

LAWRENCE G. WASDEN
Attorney General
DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division
ANN Y. VONDE (ISB #8406)
MICHAEL C. ORR (ISB # 6720)
Deputy Attorneys General
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: 208-334-2400
Facsimile: 208-854-8072

RECEIVED
FEB 20 2020
DEPARTMENT OF
WATER RESOURCES

Attorneys for the Idaho Water Resource Board and the Idaho Department of Fish and Game

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

IN THE MATTER OF APPLICATION)	
FOR PERMIT NO. 74-16187 IN THE)	IWRB'S AND IDFG'S EXCEPTIONS TO
NAME OF KURT W. BIRD OR JANET)	AMENDED PRELIMINARY ORDER
E. BIRD)	APPROVING APPLICATION and
)	MEMORANDUM IN SUPPORT

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 Rule 730 of the Idaho Department of Water Resources' Rules of Procedure and the "Explanatory Information" attachment to the *Amended Preliminary Order Approving Application* issued on February 6, 2020 ("*Amended Preliminary Order*"), hereby jointly submit their exceptions to the *Amended Preliminary Order*, and supporting memorandum.

The Agencies request that the Director issue a Final Order that adopts, with only limited changes, the findings, analysis, and conclusions of the *Amended Preliminary Order*.¹ The only

¹ For purposes of any protests that the Agencies have filed or may file to other applications for irrigation water rights in the Lemhi River basin, the Agencies reserve their position that none of the remaining unappropriated water in the Lemhi River basin should be considered available for

SCANNED
MAR 02 2020

changes the Agencies request are: (1) limited modifications to certain conditions of approval that are intended to protect the “local public interest” in maintaining and recovering fish species listed under the Endangered Species Act (“ESA”) and their critical habitat; and (2) deletion or modification of a portion of the *Amended Preliminary Order*’s discussion regarding “minimum stream flows” under Chapter 15, Title 42, Idaho Code. These changes are necessary and appropriate to adequately protect the local public interest in maintaining and recovering the listed fish species and their habitat, and to remove an unnecessary discussion of the applicability of the minimum stream flows provisions of Chapter 15, Title 42, Idaho Code.

EXCEPTIONS

The Agencies’ specific “exceptions” to the *Amended Preliminary Order* are as follows:

1. The *Amended Preliminary Order* does not, but the Final Order should, require that any flows the Agencies have secured or will secure in the future for the purposes of “reconnecting” Big Timber Creek to the Lemhi River will not be “counted” in determining whether the 18 CFS “bypass” flow requirement at the Lower Big Timber Creek Gage (Conditions 8 and 9) has been satisfied; and
2. The *Amended Preliminary Order* defines the “peak” flow at the Upper Big Timber Creek Gage site as determined from measurements at the Bird Gage site (Condition 10) as the flow that will be exceeded once every five years, on average (217 CFS) and that the Applicant may begin diverting after ten (10) days of “peak” flows, but the Final Order should define the “peak” flow as the flow that will be exceeded once every four years, on average (approximately 194 CFS), and that the Applicant may begin diverting after sixteen (16) days of such “peak” flows; and
3. The *Amended Preliminary Order* does not, but the Final Order should, require that the conditions protecting the “bypass” and “peak” flows (Conditions 8, 9, and 10) and prohibiting diversions of “high flows” onto the place of use (Condition 12) will be administered and enforced at the field headgate for the place of use, rather than at the point of diversion from Big Timber Creek; and
4. The *Amended Preliminary Order* does not, but should, clarify that Big Timber Creek has

new irrigation water rights or expanded irrigation development. *IWRB’s Post-Hearing Brief* at 15-18 (Sep. 27, 2019); *IDFG’s Post-Hearing Brief* at 20 (Sep. 27, 2019). The Agencies also note that this position is consistent with the Lemhi Irrigation District’s request that the Director issue a moratorium on new consumptive uses in Basin 74 (Oct. 21, 2019).

not been fully “reconnected” to the upper Lemhi River for purposes of recovering ESA listed fish species; and

5. The section of the *Amended Preliminary Order* entitled “Minimum Stream Flows” (pages 25-27) should either be deleted entirely, or in the alternative replaced in the Final Order with the following paragraph:

The IWRB holds a water right for a minimum stream flow on the lower Lemhi River, pursuant to Chapter 15, Title 42, Idaho Code. This minimum stream flow has no effect on any existing or future water rights diverting from Big Timber Creek because of the previously discussed “separate streams” provision of the Basin 74 General Provisions. While neither of the Agencies has sought a minimum stream flow water right for Big Timber Creek, the question of whether to seek a minimum flow water right for Big Timber Creek is beyond the scope of this proceeding, and is committed to the IWRB’s discretion.

ARGUMENT

I. The Hearing Officer’s Local Public Interest Analysis is Supported by Idaho Law and the Administrative Record.

The Hearing Officer determined that “the local public interests associated with the recovery of ESA-listed species outweigh the local public interests associated with Bird’s proposed development,” *Amended Preliminary Order* at 32, and “the application for permit would have to be denied” unless it is conditioned to protect the local public interest values associated with recovery of the listed fish species and their habitat. *Order Granting Petitions, in Part* at 1 (Feb. 6, 2020). These determinations are supported by Idaho law and the administrative record.

Idaho Code § 42-203A authorizes the Director to “reject” an application or “grant a permit upon conditions” when the proposed use “conflicts with the local public interest” as defined in Idaho Code § 42-202B. Idaho Code § 42-203A(5).² This provision creates “the

² The “local public interest” is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resources.” Idaho Code § 42-202B(3).

affirmative *duty* to assess and protect the public interest.” *Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 441, 448 (1985) (italics in original). “Factors of the local public interest carry different weight depending on the specific circumstances and interests involved, and both the benefits and detriments must be considered.” *Chisholm v. IDWR*, 142 Idaho 159, 164, 125 P.3d 515, 520 (2005). The Director’s “local public interest” determinations are reviewed under an abuse of discretion standard. *Id.*; *Shokal*, 109 Idaho at 339, 707 P.2d at 450.

The term “local public interest” should be read “broadly so as to secure the greatest possible benefit.” *Chisholm*, 142 Idaho at 164, 125 P.3d at 520. IDWR’s Water Appropriation Rules require consideration of effects on “fish and wildlife resources in the local area affected by the proposed use” when evaluating the “local public interest.” IDAPA 37.03.08.045.01.e.ii. As the Idaho Supreme Court stated in *Shokal*, “clearly” the Legislature intended the term “local public interest” to include “fish and wildlife habitat.” *Shokal*, 109 Idaho at 338, 707 P.2d at 449. In *Hardy v. Higginson*, the Idaho Supreme Court held that the Director had authority to impose local public interest conditions that limited diversions under a permit to protect the habitat of an ESA-listed fish species. 123 Idaho 485, 490-93, 849 P.2d 946, 951-54 (1993).

The administrative record in this case establishes that the Lemhi River and many of its tributaries, including Big Timber Creek, provide habitat for Snake River Chinook Salmon, Snake River Steelhead, and Bull Trout, all of which are listed under the Endangered Species Act. The administrative record also establishes that since the early 2000s, the State of Idaho, through the Agencies, has worked closely with local people and organizations, including Big Timber Creek water users, to develop and implement conservation measures intended to promote recovery of the listed fish species and their habitat, and to provide local water users and landowners with some measure of protection from federal enforcement of the ESA. These facts are discussed

briefly on pages 3-4 of the *Amended Preliminary Order*, and in significantly more detail in the Agencies' post-hearing briefs, the relevant portions of which are incorporated herein by this reference.³

Prior to the hearing, the Hearing Officer issued a partial summary judgment decision that adopted three conclusions related to the local public interest. *Amended Preliminary Order* at 1. Specifically, the Hearing Officer concluded that it is in the local public interest to:

- maintain the anadromous fisheries in Big Timber Creek and in the Lemhi River drainage;
- reconnect Big Timber Creek to the Lemhi River and to recover fish species listed under the [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; and
- maintain a portion of the unappropriated water in streams supporting anadromous fish for the protection of fish habitat.

Id. at 19-20.

These conclusions, the *Amended Preliminary Order* confirmed, “are fully supported by the administrative record for this contested case, as described in the findings of fact set forth above.” *Id.* at 20. The administrative record is replete with testimony and documentation establishing the local public interests in: (1) maintaining and protecting the listed fish species and their habitat, (2) protecting local water users and landowners from federal enforcement of the ESA, and (3) the extensive efforts undertaken by the Agencies as well as by other entities, groups, and individuals to conserve and recover the listed fish species and their habitat in the Lemhi River basin. *Id.* at 3-10.⁴ Thus, Idaho law and the administrative record fully support the

³ *IWRB's Post-Hearing Brief* at 4-9; *IDFG's Post-Hearing Brief* at 2-20.

⁴ *See also generally IWRB's Post-Hearing Brief* and *IDFG's Post-Hearing Brief*.

Hearing Officer's conclusions that the local public interests associated with the recovery of ESA-listed fish species and their habitat outweigh the local public interests associated with the proposed development, and that the application would have to be denied unless it is conditioned to protect the local public interest in recovering the listed species and their habitat. *Amended Preliminary Order* at 32; *Order Granting Petitions, In Part* at 1.

The permit includes five conditions intended to protect these local public interest values: Conditions 8, 9, 10, 11, and 12.⁵ Conditions 8 and 9 require what have been termed "bypass" flows necessary for fish habitat and passage in two different reaches of Big Timber Creek; Condition 10 protects what has been termed the channel-altering "peak" flow necessary for maintaining stream channel morphology; Condition 11 establishes the gaging requirements necessary for administering the "bypass" and "peak" flow conditions; and Condition 12 prohibits the use of so-called "high flows" on the permitted place of use. *Amended Preliminary Order* at 20-21, 24-25, 30, 31-35. The administrative record supports these specific conditions.

Under the "bypass" flow conditions (Conditions 8 and 9), the permit is "only available when flow at the Bird Gage . . . is at least 54 cfs and flow at the Lower Big Timber Creek Gage . . . is at least 18 cfs," and diversions under the permit must "cease" whenever flows at these locations are "less than" 54 CFS and 18 CFS, respectively. *Amended Preliminary Order* at 20-21, 32, 34. The Hearing Officer also determined the permit should be conditioned to protect "peak" flows. The "peak" flow condition (Condition 10) requires that diversions under the

⁵ While Condition 15 also protects the local public interest in recovering the listed fish species because it requires compliance with IDFG fish screening and/or passage requirements, *Amended Preliminary Order* at 34, this condition is based on express statutory authority. Idaho Code §§ 36-906, 36-908.

permit “cease” when “the flow at the Bird Gage is greater than 217 cfs,”⁶ although diversions “may resume when the flow at the Bird Gage drops below 217 cfs or has exceeded 217 for at least ten days in the current irrigation season.” *Id.* at 24-25, 32, 34. The Hearing Officer’s determinations of the “bypass” and the “peak” flow levels to be protected were based on unrefuted technical evidence regarding the instream flows necessary to conserve and recover the listed fish species and their habitat in Big Timber Creek,⁷ actual gage data, the Hearing Officer’s reasoned analysis of the technical evidence and gage data, and a weighing of the relevant local public interest factors. *Amended Preliminary Order* at 19-33; *Order Granting Petitions, In Part* at 1, 3-4, 6-9.

For largely the same reasons, the Hearing Officer also conditioned the permit to require the Applicant to “install, operate, and maintain physical devices or structures that can accurately measure streamflow at the Bird Gage site and the Lower Big Timber Creek Gage site.”

Amended Preliminary Order at 34 (Condition 11). These “measurement sections” must comply

⁶ Condition 10’s flow of 217 CFS at the Bird Gage site is intended to protect a “peak” flow of 284 CFS at the Upper Big Timber Creek Gage site. The Hearing Officer determined that the flow at the Upper Big Timber Creek Gage site should exceed 284 CFS one year out of every five, on average, and that this flow “translates” to 217 CFS at the Bird Gage. *Amended Preliminary Order* at 24-25. As will be discussed, the Agencies request the Director to modify Condition 10 so that it defines the “peak” flow as the flow at the Upper Big Timber Creek Gage site that should be exceeded once in every four years, on average.

⁷ The Hearing Officer implied that “the USBR Study” (Exhibit 202) is the only “technical information” in the administrative record and concluded it did not support the Agencies’ position none of the remaining unappropriated water in the Lemhi River basin should be considered available for new irrigation water rights or expanded irrigation development in the basin. *Amended Preliminary Order* at 20; *IWRB’s Post-Hearing Brief* at 15-18; *IDFG’s Post-Hearing Brief* at 20. While the Agencies disagree that they failed to present “technical information” supporting their position, the Agencies acknowledge that “the USBR Study” is the only quantitative instream flow assessment in the administrative record.

with NOAA⁸ fish passage standards, and the measurement data must be available to the watermaster on a real-time basis. *Id.*⁹ These measurement requirements “facilitate delivery.” *Id.* at 21, 34; *Order Granting Petitions, In Part* at 4-6. They are also essential for protecting the local public interest in recovering the listed fish species and their habitat, because they ensure the flow data needed to administer the “bypass” and “peak” flow conditions are readily available to the watermaster. *Id.*

The *Amended Preliminary Order* also determined that if the Applicant “were allowed to circumvent the local public interest conditions by irrigating under the guise of high flow use, then the local public interest conditions become meaningless.” *Amended Preliminary Order* at 30. Therefore, “to maintain the integrity of the local public interest conditions,” the *Amended Preliminary Order* included a condition “prohibiting the use of high flows under the Basin 74 General Provisions on the proposed place of use.” *Id.* at 30, 34 (Condition 12). Evidence in the record regarding the use of “high flows” supports the Hearing Officer’s conclusion that the “bypass” and “peak” flow conditions could be circumvented simply by characterizing any diversions onto the permitted place of use as “high flows.” *Amended Preliminary Order* at 11-13, 15, 28-30. Thus, prohibiting diversion of “high flows” onto the authorized place of use is consistent with the Idaho Supreme Court’s determination that a prospective water user should not be allowed to “circumvent” conditions that are necessary to protect the local public interest. *Hardy*, 123 Idaho at 489, 849 P.2d at 950.

⁸ National Oceanic and Atmospheric Administration.

⁹ The Applicant is authorized to “rely on streamflow data collected for state or federal agencies,” such as the data currently collected for the IWRB by Idaho Power Company at the Lower Big Timber Gage, to satisfy these requirements. *Amended Preliminary Order* at 20-21, 34.

II. Limited Changes to the *Amended Preliminary Order* are Necessary to Protect the Local Public Interest in Recovering the Listed Fish Species and Their Habitat.

a. “Reconnect” Flows Should Not “Count” Toward the 18 CFS “Bypass” Flow.

Conditions 8 and 9 require a “bypass” flow of 18 CFS in “Reach 1” of Big Timber Creek, which is “the most downstream reach” of Big Timber Creek. However, but for the 7.3 CFS of “reconnect” flows secured by the IWRB through the Water Transaction Program, this reach of Big Timber Creek “would be completely dewatered for most of the irrigation season.” *Amended Preliminary Order* at 5-6, 20. The Agencies therefore requested the Hearing Officer to clarify Conditions 8 and 9 so that any “reconnect” flows secured by the IWRB will not be “counted” towards the 18 CFS “bypass” flow at the Lower Big Timber Creek Gage. *IWRB’s and IDFG’s Joint Petition for Clarification or in the Alternative Reconsideration* at 5-6.

The Hearing Officer denied this request on grounds that “[t]he local public interest concerns are addressed whenever there is 18 cfs of flow in lower Big Timber Creek, regardless of the purpose for or motives behind the flow.” *Order Granting Petitions, In Part* at 12. This conclusion was erroneous because disregarding the “purpose for or motives behind” the IWRB’s Water Transaction Program is directly contrary to the local public interest. Further, the Hearing Officer’s rationale threatens to undermine the Water Transaction Program by opening the door to using flows secured specifically and exclusively for ESA recovery purposes as a basis for authorizing new irrigation diversions.

The administrative record establishes that the core purpose of the IWRB Water Transactions Program is to protect the local public interest. The IWRB established the Water Transactions Program in 2003, as part of the State of Idaho’s response to NOAA’s threat to impose penalties and injunctions against Lemhi River Basin water users after a dewatering event on the lower Lemhi River killed several salmon. *IWRB’s Post-Hearing Brief* at 6-7; *IDFG’s*

Post-Hearing Brief at 44; Exs. 206A-206B, 213, 219. The Water Transactions Program “compensates water right owners for changes in irrigation practices that protect the local economy while providing the flows required for recovery of ESA-listed species in accordance with Idaho water law.” Ex. 219 at 3; *see also* Ex. 212 at 2 (similar). The Water Transactions Program has invested or committed approximately \$5 million to fish conservation and recovery projects in the Lemhi River basin. Ex. IDWR 12 at Attachment A; Ex. 219 at 8-9; Ex. 220 at 5-6.

Among other things, the Water Transactions Program pays for the flows necessary to “reconnect” tributaries such as Big Timber Creek, for the flows necessary to provide the minimum stream flow of 35 CFS established on the lower Lemhi River, and for a network of stream gages in the Lemhi and Upper Salmon River Basins to monitor these flows. *IWRB’s Post-Hearing Brief* at 7-8; Exs. 212, 215, 219, 234-35. Water Transactions Program projects have been key to the ongoing efforts to recover the listed fish species and their habitat in the Lemhi River Basin, and provides local water users and landowners with a measure of protection from the still-present and “very real” threat of federal enforcement of the ESA. Day 2, Track 4 at 59:45-1:00:42 (DiLuccia); *see also* Day 2, Track 3 at 35:06-3700 (“the regulatory cloud is still there”) (DiLuccia); Ex. 205 (NOAA letter). In the absence of a formal Section 6 Cooperative Agreement regarding water uses in the Lemhi River basin, the Water Transaction Program and associated efforts to promote recovery of the listed fish species and their habitat have been crucial to protecting water uses in the Lemhi River Basin from direct ESA enforcement actions by NOAA. Day 2, Track 2 at 10:35-10:55, 23:30-25:15, 38:48-39:00 (DiLuccia).¹⁰

¹⁰ *IWRB’s Post-Hearing Brief* at 28; *IDFG’s Post-Hearing Brief* at 8.

The funding that makes the Water Transactions Program projects and contracts possible comes from the Bonneville Power Administration (“BPA”), through the Columbia Basin Water Transactions Program. *IWRB’s Post-Hearing Brief* at 29-30. This funding is specifically intended “to address diminished flows” in the Columbia River basin and to support fish conservation and recovery efforts. *Id.* This funding, and the “reconnection” and flow enhancements projects it makes possible in the Lemhi River basin, were never intended to support new irrigation development, and were not secured by the IWRB for that purpose.

“Reconnect” flows would not be present but for the IWRB’s efforts and funding. “Counting” the “reconnect” flows towards the “bypass” flow requirement means that flows secured by the IWRB specifically to remedy deficiencies in stream flows can now also be relied upon for the entirely contrary purpose of authorizing additional diversions. This result is inconsistent with the local public interest because it conflicts with the core purpose of the Water Transactions Program and the reasons for which the IWRB—not the Applicant—obtained the funding necessary to secure the “reconnect” flows. It could also undermine the IWRB’s ability to obtain funding in the future from the BPA and the Columbia Basin Water Transaction Program. The manager of the Water Transactions Program testified at the hearing that BPA officials were “quite surprised” to learn that IDWR is considering new water right applications in the Lemhi River Basin, which is already critically flow-limited from an ESA recovery standpoint,¹¹ and that approving new water rights “could undermine our relationship with them.” *IWRB’s Post-Hearing Brief* at 30. For the same reasons, it makes little sense for BPA to continue funding “reconnect” and flow enhancement projects in the Lemhi River basin if the flows secured thereby will be “counted” for purposes of authorizing new diversions.

¹¹ *IDFG’s Post-Hearing Brief* at 5, 15.

Thus, and for exactly the same reasons that requiring an 18 CFS “bypass” flow at the Lower Big Timber Creek Gage is in the local public interest, it is contrary to the local public interest to “count” the “reconnect” flows for purposes of administering the 18 CFS “bypass” flow requirement. This is not equivalent to arguing that a “bypass” flow of more than 18 CFS is necessary for fish passage, as the Hearing Officer incorrectly concluded. *Order Granting Petitions, in Part* at 12. Rather, it is an argument that applicants for new water rights may not rely upon “reconnect” flows that would not be there but for the IWRB’s efforts, and that were secured specifically to help offset and remedy the effects of existing diversions, rather than to facilitate or support new diversions. This is an important distinction that recognizes and protects the underlying purposes of the Big Timber Creek “reconnect” project, as well as other stream flow enhancement projects and efforts undertaken by the Agencies. The local public interest in recovering the listed fish species and their habitat in the Lemhi River basin would be undermined by allowing the “reconnect” flows to be “counted” towards the 18 CFS “bypass” flow requirement.

b. The “Peak” Flow Should Be Based on a Four-Year Average.

The “peak” flow condition (Condition 10) requires diversions under the permit to “cease” when the flow at the Bird Gage “is greater than 217 cfs,” although diversions may resume when the flow at the Bird Gage “drops below 217 cfs or has exceeded 217 [cfs] for at least ten days during the current irrigation season.” *Amended Preliminary Order* at 34. This condition is intended to protect “periodic high flow events that maintain channel morphology.” *Id.* at 24. “Ideally, any condition created to preserve peak flow would be measured upstream of the major irrigation diversions” at the Upper Big Timber Creek Gage, but that gage “is not active and is not located on property owned by Bird.” *Id.* at 24. Condition 10 therefore sets the “peak” flow at

217 CFS as measured at the Bird Gage, a flow the Hearing Officer determined to “translate” to a flow of 284 CFS at the Upper Big Timber Gage. *Amended Preliminary Order* at 24-25.

The Hearing Officer selected 284 CFS as the “peak” flow because: (1) IDFG’s expert witness provided testimony to the effect that “peak flow events occurring every three to five years, on average,” would be beneficial for maintaining the stream channel characteristics of Big Timber Creek ideal for fish habitat, and (2) actual flow data for the Upper Big Timber Creek Gage and an exceedance flow table in the USBOR Study supported a conclusion that flows at the Upper Big Timber Creek Gage site “should exceed 284 cfs one year out of five, on average.” *Id* at 24.

The Agencies do not object to the Hearing Officer’s methodology for determining the “peak” flow in this case, except that the administrative record does not support the Hearing Officer’s determination that the “peak” flow is the flow that will be exceeded in one year out of every five, on average. The testimony upon which the Hearing Officer relied referred to a range of “three to five years, on average,” not “five years, on average.” *Amended Preliminary Order* at 24. Even if the “peak” flow condition must be “narrowly tailored” to conform to the evidence in the administrative record, *Order Granting Petitions, in Part*, at 9, the evidence does not support interpreting “three to five years, on average” as meaning “five years, on average.”

Thus, the “peak” flow that should be selected is the flow that would be exceeded once every four years, on average. Presumably this would be a flow of approximately 261 CFS as measured at the Upper Big Timber Creek Gage site, i.e., halfway between the five-year and three-year exceedance flows for that site determined by the Hearing Officer. *Amended Preliminary Order* at 24-25; *Order Granting Petitions, in Part* at 7-10. This “translates” to a

flow of 194 CFS as measured at the Bird Gage site. *Id.* Condition 10 should therefore be modified to replace “217 cfs” with “194 cfs.”

For the same reasons, Condition 10 should be further modified to provide that in years when there are “peak” flows in excess of 194 CFS, the Applicant may begin diverting after sixteen (16) days of such flows, rather than after the existing ten (10) day period. *Amended Preliminary Order* at 34. As the Hearing Officer determined, the administrative record establishes that the “peak” stream flows of 2009 were sufficient to provide the channel-altering benefits in Big Timber Creek that are necessary to protect the local public interest in recovering the listed fish species and their habitat. *Amended Preliminary Order* at 24-25; *Order Granting Petitions, in Part* at 7-10. The Hearing Officer determined, therefore, that Condition 10’s prohibition against diversions during “peak” flows should be limited to the number of days that flows exceeded 284 CFS at the Upper Big Timber Creek Gage site in 2009, i.e., ten (10) days. *Order Granting Petitions, in Part* at 9. As discussed above, however, the “peak” flow at this location should be defined as approximately 261 CFS. There were sixteen (16) days during 2009 when flows at the Upper Big Timber Creek Gage site met or exceeded 261 CFS. Ex. IDWR 18. Thus, Condition 10 should be further modified to provide that diversions may resume after “sixteen days” of “peak” flows—i.e., flows of 194 CFS or more as measured at the Bird Gage site—rather than “ten days.”

c. The Local Public Interest Conditions Should 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. *Amended 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. *Amended Preliminary Order* at 2. The existing water rights diverted at BT12 and delivered through the Home Ditch are not limited by conditions such as Conditions 8, 9, 10, and 12 in the permit, however.

As a result, Conditions 8, 9, 10, and 12 cannot be effectively administered or enforced simply by measuring diversions from Big Timber Creek, especially during periods when "high flows" are being diverted through the same ditch to other places of use. The Agencies therefore requested that the Hearing Officer clarify or amend the *Preliminary Order Approving Application* (Jan. 9, 2020) 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 Hearing Officer denied this request on grounds that it exceeded the scope of the watermaster's routine duties, and falls within the Department's enforcement authority under Idaho Code § 42-351. *Order Granting Petitions, in Part* at 12.

While the Agencies understand the Hearing Officer's reasoning, they respectfully submit that the circumstances of this case require a different approach. As the Hearing Officer emphasized, "the local public interests associated with the recovery of ESA-listed species outweigh the local public interests associated with Bird's proposed development," *Amended Preliminary Order* at 32, and "the application for permit would have to be denied" unless it is conditioned to protect the local public interest values associated with recovery of the listed fish species and their habitat. *Order Granting Petitions, In Part* at 1. For purposes of protecting the local public interest in recovering the listed fish species and their habitat, it is essential that

Conditions 8, 9, 10, and 12 be effectively administered and enforced on a real-time basis. This cannot occur at the point of diversion on Big Timber Creek due to the numerous other water rights diverting at the location which are not conditioned similarly.

Moreover, IDWR should not allow prospective water users to circumvent conditions imposed to protect the local public interest. *Hardy*, 123 Idaho at 489, 849 P.2d at 950. In this case, the Applicant provided testimony that, at some times during the irrigation season, it is not an 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.) The recommendation of the Watermaster for Water District 170 also referred to “the very real potential” for water diverted under the Applicant’s existing water rights to be diverted onto the place of use authorized under the permit, after it falls out of priority. *See Ex. 183A* (watermaster recommendation); Day 1, Track 6, 35:30 – 37:05 (discussing same) (Yenter). The record demonstrates a compelling need for administration that prevents Conditions 8, 9, 10, and 12 from being ineffective or circumvented.

Further, requiring the watermaster to administer Conditions 8, 9, 10, and 12 at the field headgate for the authorized places of use would not be unduly burdensome, because the permit will be in priority for an average of only about twenty days a year, on average. *Amended Preliminary Order* at 16. The Applicant testified that he would not object to a clarification in the permit that requires administration at the field headgate, Day 1, Track 4, 43:50-44:30, which would generally clarify administration, Day 1, Track 6, 37:00 – 37:30 (Yenter), and allow for effective implementation of conditions specifically imposed to protect the overriding local public interest in recovering the listed fish species and their habitat. Moreover, the need to actually visit

the field headgate could be removed by requiring the Applicant to install a telemetry-capable measuring device at the field headgate that uploads data to a publicly accessible internet site.

d. Big Timber Creek Has Not Been Fully “Reconnected” to the Lemhi River.

The lowest reach of Big Timber Creek, like that of many of the tributaries to the Lemhi River, has historically been completely dewatered during the irrigation season. *Amended Preliminary Order* at 5-6. “Reconnecting” Big Timber Creek and other tributaries to the Lemhi River has, therefore, been a high priority for ESA recovery efforts in the Lemhi River Basin. *Id.* While IWRB’s Water Transaction Program has facilitated “reconnect” projects that have provided approximately 7.3 CFS of “reconnect” flows in the lowest reach of Big Timber Creek, unrefuted evidence in the record establishes that these flows are not sufficient to fully “reconnect” Big Timber Creek to the Lemhi River for purposes of fish passage or fish habitat. Ex. 201 at 9; Ex. 204 at 231, 234; Day 2, Track 1 at 33:00-34:45 (DiLuccia); Day 2, Track 2 at 1:30-1:50, 27:20, 33:40 (DiLuccia).¹²

In short, it is not correct to state or imply that Big Timber Creek has been “reconnected” to the Lemhi River for purposes of ESA recovery efforts. At times, however, the *Amended Preliminary Order* incorrectly refers to the Big Timber Creek “reconnect” as if it has been fully accomplished. *See, e.g., Amended Preliminary Order* at 6 (“These projects have reconnected Big Timber Creek to the Lemhi River during the irrigation season”); *id.* at 5 (“Now that Big

¹² There are still times when Big Timber Creek is effectively dewatered, meaning there is insufficient flow for fish. Ex. 236; Day 2 Track 7 at 21:33-21:41, 32:25-33:00 (Cassel). Moreover, the “reconnect” flows have been obtained through term contracts that will eventually expire. I.e., even the existing partial “reconnect” is not permanent, and maintaining it will eventually require additional negotiations and new contracts. Multiple “check” structures associated with irrigation diversions and unscreened irrigation canals on Big Timber Creek pose additional “reconnect” challenges because they can result in entrainment or substantially delay upstream and downstream migration.

Timber Creek has been reconnected to the Lemhi River”); *id.* at 20 (“Now that Big Timber Creek has been reconnected to the Lemhi River”). This is a significant inaccuracy, because it is in the local public interest to “reconnect” Big Timber Creek to the Lemhi River for purposes of supporting ESA recovery efforts. *Amended Preliminary Order* at 19. The Agencies therefore request that the Director’s Final Order affirmatively clarify that Big Timber Creek has not been fully “reconnected” to the upper Lemhi River for purposes of recovering the listed fish species and their habitat.

e. The *Amended Preliminary Order*’s Discussion of Minimum Stream Flows Should Be Deleted or Modified.

The *Amended Preliminary Order* includes approximately two pages of discussion of “Minimum Stream Flows,” which are governed by Chapter 15 of Title 42, Idaho Code (“Chapter 15”). *Amended Preliminary Order* at 25-27. This matter, however, involves an application for a permit to divert water for irrigation that was filed pursuant to Idaho Code § 42-202. The Agencies and other parties filed protests to the application, as authorized by Idaho Code § 42-203A. This proceeding does not involve a minimum stream flow application under Chapter 15, and there are no Chapter 15 applications pending in the Lemhi River Basin. Further, while the IWRB holds a minimum stream flow water right for the lower Lemhi River (74-14993), that water right was decreed in the SRBA and is subject to the “separate streams” provision of the Basin 74 General Provisions, which provides that new appropriations on Big Timber Creek (and other creeks) “are not considered subject to prior downstream rights on the Lemhi River proper.” Ex. 188 at 1-2.

In short, the minimum stream flow provisions of Chapter 15 have little or no relevance to this proceeding. The entire discussion of “Minimum Stream Flows” in the *Amended Preliminary Order* was unnecessary and irrelevant to resolving any of the issues presented by the application

and the protests. Moreover, and contrary to the tone of the *Amended Preliminary Order*, the decision of whether to seek Chapter 15 water rights, in the Lemhi River basin or anywhere else, is committed to the sole authority and discretion of the IWRB. Idaho Code §§ 42-1502—42-1504.¹³ The Hearing Officer’s commentary concerning a decision vested in the sole and exclusive discretion of a co-equal agency of the State of Idaho was both unnecessary and beyond the scope of the issues presented.

Further, the administrative record and the *Amended Preliminary Order*’s discussion of the local public interest cast doubt on the Hearing Officer’s view that seeking new Chapter 15 water rights in the Lemhi River basin is an appropriate or viable means of protecting the local public interests in the ESA recovery efforts in the Lemhi River basin. In many cases there is no “minimum stream flow” available for appropriation under Chapter 15. The administrative record establishes, and the *Amended Preliminary Order* recognizes, that Big Timber Creek and many other tributaries to the Lemhi River have historically been dewatered during the irrigation season by existing water rights. Chapter 15 water rights must appropriate unappropriated water, however, and may not interfere “with any vested water right, permit, or water right application” with a senior priority date. Idaho Code § 42-1503. A similar statutory obstacle is the requirement that a Chapter 15 water right may be issued only if “it is capable of being maintained as evidenced by records of stream flows and water levels.” *Id.* Further, Chapter 15, is intended to protect “minimum” flows, and it is unclear whether or how Chapter 15 water rights could protect both “bypass flows” and “peak” flows. The administrative record and the applicable statutory provisions do not support a conclusion that new Chapter 15 water rights are

¹³ The only exception is that the IWRB can be statutorily “directed” to appropriate a Chapter 15 water right. Idaho Code § 42-1506(1).

an appropriate or viable means of protecting the local public interest in recovering the listed fish species and their habitat in the Lemhi River basin.

The Agencies therefore request that *Amended Preliminary Order*'s discussion of "Minimum Stream Flows" be deleted in its entirety, or replaced in the Director's Final Order with the following paragraph:

The IWRB holds a water right for a minimum stream flow on the lower Lemhi River, pursuant to Chapter 15, Title 42, Idaho Code. This minimum stream flow has no effect on any existing or future water rights diverting from Big Timber Creek because of the previously discussed "separate streams" provision of the Basin 74 General Provisions. While neither of the Agencies has sought a minimum stream flow water right for Big Timber Creek, the question of whether to seek a minimum flow water right for Big Timber Creek is beyond the scope of this proceeding, and is committed to the IWRB's discretion.

CONCLUSION

For the reasons discussed above, the Agencies respectfully request that the Director issue a Final Order that adopts, with the limited changes discussed above, the findings, analysis, and conclusions of the *Amended Preliminary Order*.

DATED this 20th day of February, 2020.

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



MICHAEL C. ORR
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 20th day of February 2020, I caused the original of the foregoing to be filed with the Idaho Department of Water Resources, and copies to be served upon the following, in the manner listed below:

1. Original to:

DIRECTOR GARY SPACKMAN IDAHO DEPARTMENT OF WATER RESOURCES 322 E. FRONT STREET, SUITE 648 BOISE, ID 83720-0098	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: 208-525-7177 <input checked="" type="checkbox"/> Email: gary.spackman@idwr.idaho.gov

2. Copies to the following:

JAMES CEFALO IDAHO DEPARTMENT OF WATER RESOURCES 900 N. SKYLINE DR., STE A IDAHO FALLS, ID 83402-1718	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile: 208-287-6700 <input checked="" type="checkbox"/> Email: james.cefalo@idwr.idaho.gov
ROBERT L HARRIS HOLDEN, KIDWELL, HAHN & CRAPO PLLC 1000 RIVERWALK DR., STE 200 P.O. BOX 50130 IDAHO FALLS, ID 83405	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: rharris@holdenlegal.com
MARIE CALLAWAY KELLNER MATTHEW A NYKIEL IDAHO CONSERVATION LEAGUE P.O. BOX 2308 SANDPOINT, ID 83864	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: mkellner@idahoconservation.org mnykiel@idahoconservation.org
TRAVIS L THOMPSON BARKER RSHOLT & SIMPSON LLP	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery

163 SECOND AVE WEST P.O BOX 63 TWIN FALLS, ID 83303-0063	<input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: tlt@idahowaters.com
PURCELL RANCH PARTNERSHIP KERRY PURCELL 98 PURCELL LAND LEADORE, ID 83464	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input type="checkbox"/> Email:
KERRY PURCELL 1774 LEE CREEK ROAD LEADORE, ID 83464	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input type="checkbox"/> Email:
PENNY JANE OGDEN-EDWARDS 2330 S 350 W PERRY, UT 84302	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input type="checkbox"/> Email:


 MICHAEL C. ORR



RECEIVED
FEB 20 2020
DEPARTMENT OF
WATER RESOURCES

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

February 20, 2020

Director Gary Spackman
Idaho Department of Water Resources
322 E. Front Street, Suite 648
Boise., Idaho 83720-0098

Via hand delivery

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

Dear Director Spackman:

Please find enclosed for filing in the above-referenced matter the original of the *IWRB's and IDFG's Exceptions to Amended Preliminary Order Approving Application and Memorandum in Support*. A copy of the same is also enclosed, for your convenience. Service copies are being provided to the Hearing Officer and the parties via U.S. mail and email, as shown in the certificate of service.

Very truly yours,

A handwritten signature in blue ink, reading "Michael C. Orr".

Michael C. Orr
Deputy Attorney General
Natural Resources Division
Office of the Attorney General
State of Idaho