

**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 DEPARMENT OF WATER
RESOURCES,

Respondent.

Case No. CV01-20-9661

**RESPONSE BRIEF OF PETITIONERS
THE IDAHO WATER RESOURCE
BOARD AND THE IDAHO
DEPARTMENT OF FISH AND GAME**

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

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

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STATEMENT OF THE CASE

I. THE NATURE OF THE CASE.

This is a judicial review proceeding pursuant to the Idaho Administrative Procedure Act (“IDAPA”) and Idaho Rule of Civil Procedure 84, arising from an application filed by Kurt E. Bird and Janet W. Bird (“Bird”) for a permit to appropriate water from Big Timber Creek, a tributary of the Lemhi River, for irrigation purposes. The Idaho Water Resource Board and the Idaho Department of Fish and Game (individually, “IWRB” and “IDFG”; collectively, “the Agencies”) protested the application as contrary to the “local public interest”¹ in their efforts to protect and recover several fish species listed as threatened or endangered under the Endangered Species Act (“ESA”). The Idaho Department of Water Resources (“IDWR”) ultimately issued an order (“*Final Order*”²) approving the permit with certain conditions intended to protect these local public interests. The Agencies filed a petition for judicial review of the *Final Order*, and have filed their opening and reply briefs in support of that petition.

Bird filed a cross-petition for judicial review of the *Final Order*, and requested that Condition Nos. 8-11 be removed from the permit. This brief responds to the arguments in *Bird’s Combined Opening Brief on Cross-Appeal and Response Brief* (“*Bird’s Brief*”) asserting that that Condition Nos. 8-11 are unlawful, unnecessary, unreasonable, overly broad, excessive, and/or not narrowly tailored to protect “the interest of concern.” *Bird’s Brief* at 11. The

¹ Idaho Code § 42-203A(5)(e).

² The full title of the *Final Order* is *Order on Exceptions; Final Order*.

Agencies' arguments in this brief are made solely for the limited purpose of responding to Bird's arguments in his cross-appeal. This brief is not intended to waive, concede, or limit any of the issues, positions, or arguments the Agencies have asserted in their own appeal, all of which are expressly reserved.

II. THE COURSE OF THE PROCEEDINGS.

The Agencies rely on the statement of the "The Course of the Proceedings" set forth on pages 8-13 of the *Opening Brief of Petitioners the Idaho Water Resource Board and the Idaho Department of Fish and Game* ("Agencies' Opening Brief"), and incorporate it herein by this reference. The Agencies supplement that statement by acknowledging that Bird filed his cross-appeal on July 2, 2020. R. 01627-23.³

The Agencies also assert that Bird's statement of the course of proceedings is incorrect insofar as it implies there was a conclusive determination that efforts to "reconnect" Big Timber Creek to the Lemhi River have restored the flows needed for fish passage by eliminating "dewatering" events in the lowest reach of Big Timber Creek. *Bird's Brief* at 5. The *Final Order* recognized that Big Timber Creek is not fully reconnected to the Lemhi River for purposes of fish passage. R. 01513-14. This recognition was based on un rebutted evidence

³ The agency record was filed in electronic form that is not organized in separate "volumes" and does not have numbered "lines." I.A.R. 35(e). Citations to the record in the Agencies' briefs, therefore, consist of "R." followed by the page number. All exhibits are cited using the form "Ex. [exhibit number] at [page number]." For the exhibits, the cited "page number" refers to the pagination within the exhibit itself (unless the exhibit is not paginated, in which case the page number refers to the page of the exhibit ".pdf" file).

adduced at the hearing showing that complete and partial dewatering events still occur in the lowest reach of Big Timber Creek, and that even if this reach is not completely dewatered, low flows can leave it functionally disconnected from the Lemhi River for purposes of fish passage. R. 01471-72, 01486-87.

III. THE FACTS OF THE CASE.

The Agencies rely on the statement of the “The Facts of the Case” set forth on pages 14-18 of the *Agencies’ Opening Brief*, and incorporate it herein by this reference.

ADDITIONAL ISSUES PRESENTED ON CROSS-APPEAL

The Agencies do not present any additional issues on cross-appeal. The Agencies reaffirm and reserve all of the issues, positions, assertions, and arguments in the *Agencies’ Opening Brief* and the *Reply Brief of Petitioners the Idaho Water Resource Board and the Idaho Department of Fish and Game* (“*Agencies’ Reply Brief*”).

ARGUMENT

Bird asserts that his application “should not be controversial” because it only seeks to appropriate “high flows” he already diverts and to which he is “legally entitled,” and which the Wild and Scenic Agreement reserved specifically for new developments such as the one Bird proposes. *Bird’s Brief* at 1-3. Bird further asserts the Agencies have used this case as a vehicle to raise “ESA issues” that are not implicated by his proposed development, and to “lay claim” to all unappropriated water in the Lemhi River Basin. *Id.*

These assertions are contradicted by the *Final Order* and the administrative record, which show that what Bird calls “the ESA issues” have been front and center in this case since day one.

The *Final Order* and the record also demonstrate that rather than “laying claim” to water, the Agencies merely seek to protect the local public interests in recovering the ESA-listed fish species in the Lemhi River Basin, and that this effort is crucial to protecting existing water uses and the local economy of the Lemhi River Basin from the potentially devastating effects of ESA enforcement actions by NOAA Fisheries. Denying or conditioning Bird’s application in order to protect these local public interests does not offend the Wild and Scenic Agreement.

All of Bird’s various constitutional and statutory challenges to the conditions that require flows of 18 cfs and 54 cfs in different reaches of Big Timber Creek (Condition Nos. 8 and 9) lack merit because IDWR has ample statutory and constitutional authority to impose local public interest conditions that limit Bird’s diversions under the proposed permit. Assuming *arguendo* that any of Bird’s challenges to Condition Nos. 8 and 9 had merit, it would only mean that Bird’s application must be denied in its entirety. These are the only conditions imposed to “protect the streamflow and habitat needed to recover ESA-listed species,” and the *Final Order* determined that if these local public interests are not protected the application must “be denied.” R. 01541.

Bird’s challenges to the gaging requirement of Condition No. 10 and the subordination benefits recognized by Condition No. 11 similarly lack merit. If the application is approved rather than denied, these and other conditions are both appropriate and essential, and IDWR had ample authority to include them in the proposed permit.⁴

⁴ The Agencies reaffirm and reserve all of the issues, positions, assertions, and arguments in the *Agencies’ Opening Brief* and the *Agencies’ Reply Brief*.

I. STANDARD OF REVIEW.

The Agencies rely on the “Standard of Review” set forth on pages 19-20 of the *Agencies’ Opening Brief*, and incorporate it herein by this reference.

II. THE LOCAL PUBLIC INTERESTS IN RECOVERING THE ESA-LISTED FISH SPECIES ARE THE “MAIN ISSUE” IN THIS CASE.

Bird asserts this case involves an application that “should not be controversial” because he is already “legally entitled” to divert the water he now seeks to appropriate, but the Agencies have used this case as a vehicle to “lay claim” to all unappropriated water in the Lemhi River Basin by raising “the ESA issues.” *Bird’s Brief* at 1-2. Bird asserts “the ESA issues” are simply a “distraction” from the Agencies’ alleged “legal position” that the local public interest “mandates the setting aside of all unappropriated water in the Lemhi River Basin,” which Bird asserts is “the main issue” in this case. *Bird’s Brief* at 2-3. These assertions mischaracterize the record.

Concerns over what Bird calls “the ESA issues,” *Bird’s Brief* at 2, were central to this case long before the Agencies filed protests. This was confirmed in a letter IDWR sent to Bird shortly after he filed his application. R. 00012-13. This letter expressly put Bird on notice that “[b]ecause of the ESA-listed species recovery efforts in the upper Salmon River basin, IDWR must determine on a case-by-case basis whether it is in the local public interest to authorize proposed water uses that would further deplete flow-limited stream reaches.” R. 00013.

IDWR’s letter explained that the upper Salmon River basin “is home to stocks of chinook salmon, sockeye salmon, steelhead trout, and bull trout, all of which are listed as threatened or

endangered under the [ESA].” R. 00012. The letter further explained that “[s]ince the early 1990s, local water users, conservation districts, and federal and state agencies have cooperated to implement conservation measure to protect and restore habitat for ESA-listed species.” *Id.* The letter explicated that “Idaho has been developing a long term conservation plan for the benefit of ESA-listed species in the Lemhi River basin,” that “[i]mproving conditions in flow-limited river reaches and streams is a fundamental component of the Lemhi plan,” and that “numerous state agencies . . . have committed and continue to commit significant resources toward this objective” under a number of different programs. *Id.*

The *Final Order*’s factual findings and conclusions confirmed that the local public interests in recovering the ESA-listed species lie at the heart of this case. The *Final Order* found that “[i]n the absence of a Section 6 Agreement, local water users are at risk of enforcement under the ESA,”⁵ that “[s]ignificant amounts of money and resources have been invested to increase streamflow in the Lemhi River Basin and to improve spawning and rearing habitat for ESA-listed species,” and that “[t]his investment . . . has been made to avoid ESA-based enforcement by the federal government against the State of Idaho or its citizens.” R. 01518. The *Final Order* determined that there are local public interests in “recover[ing]” the ESA-listed fish species and “protect[ing] the streamflow and habitat needed to recover ESA-listed species,” and that “provid[ing] local people with protection from incidental take liability under the ESA” is

⁵ Section 6 of the ESA authorizes cooperative conservation agreement with any State that establishes and maintains “an adequate and active program for the conservation of endangered species and threatened species.” 16 U.S.C. § 1535(c)(1); R. 01518.

integral to these local public interests. R. 01534, 01541. The *Final Order* determined that the local public interests in recovering the ESA-listed fish species “outweigh” whatever local public interests are associated with Bird’s proposed development, and that the local public interests in ESA recovery must be protected, even if that requires denying the application entirely. *Id.*

The evidentiary record the Agencies developed in this case fully supported these findings and conclusions. The record established that local water users and land owners in the Lemhi River Basin began taking voluntary ESA-related conservation actions in the 1990s. Nonetheless, in the year 2000 NOAA Fisheries threatened enforcement actions against Lemhi River Basin water users for violations of the ESA, including actions for penalties and injunctions. This precipitated a crisis for Lemhi River Basin water users, and led the State of Idaho to step in to assist the water users in their dealings with NOAA Fisheries. The State, Lemhi River Basin water users, and NOAA Fisheries began negotiations to develop a Section 6 Agreement that would include conservation measures to benefit the listed fish species, and provide local people with protection from ESA enforcement actions by NOAA Fisheries. In a series of “interim” conservation agreements executed while the parties negotiated an overall Section 6 Agreement, NOAA Fisheries agreed, as an exercise of its “enforcement discretion,” to not take legal actions against Lemhi River Basin water users if the interim conservation measures were implemented. *Agencies Opening Brief* at 14-16.

The draft Section 6 Agreement included numerous conservation and habitat strategies and actions that NOAA Fisheries supported, but ultimately the Section 6 negotiations broke down because NOAA Fisheries also demanded more instream flow in the Lemhi River and its

tributaries than local water users were willing to provide. That was in 2004, and since then Lemhi River Basin water users have had no formal protection from enforcement actions by NOAA Fisheries. The only protection has been the fact that NOAA Fisheries has exercised its discretion to continue withholding enforcement action, mainly because the habitat conservation and recovery efforts laid out in the draft Section 6 Agreement continue to be implemented and enhanced. These ongoing fish and habitat conservation efforts are voluntary and involve a number of local groups, but are spearheaded by the IWRB and IDFG, who often work jointly or cooperatively on projects to improve habitat and flow conditions (such as the Big Timber Creek “reconnect” projects). The IWRB and IDFG have invested millions of dollars in these efforts, which are intended in large measure to protect local people from ESA enforcement actions.

Agencies Opening Brief at 16-17.

The underlying ESA issues had not been resolved when Bird filed his application. Despite the efforts of the IWRB, IDFG, and others, population abundances of the ESA-listed fish species remain severely depressed, and these populations are at high risk of extirpation from the Lemhi River Basin. This is mainly because the Lemhi River Basin lacks the fish habitat necessary to support recovery objectives. Depleted stream flows are the main reason for the lack of suitable fish habitat. Recovery of the ESA listed species is still NOAA Fisheries’ objective, however, and the threat of ESA enforcement actions that would be devastating to the local economy of the Lemhi River Basin remains “very real.” *Agencies Opening Brief* at 17-18.

In sum, the record conclusively disproves Bird’s argument that “the ESA issues” are simply a “distraction” injected into a case involving a non-controversial application. *Bird’s Brief*

at 1-3. Contrary to Bird's assertion, the local public interests in recovering the ESA-listed fish species have always been "the main issue" in this case, *Bird's Brief* at 3, and IDWR has "an affirmative *duty* to assess and protect" the local public interests in recovering the ESA-listed fish species. *Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 441, 448 (1985) (italics in original).⁶

III. THE RECORD UNDERMINES BIRD'S ASSERTIONS THAT HIS "PHYSICAL" AND/OR "LEGAL" DIVERSIONS "WILL NOT CHANGE."

Bird argues his application "should not be controversial" because he is "legally entitled" to the "high flows" he already diverts, and thus his physical diversions "will not change" if the application is approved. *Bird's Brief* at 1. These assertions are contrary to the record and the Basin 74 General Provision regarding "high flow" uses, for the reasons explained on pages 28-32 of the *Agencies' Reply Brief*. Rather than repeating that discussion here, the Agencies incorporate it by reference, and provide this brief summary.

The *Final Order* did not find that Bird's physical diversions "will not change" if the application is approved, *Bird's Brief* at 1, and the record does not support such a conclusion. Bird had the burden of proving that his physical diversions "will not change," but failed to do so. Bird did not offer any data, analyses, reports, or expert testimony to support this assertion, and Bird's own testimony that he intends to divert both permitted water and "high flows" undermines the credibility of his assertion that his physical diversions "will not change."

Moreover, whatever "legal entitlement" Bird has to use "high flows" under the Basin 74 General Provisions is limited to the 23 acres of the 320-acre place of use that are covered by

⁶ The parenthetical is omitted in subsequent citations to *Shokal*.

existing decreed water rights. In other words, Bird's lawful diversions would increase even if his unauthorized physical diversions do not, and IDWR has an "affirmative *duty*" to protect the local public interests in ESA recovery from the adverse effects of any increase in Bird's lawful diversions. *Shokal*, 109 Idaho at 337, 707 P.2d at 448; *see also* R. 01462 ("Just because an applicant has already been negatively impacting the local public interests for years should not result in an automatic pass to continue such impacts.").

IV. THE AGENCIES' ARGUMENTS DO NOT "LAY CLAIM" TO WATER.

The record also disproves Bird's contentions that the Agencies are trying to "lay claim" to all unappropriated water in the Lemhi River Basin, or have taken the "legal position" that all this water should be "set aside." *Bird's Brief* at 2-3. The Agencies filed "protests" in order to protect the local public interests in recovering the ESA-listed fish species in the Lemhi River Basin. R. 00044-49, 01509. "Protests" are not "applications," however, and do not "lay claim" to unappropriated water. Idaho Code § 42-203A.

Further, and contrary to Bird's assertions, the Agencies have never taken the "legal position" that "all unappropriated water in the Lemhi River Basin" should be "set aside." *Bird's Brief* at 3. This contention mischaracterizes the Agencies' assertion that, from an ESA recovery perspective, there is no water available for new water rights in the Lemhi River Basin. This is simply a statement of technical fact that, as discussed below, is fully supported by extensive and un rebutted evidence in the record—including, contrary to Bird's assertions, "technical" evidence and quantitative analyses. *Bird's Brief* at 34-36.

Because it was clear long before the hearing that the local public interest in recovering the ESA-listed fish species would be an issue in this case, the Agencies submitted extensive evidence of NOAA Fisheries' recovery goals for the Lemhi River Basin, and the streamflow and habitat needed to achieve these recovery goals. This evidence included an expert report (Ex. 201), excerpts of NOAA Fisheries' *ESA Recovery Plan* (Ex. 204) and the Idaho Office of Species Conservation's *IRA* (Ex. 203), and the testimony of IDFG's expert witness. *Agencies Opening Brief* at 22-23; *Agencies' Reply Brief* at 11-12, 18-22.

This evidentiary record established what NOAA Fisheries' recovery goals are for the ESA-listed fish species in the Lemhi River Basin, the ESA recovery status of the Lemhi River Basin's populations of the listed fish species, the limiting factors that are impeding recovery, and the changes and actions needed to meet recovery goals, or at least make incremental progress towards them. *Agencies' Opening Brief* at 15-17, 22, 25, 27-30, 33; *Agencies' Reply Brief* at 11-12, 18-24. This evidence conclusively demonstrated that, from an ESA recovery perspective, there is no water available in the Lemhi River Basin for new water rights. As IDFG's expert witness stated in summarizing this evidence:

Okay. I guess I'll start by saying basinwide, based on the most recent and rigorous research, that we don't have the [habitat] capacity to support recovery. It's that low. It's severely low. The basin is flow limited, and flow relates directly to habitat capacity. So our data is suggesting that we need to do something to increase that capacity. Certainly approval of any new water rights is going to negatively affect or drag that number down.

Tr. Vol. II, p.440, ll.8-16; *see also* Ex. 201 at 16 (stating that if the application were approved, the resulting diversions "would have adverse effects on the capacity and quality of critical habitat

for ESA-listed fish species,” and “would tend to undermine existing and planned efforts to provide sufficient flows to support recovery and de-listing”).

In short, the evidence demonstrated that from a “recovery” perspective, the Lemhi River Basin is in a deep “hole,” and the first rule for getting out of a hole is to “stop digging.”⁷ Approving new irrigation water rights in the Lemhi River Basin (even with conditions that limit diversions) simply digs the ESA hole deeper, which does not protect recovery of the ESA-listed fish species but rather puts recovery even further out of reach. This conclusion would be the same even under the non-technical definition of “recovery.” *See, e.g.*, Black’s Law Dictionary at 1302 (“recovery. 1. The regaining or restoration of something lost or taken away”) (8th ed. 2004).

Bird mischaracterizes these unrebutted statements of technical fact, and descends into hyperbole, with assertions that the Agencies are trying to “lay claim” to all unappropriated water in the Lemhi River Basin and have taken a “legal position” that “all unappropriated water in the Lemhi River Basin” should be “set aside.” *Bird’s Brief* at 2-3. What the Agencies have actually

⁷ “The first law of holes, or the law of holes, is an adage which states: ‘if you find yourself in a hole, stop digging.’ Digging a hole makes it deeper and therefore harder to get out of, which is used as a metaphor that when in an untenable position, it is best to stop carrying on and exacerbating the situation.” https://en.wikipedia.org/wiki/Law_of_holes. As a federal court stated in a case dealing with water quality standards:

. . . the answer is that a small contribution to an impairment is still a contribution. Someone once said that a person in a hole should stop digging. It is good advice, and it applies as well to a lake with excessive nutrients. It makes sense to stop putting in more water with excessive nutrients.

Fla. Wildlife Fed’n, Inc. v. Jackson, 853 F. Supp. 2d 1138, 1170 (N.D. Fla. 2012).

argued is that new irrigation water rights should not be issued at this time, because as the *Final Order* recognized, most of the Lemhi River Basin's water supply is already appropriated for irrigation purposes, R. 01520, and "irrigation of agricultural lands supports the local economy and is critical for the survival of rural communities like Leadore." R. 01534; *see Agencies' Reply Brief* at 8, 13, 21-22 (distinguishing the local public interests in "existing" and "new" irrigation water rights). Further, the Agencies recognize that the local public interests in new uses other than irrigation, such as DCMI uses, may outweigh the local public interests in ESA recovery. R. 01265 n.12.⁸

While Bird tries to frame "recovery" as benefitting fish at the expense of the local people and the local economy, the *Final Order* and the administrative record confirm that the local public interests in recovering the ESA-listed species and in protecting existing water uses in the Lemhi River Basin are aligned rather than opposed. R. 01518-20, 01534, 01541; *Agencies' Reply Brief* at 8, 13-14, 18 n.20, 21-22. The local public interests in protecting existing water uses and the existing agricultural economy of the Lemhi River Basin far outweighs any local public interests in approving new irrigation water rights. Even Bird agreed that existing water rights are "more important . . . without a doubt . . ." Tr., Vol. I, p.139, ll.8-13.

⁸ As discussed in the *Agencies Reply Brief*, the Agencies recognize that IDWR has discretion to balance and weigh the local public interests, and to approve the application with conditions rather than deny it. In doing so, however, IDWR must rely on record evidence of what IDWR calls "the characteristics of ESA recovery," *Respondent IDWR's Response Brief* at 36, in order to fulfill the "affirmative duty to assess and protect" the local public interests in recovering the ESA-listed species. *Shokal*, 109 Idaho at 337, 707 P.2d at 448; *Agencies' Reply Brief* at 9, 11-15, 17. The Agencies reserve their arguments that IDWR did not fulfill this affirmative duty. *Id.*

V. BIRD MISCHARACTERIZES THE WILD AND SCENIC AGREEMENT.

Bird asserts his application is intended to develop a portion of the “preserved water negotiated for by the State of Idaho and the IWRB” in the Wild and Scenic Agreement, but “those negotiations will be wasted” if the Agencies’ arguments are accepted, because they result in “[e]liminating the appropriation of water specifically reserved under the Wild and Scenic Agreement.” *Bird’s Brief* at 2, 30-31. These assertions mischaracterize the Wild and Scenic Agreement, and the Agencies’ arguments.

Contrary to Bird’s arguments, the Wild and Scenic Agreement did not contemplate “preserving” water but rather subordinating water rights held by the United States, and the subordination provision are not set forth in the Agreement but rather in the partial decrees issued pursuant to the Agreement. Ex. IDWR 14 at 8; Ex. IDWR 13 at 4-7. While the subordination provisions provided opportunities for future development, the Agreement and the partial decrees did not contemplate or guarantee that future applications would simply be mechanically approved until the subordinated water was used up. To the contrary, the Agreement specifically stated that “[t]his Stipulation does not affect the right of any party to protest any application for permit to appropriate water filed with IDWR.” Ex. IDWR 14 at 16.

Further, the Wild and Scenic Agreement does not apply exclusively in the Lemhi River Basin; rather it encompasses the entire Upper Salmon River Basin. Ex. IDWR 14 at 4. Even Bird acknowledged this when the Hearing Officer pointed it out during the hearing. Tr., Vol. II, p.561, l.24—p.562, l.2. Thus, even if it is assumed, *arguendo*, that Bird is correct in claiming the Agencies seek to “set aside” all remaining water in the Lemhi River Basin, *Bird’s Brief* at

3—and this claim is not correct, for reasons previously discussed—it would not result in “[e]liminating the appropriation of water specifically reserved under the Wild and Scenic Agreement,” nor would it mean the Wild and Scenic Agreement negotiations were “wasted.” *Bird’s Brief* at 30-31. Indeed, when the Wild and Scenic Agreement was being negotiated and finalized, the State and Lemhi River Basin water users generally anticipated the “high flow” claims would be decreed, and there would be little if any unappropriated water available for future development in the Lemhi River Basin. *See, e.g.*, Ex. 189 at 2-4 (discussing “high flow” claims and the *Lemhi Decree*).⁹

Further, the Wild and Scenic Agreement was not intended to address or resolve the contentious ESA questions in the Lemhi River Basin. These matters were the subject of separate negotiations going on at the same time to develop the “interim” conservation agreements, and a comprehensive Section 6 Agreement. Tr., Vol. II, pp.348-94. Moreover, the Wild and Scenic Agreement stated that it did not affect or limit the “statutory or regulatory authority” of the United States or the State of Idaho. Ex. IDWR 14 at 17. The concurrent ESA negotiations in the Lemhi River Basin were taking place under these very authorities.

In sum, Bird’s reliance on the Wild and Scenic Agreement in this proceeding is misplaced. Bird’s assertions that the Agencies’ positions are contrary to the Wild and Scenic Agreement are based on mischaracterizations of the Agreement and the Agencies’ arguments.

⁹ Several years after the Wild and Scenic Agreement was finalized, however, this Court determined the doctrine of *res judicata* barred the “high flow” claims. Ex. 189.

VI. THE AGENCIES WERE NOT REQUIRED TO FILE WATER RIGHT APPLICATIONS.

There is also no merit in Bird's argument that the Agencies were required to "participate in the minimum stream flow process described in the Idaho Code" rather than protesting his application. *Bird's Brief* at 31. Nothing in Title 42 of the Idaho Code provides that minimum stream flow water rights are the sole or exclusive means to protect public interests in fish and fish habitat. To the contrary, as *Shokal* stated: "Clearly, the legislature in § 42-203A must have intended the public interest on the local scale to include the public interest elements listed in § 42-1501: 'fish and wildlife habitat, aquatic life'" 109 Idaho at 338, 707 P.2d at 449.¹⁰ Further, the decision of whether to seek a minimum stream flow water right is statutorily committed entirely to the sole discretion of the IWRB. Idaho Code § 42-1504. For these reasons, Bird's reliance on the Hearing Officer's view that the Agencies "'should file an application for a minimum stream flow as contemplated by Idaho Code § 42-1503'" rather filing protests, *Bird's Brief* at 31 (quoting *Amended Preliminary Order*), is misplaced. The Hearing

¹⁰ The "Statement of Purpose" for the 2003 legislation to which Bird points (HB284), *Bird's Brief* at 13, 19, shows that the legislation was intended to confirm *Shokal's* interpretation of the "local public interest." The Senate and House committee minutes for this legislation also specifically confirm that "fish and wildlife" values would remain part of the "local public interest" inquiry. A copy of the Statement of Purpose, and excerpts of the committee minutes, are included in Attachment A. The Statement of Purpose and the committee minutes are available for viewing on the Idaho Legislature's website. (<https://legislature.idaho.gov/sessioninfo/2003/legislation/H0284/#sop>; <https://legislature.idaho.gov/sessioninfo/2003/standingcommittees/>). This Court may take judicial notice of the Statement of Purpose and the committee minutes pursuant to I.R.E. 201.

Officer's view on this point was not only irrelevant "dicta," R. 01515, but addressed a question that falls under the IWRB's authority and discretion alone.

Bird's argument is also based on a mischaracterization of the nature and scope of the local public interests in recovering the ESA-listed fish species in the Lemhi River Basin. Bird asserts that these local public interests are limited to the same values that minimum stream flow water rights are intended to protect, specifically, "fish and wildlife habitat" and "aquatic life." Idaho Code § 42-1501; *see Bird's Brief* at 20 ("fish and wildlife habitat and fish passage"). The local public interests in recovering the ESA-listed fish species, however, are not simply interests in protecting fish and fish habitat.

As the *Final Order* recognized, "local water users are at risk of enforcement under the ESA" and significant amounts of money and resources have been invested in recovery efforts "to avoid ESA-based enforcement by the federal government against the State of Idaho or its citizens." R. 01518. "It is in the local public interest . . . to provide local people with protection from incidental take liability under the ESA." R. 01534. Existing irrigation uses are "critical" to the local economy of the Lemhi River Basin, *id.*, and protecting ESA recovery is crucial to protecting existing water rights, local water users, and the local economy from destabilizing and potentially ruinous ESA enforcement actions. R. 01518; Tr. Vol. II, p.633, l.17—p.634, l.6; *id.*, p.705, ll.11-13; *id.*, p.707, ll.2-4. These public interests are beyond the scope of the purposes of minimum stream flow water rights as set forth in Idaho Code § 42-1501. Further, minimum stream flow water rights are strictly limited to a "minimum flow" as opposed to the "most desirable flow." Idaho Code § 42-1503. Meeting or even making progress towards ESA

recovery goals, however, requires much more fish habitat than a “minimum flow” can provide, as the factual findings of the *Final Order* confirm and the State Water Plan explicitly recognizes. R. 01518-20; Ex. 21 at 25-27, 71-74; *see also generally Agencies’ Opening Brief* at 13-16, 22-30, 32-33; *Agencies’ Reply Brief* at 7, 11-13, 18-24.

VII. BIRD’S CHALLENGES TO CONDITION NOS. 8 AND 9 LACK MERIT, AND EVEN IF CREDITED WOULD REQUIRE THAT THE APPLICATION BE DENIED.

Condition Nos. 8 and 9 prohibit Bird from diverting under the permit unless there is 18 cfs of flow in Reach 1 and 54 cfs in Reach 5. R. 01509-10, 01534-36, 01543.¹¹ Bird challenges Condition Nos. 8 and 9 on various constitutional and statutory grounds. *Bird’s Brief* at 13-24. These arguments are without merit for reasons discussed in the following sections of this brief.

As an initial matter, however, Bird fails to acknowledge that even if any of his constitutional or statutory challenges to Condition Nos. 8 and 9 were to succeed, it would only mean that Bird’s application must be denied in its entirety. This follows from the *Final Order*’s weighing of the local public interests implicated in this case. The *Final Order* expressly determined: (1) that the local public interests in recovering the ESA-listed fish species and protecting the streamflow and habitat needed for this purpose “outweigh” whatever local public interests there may be in Bird’s proposed development; and (2) that unless the local public interests in ESA recovery are protected, Bird’s application must “be denied.” R. 01541; *see also*

¹¹ “Reach 1” is the most downstream reach of Big Timber Creek; “Reach 5” is the reach that includes Bird’s point of diversion. R. 01521.

01456 (“If the local public interest conditions were removed or significantly changed, however, the application for permit would have to be denied.”).

Condition Nos. 8 and 9 are the only conditions imposed to “protect the streamflow and habitat needed to recover ESA-listed species.” R. 01541. Thus, under the plain language of the *Final Order*, Bird’s application must “be denied” if Condition Nos. 8 and 9 are removed or deemed invalid. *See Shokal*, 109 Idaho at 337, 707 P.2d at 448 (holding that under Idaho Code § 42-203A(5), IDWR has “the affirmative *duty* to assess and protect” the local public interest).

Bird’s challenges to Condition Nos. 8 and 9 ignore this inescapable conclusion. Bird does not argue that the *Final Order* erred in concluding that the local public interests in recovering the ESA-listed species “outweigh” whatever local public interests are associated with his proposed development, and that his application must “be denied” if the local public interests in recovering the ESA-listed fish species are not protected. R. 01541. Rather, Bird’s arguments are devoted entirely to explaining *why* he believes Condition Nos. 8 and 9 are unlawful. *Bird’s Brief* at 13-24.¹² Thus, even if any of Bird’s challenges to Conditions Nos. 8 and 9 were deemed to have merit—and they do not, for reasons discussed below—this would simply mean that Bird’s application must be denied.

¹² In the subsequent portion of his brief responding to the Agencies’ appeal, Bird makes a conclusory assertion that his proposed development will not have enough impact on anadromous fish recovery to outweigh the benefits of his proposed development. *Bird’s Brief* at 33. This assertion is contrary to the record and the Basin 74 General Provisions, for reasons previously discussed. *Supra* Part III; *Agencies’ Reply Brief* at 28-33.

VIII. CONDITION NOS. 8 AND 9 ARE CONSTITUTIONAL.

Bird argues Conditions Nos. 8 and 9 are “unconstitutional” because they “sidestep” Section 3 of Article XV of the Idaho Constitution (“Section 3”). *Bird’s Brief* at 14-17. Specifically, Bird argues Condition Nos. 8 and 9 are contrary to: (1) “the simple guarantee that ‘[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied’”; and (2) the principle that “[p]riority of appropriation shall give the better right between those using the water.” *Bird’s Brief* at 15-16.¹³ This argument is based primarily on this Court’s decision in *N. Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 376 P.3d 722 (2016) (“*North Snake*”), which Bird argues is “of particular importance” to this case. *Bird’s Brief* at 14. This case is distinguishable from *North Snake*, however, and Condition Nos. 8 and 9 are constitutional.

a. This Case Does Not Involve a “Race to Appropriate.”

As Bird recognizes, *North Snake* involved a “race to appropriate” between two competing applications for the same water: one filed by several ground water districts (“Districts”), and a second one filed later by Rangen. *Bird’s Brief* at 16 (quoting the *Wildman Decision*). This Court determined the Director’s denial of the Districts’ application “appear[ed] to penalize the Districts for being first in time,” in contravention of the fundamental principle

¹³ These pages in *Bird’s Brief* quote this Court’s decision in the judicial review proceedings underlying *N. Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 376 P.3d 722 (2016). Bird refers to this Court’s decision in that case as the “*Wildman Decision*.” *Bird’s Brief* at 14. In order to avoid potential confusion, the Agencies will use Bird’s terminology.

that “first in time is first in right.” *Wildman Decision* at 12; *North Snake*, 160 Idaho at 524, 376 P.3d at 728. That holding is not relevant to the issues in this case, however, because this case does not involve a “race to appropriate” between competing applications. *Bird’s Brief* at 16 (quoting *Wildman Decision*). The only application at issue in this case is Bird’s, and for that reason this case does not implicate the constitutional principle that “[p]riority of appropriation shall give the better right as between those using the water.” Idaho Const. Art. XV § 3.

Bird nonetheless attempts to create a “race to appropriate,” and thereby shoehorn this case into the *North Snake* analysis, by arguing the Agencies are attempting to appropriate water without filing permit applications. See *Bird’s Brief* at 17 (referring to “the Agencies who have not filed permit applications”). Bird asserts the Agencies were required to file minimum stream flow permit applications pursuant to Idaho Code § 42-1503, but have made an “end-run” around this requirement by filing protests rather than applications. See, e.g., *Bird’s Brief* at 2, 19, 31, 40. These assertions lack merit for reasons previously discussed, *supra* Part VI, and do not support Bird’s attempt to transform this case into a “race to appropriate.” *Bird’s Brief* at 16.

b. The Local Public Interests in Recovering the ESA-Listed Fish Species in the Lemhi River Basin Are “Local Public Interests” Within the Meaning of Idaho Code § 42-202B(3).

North Snake’s holdings regarding the “local public interest” also distinguish that case from this one. In *North Snake*, this Court reversed the Director’s local public interest determinations because they were based on considerations that went “beyond the scope” of the statutory definition of the “local public interest.” *Wildman Decision* at 11-12. The Idaho Supreme Court affirmed this statutory holding. See *North Snake*, 160 Idaho at 525, 376 P.3d at

729 (“The Director’s interpretation of ‘local public interest’ in this case is entitled to no deference because it is inconsistent with the plain language of the statutory definition”).

In this case the local public interests expressly identified in the *Final Order* include local public interests in “recover[ing]” the ESA-listed fish species in the Lemhi River Basin and “protect[ing] the streamflow and habitat needed to recover ESA-listed species,” which include the local public interests in “provid[ing] local people with protection” from liability under the ESA. R. 01534, 01541. These interests clearly fall well within the plain language of the statutory definition of “local public interest.” *See* Idaho Code § 42-202B(3) (“‘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 resource.”). Bird does not challenge these determinations of “the interest of concern,” *Bird’s Brief* at 11, 33, and his attempts to ignore these expressly recognized local public interests or re-define them in more limited terms lack merit for reason discussed above. *Supra* Part II; *see also generally Agencies’ Opening Brief* at 19-23; *Agencies’ Reply Brief* at 6-15.

c. Condition Nos. 8 and 9 Are a Valid Exercise of Constitutional Authority.

While Bird’s reliance on *North Snake* is misplaced, his arguments nonetheless explicitly assert that Condition Nos. 8 and 9 are unconstitutional because they deny Bird the right to appropriate unappropriated water. *See, e.g., Bird’s Brief* at 16 (“Bird seeks unappropriated water under 74-16187.”). These arguments lack merit.

It is undisputed that Condition Nos. 8 and 9 are an exercise of the Director’s authority (and duty) under Idaho Code § 42-203A(5) to protect the local public interest. This authority is

not limited to denying an application; the statute also authorizes the Director to approve an application “for a smaller quantity than applied for” in order to protect the local public interest:

In all applications whether protested or not protested, where the proposed use is such: . . . that it will conflict with the local public interest as defined in section 42-202B, Idaho Code . . . the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

Idaho Code § 42-203A(5) (underlining added).

In actual effect, Condition Nos. 8 and 9 limit Bird’s diversions to “a smaller quantity than applied for,” as Bird implicitly acknowledges. *See Bird’s Brief* at 19 (recognizing that Condition Nos. 8 and 9 “make water unavailable that would otherwise be available”). By prohibiting diversions at times when Bird would otherwise be allowed to divert under the priority of the permit, Condition Nos. 8 and 9 permissibly limit Bird’s diversions to “a smaller quantity of water” than he would otherwise have been able to divert, as expressly authorized by Idaho Code § 42-203A(5).

Like any other statute, Idaho Code § 42-203A is presumed to be constitutional. *See Walsh v. Swapp Law, PLLC*, 166 Idaho 629, 462 P.3d 607, 619 (2020) (“It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional.”) (citation omitted). Bird has not cited any authority for his argument that it is unconstitutional for the Director to deny an application or approve it “for a smaller quantity than applied for” in order to protect the local public interest.

Moreover, *North Snake* undermines Bird’s argument. It is true, as Bird pointed out, that in *North Snake* this Court recognized the “‘long-standing constitutional tenet’” that the right to divert and appropriate the unappropriated waters of a natural stream “‘shall never be denied,’” *Bird’s Brief* at 15; (quoting *Wildman Decision* at 5). In the very next sentence of that decision, however, this Court also went on to recognize that “the Director has the discretion to deny an otherwise complete application to appropriate unappropriated water,” although this discretion “is not unbridled.” *Wildman Decision* at 8. The Idaho Supreme Court also recognized that “Idaho law allows the Director to deny an application to appropriate water where the proposed use ‘will conflict with the local public interest’” as defined in Idaho Code § 42-202B(3). *North Snake*, 160 Idaho at 524, 376 P.3d at 728 (quoting Idaho Code § 42-203A(5)(e)).

These holdings are consistent with the Idaho Constitution. The local public interest provision of Idaho Code § 42-203A(5) is a direct implementation of the Legislature’s authority under Section 7 of Article XV of the Idaho Constitution (“Section 7”). Section 7 was adopted in 1964 “in response to a publicly recognized need for the state to maintain greater control over its water resources.” *Idaho Power Co. v. State*, 104 Idaho 570, 571, 661 P.2d 736, 737 (1983). Section 7 provides, in relevant part, that the IWRB “shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest. The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law.” Idaho Const. Art. XV § 7.¹⁴ This authority applies to “all

¹⁴ The IWRB is the “State Water Resources Agency” authorized by Section 7. Idaho Code § 42-1732.

unappropriated water resources and waterways of this state[.]” Idaho Code § 42-1734A(1).

In 1978, the Legislature passed a concurrent resolution that amended (and sometimes rejected) policies that had been included in the IWRB’s initial State Water Plan. *Idaho Power Co.*, 104 Idaho at 572, 661 P.2d at 738; 1978 Idaho Sess. Laws 1003-13. Policy 1 of the IWRB’s State Water Plan had called for amending Idaho Code § 42-203A to require consideration of “the public interest . . . as identified by the [IWRB’s] State Water Plan.” 1978 Idaho Sess. Laws 1004. The Legislature narrowed this Policy so that it only called for amending Idaho Code § 42-203A to require consideration of “the local public interest as defined by statute.” *Id.*¹⁵ The Legislature added the “local public interest” criterion to Idaho Code § 42-203A during the same legislative session. 1978 Idaho Sess. Laws 768; *Bird’s Brief* at 12.¹⁶

Thus, there is no merit in Bird’s constitutional challenges to Condition Nos. 8 and 9. The mere fact that the Director approved Bird’s application with conditions that limit Bird’s diversions in order to protect the local public interests in recovering the ESA-listed fish species does not render Condition Nos. 8 and 9 unconstitutional.

¹⁵ The Idaho Supreme Court held in 1983 that Section 7 as originally adopted did not authorize the Legislature to amend or reject the IWRB’s State Water Plan. *Idaho Power Co.*, 104 Idaho at 573, 661 P.2d at 739. Section 7 was amended the following year to provide the Legislature with this authority. 1984 Idaho Sess. Laws 689-90.

¹⁶ Copies of the cited portions of the 1978 Idaho Session Laws are included in Attachment B.

IX. CONDITION NOS. 8 AND 9 DO NOT VIOLATE THE PERMITTING STATUTES OF TITLE 42.

Bird asserts Condition Nos. 8 and 9 effectively create minimum stream flow water rights, in violation of Chapter 15 of Title 42 of the Idaho Code (“Chapter 15”) and Idaho Code § 42-203A. *Bird’s Brief* at 18. Bird argues that Chapter 15 is “the *only* mechanism available for appropriation of minimum stream flow water rights” in Idaho, and that Idaho Code § 42-203A(5) prohibits the Director from “impliedly” granting a minimum stream flow water right through conditions imposed to protect the local public interest. *Id.* at 18-19 (italics in original).

a. Condition Nos. 8 and 9 Permissibly Limit Bird’s Diversions to Protect the Local Public Interests in Recovering the ESA-listed Fish Species.

Bird’s argument ignores the fact that, as previously discussed, Idaho Code § 42-203A(5) expressly authorizes the Director to approve a permit “for a smaller quantity of water than applied for” if necessary to protect the local public interest. Idaho Code § 42-203A(5). This is exactly what Condition Nos. 8 and 9 accomplish, by prohibiting diversions at times when Bird would otherwise be allowed to divert under the priority of the permit. *See Bird’s Brief* at 19 (recognizing that Condition Nos. 8 and 9 “make water unavailable that would otherwise be available”). Condition Nos. 8 and 9 protect the local public interest by limiting Bird’s diversions to “a smaller quantity of water than applied for,” which is expressly authorized by Idaho Code § 42-203A(5).

Bird overreaches in arguing that Condition Nos. 8 and 9 are indistinguishable from minimum stream flow water rights. *See Bird’s Brief* at 22 (“function precisely like an IWRB minimum stream flow water right”). Contrary to Bird’s argument, Condition Nos. 8 and 9 do not

“lay claim” to unappropriated water in the sense that the IWRB does when filing a permit application under Idaho Code § 42-1503. *Bird’s Brief* at 19. Bird is also incorrect in asserting Condition Nos. 8 and 9 are the same as minimum stream flow water rights because they are “for the benefit of an entity” such as the IWRB or the IDFG. *Id.* at 20. Condition Nos. 8 and 9 are intended to benefit local public interests in the Lemhi River Basin, R. 01535-36, not the Agencies. Finally, Bird’s assertion that Condition Nos. 8 and 9 were imposed for the same “specific purpose” that minimum stream flow water rights are established—“fish habitat and the fish itself”—mischaracterizes the local public interests that Condition Nos. 8 and 9 are intended to protect. As discussed above, the local public interests in recovering the ESA-listed fish species are not simply interests in protecting fish and fish habitat. Protecting recovery of the ESA-listed species is also necessary protect local water users and the local economy from ESA enforcement actions by NOAA Fisheries. These are interests that go far beyond the scope of Chapter 15, and protecting these interests requires much more than establishing minimum stream flow water rights. *Supra* Part VI.

b. Bird’s Interpretation of Idaho Code § 42-203A(5) Nullifies its Express Statutory Language.

Bird’s argument that Condition Nos. 8 and 9 impermissibly create “minimum stream flow water rights” threatens to nullify the express authorization to protect the local public interest by either denying an application entirely, or by approving it permit “for a smaller quantity of water than applied for.” Idaho Code § 42-203A(5). Denying an application entirely, or limiting a permit to “a smaller quantity of water than applied for” necessarily has the effect of imposing a

“bypass” or “minimum” flow, because such a limitation requires the applicant to allow some or all of the applied-for water to bypass the point of diversion and remain in the stream.

It is only a small leap to argue, as Bird has here, that denying an application or limiting diversions to “a smaller quantity” necessarily amounts to imposing a “minimum flow water right.” Such an argument, if accepted, would impermissibly reduce the express statutory authority to protect the local public interest by denying an application or approving it “for a smaller quantity” to ineffectual surplus language. *See Potlatch Corp. v. United States*, 134 Idaho 912, 915, 12 P.3d 1256, 1259 (2000) (“A fundamental principle of statutory construction is that a provision should not be construed to make surplusage of provisions included within the act.”). Bird’s argument would effectively prohibit the Director from exercising authority to protect the local public interest that was expressly granted by the Legislature.

X. CONDITION NOS. 8 AND 9 ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.¹⁷

Bird argues that Condition Nos. 8 and 9 are not reasonable and not based on substantial evidence, for two reasons: (1) the Agencies asserted Bird’s application should be denied rather

¹⁷ Nothing in this section is intended to waive any of the Agencies’ positions and arguments asserted in their appeal that, in order to fulfill the “affirmative *duty* to assess and protect” the local public interests in recovering the ESA-listed fish species in the Lemhi River Basin, *Shokal*, 109 Idaho at 339, 707 P.2d at 450, IDWR was required to deny the application; or approve it with the conditions of the *Amended Preliminary Order*, as clarified and supplemented by the additional conditions requested in the Agencies’ “Exceptions.” The Agencies expressly reserve all of their position and arguments on these questions, including but limited to the questions of discretion, substantial evidence, and the USBR Study.

than approved with conditions; and (2) there are allegedly “technical issues” with the 54 cfs flow required in Reach 5. *Bird’s Brief* at 23-25.

a. IDWR has Discretionary Authority to Approve an Application With Conditions Even if Denial Is Requested.

Bird asserts it was “surprising” that the application was approved with conditions, because the Agencies requested that it be denied entirely. *Bird’s Brief* at 23. Bird also takes issue with the Hearing Officer allegedly “comb[ing] through the record to find a technical basis for [Condition Nos. 8 and 9] even though they were never requested or advocated for by the Agencies.” *Id.* Bird therefore asserts that approving the application with Condition Nos. 8 and 9 was not “a reasonable exercise of discretion.” *Id.*

This argument incorrectly assumes that the only permissible outcome of an administrative proceeding on a protested permit application are those the parties expressly requested. There is no such requirement, however, in Idaho Code § 42-203A, in the Idaho Administrative Procedure Act, or in IDWR’s Rules of Procedure. To the contrary, Idaho Code § 42-203A(5) expressly authorizes the Director to make the determination of whether to “reject” an application, approve it “for a smaller quantity than applied for,” or approve the application with conditions. This determination is committed to the Director’s “sound discretion.” *Shokal*, 109 Idaho at 339, 707 P.2d at 450.

Moreover, IDWR’s Rules of Procedure specifically provide that non-attorney Hearing Officers “should ordinarily be persons with technical expertise or experience in issues before the agency,” IDAPA 37.01.01.410, and that “[t]he agency’s experience, technical competence and

specialized knowledge may be used in evaluation of evidence.” *Id.* 37.01.01.600. Further, the Hearing Officer is not limited to considering evidence submitted by the parties. The Hearing Officer may take “Official Notice” of evidence outside that submitted by the parties, *id.* 37.01.01.602, and may consider evidence submitted by “Public Witnesses” who are not formal parties to the contested case. *Id.* 37.01.01.355. These rules clearly contemplate the Hearing Officer has broad discretion to review the evidence, and to reach decisions that resolve the case based on the Hearing Officer’s evaluation of the evidence, even if that leads to a decision that differs from the specific outcomes advocated by the parties.

Thus, the mere fact that the Hearing Officer and the Director approved the application with conditions rather than denying it as requested by the Agencies, in and of itself, does not necessarily constitute an abuse of discretion. *Agencies’ Reply Brief* at 8-9, 15-17. Similarly, the mere fact that the Hearing Officer approved the application with conditions rather than denying it does not, in and of itself, mean the record lacked “substantial evidence” for the conditions. *Bird’s Brief* at 23.¹⁸ The evidence upon which the Hearing Officer and the Director relied was no less “substantial” simply because they used it to approve the application with conditions rather than deny the application entirely. *See North Snake*, 160 Idaho at 522, 376 P.3d at 726 (“Substantial evidence is ‘relevant evidence that a reasonable mind might accept to support a conclusion.’”) (internal citation omitted).

¹⁸ The Agencies reserve all their arguments and positions as to whether approving Bird’s application with only the “bypass flow” conditions was supported by substantial evidence in the record as a whole. *Agencies’ Reply Brief* at 15-28

b. Bird's Unsupported "Technical" Arguments Should Be Disregarded.

Bird argues "there are technical issues" with one of "recommended flow rates" in the USBR Study. *Bird's Brief* at 23-24 (quoting the *Final Order*). Specifically, Bird asserts the USBR Study's determination that 54 cfs is needed for adult fish passage in Reach 5 is "suspect, and therefore unreliable," and "it was not reasonable to rely upon this amount" for purposes of formulating Condition Nos. 8 and 9. *Id.* at 24. These assertions lack support in the record.

The *Final Order* determined the USBR Study is "scientific evidence" of the flow rates necessary to maintain anadromous fishery values in various reaches of Big Timber Creek. R. 01509.¹⁹ Further, Bird concedes that his challenge to the USBR Study's 54 cfs flow determination for Reach 5 raises "technical issues." *Bird' Brief* at 23. Bird did not submit an expert report or call an expert witness for any "scientific" or "technical" purpose, however, much less to address "technical issues" in the USBR Study or its 54 cfs flow determination. Moreover, there is no testimony or exhibit in the record stating or implying that any of the USBR Study's flow rate determinations are "suspect" or "unreliable," or that the 54 cfs flow for adult fish

¹⁹ The Bureau of Reclamation does not determine ESA recovery and delisting goals in the Lemhi River Basin. Tr. Vol. II, pp.344-45, 419-20. While the Agencies agree the USBR Study is reliable scientific evidence of what it was intended to investigate, that is, the "stream flow needs to support relevant life stages" of the ESA-listed fish species, Ex. 202 at 1, the Agencies do not agree the USBR Study was intended to determine "the streamflow and habitat needed to recover ESA listed species," R. 01541, or that it made such determinations. The Agencies expressly reserve their arguments that by relying exclusively on the USBR Study, IDWR failed to fulfill its "affirmative *duty* to assess and protect" the local public interest in recovering the ESA-listed fish species in the Lemhi River Basin. *Shokal*, 109 Idaho at 339, 707 P.2d at 450; *see generally Agencies' Opening Brief* at 7-8, 20-28; *Agencies' Reply Brief* at 6-7, 25-28.

passage in Reach 5 in particular is questionable. To the contrary, the only testimony Bird submitted of any kind regarding the USBR Study was provided by fact witnesses who did not question the USBR Study, but rather supported using its determination of 13 cfs as the flow necessary for “adult salmonid passage” at “the most downstream study site”²⁰ as the measure of ESA recovery requirements. Tr. Vol. I, p. 138, ll.13-22; *id.*, p.181, l.24-p.182, l.1.²¹

At this point in the proceedings, any “technical” challenge to the methods, findings, and conclusions of the USBR Study must be supported by technical evidence in the record. Bird signaled well before the hearing that he intended to rely upon the USBR Study, which was the basis for the 13 cfs flow condition in water right 74-15613. *Bird’s Brief* at 14; R. 00286. Bird included the USBR Study in the list of exhibits he intended to submit at hearing. R. 01140. Bird had reason and opportunity to provide a technical analysis of the USBR Study, but did not.

Thus, Bird’s challenge to the USBR Study’s 54 cfs flow determination is simply an attempt to use a legal brief to opine on “technical issues,” such whether a fish can or will “spawn in an area that an adult cannot pass through,” and whether the 54 cfs flow figure is “an outlier.” *Bird’s Brief* at 24. The former issue is a question of fish biology, the latter one of statistics, and both implicate the USBR Study’s methods, findings, and conclusions. A legal brief is not expert

²⁰ Ex. 202 at 1.

²¹ There is nothing in the record supporting a conclusion that these fact witnesses (Bird and Whittaker) were qualified to interpret, critique, or confirm the USBR Study’s methods, findings, or conclusions, or to opine as to whether it established flows necessary to recover ESA-listed fish species.

testimony, however, and may not substitute for it. I.R.E. 702. Moreover, by making admittedly technical assertions for the first time in a post-hearing brief, Bird has denied the Agencies the opportunity to show, through cross-examination and a rebuttal expert, why Bird's technical assertions are incorrect.

c. Bird's Reliance on the 13 cfs Flow of the USBR Study Lacks Support in the Record.

In the end, Bird's arguments that Condition Nos. 8 and 9 are unreasonable, excessive, overly broad, and not narrowly-tailored, *Bird's Brief* at 11, 23-25, are implicitly based on his agreement to be bound by the same 13 cfs flow condition as that in water right 74-15613. *Bird's Brief* at 4. This condition was based on the USBR Study's determination that "at the most downstream study site, flow required for adult salmonid passage was 13 cfs." Ex. 202 at 1; R. 00286. In Bird's view, the 13 cfs condition is "enough to take care of ESA requirements." Tr., Vol. I, p.138, ll.16-17.

Bird's reliance on the 13 cfs condition in water right 74-15613 is misplaced. There is no technical testimony, data, or analysis in the record supporting a conclusion that 13 cfs in the lowest reach of Big Timber Creek is "enough to take care of ESA requirements." Tr., Vol. I, p.138, ll.16-17; *see also supra* note 21. To the contrary, IDFG's expert witness confirmed that the USBR Study was "not making any statement about what it's going to take to protect or recover the fish." Tr. Vol. II, p.420, ll.2-6. Moreover, the Director determined that the 18 cfs

and 54 cfs flows defined in Condition Nos. 8 and 9 were necessary to protect the local public interests in recovering the ESA-listed fish species. R. 01509-10, 01535-36.²²

XI. CONDITION NO. 10 IS A VALID EXERCISE OF IDWR'S STATUTORY AUTHORITY.

Bird asserts that Condition No. 10 must be removed because it is contrary to Idaho Code § 67-5279(3). *Bird's Brief* at 25-27. Condition No. 10 requires Bird to “install, operate, and maintain physical devices or structures that can accurately measure streamflow” in Reach 5 and at the Lower Big Timber Creek Gage site. R. 01536, 01543. The condition also allows Bird to “rely on streamflow data collected for state or federal agencies to satisfy this requirement.” *Id.*

The *Final Order* does not discuss the reasons this condition was included in the permit, for two reasons: (1) while the condition was included in the *Amended Preliminary Order* (as Condition No. 11), R. 01451, Bird did not file “Exceptions” to the Director and therefore there was no reason for the *Final Order* to address the gaging requirement (which was re-numbered to be Condition No. 10); and (2) the Hearing Officer’s reasoning for the gaging requirement was not explained in the *Amended Preliminary Order* but rather in the *Order Granting Exceptions, in Part*, R. 01456-69, which was issued on the same day as the *Amended Preliminary Order*. The Hearing Officer’s discussion of the gaging requirement in the *Order Granting Exceptions, in*

²² As previously noted, the Agencies reserve their positions and arguments that the permit should have been denied; but if approved, it should have included a number of additional conditions, as well.

Part addresses most of Bird's arguments regarding Condition No. 10. R. 01459-61. The Agencies incorporate that discussion herein by this reference.

Bird argues Condition No. 10 is unlawful because it is intended to facilitate administration of other allegedly unlawful conditions—specifically, Condition Nos. 8 and 9. *Bird's Brief* at 25. This argument lacks merit because Condition Nos. 8 and 9 are valid exercises of the Director's authority under the local public interest criterion of Idaho Code § 42-203A(5), as explained above. *Supra* Parts XIII-X.²³

Otherwise, Bird does not clearly explain which provision(s) of Idaho Code § 67-5279(3) have allegedly been contravened. Bird's argument appears to reduce to contentions that: (1) IDWR lacks authority to impose Condition No. 10 because Bird has no authority or automatic right to install gages on lands he does not own; and (2) distributing water pursuant to water rights is a governmental function, not a private responsibility. *Bird's Brief* at 25-27.

Bird's argument that IDWR lacks authority to include Condition No. 10 in the permit is incorrect. Idaho Code § 42-703 expressly provides that "[i]t shall also be the duty of those using water in any district to place in the streams from which said water is diverted and at such places and intervals on said streams as the department of water resources may require suitable systems or devices for measuring the flow of water." IDWR also has authority to impose conditions on a permit in order to protect the local public interest. Idaho Code § 42-203A(5). The fact that Bird may not own the land at the identified gaging locations does not vitiate these express statutory

²³ The Agencies reserve their positions and arguments that the permit should have been denied; but if approved, it should have included a number of additional conditions, as well.

authorities, nor does it mean that Bird is incapable of making arrangements or entering into agreements that may be necessary to fulfill the requirements of Condition No. 10. Further, while Bird is correct that distributing water to water rights is a “governmental function,” *Bird’s Brief* at 26, the authorities he has cited do not address the installation of gages or other measuring devices, and do not contradict or limit IDWR’s authority under Idaho Code §§ 42-203A(5) and 42-703.

XII. CONDITION NO. 11 IS CONSISTENT WITH THE WILD AND SCENIC AGREEMENT.

The *Final Order* determined that Condition No. 11, which pertains to the subordination provisions of the Wild and Scenic Agreement, is necessary to ensure that Bird’s proposed development is not “contrary to conservation of water resources within the State of Idaho.” Idaho Code § 42-203A(5)(f); R. 01532-33.²⁴ Bird asserts that Condition No. 11 should be amended because it is contrary to the Wild and Scenic Agreement and the partial decree issued pursuant to it for the Salmon River (“Partial Decree”). *Bird’s Brief* at 27-29

Condition No. 11 provides that Bird’s permit “benefits from the subordination described in Paragraph 10(b)(6)(A)(ii)” of the Partial Decree, and thus may be diverted only when “the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 cfs.” R. 01543 (underlining added). Bird asserts Condition No. 11 should provide that his permit

²⁴ While Bird’s challenge to Condition No. 11 does not implicate the local public interest criterion of Idaho Code § 42-203A(5)(e), the Agencies have an interest in Bird’s challenge to Condition No. 11 because it is based on the Wild and Scenic Agreement, which as Bird has acknowledged was signed by “the State of Idaho, including the Idaho Water Resources Board.” Ex. IDWR 14 at 21.

benefits from the subordination described in Paragraph 10(b)(6)(A)(i) of the Partial Decree, which would allow Bird to divert when flow at the Shoup gage is less than or equal to 1,280 cfs. *Bird's Brief* at 27-29; Ex. IDWR 13 at 6.

Bird argues this is required by the plain language of the Wild and Scenic Agreement and the Partial Decree because they allegedly establish “a priority for new water right applications” under which “new applications for water rights are treated on a first-come-first-served basis.” *Bird's Brief* at 28-29. Under this system, Bird asserts, new applications automatically benefit from the subordination provision that authorizes diversions when flow at the Shoup gage is less than or equal to 1,280 cfs, until the 150 cfs limit of that provision is reached; and that only then are new applications limited to the lesser benefit of the provision that allows diversions only when flow at the Shoup gage is greater than or equal to 1,280 cfs.” *Bird's Brief* at 29. Bird calls these two provisions “first class” and “second class,” respectively, and argues that because there is “plenty of room” in “first class” he has a right to be there. *Id.* at 28.

Bird has not identified any language in the Wild and Scenic Agreement or the Partial Decree, however, that established or recognized the alleged “first-come-first-served” system. Further, while the Wild and Scenic Agreement includes a lengthy section entitled “Administration of Subordination Provisions of Partial Decrees,” nothing in this section refers to or contemplates a “first-come-first-served” system. Ex. IDWR 13 at 8-15. To the contrary, this section draws no distinction between “first class” and “second class” at all. Rather it refers to both collectively, by simply pointing to “paragraph 10.b.(6) of the Partial Decree.” *Id.* at 8-9, 11-14.

The Partial Decree also contains no explicit language requiring or recognizing anything like a “first-come-first-served” system for allocating the benefits of the subordination provisions. Further, there is no merit in Bird’s assertion that the “substitution provision” on page 6 of the Partial Decree “clearly establishes a priority” for allocation of subordination benefits. *Bird’s Brief* at 28. The only support Bird offers for this assertion is a circular argument that assumes exactly what it sets out to prove. *Id.* In effect, Bird’s argument collaterally attacks the Partial Decree by attempting to read language into it that simply is not there. *Rangen v. IDWR*, 159 Idaho 798, 806, 367 P.3d 193, 201 (2016).

Finally, Bird has not challenged the *Final Order*’s legal and factual bases for including Condition No. 11. The *Final Order* reasoned that the 150 cfs and 225 cfs “pots” of subordinated water identified in the Partial Decree “represent a critical water supply for future development in the Salmon River drainage” and IDWR “has a duty to allocate these limited water resources in a manner that optimizes the value of the available water supply.” R. 01533. The *Final Order* further reasoned IDWR “should only allocate water from the 150 cfs supply to water rights that will actually benefit from the additional subordination protection.” *Id.* The *Final Order* found that Bird’s permit would *not* actually benefit the additional subordination protection, because the streamflow data in the record “show that streamflow at the Shoup gage always exceeds 1,280 cfs when the proposed permit would be available for diversion.” *Id.* The *Final Order* thus concluded “the proposed permit should be allocated under [the subordination provision that allows diversions only when flow at the Shoup gage is greater than or equal to 1,280 cfs].” *Id.*


These conclusions are supported by substantial evidence in the record that Bird did not rebut, despite having had “ample opportunity to provide technical analysis.” *Id.* Further, the *Final Order*’s legal reasoning regarding “conservation of water resources” under Idaho Code § 42-203A(5)(f) was consistent with well-established Idaho law. *See Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960) (“The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.”); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (referring to “the constitutionally enunciated policy of promoting optimum development of water resources in the public interest”).

CONCLUSION

For the reasons discussed herein, there is no merit in Bird’s arguments that his application should have been approved without Condition Nos. 8-10. Rather, for the reasons discussed in the *Agencies Opening Brief* and the *Agencies’ Reply Brief*, the application should have been denied entirely; or, approved with all of the conditions of the *Amended Preliminary Order*, and also the additional conditions requested by the Agencies’ “Exceptions.”

Respectfully submitted this 9th day of December, 2020.

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


MICHAEL C. ORR (ISB # 6720)
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of December 2020, I caused the original of the foregoing to be filed with the Court, and true and correct copies to be served on the parties, by the methods indicated:

1. Original to:

CLERK OF THE DISTRICT COURT SNAKE RIVER BASIN ADJUDICATION 253 3rd AVENUE NORTH PO BOX 2707 TWIN FALLS, ID 83303-2707	<input checked="" type="checkbox"/> Hand Delivery Courtesy copy provided by email, to jconnell@idcourts.net
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2. Copies to the following:

GARRICK L BAXTER SEAN H COSTELLO IDAHO DEPARTMENT OF WATER RESOURCES 322 E. FRONT STREET, SUITE 648 P.O. BOX 83720 BOISE, ID 83720-0098	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email: garrick.baxter@idwr.idaho.gov sean.costello@idwr.idaho.gov
ROBERT L HARRIS LUKE H MARCHANT 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 checked="" type="checkbox"/> Email: rharris@holdenlegal.com lmarchant@holdenlegal.com


MICHAEL C. ORR

ATTACHMENT A

Statement of Purpose for 2003 HB284

Excerpts of Senate and House Committee Minutes, 2003 HB284

the water supply bank must be approved by the director of the department of water resources. The director of the department of water resources may reject and refuse approval for or may partially approve for a less quantity of water or may approve upon conditions any proposed rental of water from the water supply bank where the proposed use is such that it will reduce the quantity of water available under other existing water rights, the water supply involved is insufficient for the purpose for which it is sought, the rental would cause the use of water to be enlarged beyond that authorized under the water right to be rented, ~~or if the rental will conflict with the local public interest where the local public interest is as defined as the affairs of the people in the area directly affected by the proposed use~~ in section 42-202B, Idaho Code, or the rental will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates. The director shall consider in determining whether to approve a rental of water for use outside of the state of Idaho those factors enumerated in subsection (3) of section 42-401, Idaho Code.

Approved on the 15th day of April, 2003.

Effective: July 1, 2003.

STATEMENT OF PURPOSE

RS 13046

This legislation clarifies the scope of the “local public interest” review in water right applications, transfers and water supply bank transactions. This legislation is intended to ensure that the Department of Water Resources has adequate authority to require that diversions, transfers and other actions affecting water resources do not frustrate the public’s interest in the effective utilization of its water resources. The “local public interest” should be construed to ensure the greatest possible benefit from the public waters is achieved; however, it should not be construed to require the Department to consider secondary effects of an activity simply because that activity happens to use water. For example, the effect of a new manufacturing plant on water quality, resident fish and wildlife and the availability of water for other beneficial uses is appropriately considered under the local public interest criteria. On the other hand, the effect of the manufacturing plant on the air quality is not within the local public interest criteria because it is not an effect of the diversion of water but rather a secondary effect of the proposed plant. While the impact of the manufacturing plant on air quality is important, this effect should be evaluated by DEQ under the E P H A. As noted by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330 (1985), “[i]t is not the primary job of Water Resources to protect the health and welfare of Idaho’s citizens and visitors that role is vested” in other agencies.

Water Resources role under the “local public interest” is to ensure that proposed water uses are consistent with securing “the greatest possible benefit from [the public waters] for the public.” Thus, within the confines of this legislation, Water Resources should consider all locally important factors affecting the public water resources, including but not limited to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality and the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time. This legislation contemplates that “[t]he relevant impacts and their relative weights will vary with local needs, circumstances, and interests.” “The determination of what elements of the public interest are impacted, and what the public interest requires, is committee to Water Resources’ sound discretion.”

In recent years, some transactions have been delayed by protests based on a broad range of social, economic and environmental policy issues having nothing to do with the impact of the proposed action on the public’s water resource. Applicants have experienced costly delays and have been required to hire experts to respond to issues at an agency whose propose has nothing to do with those issues.

This legislation also clarifies that the effect on the local economy of a watershed or local area that is the source of a proposed use of water but not the place of use for the proposed use shall be considered. The purpose of this criteria is to ensure that out of basin transfers do not deprive a local area of use of the available water supply.

FISCAL IMPACT

This legislation should remove significant financial burdens on the Department of Water Resources and on private parties. This legislation should impose no fiscal burden on any agency or unit of government.

Senator Kennedy inquired as to the status of a hearing on the WestRock/Tamarck project because he has concerns he would like to have addressed. Additionally, he would like some reassurance that the Department of Lands has satisfactorily evaluated and protected the state from liability and can satisfactorily perform obligations under the lease agreement.

Senator Cameron stated he was concerned about the disclosure of financial documents to the public and competitors. The documents are available to the committee for private review upon signing a statement of non disclosure. He stated he had not a problem with addressing concerns through a letter of legislative intent.

Senator Little stated it is the not Legislature's responsibility to guarantee that the project is successful, but the Legislature does have the responsibility to assure that the state's funds are protected and the assets are protected. The State Land Board should assure that the state will be not be jeopardizing the resources for the long term maximum yield.

There being no further matters to come before the Committee, the meeting was adjourned at 3:10 p.m.

DATE: March 26, 2003

TIME: 1:30 p.m.

PLACE: Gold Room

**MEMBERS
PRESENT:** Chairman Noh, Vice Chairman Pearce, Senators Cameron, Schroeder, Burtenshaw, Williams, Brandt, Little, Stennett, Kennedy

The meeting was called to order by Chairman Noh at 1:35 p.m.

Chairman Noh stated the meeting was an informational session with well-qualified water attorneys in connection with H 284 and the application of the local public interest criteria in water rights administration. Chairman acknowledged Chairman Representative Bert Stevenson and the background of the proposed legislation. He noted there have been concerns expressed over the past several years by the dairy industry and others water users that there have been legal expansion in the application of the local public interest criteria. There has been legislation introduced over the past two years which would have made radical changes to the local public interest criteria. Clive Strong, Deputy Attorney General, was asked to review and draft proposed legislation that is intended to leave in place all of the provisions as set forth in *Shokal v. Dunn*, 109 Idaho 330 (S.Ct. 1985). Additionally, Strong was requested to determine if there would be added economic risks and the degree to which the local public interest criteria would continue to provide a maximum of public participation in the processes. Concern was expressed that larger economic interests not move water across basins or out of state, that local public interest is well protected and there are intended consequences.

Norm Semanko, Idaho Water Users Association, stated the law has been in place for more than twenty-five years and case law has developed over time. He provided handouts to the Committee (copies are attached). The local public interest criteria were added to the water code in 1978, and, thus expanded the scope of inquiry by the Department of Water Resources for new water right or transfer of a water right. Originally the only consideration was whether the proposed change in use would injure another water right. In addition, in the 1970's there was a growing concern for the wider impacts on the water resources, such as recreation, fishing, and aesthetic values. Those requirements and others resulted in the addition of the local public interest criteria. Additional concerns at that time were the potential impacts of water being transferred out of state and transferring water between hydrologic basins. The local public interest concept in regard to the proposed use by all water users, not just those with water rights, has been in the water code for twenty-five years. In the 1985 Supreme Court case of *Shokal v. Dunn*, the issue was whether water quality had to be considered by the Department of Water Resources when considering an application. At that time the definition of local public interest was interpreted to mean the area that was directly impacted. He noted the Supreme Court ruled that local public interest does include water quality. The Supreme Court further ruled the Department of Health and

Welfare, now the Department of Environment Quality, had the responsibility to regulate water quality. The Department of Water Resources, in connection with the local public interest criteria, could not grant an application which would violate water quality standards. The Supreme Court further stated that it was appropriate for the Department of Water Resources to condition the water right on obtaining the relevant permits from DEQ for water quality. He noted this has worked well for some time. In the past couple of years there has been a change in case law. The district court in Twin Falls recently held that local public interest can mean any locally important factor even without direct reference to the use of water. If the director of DWR has jurisdiction over any local public interest factor, then the director has jurisdiction over everything that the DWR has traditionally reviewed along with considerations by the county, DEQ, and the highway district. He stated this factor has become a very serious problem. The case bringing these factors to attention was the K&W Dairy case in which local public interest issues were raised by the protestant included ground water issues, as well as potential odor problems. After the hearing by DWR, the department approved the application with the condition that in place of a flushing manure management system the applicant install a mechanical scraping system for removing dairy waste in order to reduce odors. When DWR's decision was reviewed by the district court, the court held that DWR should have determined what an acceptable level of odors is and then measured the proposed dairy against the standard. He stated this is something to be handled by the Department of Agriculture or DEQ. The district court ruled that because DWR has broad jurisdictional grounds because of the local public interest criteria, DWR cannot satisfy the criteria by requiring applicant to comply with DA or DEQ. The district court ruled that DWR cannot sidestep the statutory standard at the transfer or application stage and pass to another agency for regulation. Now, there is a decision by a court that all of the factors presented in regard to the local public interest must be fully considered by DWR, regardless of whether another agency has complete and full jurisdiction in that area.

Semanko noted another case is the Rocky Mountain Land & Cattle Company in the Glens Ferry area. This was a case where the hearing officer of DWR recommended denial of an application based in part on the traffic hazards of increased vehicles on a road. This is something the county should review and did review. He noted the county ultimately denied the application but it did not stop DWR from having to review the identical issue of an increase in traffic. All the issues being raised under the local public interest are important but are not issues that DWR should be considering. The proposed legislation would specifically recognize

DWR is to review the impacts on the public water resource. The legislation retains the language stating “the people in the local area directly affected.” This language is historically significant and must be retained. The clarification contained in the proposed legislation is “on the public water resource.” He noted the proposed legislation codifies the requirements for consideration of local public interest as set forth in the Shokal v. Dunn case. The director of DWR must review fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, water quality and alternative use of water. The proposed legislation is intended to clarify that the local public interest is very broad when it relates to the impacts on the public water resource, not just water rights or water supply, but all of the attributes of the public water supply. Semanko stated the local public interest should be retained as historically set forth by the Supreme Court.

Additionally, Semanko informed the Committee the legislation does not eliminate any one’s right to file a protest to a water right application. He further stated the right to file a protest provides for a hearing before DWR. If a protest is filed, a hearing will be held. What would be changed is a clarification for one of the criteria that must be reviewed by the director of DWR. The applicant must demonstrate that the application is in the local public interest. Local public interest would mean the impacts to the people in the area directly affected in the potential impacts on the water resource and all of the water users in the broadest sense.

Scott Reed, Coeur d’Alene attorney, representing Idaho Conservation League, stated he was appointed twenty-three years ago by Governor Evans to represent the environmental interests on the Idaho Water Resource Board. He stated Reed Hansen and he, the only remaining members of the 1976 Idaho Water Resource Board, published a guest opinion in the Idaho Statesman recently. The article provided a history of the establishment of public interest as the number one policy in the state water plan. The public interest, modified by the Legislature, added “local” to the terminology. This was adopted in 1978 and has become part of the regulations for required consideration in approving water right applications and water transfers by DWR. The intent and effect of H 284 if adopted would destroy local public interest as intended in the state water plan. He stated if H 284 is adopted other areas would be affected through defining local public interest as the interest of people in the area directly affected by water use and the effects of such use on the public water resource. H 284 does not take away the direction to consider whether there is enough water. Reed noted a recent dispute in north Idaho

Representative Barrett spoke in support of the substitute motion, saying this is a policy issue and there needs to be a way to get a handle on the issue. Representative Langhorst spoke in support of the original motion, saying that sportsmen want Fish and Game to buy more land and the bill takes away private land owners rights and doesn't prevent new land owners or non-profit groups to buy the land. Representative Roberts spoke in support of the amended substitute motion, saying this will bring people together to talk about the issue, that the merits of the bill are strong and solid but it needs to give more flexibility to the Fish and Game Department. Representative Raybould spoke in support of the amended substitute motion, saying the bill will not stop the sale of agriculture and grazing land and if land is sold to other people and conservation groups we will loose the economic and tourism value of the land. Representative Sayler spoke in opposition of the amended substitute motion and in favor of the original motion, saying there is clearly a problem in these specific counties but it is too broad to put this on a statewide level. Representative Bedke spoke in support of the amended substitute motion, saying if the bill was amended, he could support it.

Representative Wood called for the question and a roll call vote was asked for.

**ROLL CALL
VOTE:**

By a roll call vote the amended substitute motion carried with Representatives Stevenson, Wood, Field (23), Barraclough, Barrett, Eskridge, Raybould, Roberts, Bedke and Cuddy voting AYE and Representatives Robison, Langhorst and Sayler voting NAY. Representatives Jones, Bell, Denney, Campbell and Moyle were absent/excused. H 252 will be sent to General Orders with committee amendments attached. Representatives Eskridge and Campbell will sponsor the bill on the floor.

ADJOURN:

The meeting adjourned at 4:31 p.m.

DATE:

March 3, 2003

TIME: 1:30 p.m. or Upon Adjournment

PLACE: Gold Room

MEMBERS: Chairman Stevenson, Vice Chairman Wood, Representatives Field(23), Jones, Bell, Barraclough, Denney, Campbell, Barrett, Moyle, Eskridge, Raybould, Roberts, Bedke, Robison, Cuddy, Langhorst, Sayler

**ABSENT/
EXCUSED:** None

Chairman Stevenson called the meeting to order at 2:25 p.m.

MOTION: Representative Bedke made a motion to approve the minutes of Thursday, February 27, 2003. By a voice vote the motion carried.

H 284 Mr. Norm Semanko, Idaho Water Users Association, reviewed the background and gave a history on local public interest. He said the legislative committee defined local public interest as "the affairs of the people in the area directly affected." Mr. Semanko said that key considerations are water quality, recreational uses of water, out-of-state uses of water and water uses between hydro-logic basins. Mr. Semanko said this bill does not delete or eliminate local public interest review, it does bring it back to the original intent of the legislature. He said the bill clarifies that the director of the Department of Water Resources will determine impacts of a proposed water use, which include fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, water quality, and alternative uses of the water. Mr. Semanko said the director would not make decisions on secondary impacts like air quality and traffic, it is not the job of the Department of Water Resources to regulate these other aspects. He said this bill does not take away anyone's right to protest a transfer or have a hearing. Mr. Semanko said the bill addresses concerns regarding the affects of taking surface water from one basin to another and a new criteria would be added for permits, transfers, exchanges and water bank rental application processing. He said the bill also takes into consideration local public interest criteria on in-stream impacts for fish, wildlife and recreation, but does not create a minimum stream flow for such purposes. Mr. Semanko said the bill represents a compromise position on a viable water right law in Idaho, which is part of Idaho's rich water law and tradition. He asked the committee to send H 284 to the floor with a "do pass" recommendation.

ATTACHMENT B

1978 Idaho Session Laws 767-69, 1003-13

CHAPTER 306

(H.B. No. 620)

AN ACT

RELATING TO PERMITS FOR THE APPROPRIATION OF WATER; AMENDING SECTION 42-203, IDAHO CODE, TO INCLUDE LOCAL PUBLIC INTEREST AS A CRITERIA FOR APPROVING OR DISAPPROVING APPLICATIONS TO APPROPRIATE WATER; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-203, Idaho Code, be, and the same is hereby amended to read as follows:

42-203. NOTICE UPON RECEIPT OF APPLICATION -- PROTEST -- HEARING AND FINDINGS -- APPEALS. On and after the passage, approval and effective date of this section, upon receipt of an application to appropriate the waters of this state, the department of water resources, shall prepare a notice in such form as the department may prescribe, specifying the number of the application and the date of filing thereof, the name and post-office address of the applicant, the source of the water supply, the amount of water to be appropriated, in general the nature of the proposed use, the approximate location of the point of diversion, and the point of use, stating in said notice that any protest against the approval of such application, in form prescribed by the department, shall be filed with the department within ten (10) days from the last date of publication of such notice. The director of the department of water resources shall cause the notice to be published in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed in said county, then in a newspaper of general circulation therein. This notice shall be published at least once each week for two (2) successive weeks.

Any person, firm, association or corporation concerned in any such application may, within the time allowed in the notice of application, file with said director of the department of water resources a written protest against the approval of such application, which protest shall state the name and address of protestant and shall be signed by him or by his agent or attorney and shall clearly set forth his objections to the approval of such application. Hearing upon the protest so filed shall be held within sixty (60) days

from the date such protest is received. Notice of this hearing shall be given by mailing notice not less than ten (10) days before the date of hearing and shall be forwarded to both the applicant and the protestant, or protestants, by certified mail. Such notice shall state the names of the applicant and protestant, or protestants, the time and place fixed for the hearing and such other information as the ~~state--reclamation--engineer~~ director of the department of water resources may deem advisable. In the event that no protest is filed, then the director of the department of water resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of water resources.

Such hearing shall be conducted before the director of the department of water resources under rules and regulations to be promulgated by the department of water resources under the provisions of chapter 52, title 67, Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied, ~~and~~. In all applications whether protested or not protested, where such the proposed use is such (1) that it will reduce the quantity of water under existing water rights, or (2) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (3) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or (4) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (5) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use.

~~†~~The director of the department of water resources may reject such application and refuse issuance of permit therefor, or may partially approve and grant permit for a less quantity of water than applied for, or may grant permit upon conditions. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

Any person or corporation who has formally appeared at the hearing, feeling aggrieved by the judgment of the director of the department of water resources may appeal therefrom to the district court of the county in which the point of diversion of the proposed appropriation shall be situated. Such appeal shall be taken within sixty (60) days from

the ruling or action of the director of the department of water resources and shall be perfected when the appellant shall have filed in the office of the clerk of such district court a copy of the application, certified by the director of the department of water resources as a true copy, together with the petition to such court setting forth the appellant's reason for appeal. A copy of such petition shall be served upon all persons or corporations adversely affected who appeared at the hearing. Such appeal shall be heard and determined upon such competent proof as shall be adduced or offered by the department of water resources or some person duly authorized in its behalf. Upon hearing of said cause, the district court shall have jurisdiction to reverse and remand said cause for further hearing before the director of the department of water resources or dismiss said cause, or may affirm the ruling of the director of the department of water resources, or may modify the decision appealed from in any manner which the said district judge shall deem to comport with equity and justice.

A copy of said judgment shall be transmitted to the director of the department of water resources within five (5) days after its rendition.

An appeal by any party aggrieved lies from a final judgment of the district court in said cause to the Supreme Court of the state of Idaho and the practice and procedure that now obtains or that may be enacted hereafter by law and the rules of the Supreme Court of the state shall apply in all appeals from any final judgment of the district court as aforesaid.

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

Approved March 29, 1978.

(H.C.R. No. 48)

A CONCURRENT RESOLUTION

STATING LEGISLATIVE FINDINGS, ADOPTING, AMENDING AND REJECTING CERTAIN POLICIES OF THE STATE WATER PLAN AS SUBMITTED BY THE IDAHO WATER RESOURCES BOARD AND DIRECTING THE REVISION AND PUBLICATION OF THE STATE WATER PLAN TO CONFORM WITH THE POLICIES AS APPROVED BY THE LEGISLATURE.

Be It Resolved by the Legislature of the State of Idaho:

WHEREAS, Section 7 of Article XV, of the Constitution of the State of Idaho empowers the Idaho Water Resource Board to formulate and implement a State Water Plan for optimum development of water resources in the public interest; and

WHEREAS, Section 42-1731, Idaho Code, provides that the optimum use of the water resources of Idaho, requires the formulation of a coordinated, integrated, multiple use water resource policy and the development of a plan to activate this policy as rapidly as possible; and

WHEREAS, the Idaho Water Resource Board, by the authority of Section 42-1734, Idaho Code, shall formulate a program for use of all unappropriated water resources of this State, based upon studies and after public hearings, in affected areas at which all interested parties shall be given the opportunity to appear; and

WHEREAS, the State Water Plan was adopted by the Idaho Water Resource Board pursuant to Section 42-1734, Idaho Code; and

WHEREAS, Section 42-1736, Idaho Code, provides that the State Water Plan shall not become effective until approved by the Legislature; and

WHEREAS, it is the finding of the Legislature that the State Water Plan as amended by this resolution complies with the intent of the Legislature.

NOW, THEREFORE, BE IT RESOLVED by the members of the Second Regular Session of the Forty-fourth Idaho Legislature, the House of Representatives and the Senate concurring therein, that the State Water Plan as adopted by the Idaho Water Resource Board and submitted to the Legislature is hereby approved by the Legislature pursuant to Section 42-1736, Idaho Code, with the following changes:

POLICY NO. 1: PUBLIC-INTEREST PROTECTION OF EXISTING WATER RIGHTS

~~Applications--for-future-water-permits--shall-not-be-approved if-they-are-in-conflict-with-the-State-Water-Plan-adopted-by the-Idaho-Water-Resource-Board-in-the-public-interest. The State Water Plan shall be a guide concerning the uses of water within the State of Idaho. Water rights and the administration of water rights shall be governed by statute. Section 42-203, Idaho Code, should be amended to provide the following: (1) protection for all existing water. Nothing in this plan shall adversely affect water rights established and vested under the Constitution and laws of Idaho; (2) all new water uses, both consumptive and non-consumptive such as irrigation, municipal, industrial, power, mining, fish and wildlife, recreation, aquatic life, and water quality will be judged to have equal desirability as beneficial uses subject to Article XV, Section 3, of the state Constitution; (3) if conflicts occur between meeting new water uses, the approval or denial of the application shall consider the local public interest including an evaluation of the beneficial and adverse economic, environmental and social impacts as identified in the State Water Plan as adopted by the Idaho Water Resource Board as defined by statute.~~

POLICY NO. 2: NATURE OF USE OF WATER RIGHTS

Water users should be allowed to change the nature of use of their own water rights for use within the State of Idaho provided other water rights are not injured thereby. Section 42-222 should be amended to allow existing water right holders to make such changes provided the change is not in conflict with the State Water Plan adopted by the Idaho Water Resource Board as approved by the legislature.

POLICY NO. 3: CONSOLIDATE STATE WATER QUANTITY AND QUALITY PLANNING AND ADMINISTRATION

The state programs of water quantity and water quality planning and administration should be consolidated in the Department of Water Resources. The Idaho Code should be amended to implement this policy.

POLICY NO. 4: UNRECORDED WATER RIGHTS

Claims except for domestic uses should be submitted on all existing unrecorded water rights within the State of Idaho by June 20, 1982 1983. Legislation implementing this policy should provide that failure to file such a claim by the pre-

scribed filing date shall be grounds for instituting an action for forfeiture of the claimed right.

POLICY NO. 5: FLOOD PRONE AREA IDENTIFICATION

~~The--sellers--of--parcels--of--land--within--flood--prone--areas--as--identified--by--the--Department--of--Water--Resources--should--be--required--to--notify--the--buyer--in--writing--that--such--lands--are--within--such--flood--prone--areas--Written--notification--with--an--acknowledgement--by--the--buyer--should--be--recorded--with--the--title--to--the--lands--Legislation--implementing--this--policy--should--also--provide--that--the--buyer--may--recover--damages--from--the--seller--if--the--seller--fails--to--so--notify--the--buyer--~~ The Department of Water Resources should identify flood prone areas throughout the state. The department shall utilize all previous and current flood prone area studies and shall make the information available for public use. The flood prone area identified shall be based on flooding from the 100 year flood history.

POLICY NO. 6: INSTREAM FLOWS

Water rights should be granted for instream flow purposes. The legislation authorizing this policy should recognize and protect existing water rights and priorities of all established rights and delegate responsibilities for determining flows and administrative authority to the Department of Water Resources. The legislation should also direct that the Idaho Water Resource Board shall be the only applicant for instream flow. All applications by the Water Resource Board shall be subject to the approval of the legislature.

POLICY NO. 7: STATE NATURAL AND RECREATIONAL SYSTEM

A State Natural and Recreational River System should be established and designed to fit the desires of the citizens of Idaho. Legislation implementing this policy should permit the protection of the unique features that exist on each of the various rivers bordered by public lands within the state and should provide the necessary authorization and adequate funding to state and local government to protect such rivers and related lands for recreational, scenic and natural values while still allowing the widest possible opportunity for use by private interests. Funds would be provided from the Water Management Fund created under Policy 31 for this purpose.

POLICY NO. 8: GREENWAY-GREENBELT-PROGRAM

State--and--local--greenway--and--greenbelt--systems--should--be established--Legislation--implementing--this--policy--should provide--for--local--county--and--city--government--planning--regulations--and--administration--of--lands--adjacent--to--Idaho's rivers--State--financial--and--technical--support--would--be--provided--on--a--project--by--project--basis--Funds--would--be--provided from--the--Water--Management--Fund--created--under--Policy--31--for this--purpose--

POLICY NO. 9: LAKE-AND-RESERVOIR-SURFACE-MANAGEMENT-PLAN

State--and--local--units--of--government--should--prepare--lake--and reservoir--surface--management--plans--The--authorizing--legislation--should--also--define--and--adopt--procedures--and--provide for--enforcement--Funds--would--be--provided--from--the--Water--Management--Fund--created--under--Policy--31--for--this--purpose--

POLICY NO. 10: PROTECTION OF LAKE AND RESERVOIR SHORELANDS

Local units of government should prepare comprehensive plans and adopt zoning standards for the management of lake and reservoir shorelands to protect the water resources and its uses. Title--67--Chapter--65--Idaho--Code--the--Local--Planning Act--of--1975--should--be--amended--to--implement--this--policy--Funds would be provided from the Water Management Fund created under Policy 31 for this purpose.

POLICY NO. 11: WATER SUPPLY BANK

A water supply bank should be established for the purpose of acquiring water rights or water entitlements, provided other water rights are not injured, from willing sellers for reallocation by sale or lease to other new or existing uses within the State of Idaho. Legislation authorizing the water supply bank should also provide for the bank to be self-financing in the long run with initial funding to be provided by creation of a Water Management Fund as provided for in Policy 31.

POLICY NO. 12: CONSERVANCY DISTRICTS

Water Conservancy Districts should be established where needed. Legislation implementing this policy should provide for an equitable funding procedure to spread costs among all beneficiaries.

POLICY NO. 13: ENERGY PLAN

A State energy plan should be prepared. The Department of Water Resources should contribute the water related components to such a plan. Legislation authorizing this policy should also provide funding through the Energy Development and Study Fund for this purpose as provided in Policy 31.

POLICY NO. 14: WATER CLAIMS BY INDIAN TRIBES

Claims to water by Idaho Indian tribes should be identified by June 30, ~~1982~~ 1983.

POLICY NO. 15: FEDERAL WATER CLAIMS

Claims to water by the federal government should be identified by June 30, ~~1982~~ 1983.

POLICY NO. 16: FEDERAL RESERVOIRS WATER ALLOCATION

An agreement should be established with federal agencies to allow review by the Idaho Water Resource Board of any proposed allocation of water in excess of 500 acre-feet annually from federal reservoirs.

POLICY NO. 17: STATE ADMINISTRATION OF FEDERAL PROGRAMS

Federal programs dealing with water should be administered by the state when ~~the-state-has-the-option~~ in the state's interest to do so.

POLICY NO. 18: COMBINE APPLICATIONS FOR WATER RESOURCES

Existing state statutes should be reviewed and amended so that applicants may complete a single application form to request approval from necessary state authorities to develop or utilize the state's water and related land resources.

POLICY NO. 19. LEGISLATIVE COMMITTEE

A Legislative Committees on Water Resources should be appointed continue to work with the Idaho Water Resource Board in implementing the State Water Plan.

POLICY NO. 20: LAND DEVELOPMENT POLICY

Where the supply of water from a particular water source is limited, it is preferable to develop new lands in Idaho of higher agricultural productivity over those of a lower productivity providing existing rights are protected and water is not transferred between water basins within the state.

POLICY NO. 21: PROTECTION OF POTENTIAL RESERVOIR SITES

Potential reservoir sites should be protected against significant land use change. The legislation implementing this policy should recognize rights of existing land owners and should direct the state to acquire lands for reservoir sites as they become available for sale. Reservoir sites given this protection should be re-evaluated on ten-year intervals. Funds would be provided from the Water Management Fund created under Policy 31 for this purpose.

Potential Reservoir	Stream
Snake River Basin	
Upper Snake	
<u>Palisades</u>	<u>Snake River</u>
Lynn Crandall	<u>Snake River</u>
American Falls (Exist.)	<u>Snake River</u>
Clear Lakes	<u>Snake River</u>
Thousand Springs	<u>Snake River</u>
Shoestring	<u>Snake River</u>
Warm River	<u>Henrys Fork</u>
Blackfoot-(Exist-)	Blackfoot-River
Driggs	<u>Teton River</u>
Medicine Lodge	<u>Medicine Lodge Creek</u>
Birch Creek	<u>Birch Creek</u>
Boulder Flats	<u>Big Wood River</u>
Bliss	<u>Big Wood River</u>
Southwest Idaho	
Grindstone Butte	<u>Snake River (off-stream)</u>
Sailor Creek	<u>Snake River (off-stream)</u>

Guffey (High Alternative)	Snake River
Garden-Valley	South-Fork-Payette-River
Gold Fork	Gold Fork Payette River
Twin Springs	Boise River
Lost Valley (Exist.)	Lost Valley Creek
Tamarack	Weiser River
Goodrich	Weiser River
Monday Gulch	Little Weiser River
Lucky Peak (Exist.)	Boise River
Lower Snake	
Challis	Challis Creek
Panhandle Basins	
Low Katka	Kootenai River
Bear River Basin	
Caribou	Bear River
Oneida Narrows	Bear River
Plymouth	Malad River
Thomas Fork	Thomas Fork

POLICY NO. 22: EVALUATE FLOOD CONTROL LEVEES

The Department of Water Resources should be directed to inventory, identify, and evaluate the adequacy of existing flood control levees. Idaho Code, Section 42-1708, should be amended to implement this policy.

POLICY NO. 23: ASSIST INDIAN TRIBES IN WATER RESOURCES IDENTIFICATION

The Idaho Water Resource Board offers to assist Indian tribal representatives in the identification, evaluation and tabulation of water resources on Indian lands.

POLICY NO. 24: SAFETY-MEASURES-PROGRAM

A--program--should--be--established--to--assist--local--units--of government--in--repairing--and--installing--safety--structures--on or--near--canals,--rivers,--lakes--and--reservoirs.--The--program should--be--established--as--a--cost--sharing--cooperative--program with--the--state--share--at--75--percent--and--local--share--at--25 percent--of--each--identified--project.--Funds--would--be--provided

~~from the Water Management Fund created under Policy 31.~~

POLICY NO. 25: REHABILITATION PROGRAM

A program should be established to identify and evaluate rehabilitation of abandoned mineral extraction and by-product storage areas and other abandoned projects which currently or potentially affect the yield or quality of the state's watersheds, streams and stream channels.

POLICY NO. 26: MONITOR RADIOACTIVE WASTE DISPOSAL

A program should be established by the State of Idaho to monitor and regulate radioactive waste disposal at the U.S. Energy Research and Development Administration's Idaho National Engineering Laboratory, and other areas as may be designated.

POLICY NO. 27: FISH AND GAME PLAN

A program should be established within the Idaho Department of Fish and Game to prepare and adopt objectives and management criteria for fish, wildlife and all other aquatic resources for all principal streams and wet-lands in the state.

POLICY NO. 28: TAILING PONDS

Encourage the mining industry to work with federal and state agencies to achieve uniform safety standards for the construction of tailing ponds and other similar mine waste storage facilities. If agreement cannot be reached under existing laws and policies then legislation should be adopted placing tailing ponds and other similar mine waste storage facilities under jurisdiction of the Dam Safety Act (I.C. 42-1714 et seq).

POLICY NO. 29: PLANNING PROGRAM

A Water Resource Project Feasibility Planning Program should be established to conduct studies required to implement the State Water Plan. Funds would be provided from the Water Management Fund as provided in Policy 31.

POLICY NO. 30: WATER RESOURCES RESEARCH PROGRAM

Research should be conducted on important water resource topics to augment the State Water Plan.

POLICY NO. 31: FUNDING PROGRAM

The State of Idaho should establish a major water resource funding program to supplement private and federal monies to develop, preserve, conserve and restore the water and related land resources of Idaho and to implement the State Water Plan. The recommended funds are Water Management Fund, Rehabilitation Fund and Energy Development and Study Fund as approved by the legislature.

POLICY NO. 32: SNAKE RIVER BASIN

The available and unappropriated waters of the Snake River Basin are allocated to satisfy existing uses, meet needs for future growth and development, and protect the environment. The allocations recognize and protect existing water uses and rights. The water allocations are made by large regions to allow the widest possible discretion in application and it is the policy of the State of Idaho to augment, maintain, enhance and increase available, usable water by additional upstream, off stream and aquifer storage.

Therefore, It is legislative intent that main stem Snake River flows will be protected against further appropriations depletions and preserved to provide the following average daily flows at the following U.S. Geological Survey stream gaging stations.

Gaging Station	Protected Flow (Average Daily)
Milner	0 cfs
Murphy	3,300 cfs
Weiser	4,750 cfs

Studies indicate that sufficient water exists in excess of those flows to provide for additional uses if water conserving and storage facilities are constructed.

Water is allocated for electric energy. Additional hydro-electric power sites remain on streams within the Snake River Basin. Wherever feasible these should be developed as part of multi-purpose projects. Future electric

energy requirements will be largely supplied from thermal plants. The plan provides for 170,000 acre-feet beyond August 1975 levels for consumptive use in cooling thermal power plants. The depletion is distributed as follows: Upper Snake - 75,000 acre-feet; Southwest Idaho - 30,000 acre-feet. In addition, flows in the Snake River will be stabilized for the hydro-power generating capability of the river.

POLICY NO. 33: PANHANDLE BASINS

The available and unappropriated waters of the Spokane, Pend Oreille-Clark Fork and Kootenai river basins are allocated to satisfy existing and potential needs for economic development and environmental quality. This allocation recognizes and protects all existing and potential water uses and private and public rights.

Water is allocated for electric energy. Additional hydro-electric power sites remain on streams within the Panhandle River Basins. Wherever feasible these should be developed as part of multi-purpose projects. Future electrical energy requirements will be largely supplied from thermal plants. The plan provides for 18,000 acre-feet of depletion from the Pend Oreille-Clark Fork River system in the Panhandle Basins for evaporative cooling of thermal power plants.

POLICY NO. 34: BEAR RIVER BASIN

~~The--Idaho-Water-Resource-Board-supports-interstate-negotiations-efforts-to-reach-basinwide-agreement-for-uniform-allocation-and-development-of-the-Bear--River--Basin--resources.~~ Management of the water resources in the Bear River Basin will continue to be directed by state statute and the Bear River Compact.

POLICY NO. 35: STATE-NATURAL-RIVER-DESIGNATION RIVER MANAGEMENT CRITERIA

~~The following rivers should-be-included-in-the-State-Natural and--Recreational--River--System--initially--based--upon information--available--from--Federal-Wild-and-Scenic-Rivers studies~~ are recognized for their many uses. The Idaho Water Resource Board will cooperate with and assist local people in preparing management criteria for rivers to achieve maxi-

mum benefits for all who use them.

1. St. Joe - ~~in-its-entirety,~~
2. Priest - ~~the-upper-river-from--the--Canadian--border~~
~~down-to-the-large-Priest-Lake,~~
3. Moyie - ~~in-its-entirety.~~
4. Salmon
5. Bruneau
6. Owyhee
7. Snake

POLICY NO. 36. ST.-JOE-RIVER

~~The--St.--Joe-River-from-St.-Joe-Lake-to-Beedle-Point-should~~
~~be-included-in-the-National-Wild-and--Scenic--Rivers--System~~
~~upon--failure-of-the-state-to-adequately-protect-the-river's~~
~~free-flowing-values-by-July-1,-1978.~~

POLICY NO. 37. SOUTH FORK COEUR D'ALENE RIVER REHABILITA-
TION

The state of Idaho should sponsor a joint federal-state-private stream channel stabilization and revegetation project(s) in the South Fork Coeur d'Alene River drainage. Funds should be provided from the Rehabilitation Fund, discussed in Policy 31 for this project(s).

BE IT FURTHER RESOLVED that the Legislature directs the Idaho Water Resource Board to revise the State Water Plan to conform in all respects with the policies hereby approved and to publish the plan and distribute it generally throughout the state.

Adopted by the House February 23, 1978.

Adopted by the Senate March 13, 1978.