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

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

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)
) **IWRB'S & IDFG'S JOINT PETITION
FOR CLARIFICATION OR IN THE
ALTERNATIVE RECONSIDERATION**
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)
)

The Idaho Water Resource Board and the Idaho Department of Fish and Game (collectively, "Agencies"), by and through their counsel of record, and pursuant to the *Preliminary Order Approving Application* issued January 9, 2020 ("*Preliminary Order*"),¹ and Rules 720, 730, and 770 of the Rules of Procedure of the Idaho Department of Water Resources, hereby petition the Hearing Officer for clarification or in the alternative reconsideration of the *Preliminary Order*, as discussed herein.

This petition does not request that the Hearing Officer revisit or change any major

¹ Specifically, the page entitled "Explanatory Information to Accompany a Preliminary Order."

findings or conclusions of the *Preliminary Order*. Rather, this petition requests limited clarifications or amendments regarding administration of the conditions (“Conditions”) included in the proposed permit (“Permit”), and the distinction between the *Preliminary Order*’s conclusions regarding the “local public interest” under Idaho law vis-à-vis administration and enforcement of the Endangered Species Act (“ESA”) under federal law.

Clarifications regarding administration of the Permit are particularly important to avoid ambiguity and uncertainty in the implementation of Conditions intended to protect the “local public interest.” The Conditions required to protect the “local public interest” are complex, and the record shows that there has been considerable uncertainty associated with implementation of the much less complex “local public interest” condition of water right 74-15613, i.e., the 13 CFS “bypass flow” condition. *See* Ex. 7 (letter from Tim Luke of IDWR responding to the Water District 74-W watermaster’s request for guidance in administering the 13 CFS condition); Testimony of Derek Papatheodore (Day 1, Track 6, 6:50 – 8:30, 21:50 – 24:00, 25:00 – 25:35) (describing administration during 2018). Accordingly, the Agencies request the Hearing Officer clarify or amend the *Preliminary Order* as discussed below.

1. Flow Data for the Upper BTC Gage and the Shoup Gage Must Be Readily Available Before Diversions Are Allowed.

The *Preliminary Order* and the Conditions provide that diversions under the Permit are allowed only when: (1) flow at the IWRB’s gage downstream of the irrigation diversions on Big Timber Creek (“Lower BTC Gage”) is above 18 CFS; and (2) flow at the gage located upstream of the major irrigation diversions on Big Timber Creek (“Upper BTC Gage”) is greater than 115 CFS but less than 237 CFS; and (3) flow at the Shoup Gage on the Main Salmon River is greater than or equal to 1,280 CFS. *Preliminary Order* at 31-32 (Conditions 8, 9, 10, 13). Flow data from these three gages is therefore key to administration of the Permit. Flow data from each of

these three gages must be available in real-time, or at least be updated and made available no less frequently than once a week, for the watermaster to effectively administer the flow limitations in Conditions 8, 9, 10, and 13. *See* Testimony of Kurt W. Bird (Day 1, Track 4, 17:00 – 18:30 (testifying that the watermaster generally measures and/or regulates diversions on Big Timber Creek at least once week); Testimony of Derek Papatheodore (Day 1, Track 6, 17:45 – 18:30 (similar). Otherwise it will not be possible for the watermaster to effectively administer Conditions 8, 9, 10, and 13 during the brief period of time the Permit will be in priority. *See Preliminary Order* at 16 (stating that the Permit will be in priority for only three weeks a year, on average).

The record establishes that up-to-date flow data from the Lower BTC Gage are available to the watermaster in real time via an internet site. Testimony of Derek Papatheodore (Day 1, Track 6, 12:50 – 14:00). The record does not address, however, the availability of flow data from the Upper BTC Gage and the Shoup Gage. It has not been determined whether up-to-date flow data (i.e., flow data for the current day or week) from the Upper BTC Gage² and the Shoup Gage are available in real-time or on any reasonably timely basis, such as daily or weekly. In the absence of such information in the record, it cannot be assumed that up-to-date flow data from the Upper BTC Gage and the Shoup Gage will be readily available in the form and at the times necessary to effectively administer the Conditions in the Permit.

² The *Preliminary Order* cites Exhibit IDWR 18 in finding that “IWRB maintained” the Upper BTC Gage from 2008 to 2016. *Preliminary Order* at 7; *see also id.* at 19. Exhibit IDWR 18 does not state or imply that the Upper BTC Gage is “maintained” by IWRB, however, and in fact IWRB does not own, operate, or maintain the Upper BTC Gage. To IWRB’s knowledge, the Upper BTC Gage is maintained by an IDWR employee pursuant to a contract with, or funding provided by, the Pacific Coast Salmon Recovery Fund.

The IWRB and IDFG therefore request that the *Preliminary Order* and the Conditions in the Permit be clarified or amended to provide that no water may be diverted under the Permit until flow data for the current day or week from the Upper BTC Gage and the Shoup Gage are available to the watermaster on a real-time basis, or are updated on IDWR's Aqua Info website no less frequently than once a week.

2. Conditions 8, 9, 10, and 12 Must Be Administered at the "Field Headgate."

The point of diversion for the Permit ("BT12," or the "Home Ditch") is also the point of diversion for several of the Applicant's existing water rights. *Preliminary Order* at 2. All of the water diverted under these water rights is carried away from Big Timber Creek in the Home Ditch, and subsequently conveyed by a system of ditches and pipelines to the various places of use authorized under the Applicant's existing water rights. *Id.*; Exs. 1-4, 28. Some of these existing water rights include portions of the place of use authorized under the new Permit. *Preliminary Order* at 2. The *Preliminary Order* therefore requires that the combined use limitation on the Permit (Condition 14) is to be administered "at the field headgate for irrigation of the place of use."). *Preliminary Order* at 32. Administration at the "field headgate" is also necessary to avoid "the very real potential" for water diverted under the Applicant's existing water rights to be diverted onto place of use authorized under the Permit, after it falls out of priority. *See* Ex. 183A (watermaster recommendation); Testimony of Cindy Yenter (Day 1, Track 6, 35:30 – 37:05 (discussing same)).³

³ The Applicant provided testimony suggesting that, at some times during the irrigation season, it is not uncommon practice to move water diverted under senior water rights to pivots that may irrigate lands outside the authorized place of use of the senior water right. (Day 1, Track 4, 56:35 – 57:00.)

None of the other existing water rights that are diverted at BT12 and delivered through the Home Ditch are limited by conditions such as Conditions 8, 9, 10, and 12 in the Permit. Thus, and for the same reasons that Condition 14 and the watermaster's "water spreading" concern can only be administered at the "field headgate," Conditions 8, 9, 10, and 12 also can only be effectively administered at the "field headgate." It is not possible for the watermaster to administer Conditions 8, 9, 10, and 12, or ensure compliance with them, solely by measuring and regulating the point of diversion on Big Timber Creek.

The Agencies therefore request the *Preliminary Order* and the Conditions be clarified or amended to provide that the right holder must install a lockable isolation valve or headgate in either the pipeline or ditch serving the place of use authorized under the Permit, to be controlled and administered by the watermaster. The Applicant testified that he would not object to such a clarification. (Day 1, Track 4, 43:50-44:30). This limited change will clarify administration and allow for effective implementation of Conditions specifically imposed to protect the significant "local public interest" values recognized by the *Preliminary Order*. *Preliminary Order* at 17-30; *see also* Testimony of Cindy Yenter (Day 1, Track 6, 37:00 – 37:30) (stating that a condition authorizing the watermaster to administer at the field headgate would likely clarify future administration of the Permit).

3. "Reconnect" Water Should Not be "Counted" for Purposes of Condition 8 and 9.

The *Preliminary Order* concluded that "the Big Timber Creek reconnect project could not be affected by the proposed permit" because the Permit "can only be exercised if there is at least 18 cfs at the Lower BTC Gage." *Preliminary Order* at 25. While this conclusion appears to be correct provided the 18 CFS flow condition is effectively administered, the *Preliminary Order* does not address the question of whether the 7.3 CFS flow provided by the reconnect

project “counts” towards the 18 CFS flow required at the Lower BTC Gage under Conditions 8 and 9. *Preliminary Order* at 25. It is possible that there may be times when the flow at the Lower BTC Gage exceeds 18 CFS only because there is 7.3 CFS of “reconnect” flow. Even if these occurrences are of limited duration and occur only in some years, at such times diversions should not be allowed under the Permit.

The record establishes that the 7.3 CFS “reconnect” flow was secured to support ESA recovery efforts, not to underwrite additional irrigation development. Thus, the 7.3 CFS “reconnect” flow—and any additional “reconnect” flows that the Agencies may secure in the future to enhance or complete “reconnection” of Big Timber Creek to the upper Lemhi River⁴—should not “count” towards the 18 CFS flow required by Conditions 8 and 9. The Agencies request that the *Preliminary Order* and the Conditions be clarified accordingly. This clarification is necessary to avoid undermining the purposes of the “reconnect” projects and will promote efficient administration by avoiding a potential ambiguity.

4. The Right Holder Should Bear the Cost of Maintaining the Required “Measurement Sections.”

The *Preliminary Order* and Condition 11 provide, in part, that “[t]o facilitate delivery of this right, the right holder shall maintain measurement sections” at the Upper BTC Gage site and

⁴ While the *Preliminary Order* includes two passages stating that Big Timber Creek “has been reconnected to the Lemhi River . . .” *Preliminary Order* at 6 (Finding No. 30), 19 (first full paragraph), evidence in the record establishes that Big Timber Creek has not been fully or functionally reconnected to the Lemhi River from a biological standpoint. See, e.g., *IDFG’s Post-Hearing Brief* at 17 & n.10. The 7.3 CFS of “reconnect” flow that has been contracted to date “is not sufficient to provide migration conditions for all ESA listed adult salmonids that we would expect to enter Big Timber Creek.” *Id.* (quoting Ex. 201); see also Ex. 202 at 1 (“at the most downstream study site, flow required for adult salmonid passage was 13 cfs”). The Agencies, therefore, have not ruled out additional “reconnection” projects for Big Timber Creek.

Lower BTC Gage site. *Preliminary Order* at 20, 32.⁵ The term “measurement section,” however, is potentially ambiguous. It does not appear to be defined in IDWR’s rules, in statute, or in any reported Idaho decision. The *Preliminary Order* also does not explicitly define the term “measurement section.” The *Preliminary Order*, however, uses the term “measurement section” in a context that suggests the term refers to a physical device or structure that can accurately measure streamflow, such as a gage or flume. *Preliminary Order* at 9 (Finding of Fact 47), 19 (first full paragraph).

The Agencies therefore request that the *Preliminary Order* and the Conditions be clarified so that the term “measurement section” is defined to mean a physical device or structure that can accurately measure streamflow, such as a gage or flume, and that any instream measurement section structure (such as a flume) the Applicant installs for purposes of complying with Condition 11 must satisfy NOAA fish passage standards. This clarification will help avoid potential confusion in the future should it not be possible for the Applicant to “rely on the streamflow data collected for state or federal agencies.” *Preliminary Order* at 20, 32.

For the same reasons, the Agencies also request clarification that the phrase, “the right holder shall maintain measurement sections,” *Preliminary Order* at 20, 32, affirmatively requires the Applicant to bear the costs of installing, operating, and maintaining any physical device or structure for measuring streamflows that is necessary to administer Conditions 8, 9, and 10 (except for devices or structures that provide “streamflow data collected for state and federal agencies” at the Upper BTC Gage site and the Lower BTC Gage site). *Id.* This clarification would be consistent with the requirements of Conditions 8-11, and would avoid ambiguity and

⁵ The *Preliminary Order* and Condition 11 also provide that the right holder “may rely on streamflow data collected for state and federal agencies to satisfy this measurement condition.” *Id.*

confusion in the future should it not be possible for the Applicant to “rely on the streamflow data collected for state or federal agencies.” *Id.*

5. The “Local Public Interest” vs. the Endangered Species Act.

As the *Preliminary Order* recognizes, the Agencies took the position that the application should be denied on grounds that, from an ESA fish conservation and recovery standpoint, no water should be considered to be available in Big Timber Creek for new irrigation water rights or expanded irrigation development in the Lemhi River Basin. The *Preliminary Order* rejected this position, largely because of the contents of Exhibit 202, i.e., the United States Bureau of Reclamation’s 2004 “Flow Characterization Study – Instream Flow Assessment, Big Timber Creek, Idaho” (the “PHABSIM”). The Agencies do not request “reconsideration” of this determination.⁶

It is important to clarify, however, that the *Preliminary Order* addressed the Agencies’ arguments, and relied upon the PHABSIM, only for purposes of considering the “local public interest” under Idaho law. In other words, despite the central role that ESA issues such as species recovery and NOAA enforcement played in the summary judgment proceedings, the evidentiary hearing, and post-hearing briefing, the *Preliminary Order* did not make any substantive ESA determinations that will govern recovery of the listed fish species in the Lemhi

⁶ The Agencies reserve their positions and arguments on this question for purposes of any future administrative or judicial proceedings. The Agencies also note that the *Preliminary Order* stated that the PHABSIM’s conclusions can be applied to the upper Lemhi River. See *Preliminary Order* at 21 (“The same would be true for the upper Lemhi River”). This statement was not necessary to support the *Preliminary Order*’s conclusions regarding habitat in the upper Lemhi River, *id.* at 20-22, and lacks support in the record. The PHABSIM made no conclusions about optimum instream flows in the upper Lemhi River. The Agencies therefore request that this sentence (“The same would be true for the upper Lemhi River”) be deleted from the *Preliminary Order*.

River Basin, or potential enforcement of the ESA against Lemhi River Basin landowners or water users, or IDWR.⁷

It is necessary for the *Preliminary Order* to clarify this distinction, to ensure that the *Preliminary Order* does not give rise to the erroneous impression that it or the PHABSIM decided questions of ESA recovery and enforcement standards under federal law. The Applicant was under this mistaken impression, (Day 1, Track 4, 1:18:20 – 1:18:45), and the *Preliminary Order*'s reliance on the PHABSIM probably will tend to reinforce such misunderstandings. This concern is particularly important in light of the widespread interest in this application, and the general expectation that IDWR's analysis of this application will set the standards for resolving any ESA issues raised by other pending applications for irrigation water rights in tributaries to the upper Lemhi River.


CONCLUSION

The Agencies do not seek reconsideration of the core findings, analyses, or conclusions of the *Preliminary Order*. The Agencies only seek limited but important clarifications that are necessary: (1) for efficient administration of the Conditions in the Permit, and (2) to avoid misunderstandings of the meaning and effect of the *Preliminary Order* with respect to ESA issues in the Lemhi River Basin. These clarifications are consistent with the administrative record and with the reasoning of the *Preliminary Order*. The Agencies therefore respectfully request that the Hearing Officer grant this petition.

⁷ In some cases, federal courts have held State agencies or actors can be liable for violating the ESA's anti-"take" provisions by authorizing activities that ultimately lead to the "take" of ESA-listed species. See, e.g., *Seattle Audubon v. Sutherland*, 2007 WL 1300964 (W.D. Wash.) (May 1, 2007) (approval of forest practices application); *Strahan v. Cox*, 127 F.3d 155 (1st Cir. 1997) (permits and licenses authorizing gillnet and lobster pot fishing); *Arkansas Project v. Shaw*, 930 F.Supp. 2d 716 (S.D. Tex. 2013) (water permits), *reversed*, 756 F.3d 801 (5th Cir. 2014).

Respectfully submitted this 23rd day of January, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 23rd 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:

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