (74-16008 filed by Lynn Herbst) and argued that the subordination protection for new water rights only applied to water rights being sought for irrigation of new acres, not for supplemental purposes that Herbst sought a water right for. The hearing officer rejected this argument, and after exceptions were filed with Director Spackman, the Director likewise held that there was nothing in the plain language of the Wild and Scenic Decree supporting the Board's position. The Board first argued that the term "irrigation" found in Section 10.b.(6).(A).(i) was ambiguous and that parol evidence should be considered. The hearing officer held that the IWRB "seeks to create ambiguity where there is none," which the Director affirmed. Final Order Issuing Permit (74-16008) at 6. In its exceptions, the Board next argued "that a latent ambiguity exists with regard to the term 'irrigation.'" *Id.* The Director likewise rejected this argument, ultimately holding that the "subordination benefit set forth in Section 10.b.(6).(A).(i) does not only apply to water rights seeking to irrigate new acres." *Id.* at 7-8.

Now, a mere three years later, the Board's position of no more diversions on tributary streams, which taken to its logical conclusion means no more consumptive use,<sup>12</sup> means no more water rights should be issued, period. This position, if accepted by the hearing officer, will preclude the development of any additional water in the Lemhi River basin that the State of Idaho fought for under the Wild and Scenic Agreement. Such a position must not be adopted.

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<sup>12</sup> See Testimony of Cynthia Bridge-Clark (responding to questions from the hearing officer about the Board's position on no new consumptive uses of water).

Furthermore, from a legal standpoint, it is not enough for a IDFG and the Board to meet its burden of proof by simply asserting that it wants all the water remaining in the upper Lemhi basin without filing for a water right itself, or at least quantifying how much water is needed to satisfy the concern IDFG is raising. It is not in the local public interest to take away available water for appropriation under the Wild and Scenic Agreement to satisfy an unquantified amount for stream channel formation in the Lemhi River only for that water to flow unused out of Idaho to the Columbia River.

Relative to stream temperature and the assertion that water in excess of the 13 cfs condition is needed, as explained by Mr. Diluccia, it is the **current irrigation withdrawals** under existing water rights that have resulted in the historic disconnection of Big Timber Creek from the Lemhi River (which disconnection no longer occurs because of the rights participating in the Idaho Water Transactions Program). *See* Exhibit 202 at 2 (“However, larger fluvial (migratory) forms that historically have used Big Timber Creek, the Lemhi River, and even the Salmon River in their life cycle are absent, in part because of irrigation water withdrawals result in in its disconnection with the Lemhi.”). In short, the exercise of a very junior water right at the peak of the hydrograph that would otherwise result in water flowing out of Idaho—unused—to the Columbia River is not detrimental to anadromous fish passage.

As to the 13 cfs condition, this amount was adopted in the contested case on Whittaker’s water right (74-15613) by Director Spackman based on this finding of fact:

Studies conducted by the Bureau of Reclamation, United States Department of Interior, conclude that 13 cfs of flow is needed in lower Big Timber Creek to allow migration of adult spring chinook salmon, steelhead, and fluvial bull trout into Big Timber Creek.

Final Order (74-15613) at 6; *See also* Exhibit 202 (the report Director Spackman was referring to). Mr. Diluccia prefers a larger flow amount of between 23 and 49 cfs, even though our position is

that 13 cfs is sufficient. And yet, even if you accept these higher values for the sake of argument, a review of the relevant hydrographs and water rights on Big Timber Creek show that when the flows in the creek drop to 50-60 cfs—typically in early July—**existing senior water rights are calling for water and 74-16187 would not be in priority to receive water.** The expert report fails to connect low flow conditions with 74-16187. Indeed, the report suggests the opposite:

Additionally, while existing water right no. 74-15613 has a condition that requires a minimum 13 cfs of flow in Big Timber Creek (IDWR Final Order, License no. 74-15613), **this is a relatively junior application and the 13 cfs condition would be typically pertinent for only a few weeks in late May through June during the period of high water.** Thus, during most of the irrigation season flow in Big Timber Creek returns to the 7.3 cfs level provided by the water right transactions, which is insufficient to provide quality rearing capacity to support growth and survival of juveniles in Big Timber Creek, or for maintaining suitable conditions for all adult migrating fish.

Exhibit 201 at 10 (emphasis added). Accordingly, there has been no tie by IDFG or the Board as to how 74-16187 would affect fish passage or why there should be any change to the 13 cfs condition.

Finally, relative to the flows measured at the Lemhi River under the Board's water right (74-14993), we incorporate by reference the arguments from above relative to the separate streams general provision where there is simply no legal ability for this right to be asserted as the basis of a finding of injury in this contested case. However, even if the flows at L-5 are considered, 74-16187 will not interfere with 74-14993. The flows historically measured at L-5 in comparison with flows in Big Timber Creek show that at the time when 74-16187 would be curtailed, there is more than adequate flow for fish passage at this location. Exhibit 13.

In short, Bird asserts that the exercise of 74-16187 will not interfere with or negatively impact anadromous fish recovery efforts. It will be too junior of a water right to cause any such negative impacts. Bird has already met his burden because there is a presumption of public interest



with the intended use of water for irrigation. Accordingly, as to its initial burden on this issue, IDFG and the Board and the Protestants in support of IDFG's and the Board's position have not met their burden under Idaho law that 74-16187 should be denied as contrary to the local public interest.

**F. 74-16187 is not contrary to the conservation of water resources within the state of Idaho.**

While it is anticipated that the Protestants may attempt to argue other issues that are addressed under the local public interest criterion apply to the conservation of water resources criterion, in the *Order* the hearing officer held that "[i]t is not clear that maintaining stream flow for anadromous fish habitat falls within the conservation of water resources review criterion. The Agencies did not provide a persuasive argument as to why the conclusion of law should refer to the conservation of water resources criterion." *Order* at 4. To the extent such arguments are asserted, we maintain that nothing has changed since this order was issued, and that this criterion should focus on the means by which water under a proposed permit application is conveyed and applied to a beneficial use.

Bird proposes to irrigate with center pivots with water delivered through a delivery system that is piped for a portion of its length. Irrigation with "center pivots and sprinklers" is "an efficient means of irrigation and is consistent with the conservation of water resources within the state of Idaho." *Preliminary Order Approving Transfer*, Transfer No. 82640, at 28 (August 5, 2019). For this reason, Bird has satisfied the burden of proof on this issue as provided under Idaho law and the Protestants have not provided evidence to the contrary.

**G. Because 74-16187 does not propose to irrigate a place of use outside of the watershed or local area where the source of water originates, Idaho Code § 42-230A(5)(g) does not apply.**

The final review criterion under Idaho Code § 42-203A(5) is whether the application for water right permit “will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates.” Idaho Code § 42-203A(5). 74-16187 proposes to divert water from Big Timber Creek and use the diverted water on land adjacent to Big Timber Creek near current places of use for other Big Timber Creek water rights owned by Bird. As such, 74-16187 does not propose to irrigate a place of use “outside of the watershed or local area where the source of water originates,” and for that reason, this criterion is not applicable to 74-16187 and should not be considered.

#### IV. CONCLUSION

74-16187 should be approved with the following conditions,<sup>13</sup> along with any other standard conditions of the Department associated with new water right permits:

7. 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.
8. 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.
9. 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.
10. 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.

Bird has met the burdens of proof requirements required of an applicant for a water right permit as described herein. The Protestants have not met their burdens of proof that 74-16187

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<sup>13</sup> The only change to these conditions is the need to correct a typographical error with the legal description in condition no. 10 for the measuring device on the Lila Livingston property. That legal description should be the NENWNW, Section 33, T16N, R26E.

should be denied because it is not in the local public interest, nor have they presented evidence contrary to the other statutory review criteria. For these reasons, a permit should be issued for 74-16187 as described herein.

DATED this 27<sup>th</sup> day of September, 2019.



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Robert L. Harris, Esq.  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

## CERTIFICATE OF SERVICE

I hereby certify that on this 27<sup>th</sup> day of September, 2019, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

**DOCUMENT SERVED:**     **APPLICANT'S RESPONSE TO JOINT MOTION BY IWRB  
AND IDFG FOR PARTIAL SUMMARY JUDGMENT**

**ORIGINAL TO:**     **James Cefalo**  
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