

Robert L. Harris (ISB #7018)

rharris@holdenlegal.com

Luke H. Marchant (ISB # 7944)

lmarchant@holdenlegal.com

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

1000 Riverwalk Dr., Ste. 200

P.O. Box 50130

Idaho Falls, Idaho 83405

Telephone: (208) 523-0620

Facsimile: (208) 523-9518

Attorneys for Janet E. Bird & Kurt W. Bird

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 RESPONSE TO
EXCEPTIONS**

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 file this *Applicant's Response to Exceptions*. This pleading relates to the *Amended Preliminary Order Approving Application* dated and served on February 6, 2020 (the "Preliminary Order") and the *Order Granting Petitions, In Part* (the "Reconsideration Order") issued on the same date by Idaho Department of Water Resources ("IDWR" or "Department") employee James Cefalo (the "Hearing Officer") after a hearing on this contested case was held on August 28-29, 2020, in order to address protests filed by the following entities and individuals: (1) Idaho Conservation League; (2) Idaho Department of Fish & Game ("IDFG"); (3) Beyeler Ranches LLC; (4) High Bar Ditch Association; (5) Carl Ellsworth; (6) Purcell Ranch Partnership; (7) Kerry Purcell; (8) Penny Jane Ogden-Edwards; (9) Lemhi Irrigation District; (10) Lemhi Soil & Water

Conservation District; and (11) Idaho Water Resource Board (“IWRB”). IDFG and IWRB are referred to herein collectively as the “Agencies.”

IDAPA 37.01.01 “contains the rules of procedure that govern the contested case proceedings before the Department of Water Resources and Water Resource Board of the state of Idaho.” Rule 001.02.¹ Application for Permit No. 74-16187 (hereinafter simply “74-16187”) is a contested case before the Idaho Department of Water Resources (“IDWR” or “Department”). Rule 730.02.b allows a party to take exceptions to a preliminary order within 14 days after the service date of the preliminary order. The Agencies timely filed their *IWRB’s and IDFG’s Exceptions to Amended Preliminary Order Approving Application and Memorandum in Support* (the “Exceptions”) on February 20, 2020.² Rule 730.c allows an opposing party 14 days to respond to the exceptions (the “appeal within the agency”), and this response is being timely filed within this 14 day timeframe.

The Agencies describe their exceptions as requesting “limited changes.” Exceptions at 1. The changes are more significant than suggested, which are:

¹ Citations to rules in IDAPA 37.01.01 hereafter only include the specific subsections for these rules and do not include IDAPA 37.01.01 before the subsection citation.

² Bird elected not file exceptions, and instead, intends to appeal the Director’s forthcoming final order in the event the concerns raised in Bird’s petition for reconsideration are not fully addressed.

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 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.

Exceptions at 2-3.

Before specifically responding to the Agencies' *Exceptions*, the Applicant incorporates by

reference its arguments set forth in *Applicant's Petition for Reconsideration* concerning conditions 8, 9, 10, 11, 12 and 13. By responding to the Agencies' *Exceptions*, the Applicant is not conceding that any of the conditions addressed are constitutional or comply with Idaho statutes or other Idaho law. As set forth in *Applicant's Petition for Reconsideration*, a minimum flow water right cannot be established under the local public interest criterion; such water rights or water entitlements must be established pursuant to the water right permitting process and in accordance with Chapter 15 of Title 42 of the Idaho Code. *See also* Idaho Code §§ 42-203A(5) and 42-222 ("Provided however, that minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.").

The Agencies first contend that the 18 cfs minimum flow condition "should not 'count' toward the 18 cfs 'bypass' flow." *Exceptions* at 9. Where this minimum flow was based upon fish passage as explained by the Hearing Officer (*Reconsideration Order* at 12), it does not matter why the water is present in the creek channel as the fish cannot tell a difference. The Agencies' position has no merit, other than to highlight the concerns that the Applicant has already raised with the imposition of a minimum flow under the local public interest without following the water right permitting process and/or Chapter 15 of Title 42 of the Idaho Code. Adding a parasitic minimum flow requirement to a water right permit has now led to the Agencies wanting clarification that, if the permit is exercised, the state cannot count certain water flows in meeting the condition because it will look bad. Allowing an end-run around the strictures of the water right permitting process and/or Chapter 15 of Title 42 of the Idaho Code raises these issues and could be avoided if the IWRB were simply applied for a minimum flow water right rather than allowing the Hearing Officer to unlawfully impose one.

Second, the Agencies ask for modification to Condition No. 10—the minimum maximum

high flow condition—in three ways: (1) by changing the time period where the minimum maximum high flows must be met from every year to once every four years; (2) by reducing the minimum maximum flow condition amount down from 217 cfs to 194 cfs; and (2) by increasing the number of days the minimum maximum flow must occur from 10 days to 16 days. *Exceptions* at 12-14. By responding to the Agencies’ *Exceptions* concerning Condition No. 10, the Applicant is not conceding that any of the conditions addressed are constitutional or comply with Idaho statutes or other Idaho law. Indeed, this parasitic condition to a water right permit only serves to now eliminate the available high flows for use by water users under the Basin 74 General Provisions decreed in the SRBA. Indeed, this condition directly pits the portions of the high flows general provision against each other because high flow use is allowed only if “existing decreed rights and future appropriations of water are first satisfied.” What the SRBA granted to the water users is now being taken away in a contested case for a water right permit for additional water—additional water that was specifically bargained for and preserved just over a decade ago in the Wild and Scenic Agreement. IDWR Exhibit 14.

Notwithstanding these issues, the Agencies are in no position to argue for changes to Condition No. 10 because they did not ask for these conditions. It is undisputed what the Agencies wanted the Hearing Officer to do with 74-16187—deny it entirely. *See IWRB’s Post-Hearing Brief* at 35 (“ . . . the IWRB therefore respectfully requests that the Application be denied.”); *See also* IDFG’s Post Hearing Brief at 20 (“In IDFG’s assessment, the above-described adverse effects of approving the Application cannot be ‘avoided, minimized, or mitigated’ by imposing protective conditions on the Application.”). Despite the foregoing, in terms of the proposal to increase the number of days the minimum maximum flow must be met, such request should be denied. The testimony of the Agencies’ own expert, Jeff Diluccia, who testified that 10 days was an adequate

duration for these flows. *Reconsideration Order* at 9. The Agencies attempt to use a historic record from 2009 where very high flows were recorded for a period of 16 days to support their claim that the 10-day time period should be increased to 16 days. However, using historic flow records to address the needed duration for channel-forming flows is misplaced. The Hearing Officer's duration determination in this regard is supported by not only evidence in the record, but evidence in the record from the Agencies themselves. If allowed to remain in any form, the duration portion of Condition No. 10 should not be amended.

Thirdly, the Agencies ask for extraordinary measures by requiring the watermaster to measure water subject to the conditions associated with 74-16187 at the field headgate, rather than at the stream like all other water users. *Exceptions* at 14-17. The Agencies even go so far as to suggest a telemetry-capable measuring device at the field headgate. *Id.* at 17. However, the issuance of a water right permit is not a license for the Department to single out a permit holder and subject him or her to additional water administration requirements when the water district—an instrumentality of the Department—already has authority to enforce water rights under Idaho Code § 42-351. This requested change is therefore unlawful and unnecessary.

Fourthly, the Agencies take issue with the Hearing Officer's terminology in his use of the word "reconnect." *Exceptions* at 17. However, the Hearing Officer's use of "reconnect" is the more commonly understood meaning of water flowing into the Lemhi River. The Agencies' definition is different, and apparently instead the reconnect refers to whether the water flowing into the Lemhi River is enough to support ESA recovery. *Id.* at 18. The Director should maintain use of the word "reconnect" as it is generally understood, which is that water is flowing into the Lemhi River, and in that regard, Big Timber Creek has been reconnected.

Finally, the Agencies want the Hearing Officer's discussion of minimum stream flows to

be deleted or modified because it is “unnecessary and irrelevant.” *Id.* We strongly disagree. While we can argue over whether the parasitic minimum flow condition attached to the exercise of 74-16187 is appropriate under the local public interest, it is clear that the parasitic condition at least functions like a minimum stream flow right and therefore implicates the provisions of Chapter 15 of Title 42 of the Idaho Code. The *Applicant’s Petition for Reconsideration* makes this clear, and while we understand why the Agencies do not like discussion of it in the *Preliminary Order*, it is disingenuous to argue that it is not relevant or necessary to the discussion.

DATED this 5th day of March, 2020.



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

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2020, 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 EXCEPTIONS

ORIGINAL TO: Gary Spackman, Director
Rosemary DeMond, Administrative Assistant
Idaho Department of Water Resources
P O Box 83720
Boise, ID 83720-0098
Gary.Spackman@idwr.idaho.gov
Rosemary.DeMond@idwr.idaho.gov

ATTORNEYS AND/OR INDIVIDUALS SERVED:

James Cefalo
Hearing Officer,
Idaho Department of Water Resources
900 North Skyline Dr., Ste. A
Idaho Falls, ID 83402-1718
James.Cefalo@idwr.idaho.gov

- Mail
- Hand Delivery
- Facsimile
- Email

JANET E. AND KURT W. BIRD
56 Lower Texas Creek Rd.
Leadore, ID 83464

- Mail
- Hand Delivery
- Facsimile
- Email

IDAHO CONSERVATION LEAGUE
Marie Callaway Kellner or Matt Nykiel
P. O. Box 844
Boise, ID 83701
mkellner@idahoconservation.org

- Mail
- Hand Delivery
- Facsimile
- Email

PENNY J. OGDEN EDWARDS
2330 S. 350 W.
Perry, UT 84302

- Mail
- Hand Delivery
- Facsimile
- Email

STATE OF IDAHO
DEPUTY ATTORNEY GENERAL
c/o Ann Y. Vonde or Michael C. Orr
P. O. Box 83720
Boise, ID 83720-0010
Ann.Vonde@ag.idaho.gov
Michael.Orr@ag.idaho.gov

- Mail
- Hand Delivery
- Facsimile
- Email

Purcell Ranch Partnership
Kerry Purcell
98 Purcell Lane
Leadore, ID 83464

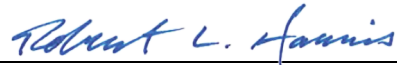
- Mail
- Hand Delivery
- Facsimile
- Email

Kerry Purcell
1774 Lee Creek Road
Leadore, ID 83464

- Mail
- Hand Delivery
- Facsimile
- Email

TRAVIS THOMPSON
BARKER ROSHOLT & SIMPSON LLP
P O Box 63
Twin Falls, ID 83303-0063
tlt@idahowaters.com

- Mail
- Hand Delivery
- Facsimile
- Email



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