

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

The IDAHO WATER RESOURCE BOARD,
and the IDAHO DEPARTMENT OF FISH
AND GAME,

Petitioners,

v.

KURT W. BIRD and JANET E. BIRD,

Cross-Petitioners,

v.

THE IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

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

Case No. CV01-20-9661

**RESPONDENT IDWR'S BRIEF IN
RESPONSE TO BIRD'S CROSS-
PETITION**

Appeal from the Idaho Department of Water Resources, Director Gary Spackman Presiding.

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The Idaho Department of Water Resources (“Department” or “IDWR”), by and through its counsel, hereby submits *Respondent IDWR’s Brief in Response to Bird’s Cross-Petition*. This brief responds to Kurt E. Bird and Janet W. Bird’s (collectively referred to herein as “Bird”) *Cross-Appeal and Cross-Petition for Judicial Review of Final Agency Action* (“Bird’s Cross Petition”).

STATEMENT OF THE CASE

I. THE NATURE OF THE CASE.

This case presents for the Court’s review issues involving Idaho’s local public interest standard. The key question before the Court is whether the Director of the Department properly applied the local public interest standard to an application for permit to appropriate water under Idaho law.

In October of 2018, Bird filed Application for Permit No. 74-16187 (“Permit”) to appropriate water from Big Timber Creek, in the Lemhi River Basin, for irrigation purposes. The Director issued his *Order on Exceptions; Final Order* (“Final Order”) in the underlying contested case on May 21, 2020. The Director’s Final Order concluded, after weighing and balancing the various local public interests in the record, the Permit could be approved but only with protective conditions related to ESA-listed fish species. Specifically, the Director conditioned the Permit to protect threshold streamflow volumes optimal for adult fish passage and habitat on Big Timber Creek. These volumes were based on quantified results from a study of streamflow and habitat needs specific to Big Timber Creek. The Director also limited the time of use of the Permit to the annual snowmelt runoff period, a time when there is excess, unappropriated water in Big Timber Creek. The Director added a measurement condition in order to monitor and administer the Permit pursuant to the local public interest conditions.

Bird disagrees with how the Director applied the local public interest standard in the Final Order. Bird asserts the Director cannot use the local public interest standard to add conditions related to the protection of ESA-listed fish species.

To the contrary, the Director may exercise his statutorily vested discretion under the local public interest standard to include conditions related to the protection of ESA-listed fish species. The local public interest Permit conditions are supported by substantial and competent evidence in the record. The Director approved the Permit contingent upon Bird mitigating the negative effects exercising the Permit may otherwise have on ESA-listed fish species. Bird's legal arguments to the contrary misinterpret Idaho law. The authority to weigh and balance the local public interest is vested with the Director and, therefore, the Court must uphold the Final Order.

II. THE COURSE OF THE PROCEEDINGS.

The Department incorporates the course of proceedings from *Respondent IDWR's Response Brief* at pages 8 through 11.

III. THE FACTS OF THE CASE.

Water rights on Big Timber Creek are administered by the watermaster for Water District 74W. Ex. 13 at Att. B; Ex. 28. The relevant point of diversion for the Permit is equipped with a lockable headgate and measuring device and is regulated by Water District 74W. Exs. 23 and 24. The Permit would be the most junior water right on Big Timber Creek and would only be available during times of high springtime flows due to snowmelt runoff. Exs. 10 and IDWR19.

Big Timber Creek provides habitat for Snake River steelhead, spring Chinook salmon and Columbia River bull trout. Ex. 210 at 1-2; Ex. 201 at 1. These species are currently listed as "threatened" under the Endangered Species Act ("ESA"). *Id.* Under Section 6 of the ESA (16 U.S.C.A. § 1535) local landowners can enter into a conservation agreement ("Section 6

Agreement”) resulting in protection from ESA enforcement actions by NOAA Fisheries. R. 01518.

In the absence of a Section 6 Agreement, local water users remain at risk of enforcement under the ESA in the event of a take of an ESA-listed species. *Id.*

The Director’s local public interest analysis included a balancing and weighing of the following local public interest criterion in the record:

- Diversion of water for irrigation is in the local public interest because irrigation of agricultural lands supports and aids in the survival of rural communities and their economies (R. 01534);
- The Applicant will derive real and substantial benefit from irrigating the proposed place of use (R. 01534);
- High flow irrigation on the Bird property leads to gains in the Lemhi River later in the season (Tr. Vol. I, p. 70-71);
- The Wild and Scenic Agreement explicitly allows for, and protects, future appropriations on Big Timber Creek (*Id.*);
- Maintenance of anadromous fisheries in Big Timber Creek and the Lemhi River drainage is in the local public interest (R. 01541);
- Contributing to the development of cooperative conservation agreements, including protecting local water users from ESA incidental take liability, is in the local public interest (R. 01541);
- Reconnection of Big Timber Creek to the Lemhi River to recover ESA-listed fish species is in the local public interest;
- Maintenance of a portion of the unappropriated water in streams supporting anadromous fish for the protection of their habitats is in the local public interest (R. 01541); and
- Protecting streamflow and habitat needed to recover ESA-listed fish species is in the local public interest (R. 01541).

Bird does not challenge the Director’s identification of these local public interest factors.

Bird explicitly states: (1) the Director’s local public interest inquiry properly includes consideration of fish and wildlife habitat, and aquatic life (*Bird’s Cross-Petition* at 33); and (2) anadromous fish

recovery should be considered as part of the local public interest as it relates to Big Timber Creek (*Bird's Cross-Petition* at 5).

The quality and quantity of fish habitat in Big Timber Creek is directly correlated to streamflow. Ex. 201 at 8-9. Depleted stream flows are the main reason for the lack of suitable fish habitat on Big Timber Creek. Tr. Vol. II, p. 440 (“The basin is flow-limited, and flow directly relates to habitat capacity.”) “Streamflow throughout the Lemhi River drainage is reduced by water diversions.” Ex. 199 at 22.

During the irrigation season (3/15 – 11/15), most of the total flow in Big Timber Creek is diverted for irrigation use. Ex. 202 at 10, 15; Exs. 10 and IDWR18. Authorized diversion rates under existing water rights exceed the total flow in Big Timber Creek except during the snowmelt runoff period. *Id.*

In June 2004, the U.S. Bureau of Reclamation’s *Flow Characterizations Study: Instream Flow Assessment, Big Timber Creek, Idaho* (“USBR Study”) was released. Ex. 202. The USBR Study identified streamflow needed to support the relevant life stages of the ESA-listed fish species in Big Timber Creek. *Id.* at 2. The USBR Study “may be used by the public, State, and Federal agencies to direct management actions addressing stream flow needs of ESA-listed anadromous and resident native fish.” *Id.* at 2-3.

The USBR Study area “encompassed the mainstem Big Timber Creek from its confluence with the Lemhi River upstream to Basin Creek.” Ex. 202 at 4. The study area was divided into seven reaches based on “differences in stream channel morphology and locations of major [irrigation] diversions.” *Id.* at 4-7. The seven reaches were situated in numerical order from Reach 1 (the most downstream reach, “[extending] from the confluence with the Lemhi River upstream to

the first major diversion”) to Reach 7 (the most upstream reach, extending upstream of the upper-most large diversion on Big Timber Creek). *Id.*

The USBR Study evaluated flow required to provide fish passage for adult populations of Chinook salmon, steelhead and bull trout in each of the seven reaches. *Id.* at 22-23, 41-43. According to the USBR Study, fish passage should be the highest priority when making management decisions about optimum streamflow. *Id.* at 26.

The following table summarizes the recommended flow rates from the USBR Study for maintaining the optimum levels of habitat for spawning and adult populations of the ESA-listed fish species and the recommended flow rates for fish passage:

	Reach 1	Reach 2	Reach 3	Reach 4	Reach 5	Reach 6	Reach 7
Flow rate (cfs) required for optimum spawning habitat	14	15	21	29	42	49	60
Flow rate (cfs) required for optimum adult habitat	18	15	16	27	36	35	40
Flow rate (cfs) required for passage of adult fish	13	13	9	19	54	11	15

Id. at 41-43.

The Permit’s proposed point of diversion is located within the stream section identified as Reach 5 in the USBR Study. *Final Order* at 6. The stream section identified as Reach 1 in the USBR Study contains the point of confluence between Big Timber Creek and the Lemhi River upstream to the first major diversion on Big Timber Creek. *Id.* at 4-7.

According to the USBR Study, a flow of 54 cfs is required to maintain passage for adult salmon, steelhead and bull trout through Reach 5. Ex. 202 at 42. If the water rights with authorized points of diversion between the uppermost Big Timber Creek stream gage (“Upper BTC Gage”) and Reach 5 were diverted at their full authorized rate, and assuming no instream losses, there would need to be at least 118 cfs to maintain 54 cfs of flow in Reach 5. *Id.* at 17-18. According to the

USBR Study, a flow of 18 cfs is required to provide the optimum level of habitat for adult salmonids in Reach 1 (the most downstream reach of Big Timber Creek). Ex. 202 at 41.

On April 22, 2005, James and Paula Whittaker (“Whittaker”) filed Application for Permit 74-15613, seeking a permit to divert water from Big Timber Creek for irrigation use. Ex. 5 at 3. Director Gary Spackman, then a Department Hearing Officer, conducted an administrative hearing for the Whittaker application on February 6 and 7, 2007. *Id.* at 1. The Director determined Whittaker’s proposed water use should not impair the 13 cfs needed for adult fish passage in Reach 1, as described in the USBR Study. *Id.* at 9.

Therefore, Whittaker’s Water Right No. 74-15613 includes the following conditions:

5. 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 [sic] required bypass flows are maintained during diversions under this right.
6. 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.
7. 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.

Ex. IDWR16 at 2. These conditions were not appealed or otherwise challenged. Bird has agreed to the inclusion of substantially the same conditions¹ on the Permit. R. 01203-01205.

¹ Bird contends there is an error in the legal description for the Big Timber Creek measurement site near the town of Leadore and asserts that the error should be addressed if the proposed permit is approved with the same conditions as Water Right No. 74-15613. R. 01204.

Water Right Nos. 75-13316 and 77-11941 (collectively “Wild and Scenic Right”) are federal reserved water rights held by the U.S. Forest Service. Ex. IDWR13. Delivery of the Wild and Scenic Right is quantified at the USGS Salmon River site at the Shoup gage (“Shoup Gage”).

Id. at 2. The Wild and Scenic Right includes the following provisions:

[T]his water right is subordinated to the following water rights and uses that are junior to this federal reserved water right and that have points of diversion or impoundment and place of use within the Salmon River Basin upstream from [the Shoup gage]:

...

(6)(A) Water rights other than those described in paragraphs (3) through (5) above claimed or applied for after the effective date of the Stipulation:

(i) with a total combined diversion of 150 cfs (including not more than 5,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre), when the mean daily discharge at the Shoup gage is <1,280 cfs. . . .

(ii) an additional diversion of 225 cfs (including up to an additional 10,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre) when the mean daily discharge at the Shoup gage is \geq 1,280 cfs.

Between 2006 and 2016, the flow at the Shoup gage was less than 1,280 cfs during the irrigation season (3/15-11/15) on the days noted in the following table:

Year	Days (between 3/15 and 11/15) when the flow at the Shoup gage was less than 1,280 cfs	# of Days	Overlap Days²
2006	Aug 6-Sep 18,	44	0
2007	Jul 22-26, Jul 30-Sep 22	60	0
2008	Aug 20-Sep 21, Sep 29-Oct 2	37	0
2009	Sep 13-16, Sep 18-29	16	0
2010	April 11, Aug 28	2	0
2011	none	0	0
2012	Aug 16-21, Aug 23-Sep 24	39	0
2013	July 23-Sep 25	65	0
2014	Sep 10-12, Sep 15-19	8	0
2015	Aug 2-Aug 9, Aug 12-Sep 16, Sep 28, Oct 1	46	0
2016	July 30-Sep 22	55	0

² Overlap days are days streamflow at the Shoup gage was lower than 1,280 cfs at the same time the Permit would be available for diversion on Big Timber Creek.

R. 01526; Ex. IDWR20. Between 2006 and 2016 the Permit would *never* have been available at any time the Shoup Gage was lower than 1,280 cfs.

ISSUES PRESENTED ON CROSS-PETITION

1. Whether Permit Condition 8 reasonably protects the local public interest of the ESA-listed fish species by inclusion of bypass flows for adult fish passage and habitat;
2. Whether Permit Condition 9 reasonably protects the local public interest of the ESA-listed fish species by requiring Permit diversions to cease at flows determined by the USBR Study to be needed for ESA-listed fish species passage and habitat;
3. Whether Permit Condition 10 properly requires Bird to measure and track diversion under the Permit in order to maintain compliance with local public interest Conditions 8 and 9;
4. Whether Permit Condition 11 properly categorizes the Permit under Paragraph 10(b)(6)(A)(ii) of the Wild and Scenic Right as it is historically only available when flow at the Shoup Gage is more than 1,280 cfs; and
5. Whether Bird's substantial rights were prejudiced.

ARGUMENT

I. STANDARD OF REVIEW.

The Department incorporates the standard of review from *Respondent IDWR's Response Brief* at pages 15 and 16.

II. THE DIRECTOR PROPERLY CONDUCTED THE LOCAL PUBLIC INTEREST INQUIRY.

The Director incorporates his discussion of Idaho's local public interest standard from *Respondent IDWR's Response Brief* at pages 16 through 18.

In *Respondent IDWR's Response Brief* the Director summarized Idaho's local public interest standard as follows:

[The local public interest inquiry] requires the Director to apply his discretion by weighing and balancing relevant, albeit potentially conflicting, factors in the

record. Conditions resulting therefrom must be reasonable and based on substantial, competent evidence in the record and not on speculation or assertion. The balancing test does not require the Director to eradicate or disallow *all* potential effects on a recognized local public interest.

Respondent IDWR's Response Brief at 18. The issue the Court must decide is whether the Director properly applied the local public interest standard in conditioning the Permit to protect ESA-listed fish species on Big Timber Creek.

A. The Director Properly Conditioned the Permit.

The Director's Final Order properly applied the local public interest standard as it related to the Permit. The Director weighed the identified public interests, including the technical information in the record, and determined the Permit *may only be approved* if conditions were attached to mitigate potential negative effects of irrigation diversion on habitat and flow for passage of the ESA-listed fish species. In other words, the local public interests associated with promoting the recovery of ESA-listed species on Big Timber Creek *outweighed* the local public interest associated with the irrigation project proposed by Bird. Only if these factors could be *balanced* by addition of reasonable mitigating conditions, could the Permit be approved.

The Director's analysis of the local public interest factors in the Final Order was not unreasonable, arbitrary, or otherwise unconstitutional. The State of Idaho and its citizens have invested millions of dollars and other resources promoting the recovery of ESA-listed fish species in the Lemhi River Basin and on Big Timber Creek. R. 01518; Tr. Vol. II at 524. Until and unless these species reach population recovery thresholds, irrigators on Big Timber Creek, *including Bird*, are under threat of ESA enforcement by NOAA Fisheries. R. 01518; Tr. Vol. II at 671-672.

To protect these interests, the Director concluded there was sufficient competent evidence in the record to prevent the Permit from *unreasonably* diminishing habitat and flow for passage of the ESA-listed fish species. Specifically, the Director concluded:

The proposed permit should be conditioned to only be available when the flow at the Lower BTC Gage is at least 18 cfs and flow at the proposed Bird Gage is at least 54 cfs. These flow thresholds will support the streamflow needed to provide optimum habitat and fish passage for adult salmonids throughout Big Timber Creek. When proposed permit 74-16187 is being exercised, these flow thresholds will reduce the amount of water available for diversion on Big Timber Creek by 18 cfs during certain times of the early irrigation season. When the 18 cfs bypass flow is in effect, the water will flow out of the Big Timber Creek drainage and will increase streamflow and fish habitat in the upper Lemhi River, a reach that can experience reduced flows during the snowmelt runoff period.

R. 01541. These conclusions are narrowly tailored to: (a) support the protection of the local public interest of maintaining and improving habitat and flow for passage of the ESA-listed fish species; and (b) still allow Bird to use a portion of the unappropriated Big Timber Creek spring high flow water for irrigation.

Bird agrees and admits fish and wildlife must be considered as a part of the Director's local public interest inquiry. *Bird's Cross-Petition* at 5. More specifically, Bird admits recovery of ESA-listed fish species is a component of the local public interest on Big Timber Creek. *Id.* at 33. Bird also admits the Director may impose reasonable conditions the Director deems necessary to protect identified local public interests. *Id.* at 4, 10-11. Bird already agreed to a bypass flow condition of 13 cfs, (the same condition attached to the Whittaker right) which represents a threshold flow value for adult fish passage determined pursuant to the USBR Study. Tr. Vol. I at 69. Bird further agreed to a Permit condition that would measure the 13 cfs bypass flow in order to ensure compliance. *Id.* Bird testified, under questioning from his counsel, that with the 13 cfs bypass flow condition and measurement condition in place, the Permit would be in the public interest. *Id.*

Regardless of all of this, Bird now argues the Director's application of the local public interest standard was unreasonable, arbitrary, and ignored Idaho law.³ *Id.* at 11. Specifically, Bird argues Permit Conditions 8 through 11 violate Bird's interpretation of the local public interest standard. *Id.* at 13. As a result, Bird contends Permit Conditions 8 through 11 are unconstitutional pursuant to Article XV, § 3 of the Idaho Constitution. *Id.*

The Director disagrees. Idaho water law, specifically the statutorily required local public interest inquiry, requires a discretionary analytical process in order to determine whether a proposed use of water is in the local public interest. The Director properly undertook this inquiry and reasonably included Permit Conditions 8 through 11 pursuant to the local public interest.

1. Conditions 8 and 9 are Reasonable and in the Local Public Interest.

The Director's Final Order included a requirement to include Conditions 8 and 9 on the Permit. Conditions 8 and 9 state:

8. This right is only available when flow at the Bird Gage (to be constructed in the SESW of Section 8, T15N, R26E) is at least 54 cfs and flow at the Lower Big Timber Creek Gage (at the Highway 28 Bridge in the SWNW of Section 28, T16N, R26E) is at least 18 cfs.
9. The right holder shall cease diversion under this right if the flow of Big Timber Creek is less than 54 cfs at the Bird Gage or is less than 18 cfs at the Lower Big Timber Creek Gage.

R. 01543.

³ These arguments are not novel. Bird made substantially the same arguments in the *Applicant's Petition for Reconsideration*. R. 01336-01378. The Hearing Officer properly rejected Bird's arguments in the *Order Granting Petitions, in Part*. R. 01456-01469.

i. Conditions 8 and 9 Are Not Minimum Stream Flows.

Bird argues the IWRB is somehow using the water appropriation process, through the local public interest inquiry, to provide a minimum stream flow “entitlement” to itself. *Bird’s Cross-Petition* at 17. Bird argues that when water is available under the Permit a “minimum flow mandate—a water right” will lead to water that is otherwise available for appropriation becoming unavailable. *Id.* at 20. Therefore, Bird argues that by exercising the Permit the IWRB receives an implied, or de facto, minimum stream flow water right. *Id.*

Bird’s argument fails for two reasons. First, Conditions 8 and 9 are not minimum stream flows—implied, de facto, or otherwise. Second, Bird misunderstands and misinterprets the Director’s discretion to condition water appropriations pursuant to the local public interest.

The Director’s Final Order concluded Permit Conditions 8 and 9 do not create a minimum stream flow water right:

A minimum stream flow right would protect a flow from all future water right appropriations. In contrast, the Director’s condition that Bird not divert water from Big Timber Creek if flows decline below 18 cfs ***is specific to Bird’s proposed use of water.*** The streamflow thresholds included in the conditions for the proposed permit do not limit or restrict any other water rights and only apply when Bird’s water right is being exercised. ***If Bird chooses not to divert water for irrigation under the [Permit], then the bypass conditions described above do not need to be satisfied.***

R. 01537 (emphasis added). In other words, the bypass flow conditions on the Permit are specific to the Permit. As a result, Permit Conditions 8 and 9 cannot be minimum stream flow water rights as defined under Idaho law.

Idaho’s Minimum Stream Flow Act (the “Act”) (Idaho Code § 42-1501 *et seq.*) controls the appropriation of minimum stream flow water rights in Idaho.⁴ The Act explicitly states

⁴ Only the IWRB can apply to IDWR for a permit and license to establish a minimum stream flow of unappropriated water. Idaho Code § 42-1503. The IWRB has not applied for a minimum stream flow on Big Timber Creek. Bird’s argument here carries the implication that because IWRB is a participant in this case, and IWRB is the only

“[w]ater shall not be deemed to be available to fill any water right of later priority date if diversion of such water would result in a decrease in the flow of the stream . . . below the minimum stream flow . . . specified in said approved application for appropriation of minimum stream flow.” Idaho Code § 42-1505. In other words, a minimum stream flow established pursuant to the Act establishes a threshold stream level that cannot be diminished by future appropriation and is always being exercised, and, therefore, always in priority. This is simply not the way the Permit will operate. If Bird is not exercising the Permit—which, again, will only be available during spring flood flows—Conditions 8 and 9 *do not affect the flow* of Big Timber Creek.

Likewise, Permit Conditions 8 and 9 have no automatic effect on any *future appropriation* of water on Big Timber Creek. If the IWRB applied for and was issued a minimum stream flow water right on Big Timber Creek, *no future appropriations could occur if the diversion would lead to a decrease in the established minimum stream flow*. Conditions 8 and 9 do not, and cannot, establish a flow against which all potential future appropriations of water on Big Timber Creek are protected.

Additionally, and critical to Lemhi Decree high flow users such as Bird, if the IWRB had a minimum stream flow water right on Big Timber Creek, high flow use under the Lemhi Decree would also become permanently unavailable when the flow dropped below the established minimum stream flow level. Conditions 8 and 9 have no effect on high flow use when not in priority.

entity capable of holding a minimum stream flow water right, the implied minimum stream flow is accomplished due to IWRB’s presence. Conditions 8 and 9 stem from the local public interest inquiry and do not relate to IWRB’s participation in this matter.

Conditions 8 and 9 are simply not imbued with the same legal consequence as a minimum stream flow right established under the Act. While Bird may perceive Conditions 8 and 9 as implying a minimum stream flow water right into existence, this perception does not negate the requirements of the Act, or the practical reality of how the Permit would operate under the prior appropriation regime.

ii. *Conditions 8 and 9 are Local Public Interest Conditions.*

Bird's perception of Condition 8 and 9 ignores the Director's duty to assess all local public interests and attach reasonable conditions to permits, as necessary. *See Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 441, 448 (1985) (Idaho Code § 42-203A assigns the Director the affirmative duty to assess the public interest); *see also Hardy v. Higginson*, 123 Idaho 485, 491, 849 P.2d 946, 952 (1993) (Permit conditions arising from the local public interest review must be based on specific information in the record, not on speculation). The Director has no legal authority to impose a minimum stream flow water right on Big Timber Creek. He *does* have the duty to assess all local public interests in the record and reasonably condition individual water rights, taking each application as it comes, pursuant to the protection of a valid local public interest. Protecting ESA-listed fish species habitat and flow for passage—and attempting to protect local water users from ESA enforcement from the federal government—are *exactly* such interests.

The Director has the express statutory authority to evaluate the local public interests and to create permit conditions to protect identified interests. Idaho Code § 42-203A(5) authorizes the Department to reject applications for permit that “conflict with the local public interest as defined in section 42-202B(3), Idaho Code” and to grant permits upon conditions. The Final Order included significant analysis of the stream flow needed to provide habitat and passage for

ESA-listed fish species.⁵ These topics fall within the definition of local public interest set forth in Idaho Code § 42-202B. The Director adopted permit conditions consistent with the requirements of Idaho Code § 42-203A(5) and they must remain.

iii. *Conditions 8 and 9 are Not Limited by the North Snake Case.*

Bird's Cross-Petition spends a significant amount of time explaining to the Court its decision in *North Snake Ground Water Dist. v. Idaho Dep't of Water Res.* (In the Matter of Application for Permit No. 36-16976 in the name of North Snake Ground Water District, et al., August 7, 2015), and the Idaho Supreme Court case affirming that decision in *North Snake Ground Water Dist. v. Idaho Dep't of Water Res.*, 160 Idaho 518, 376 P.3d 722 (2016) ("North Snake Case"). Bird argues the precedent set in the North Snake Case should control how the Director conditions the Permit in this case. *Bird's Cross-Petition* at 14. The Director disagrees.

In the contested case underlying the North Snake Case, the Director denied an application made by the North Snake Ground Water District, Magic Valley Ground Water District and Southwest Irrigation Districts (the "Districts"), in part, because it was not in the local public interest. *North Snake* at 524, 728. The Director concluded the application was not in the local public interest because the applied-for water would be used for mitigation against a delivery call made by Rangen, Inc. ("Rangen"), using the same water that Rangen had been using for 50 years. *Id.* The Director further concluded it was inconsistent with the local public interest to allow the Districts to use its eminent domain power to gain a water right for mitigation on land wholly owned by Rangen. *Id.*

This Court rejected the Director's local public interest analysis, holding the Director's ability to evaluate the local public interest is limited to evaluation of effects of the proposed use

⁵ For a full account of the Director's analytical process related to the bypass flow conditions, see *Respondent IDWR's Response Brief* at pages 16-44.

on the public water resource authorized by statute. *Id.* This Court held the local public interest statute does not allow the Director to pick winners and losers under the prior appropriation doctrine. *Id.* The Idaho Supreme Court agreed, concluding the Director's interpretation of the local public interest was inconsistent with the plain language of Idaho Code § 42-202B. *Id.* at 525, 729. Idaho Code § 42-202B(3) authorizes evaluation of "the effects of the [the proposed] use on the public water resource" and does not allow the Director to make determinations on competing applications under the prior appropriation doctrine. *Id.* The Idaho Supreme Court also held that the Director does not have the authority to determine the appropriateness of the Districts' eminent domain power, especially where the Director failed to articulate how said power related to effects on the public water resource. *Id.*

First, at base, the facts presented to the Court in this matter differ radically from those in the North Snake Case. In the North Snake Case, Rangen had a competing application for permit on the same water source, filed later in time than the application filed by the Districts. In that case the local public interest inquiry was used to move one application ahead of another. Here the Director has not moved a competing application ahead of Bird.

Bird appears to imply that because he perceives Conditions 8 and 9 to be minimum stream flow *water rights*, IWRB's implied minimum stream flow water right has now somehow jumped ahead of Bird's Permit in priority. For the reasons so stated above, Conditions 8 and 9 do not create a minimum stream flow water right. Conditions 8 and 9 are reasonable mitigating elements attached to the Permit pursuant to the local public interest of supporting and protecting ESA-listed fish species habitat and flow. The Director has made no conclusions about competing applications under the prior appropriation doctrine in this case. Unlike in the North

Snake Case, the Director did not use the local public interest criteria to advance Bird's permit in front of another.

The North Snake Case also concluded the Director's local public interest review included factors (timing of water right filings, eminent domain, fairness) that were outside of the definition of the term "local public interest" set forth in Idaho Code § 42-202B. *Id.* Here, the Director's local public interest inquiry does not include any of the factors rejected in the North Snake Case. The Director did not step outside the statutory definition of the local public interest in this case. The Director analyzed the effect Bird's Permit would have on Big Timber Creek. The Director identified, in relevant part, the following local public interests:

- Maintenance of anadromous fisheries in Big Timber Creek (R. 01541);
- Contributing to the development of cooperative conservation agreements, including protecting local water users from ESA incidental take liability (R. 01541);
- Maintenance of a portion of the unappropriated water in streams supporting anadromous fish for the protection of their habitat (R. 01541); and
- Protecting streamflow and habitat needed to recover ESA-listed fish species (R. 01541).

Bird did not challenge these conclusions. Bird admitted ESA-listed fish recovery on Big Timber Creek is in the local public interest. *Bird Cross-Petition* at 5, 33; Tr. Vol. I pp. 66-70.

These criteria are essential to the Director's evaluation of the local public interest in the water resources of Big Timber Creek for all of the reasons stated herein and in *Respondent IDWR's Response Brief*. There is nothing in the Director's local public interest inquiry as it relates to the Permit that is outside of his authority pursuant to the local public interest statute.

iv. *The 54 cfs Portion of the Bypass Flow Conditions is Reasonable and Based on Substantial and Competent Evidence.*

The Director properly utilized the USBR Study to include a 54 cfs bypass flow at Reach 5 of Big Timber Creek.⁶ Imposition of the 54 cfs bypass flow condition was reasonable and based on substantial and competent evidence in the record.

Bird argues the 54 cfs the USBR Study required for adult fish passage through Reach 5 of Big Timber Creek is “suspect” and “unreliable.” *Bird’s Cross-Petition* at 24. Bird asserts because the flow rate required for adult fish passage (54 cfs) at Reach 5 is greater than the flow rate required for optimum spawning (42 cfs) at Reach 5, the entirety of USBR’s flow optimization study is “illogical.” *Id.* at 24. Bird asserts the 54 cfs fish passage requirement at Reach 5, which is greater than the fish passage requirements in any other reach of Big Timber Creek, represents a statistical outlier and, therefore, the USBR Study is not reliable evidence. *Id.* at 24.

The USBR Study includes an explanation of how the adult fish passage requirements were calculated:

To determine the recommended flow for passage, shallow bars most critical to passage of adult fish were located, and a linear transect was measured which followed the shallowest course from bank to bank. For each transect, a flow was computed for conditions which met the minimum depth criteria in Table 10 [suggested passage criteria from the Oregon Department of Fish & Wildlife] where at least 25% of the total transect width and a continuous portion equaling at least 10% of its total width, equal to or greater than the minimum depth, was maintained.

Ex. 202 at 22 (citations omitted). The flows required for adult fish passage in Reach 5 are not theoretical or speculative. They are not arbitrary or unscientific. They are based on actual measurements of the stream channel cross-section at the most shallow transect within the reach.

⁶ For a full account of the Director’s conclusion as to the validity of the USBR Study and its use in conditioning the Permit, see *Respondent IDWR’s Response Brief* at pages 26-29.

The methods used in the USBR Study to determine the flow needed for adult fish passage differ from the methods used to determine optimum flow for spawning. Fish passage flow was determined at a specific shallow transect within the reach. In contrast, optimum flow for spawning habitat was determined based on a composite of all transects within a reach. In other words, a flow of 42 cfs may provide optimum spawning habitat throughout most of Reach 5. A higher flow rate (54 cfs), however, is required to allow passage of adult fish through the shallowest cross-section of Reach 5. The technical information garnered from the flow characterization analysis in the USBR Study is neither illogical nor unreliable. The Director reasonably concluded protecting both flow for passage and habitat for spawning meant conditioning the Permit at the higher value based on the USBR Study threshold flows. Ex. 202 at 41-43.

Bird argues IDFG and IWRB did not advocate for a minimum flow determination, they “did not submit any evidence in support of a minimum flow, let alone a discrete minimum flow amount.” *Bird Cross-Petition* at 28. To the contrary, IDFG introduced the USBR Study into the record without objection from Bird. There is no evidence in the record offered by Bird to refute the technical information contained in the USBR Study. In fact, again, Bird stipulated to the inclusion of a bypass flow of 13 cfs for Reach 1 of Big Timber Creek, which is the adult fish passage value taken directly from the USBR Study. Neither Bird, nor his Counsel, are qualified as experts in fish passage or habitat needs. Bird’s claims related to the “logic” of the flow needed for fish passage compared to habitat needs must be disregarded because they are not supported by the record.

Finally, simply because neither the IWRB nor the IDFG asked for bypass flow conditions, does not mean the Director must ignore relevant, substantial and competent evidence

sufficient to condition the Permit to protect ESA-listed fish species flow for passage and habitat. The USBR Study is substantial, competent, quantifiable, scientific evidence pertaining to the flows needs of the ESA-listed species specific to Big Timber Creek. The 54 cfs flow threshold represents a quantified, scientifically determined flow for ESA-listed fish species on Big Timber Creek at Reach 5.

2. Condition 10 is Proper as it Measures Compliance with Conditions 8 and 9.

Permit Condition 10 states:

10. To facilitate delivery of this right, the right holder shall 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. Any measurement device or structures must satisfy federal and state fish passage standards. Measurement data must be available to the watermaster on a real-time basis. The right holder may rely on streamflow data collected for state or federal agencies to satisfy this measurement condition.

R. 01543. Data collected at the Lower BTC Gage, currently supported by the IWRB's Idaho Water Transactions Program ("WTP"), can be used by the watermaster for Water District 74W to monitor the streamflow in Reach 1. Ex. 27. If the Lower BTC Gage is removed or discontinued, the Final Order requires Bird to install a measurement device at the same location, acceptable to the watermaster and IDWR. R. 01535.

Bird admits measurement conditions do not generally raise constitutional, statutory, or reasonableness concerns because a measuring device is typically installed at or near a ditch heading, and an applicant must demonstrate the legal right to use the ditch. *Bird's Cross-Petition* at 25. Here, however, Bird argues Condition 10 was included to measure unlawful minimum stream flows, and, therefore, Condition 10 is also unlawful. *Id.*

Bird's argument here is, again, unavailing. For the reasons so-stated above, Conditions 8 and 9 are *not* unreasonable, unlawful, or unconstitutional. Bird *must* measure water diverted

under the Permit in order to maintain compliance with Permit Conditions 8 and 9, and, therefore, the local public interest. Measurement in this case is critical because Conditions 8 and 9 determine whether the Permit may be exercised or not pursuant to the local public interest. If flow at the Bird Gage (Reach 5) is at least 54 cfs and flow at the Lower BTC Gage (Reach 1) is at 18 cfs, Bird may divert according to the Permit. Bird must be able to demonstrate compliance with these reasonable local public interest conditions. Condition 10 allows Bird to show compliance with the local public interest conditions on the Permit. Further, without Condition 10, no compliance enforcement or regulatory mechanism would be in place to monitor Bird's use under the Permit. Condition 10 is reasonable and in the local public interest.

Alternatively, Bird argues Condition 10 should be removed because Bird has no property right or legal authorization to construct and maintain a measuring station at the Lower BTC Gage. *Id.* Bird argues the Lower BTC Gage was installed and is maintained by the Idaho Power Company ("Idaho Power"), and it is located within a state highway right-of-way, and therefore, Bird has no means to measure flow at the site. *Id.* at 25.

First, Idaho Power Company and the IWRB WTP currently jointly measure flow at the Lower BTC Gage. There is no evidence in the record showing either will stop this practice. The permit condition specifically allows Bird to rely upon IPC and the IWRB's measurements. Second, the Lower BTC Gage is located at the bridge for Highway 28, which is an area with a significant amount of public use and disturbance because of the highway. Even if Idaho Power and/or the IWRB were to discontinue measurement activities at the Lower BTC Gage site, there is no reason why Bird could not get permission to utilize the same site in the future. Finally, even if access was somehow denied, the Department and the watermaster would undoubtedly work with Bird to find an alternative location that achieved the same goals.

Aside from access and ownership issues, Bird argues Water District 74W, and, therefore, ultimately IDWR, has the responsibility to measure and distribute water, including water diverted under the Permit. *Id.* at 25-27. Bird misinterprets the responsibility and authority of water measurement under the Permit, as conditioned. While the watermaster for Water District 74W performs the governmental function of measurement and distribution of water among appropriators,⁷ Condition 10 is not related to the measurement and distribution of water between users. Condition 10 requires Bird, as the permittee, to measure Big Timber Creek *flow* at two gage sites in order to demonstrate ongoing compliance with the local public interest pursuant to Conditions 8 and 9.

Finally, Bird argues the measurement site for the lower Big Timber Creek bypass should instead be the Whittaker flume, where the bypass flow for Whittaker's Water Right No.74-15613 is measured. *Id.* at 27. This argument was raised before the Hearing Officer and rejected in his *Order Granting Petitions, in Part*. R. 01456-01469. The Hearing Officer concluded the Lower BTC Gage is located approximately ½ mile farther downstream than the Whittaker flume. *Id.* at 01460-01461. As the Lower BTC Gage is ½ mile closer to the confluence of Big Timber Creek and the Lemhi River at Reach 1, and Conditions 8 and 9 require an 18 cfs bypass flow *throughout* Reach 1, it is reasonable to ensure the 18 cfs is measured at the closest possible point to the confluence. If the Whittaker flume were used as a measurement site, there is a chance the streamflow in Big Timber Creek would fall below the target bypass flow amounts before reaching the confluence with the Lemhi River.

In order to comply with Conditions 8 and 9, and, therefore, the local public interest, Bird should be expected to demonstrate compliance with the bypass flow condition of an 18 cfs flow

⁷ Idaho Code § 42-604.

at the confluence of Big Timber Creek and the Lemhi River, *not ½ mile upstream from the confluence*. The Lower BTC Gage is the most accurate measurement location for purposes of demonstrating compliance with Conditions 8 and 9 and Bird has current access to the data derived from it.

3. Condition 11 Complies with the Wild and Scenic Right.

The Wild and Scenic Right subordinates itself to certain junior water rights, including future water rights developed on upstream sources. R. 01530. Bird's Permit represents such an anticipated water right development. The Wild and Scenic Right contains two subordination provisions to accommodate such development. *Id.* The issue for the Court to decide is whether the Director properly categorized the Permit under the Wild and Scenic Right's subordination provisions.

First, Wild and Scenic Water Right Paragraph 10(b)(6)(A)(i) ("Paragraph 1") is subordinated to 150 cfs of junior water rights (including not more than 5,000 irrigated acres), "when the mean daily discharge at the Shoup gage is < 1,280 cfs." Ex. IDWR13 at 6. In other words, the Wild and Scenic Water Right is subordinated to future junior water rights up to 150 cfs when the Salmon River is flowing at *less than* 1,280 cfs at the Shoup Gage. R. 01530. Second, the Wild and Scenic Water Right Paragraph 10(b)(6)(A)(ii) ("Paragraph 2") subordinates an additional 225 cfs of future junior water rights when the Salmon River is flowing at *equal to or greater than* 1,280 cfs at the Shoup Gage. *Id.*

The Director's Final Order concluded the Permit belongs under the second subordination provision, or Paragraph 2. Permit Condition 11 states:

This right benefits from the subordination described in Paragraph 10(b)(6)(A)(ii) of [Wild and Scenic Right] and may only be diverted when the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 cfs.

There was a simple, practical reason for the Director's conclusion. The only streamflow data in the record for Big Timber Creek and the Salmon River at the Shoup Gage showed that during the only time the Permit could be exercised the mean daily discharge at the Shoup gage was *never* less than 1,280 cfs. R. 01530; *and see supra* at pp. 9-10. It would make no practical sense for the Permit to be classified as part of the 150 cfs under Paragraph 1 as the Permit would never be exercisable when the Shoup Gage shows flow at less than 1,280 cfs. This outcome does not prejudice Bird and is a reasonable interpretation of the Wild and Scenic Right subordination provisions.

Nevertheless, Bird argues the Permit should receive subordination protection under Paragraph 1 because the Director has no authority to differentiate between the two. *Bird's Cross-Petition* at 28-29. Bird argues subordination should occur on a first-come-first-served basis, and relegation at this time to subordination Paragraph 2 means Bird is receiving "second-class status." *Id.*

However, there is no evidence in the record supporting Bird's contention that the Permit "clearly" requires subordination protection under Paragraph 1. *Id.* at 28. The relevant substantial and competent evidence in the record—Big Timber Creek and Salmon River streamflow records—allow for only one reasonable conclusion: The Permit would inure *no* benefit from subordination protection under Paragraph 1. Bird appears to argue that the reality of the Permit and its availability in relation to Salmon River flow is irrelevant to classification under the Wild and Scenic Right subordination provisions. However, the record and the reality are important. In this case the record supports the conclusion the Permit will not be exercisable during times when the 150 cfs subordination provision is operative. The Permit will only be exercisable when the 225 cfs subordination provision will be operative. Therefore, the Director properly placed the Permit into the Paragraph 2 subordination category.

Finally, Bird argues that if the Permit belongs in the Paragraph 2 subordination provision, then all future water rights would as well, as the Permit would be senior in priority. *Bird's Cross-Petition* at 29. As a result, Bird considers the 150 cfs subordination available under Paragraph 1 to be unavailable and “capped,” which represents an unfair outcome. *Id.*

The issue with this argument is that there is no evidence in the record related to *future* appropriations and applications in relation to the Wild and Scenic Water Right subordination provisions. Bird would have the Director conduct an unduly speculative analysis of potential future appropriations in order to determine how to divide the subordination protection under the Wild and Scenic Right. Bird's argument that no future water right may qualify for Paragraph 1 subordination is also unavailing. The Permit's classification under Paragraph 2 does not automatically equate to future applications being properly placed in the Paragraph 1 subordination category.

In this case, it is reasonable to include the Permit in Paragraph 2 of the subordination categories. This result is the practical reality of flow measured at the Shoup Gage in relation to the availability of the Permit. Bird provided no contrasting streamflow data or evidence to show the Director's practical application of the Wild and Scenic Right to the Permit is improper. As Permit Condition 11 is based on substantial and competent evidence in the record it must be maintained.

B. Bird's Substantial Rights Have Not Been Prejudiced.

Bird argues his substantial rights have been prejudiced because Permit Conditions 8-11 “violate constitutional and statutory rights”, unlawfully restricting “his right to appropriate and use the unappropriated water of the State of Idaho.” *Id.* at 30.

For the reasons stated above, the Director disagrees. The Director has an affirmative duty to assess all local public interests and attach reasonable conditions to permits, as necessary. *See Shokal* at 330, 448 (1985) (Idaho Code § 42-203A assigns the Director the affirmative duty to assess the public interest); *see also Hardy* at 485, 952 (Permit conditions arising from the local public interest review must be based on specific information in the record, not on speculation). In this case the Director properly concluded there was sufficient, competent evidence in the record to quantify streamflows that will promote and reasonably protect ESA-listed fish habitat and passage on Big Timber Creek. R. 01541.

Conditions 8 through 11 implement the Director's local public interest inquiry. Conditions 8 through 11 are not water rights Bird is competing with for priority of appropriation. Conditions 8-11 represent protection of the local public interest of promoting the recovery of the ESA-listed fish species. These conditions allow Bird to irrigate under the Permit. Without them the Permit would have been denied. Bird's substantial rights have not been harmed.

CONCLUSION

The Director properly applied Idaho's local public interest standard to the Permit. The Director's Final Order is: (1) consistent with all applicable statutory provisions; (2) not in excess of statutory authority; (3) supported by substantial evidence on the record as a whole; (4) made upon lawful procedure; and (5) is not arbitrary or capricious. Bird has failed to prove there was insubstantial evidence in the record to support the agency's decision making related to Permit Condition 8 through 11. The Court should affirm the Director's *Order on Exceptions; Final Order* and affirm Permit No. 74-16187, as conditioned therein.

DATED this 8th day of December, 2020.

LAWRENCE G. WASDEN
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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2020, I served a true and correct copy of the foregoing **RESPONDENT IDWR'S BRIEF IN RESPONSE TO BIRD'S CROSS-PETITION** to be filed with the Court and served on the persons listed below by the methods indicated below:

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