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

The IDAHO WATER RESOURCE BOARD, and the IDAHO DEPARTMENT OF FISH AND GAME, Petitioners, v. KURT W. BIRD and JANET E. BIRD, Cross Petitioners. v. THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondent.	Case No. CV01-20-09661 **BIRD'S REPLY BRIEF ON CROSS-APPEAL**
IN THE MATTER OF APPLICATION FOR PERMIT NO. 74-16187 IN THE NAMEOF KURT W. BIRD OR JANET E. BIRD	

BIRD'S REPLY BRIEF ON CROSS-APPEAL

Judicial Review of the *Order on Exceptions; Final Order* (dated May 21, 2020) entered by Director Gary Spackman of the Idaho Department of Water Resources

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authority

Kurt W. Bird and Janet E. Bird (collectively "Bird"), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby file *Bird's Reply Brief on Cross-Appeal*. This reply addresses *Respondent IDWR's Brief in Response to Bird's Cross-Petition* ("*IDWR Response*") and the *Response Brief of Petitioners the Idaho Water Resource Board and the Idaho Department of Fish and Game* ("*Agencies' Response*"). These briefs respond to the cross-appeal component of *Bird's Combined Opening Brief on Cross-Appeal and Response Brief* ("*Bird's Opening Brief*").

For the sake of clarity and brevity, Petitioners will use terms as defined in *Bird's Opening Brief*. This reply in turn addresses the *IDWR Response* and then the *Agencies' Response*. To the extent any arguments in the responses are not specifically addressed, Petitioners maintain their positions initially set forth in *Bird's Opening Brief*. Both the Agencies' appeal and Bird's appeal in this matter are taken from the *Order on Exceptions; Final Order* (the "*Final Order*") issued on May 21, 2020, by Director Gary Spackman (the "Director").

I. LEGAL ARGUMENT

A. In defending the Director's inclusion of Condition Nos. 8 and 9, the Department failed to address Idaho Code § 42-203A(5), which expressly provides that minimum stream flow water rights may not be established under the local public interest criterion in a new water right permit application proceeding, and may only be established pursuant to chapter 15, title 42, Idaho Code.

The Department's main rebuttal to the arguments contained in *Bird's Opening Brief* is that "[t]he Director's analysis of the local public interest factors in the Final Order was not unreasonable, arbitrary, or otherwise unconstitutional." *IDWR Response* at 13. This misses the point. It is the *remedy* imposed by the Director in the form of unlawful conditions on the exercise 74-16187, including those specifically prohibited by statute, that violates the IDAPA.

As previously explained, in the very same 2003 bill where the Idaho Legislature amended the definition of "local public interest," the Legislature amended Idaho Code §§ 42-203A(5) (as well as the transfer statute, Idaho Code § 42-222) to expressly prohibit use of the local public interest to establish minimum stream flow water rights:

> Provided however, that **minimum stream flow water rights may not be established under the local public interest criterion**, and may only be established pursuant to chapter 15, title 42, Idaho Code.

2003 Idaho Sess. Laws ch. 298 (House Bill No. 284) (emphasis added). The stated purpose of House Bill No. 284 describes that it is "to clarify the manner in which minimum stream flow water rights may be established." *See* https://legislature.idaho.gov/sessioninfo/2003/legislation/H0284/.

Surprisingly, *neither* the Department nor the Agencies addressed this language now contained in Idaho Code § 42-203A(5), which, in Bird's view, is an acknowledgement that there is no cogent argument or response to this express statutory language. The Director unilaterally imposed conditions on the exercise of 74-16187 that function just like a minimum flow water right under chapter 15 of title 42 and are directly contrary to the plain language of Idaho Code § 42-203A(5),[1] which specifically prohibits the establishment of minimum flows on new water right permits "under the local public interest criterion."

Further, the minimum stream flow statutes do not provide the Director with authority to impliedly grant or appropriate minimum flow water rights in a water right permit contested case hearing based on the local public interest. Given the relationship between the legislation that established the local public interest criterion and the minimum stream flow statute enacted on the very same day, as described in the *Shokal* case, it is self-evident that the Legislature wanted these statutes and the policies they implement to function independent of one another. Condition Nos.

[1] The same language prohibiting the imposition of minimum flows is also found in the transfer statute, Idaho Code § 42-222.

8 and 9 are in violation of Idaho Code § 67-5279(3)(a)-(b) because they violate statutory provisions and are in excess of the statutory authority of IDWR. We could end our reply here, but there is more to respond to.

We know that the Director cannot use the local public interest to do anything he wants with a water right permit application as there is a line somewhere that the Director cannot cross in imposing conditions intended to address local public interest concerns, even though the Director has been granted broad discretion under Idaho law both by statues and court cases interpreting those statutes relative to the local public interest criterion and numerous other water-related issues. *See, e.g, N. Snake Ground Water Dist. v. Idaho Dep't of Water Res.*, 160 Idaho 518, 522, 376 P.3d 722, 726 (2016); *see also Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993). On this specific point, the *Hardy* case is instructive.

Hardy held two water right permits, one for 300 cfs diverted at a single point of diversion, and a second permit for 600 cfs diverted at six points of diversion. *Id*. at 487, 849 P.2d 948. Five of Hardy's points of diversion were located at or below a natural sculpin pool, and eventually, Hardy obtained a right-of-way from the Bureau of Land Management and wanted to amend his permits to secure an additional point of diversion (located below a sculpin pool) that would coincide with this right-of-way. *Id*. His amended permit application was protested, went to a hearing, and the Director approved the amended permits, but with numerous conditions based on the local public interest concerns related to aquatic life (primarily sculpins) summarized by the Idaho Supreme Court ("ISC") as follows:

> The Director stated that Hardy must abandon his approved points of diversion located at and below the sculpin pool once all the required approvals for use of the new point of diversion were given. As to the two points of diversion located above the sculpin pool, the Director ruled that the local public interest required Hardy to divert water from these points only "to the extent that such diversion can occur without increasing or decreasing the water levels, temperature, quality, and/or flow

> velocity within the natural sculpin pool located downstream." The Director also ordered Hardy to construct a measuring device at the new point of diversion to measure the amount of water entering the new diversion. This condition was in addition to a similar condition imposed by the BLM in granting Hardy's right-of-way which required Hardy to construct a measuring device at the proposed diversion to assure a minimum stream flow of 75 c.f.s.

Id. at 488, 849 P.2d at 948. Several of the conditions were upheld by the ISC, and several others were reversed.

The conditions that were reversed included conditions based on the BLM right-of-way permit because the ISC found several conditions to be based on insufficient evidence in the record and the conclusion that "the Director as the agent of the State of Idaho, has no interest in the agreement made between BLM and Hardy." *Id*. at 492, 849 P.2d at 948. And, in relation to a condition requiring installation of a measuring device to measure water the 75 cfs bypass flow, the Director was reversed because "[t]he state's interest is in how much water goes into the proposed diversion, and as stated earlier, the state has no interest in the agreement between BLM and Hardy." *Id.*

Importantly, the ISC *upheld* inclusion of a measurement condition for the proposed diversion because—and this is a critical point—"so long as the Director's actions are within this authority, the conditions will be found to be appropriate." *Id.* Because of Idaho Code § 42-701, a specific statute authorizing the Director to require measuring devices and controlling works, the ISC found the condition was appropriate. *Id*.

This limitation on the Director's authority to condition permits to a statutory basis is admitted by the Director. In discussing the case of *North Snake Ground Water Dist. v. Idaho Dep't of Water Res.*, 160 Idaho 518, 376 P.3d 722 (2016), the Director explains that "[t]his Court rejected the Director's local public interest analysis, holding the Director's ability to evaluate the local

public interest is limited to evaluation of effects of the proposed use on the public water resource **authorized by statute**." *IDWR Response* at 19-20 (emphasis added).

The takeaway from the *Hardy* and *North Snake Ground Water District* cases is that statutes should evaluated at to determine whether the Director has a legal basis for local-public-interest-based conditions. Here, not only is there no statute that allows the Director to impose minimum stream flow conditions on a new water right permit, but the permitting statute expressly *prohibits* it. The Director's local public interest discretion in imposing conditions is not absolute as his actions must be within his authority (described in statutes or the Idaho Constitution) as explained in both the *Hardy* and the *North Snake Ground Water District* cases.

While the Department states that Bird admits "the Director may impose reasonable conditions" based on the local public interest, *IDWR Response* at 14, the argument's logical end is that the conditions imposed on 74-16187 by the Director are reasonable. The argument continues by noting that Bird already agreed to the same minimum flow condition as James Whittaker's water right, and after misrepresenting Bird's testimony at the hearing in its response, the Department claims that Bird testified "that with the 13 cfs bypass flow conditions and measurement in place, the Permit would be in the public interest." *IDWR Response* at 14. These arguments distract from the issues Bird has asserted on appeal.

Reasonable conditions do not include conditions that are not based on the Director's legal authority, described in statute, or are otherwise illegal. This is self-evident under the IDAPA review statutes found at Idaho Code § 67-5279 (agency cannot issue a decision that is in violation of constitutional or statutory provisions or are in excess of the statutory authority.

Further, as to the argument relative to Whittaker's right, Bird's consent to be bound by this same condition was based on practicality. Whittaker is bound by the 13 cfs minimum flow

condition because he did not appeal the decision to the courts, and recognizing as a practical matter that Whittaker's senior water right conditions would need to be met before 74-16187 could be diverted, Bird consented both before and at the hearing to the same 13 cfs minimum flow condition measured at the same location as Whittaker's right. R. 01186-01187. Bird has never agreed that the *imposition* of the minimum stream flow conditions was consistent with Idaho law, even though he consented to the 13 cfs condition. Contrary to the Department's mischaracterization, Bird never testified "that with the 13 cfs bypass flow conditions and measurement in place, the Permit would be in the public interest." *IDWR Response* at 14. Bird's actual testimony was that "[i]t wouldn't be fair to James if I had a better right than him. If it's going to be on his and he's got an older right, then I would certainly expect mine would be curtailed before his and that it would all be the same." Tr. Vol. 1 p. 69.

For all the above reasons and those previously asserted, the Director's inclusion of Condition Nos. 8 and 9 is contrary to language in a specific statute—Idaho Code § 42-203A(5)—and are conditions in violation of statutory authority and in excess of his statutory authority.

B. Condition Nos. 8 and 9 are minimum stream flow water rights.

On the question of whether Condition Nos. 8 and 9 are minimum stream flow water rights, there is a starting point position upon which the Director and Bird agree: "The Director has no legal authority to impose a minimum stream flow water right on Big Timber Creek." *IDWR Response* at 18. Where the Department and Bird are at odds is whether there are sufficient distinctions between the water entitlements provided in Conditions 8 and 9 and water rights developed under chapter 15 of title 42 of the Idaho Code. Bird asserts that the Department's attempts to create a distinction between these water entitlements are unavailing and ignore the duck test described in *Bird's Opening Brief*. The end result of Condition Nos. 8 and 9 is the same

as the end result of chapter 15 of Title 42 water right, which is allocation of unappropriated water for a beneficial purpose.

In *Joyce Livestock Co. v. United States*, 144 Idaho 1, 18, 156 P.3d 502, 519 (2007), the ISC found a "distinction without a difference" when the United States argued that there was a difference in an appropriator who was a tenant instead of a licensee (in an attempt to distinguish the case the ISC case of *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 746, 291 P. 1064, 1065 (1930)). In *Thrall v. St. Luke's Reg'l Med. Ctr.*, 157 Idaho 944, 947-48, 342 P.3d 656, 659-60 (2015), the ISC held that "[T]he distinction between a 'dismissal' and the face-saving device of a 'resignation which if not immediately tendered will be followed by dismissal,' is a distinction without a difference" because "[w]hen an employee is asked to resign to avoid being fired, "the meaning is clear that the employee is being dismissed." The final result matches, regardless of how someone attempts to create distinctions. It is not necessary for both kinds of water entitlement to be identical in every facet. Here, the imposition of minimum flow conditions on 74-16187 function precisely like an IWRB minimum stream flow right with the same elements.

Further, it cannot reasonably be asserted that the 2003 amendment to Idaho Code § 42-203A does not apply in this case because this is a proceeding under Idaho Code § 42-203A(5). The statute applies. The minimum stream flow conditions at issue with 74-16187 are found in the conditions of this water right permit. It is within the confines of a contested case for a new water right permit or transfer proceeding where the legislature was concerned the Director would impose minimum flow water entitlements on a new permit or a transfer approval. This is why the 2003 amended language is contained in Idaho Code § 42-203A(5) and Idaho Code § 42-222. Both of these statutes describe the hearing process on contested permit and transfer applications. And both of these statutes use the term "water rights" in their statutory language, which is a term broad of

enough to capture allocation of entitlement to unappropriated water—otherwise, what is the point of including this language in the permitting and transfer statutes? Given the specific statutes this language was added to, reading this added language as inapplicable to contested water right permit or transfer proceedings leads to absurd results. To allow the Director to circumvent the plain language and/or purposes of Idaho statutes that address a specific matter only leads to the accumulation of more power in an agency head that has plenty. Otherwise, what is the point of the direct process (chapter 15 of title 42) if the Director can simply get to the same place by imposing permit conditions that accomplishes a stream flow entitlement? The Director acknowledged that what he was doing was allocating unappropriated water for stream flows:

> It is in the local public interest **to maintain a portion of the <u>unappropriated water</u> in streams supporting anadromous fish**.

R. 01541 (emphasis added). Use of the term "maintain" is simply another term that describes the Director's allocation of unappropriated water. This is precisely the type of action that the 2003 statutory amendment to Idaho Code § 42-203A was intended to prevent. This language was not added in these statutes to address problems arising from procedures or situations arising out of other statutes—otherwise, the language would have been included there.

The Department further attempts to distinguish these water entitlements—because they argue that it will have no automatic effect on any future appropriation in Big Timber Creek—is unpersuasive. *IDWR Response* at 17. Subject to cold weather, it is evident and obvious that Bird will exercise 74-16187 whenever water is available in priority under this right as determined by the watermaster of Water District 74W (even if there is the possibility of flooding as such diversion will remove water from Big Timber Creek to protect property). When the exercise of this right happens, it will then impose a minimum flow mandate—a water right—that will make water unavailable that should otherwise be available for appropriation. This proceeding will establish a

precedent that as a practical matter will affect the pending applications for permit in the Lemhi River Basin, and all other future applications. This is evident and obvious. The Agencies have already protested the other pending applications for permit, and this precedent will be used in those proceedings—that is how legal precedent and *stare decisis* works.

The minimum stream flow conditions contained in 74-16187 function precisely like a minimum stream flow water right and possess the same characteristics and elements of an appropriated minimum stream water right, even down to a quantified amount of water (18 cfs and 54 cfs) and what its purpose of use is. Idaho Code § 42-1501 states that minimum flow water rights are for the express purpose "to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, . . . and water quality." Protection of fish and wildlife habit and fish passage for the benefit of anadromous and other fish (*i.e.*, aquatic life) are the express bases for inclusion of the minimum flow conditions in 74-16187. R. 01541. In both instances, the allocated minimum flow water is for a specific purpose (fish habitat and for the fish itself); unappropriated water is removed from being available for appropriation (18 cfs and 54 cfs); the minimum flow is measured at a specific location (the Lower BTC Gage and the Bird Gage) just like IWRB's water right no. 74-14993; and the minimum flow is established for the benefit of an entity akin to the water right owner (the IWRB either as the applicant of a minimum flow water right, or the Agencies as protestants to 74-16187). The Department's attempts to create a distinction when there is no difference is unavailing. Condition Nos. 8 and 9 are minimum flow water rights because they allocate unappropriated water and establish an entitlement to water.

C. Condition Nos. 8 and 9 are not reasonable and are not based on substantial evidence in the record in violation of Idaho Code § 67-5279(3).

At the hearing, the Agencies introduced thousands of pages of exhibits in support of its position that it wanted 74-16187 denied outright and not approved with conditions. R. 01282

("[T]he IWRB therefore respectfully requests that the Application be denied."); *see also* R. 01240 ("In IDFG's assessment, the above-described adverse effects of approving the Application cannot be 'avoided, minimized, or mitigated' by imposing protective conditions on the Application."). Included within the thousands of pages of exhibits was the USBR Study, which was used by the Director to justify the imposition of the 54 cfs minimum flow condition. And Bird included the USBR Study within its exhibits as well, but as background for the 13 cfs minimum flow condition on Whittaker's right, which Bird knew as a practical matter his permit would be subject to given Whittaker's senior priority date. The Department states that "IDFG introduced the USBR Study into the record without objection" and "there is no evidence in the record offered by Bird to refute the technical information contained in the USBR study." *IDWR Response* at 23. However, these arguments ignore the reality of litigation proceedings, and in particular, the posture of the parties to this contested case. Unlike the Agencies, who have in-house attorneys from the AG's office, on-staff experts already on the payroll, and virtually unlimited financial resources, Bird does not have such resources. It is impractical and unreasonable to expect that Bird will comb through every exhibit document and rebut the information to address positions that the introducer of the evidence never advocated for at the hearing. If this were the case, the hearing would have lasted weeks. It is unfair for the Department to suggest that it was open and obvious that the Hearing Officer would impose a minimum flow condition that no one advocated for in their protests, nor was it argued for in testimony from witnesses (including the Agencies' main witness, Jeff Diluccia), or in post-hearing briefing. The 54 cfs condition was a surprise to everyone.

And yet, despite the Department's attempts to ignore the practical reality of how issues are identified and litigated in a contested case, the 54 cfs condition is not based on substantial evidence in the record. Again, *Hardy* is instructive. In that case, the permit conditions that were reversed

included conditions based on the BLM right-of-way permit because the ISC found several conditions to be based on insufficient evidence in the record and the conclusion that "the Director as the agent of the State of Idaho, has no interest in the agreement made between BLM and Hardy." *Hardy*, 123 Idaho at 492, 849 P.2d at 948. And, in relation to a condition requiring installation of a measuring device to measure water the 75 cfs bypass flow, the Director was reversed because "[t]he state's interest is in how much water goes into the proposed diversion, and as stated earlier, the state has no interest in the agreement between BLM and Hardy." *Id*.

The Director's 75 cfs condition in *Hardy* had something in its administrative record that the Director could point to in order to justify the inclusion of this condition, but the ISC held that was not enough evidence in the record upon which to base its condition. Bird's position is that a minimum flow condition has to at least be based on some semblance of advocacy by the Agencies because in the argument for it, evidence gets placed in the administrative record to support it that can then be used to then justify the condition in the forthcoming order. That did not happen here. We submit that this means there is not a reasonable basis in the record—let along a substantial basis—upon which to base the 54 cfs condition. The Agencies' legal position was clear, even though it was not based on any specific technical information: "more water means more fish." Quantifying the benefit of the minimum flows and/or channel-forming flows is necessary in order for the evidence to be considered substantial. Diluccia did not do that, and further, when pressed on cross examination about his position that "more water means more fish," he admitted it was "a generic statement." Tr. Vol. II p. 464 LL. 1-2. When asked "is there a number?" Diluccia responded, "Well, let me qualify that by saying that we haven't done it yet." *Id*. p. 466 LL.6-8.

Without any expert testimony to develop the evidence to support the 54 cfs condition in the first place, there was nothing for Bird to rebut, and on appeal, the Court can utilize its own reasoned logic to determine whether the condition has a reasonable basis.

Rather than address these matters raised by Bird, the Department suggests that argument from Bird's counsel on appeal is expert testimony. *IDWR Response* at 23 ("Neither Bird, nor his Counsel, are qualified as experts in fish passage or habitat needs."). Bird is perfectly within his rights to point out perceived flaws in how the USBR Study was utilized, similar to the Director's use of the BLM study in *Hardy* which was used as a basis for a condition that the ISC reversed. As previously explained, Reach 5 in the USBR Study is the only reach of the seven reaches where the flow rate required for passage of adult fish is higher than the flow rate required for optimum spawning habitat. Furthermore, the 54 cfs amount is 284% higher than the next highest adult passage flow of 19, which strongly suggests that this number is an outlier. Where this is a calculated flow based on 25% of the channel width being wet rather than actual measurements, it was not reasonable to rely upon this portion to the USBR Study to formulate a minimum flow amount. The Director's inclusion of Condition Nos. 8 and 9 simply goes too far in that regard, is arbitrary, capricious, and an abuse of discretion, all of which violates Idaho Code § 67-5279(3)(d) and (e). For all the above reasons, Condition Nos. 8-9 must be removed as a condition of the exercise of 74-16187.

D. Condition No. 10 is not authorized by statute and is improper.

As admitted by IDWR in its discussion of the of the *North Snake Ground Water District* case, the Director explains that "[t]his Court rejected the Director's local public interest analysis, holding the Director's ability to evaluate the local public interest is limited to evaluation of effects of the proposed use on the public water resource **authorized by statute**." *IDWR Response* at 19-

20 (emphasis added). In *Hardy*, the ISC upheld the imposition of a measurement condition because "the Director's actions are within his authority, the conditions will be found to be appropriate." *Hardy*, 123 Idaho at 492, 849 P.2d at 948. Because of Idaho Code § 42-701, a specific statute authorizing the Director to require measuring devices and controlling works at the point of diversion, the ISC found the condition to be appropriate. *Id*. And on this point, the ISC also determined that "[t]he state's interest is in how much water **goes into the proposed diversion**, and as stated earlier, the state has no interest in the agreement between BLM and Hardy." *Id*. (emphasis added).

Idaho Code § 42-701(1) is specific that the Director can require measuring devices "at the point where the water is diverted." There is no provision in this statute that gives the Director authority to impose gaging station responsibility on an individual water user as Condition No. 10 does. Indeed, Idaho Code § 42-703 provides otherwise. This statute—entitled "measuring devices along streams"—provides "those using water in any district," not a singled-out water user, have a "duty" to install gaging stations "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." Idaho Code § 42-703. As previously described, Bird is within Water District 74W, which is an instrumentality of IDWR that performs an "essential **governmental** function." Idaho Code § 42-604 (emphasis added). The plural language from Idaho Code § 42-703—"*those* using"—makes it clear that this statute only authorizes construction of gaging stations through water districts. This makes practical and legal sense, because as a governmental entity, Water District 74W has rights (such an eminent domain authority) that private citizens do not to place gaging stations anywhere on a stream (away from ditch headings where water users do have property rights). The Director's interest as it relates to Bird should be rooted in "how much water goes into the proposed diversion."

Hardy, 123 Idaho at 492, 849 P.2d at 948. He cannot impose additional conditions where the Director has no statutory authority to do so to an individual user. Assuming that the minimum flow conditions are upheld, the Director can then instruct its instrumentality—Water District 74W—to install and utilize gaging stations. The Department's claim that "without Condition 10, no compliance enforcement or regulatory mechanism would be in place to monitor Bird's use under the Permit" is without merit. The Director oversees water districts throughout the state of Idaho, and Water District 74W is the very regulatory mechanism the law provides for in order to distribute water. "Each water district created hereunder shall be considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators." Idaho Code § 42-604.

The Department asserts that the gaging station requirements are not Water District 74W's responsibility because "Condition 10 is not related to the measurement and distribution of water between users. Condition 10 requires Bird, as the permittee, to measure Big Timber Creek *flow* at the two gage sites in order to demonstrate ongoing compliance with the local public interest pursuant to Conditions 8 and 9." *IDWR Response* at 26 (italics in original). But this argument ignores Idaho Code § 42-703, which specifically provides that the Director may require of "those using water" in a water district to install systems for measuring "the *flow* of water." (italics added). The Department's position is unavailing, and somewhat strange, as it minimizes the Director's authority while other components of the Department's defense of the *Final Order* attempt to stretch the Director's authority beyond what is provided in statute. The Director is not permitted to assign governmental responsibility to an individual water user.

In response to Bird's property-based concerns, the Department states that as to the Lower BTC Gage "[t]here is no evidence in the record showing either [Idaho Power Company and the

IWRB] will stop this practice. . . Even if Idaho Power and/or the IWRB were to discontinue measurement activities at the Lower BTC Gage site, there is no reason why Bird could not get permission to utilize the same site in the future." *IDWR Response* at 25. This supports Bird's point—permission can always be revoked, and since Bird has no individual legal right to install and maintain gaging stations, it is not reasonable to base a condition on the permission of a landowner or holder of a right-of-way. Other considerations may trump the importance of water measurement, and Bird potentially could be found in violation of Condition No. 10.

On the gaging station question, the Department's final position is that "even if access was somehow denied, the Department and the watermaster would undoubtedly work with Bird to find an alternative location that achieved the same goals." *Id.* This is news to Bird, but more importantly, this language in not contained in the plain language of Condition No. 10. The Department's attempts to indirectly amend either the language or intent Condition No. 10 at this point does not work as any subsequent action associated with this condition will be based on the plain language of the condition.

Finally, while the Department defends construction of a third gaging station, and imposition of its maintenance on an individual water user, *IDWR Response* at 26-27, Bird maintains that there is already a flume (Bird Exhibit 27) that "was installed to aid the watermaster in the delivery of exchange water rights in the Lemhi River and in the delivery of water right 74-15613." R. 01524. Condition No. 10 adds unnecessary complexity and burdens the watermaster, which is unreasonable. For this additional reason, Condition No. 10 should be removed.

E. Condition No. 11 remains as an abuse of the Hearing Officer's discretion in violation of Idaho Code § 67-5279(3).

In an unprecedented manner, Condition No. 11 attempts to categorize 74-16187 under Paragraph 10(b)(b)(A)(ii) of the SRBA partial decree that implements the Wild and Scenic

Agreement when it should be categorized under Paragraph 10(b)(b)(A)(i). The Department defends the Director's actions as being based on a "simple, practical reason" where stream flow data does not show flows in Big Timber Creek to be high enough for 74-16187 to be in priority and the Salmon River at the Shoup Gage to be below 1,280 cfs. *IDWR Response* at 28. But a simple, practical reason does not supersede proper interpretation of a partial decree. Recognizing this flaw, the Department pivots from the interpretation question, and couches the matter as one of evidence: "there is no evidence in the record supporting Bird's contention that the Permit 'clearly' requires subordination protection under Paragraph 1." *Id*. The interpretation of the Wild and Scenic Agreement is a legal question, not a factual one. But even so, there is evidence in the record on this issue to support Bird's position.

IDWR has tracked appropriations in Basin 74 on a first-come-first-served bases, as shown on Bird's Exhibit 20. To date, only approximately 50 cfs has been debited from the 150 cfs amount. There is no spreadsheet for the 225 cfs category, a fact confirmed by the Director. R. 01530 ("As of today, no portion of the 225 cfs has been allocated."). Several of the water rights on the IDWR tracking spreadsheet are on tributary streams to the Lemhi River and Salmon River, just like 74-16187. Bird Exhibit 20.

The Director has no authority to do what he has done because it is contrary to the structure of the Wild and Scenic Agreement, and Bird did not ask for it to be done. Neither the Wild and Scenic Agreement, nor any Idaho statutes, grant the Director authority to choose the category that a future water right permit in Bain 74 will be designated under. Without any such language or authority, the structure of the Wild and Scenic Agreement is evidence of how future water rights that are developed under this Agreement are to be categorized. It is done on a first-come-first-served basis, as evidenced by this provision of the Wild and Scenic Agreement:

> . . . if a portion of the acreage permitted within the 150 cfs is to be idled for a year or more, an equal number of acres permitted for irrigation within the 225 cfs in subparagraph (ii) below can be substituted to take advantage of the subordination when the river is less than 1,280 cfs of the period of years the original acres are idled."

IDWR Exhibit 13 at 6. This substitution provision clearly establishes a priority for new water right applications, where new applications are first categorized under the 150 cfs portion up until this amount is fully appropriated, and then any new applications submitted thereafter are categorized under the 225 cfs portion. This is because those in the 225 cfs category can enjoy the subordination protections of the 150 cfs category if some of the 150 cfs category rights are idled.

The Director suggests that the Wild and Scenic Agreement contains an implied right for him to determine what category to designate new water right permits in the Salmon River Basin. To that end, the Idaho Supreme Court has described the appropriate process for interpreting water right partial decrees, and no law supports injection of implied conditions into decreed water rights:

> When interpreting a water decree this Court utilizes the same rules of interpretation applicable to contracts. [*A&B Irr. Dist. v. Idaho Dep't of Water Res.*], 153 Idaho [500,] 523, 284 P.3d [225,] 248 [(2012)]. If a decree's terms are unambiguous, this Court will determine the meaning and legal effect of the decree from the plain and ordinary meaning of its words. *Cf. Sky Canyon Props., LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013) ("If a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law to be determined from the plain meaning of its own words."). A decree is ambiguous if it is reasonably subject to conflicting interpretations. *Cf. Huber v. Lightforce USA, Inc.*, 159 Idaho 833, 850, 367 P.3d 228, 245 (2016) ("Where terms of a contract are 'reasonably subject to differing interpretations, the language is ambiguous....'" (quoting *Clark v. Prudential Prop. and Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003))). Whether ambiguity exists in a decree "is a question of law, over which this Court exercises free review." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016) (quoting *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011)).
>
> Water rights are defined by elements. *See* I.C. §§ 42-1411(2); *see also City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012) ("The elements listed [in section 42-1411(2)] describe the basic elements of a water right."); *Olson v. Idaho Dep't of Water Res.*, 105 Idaho 98, 101, 666 P.2d 188, 191 (1983). Idaho Code sections 42-1411(2) and 42-1411(3) comprise a list of elements that define a

> water right. Under Idaho Code section 42-1412(6), a water decree "shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable." … Thus, a water decree must either contain a statement of [each element] or incorporate one, but not both. *Markel Int'l Ins. Co., Ltd. v. Erekson*, 153 Idaho 107, 110, 279 P.3d 93, 96 (2012) ("The word 'or' ... is '[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things.' "); *In re Snook*, 94 Idaho 904, 906, 499 P.2d 1260, 1262 (1972) ("The word 'or' ... is given its normal disjunctive meaning that marks an alternative generally corresponding to 'either'....").

City of Blackfoot v. Spackman, 162 Idaho 302, 306-07, 396 P.3d 1184, 1188-89 (2017) (footnote omitted).

As to other disputes concerning water right interpretation, both this Court and the ISC have been extremely reluctant to find any ambiguity, uncertainty, or alternative meaning (either patent or latent) within partial decrees issued in the SRBA. *See, e.g.*, *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 203 (2016) ("the name Martin–Curren Tunnel is not ambiguous and does not create a latent ambiguity in Rangen's partial decrees"); *United States v. Black Canyon Irrigation Dist.*, 163 Idaho 54, 408 P.3d 52 (2017); *Order Denying Petitioner's Second Motion for Reconsideration* and *Order Denying Motion to Amend Petition and Complaint* (Case No. CV-2016-02, Camas County, Fifth Jud. Dist., *Cash v. Cash et al.*, Jan. 12, 2018).[2]

This Court has even explained that "[i]t would constitute a serious turmoil and confusion for this Court to issue partial decrees [on the late claims,] which contradict the precise language, intent and effect of that final judgment [i.e., the prior partial decrees]." *Memorandum Decision and Order on Challenges Final Order Disallowing Water Right Claims, Subcase Nos. 65-23531 and 65-23532*, (Oct. 7, 2016) at 5. For that reason, the court concluded "that the late claims were extinguished by operation of the plain language of the [prior] final judgment. To find otherwise would offend the plain language of the final judgment and result in contradictory court decrees."

[2] This case was decided by Judge Wildman in his capacity as a district judge after taking over the case from Judge Elgee after his retirement.

Id. These same principles apply to interpretation of the Wild and Scenic Agreement partial decrees.

Without a legal or statutory basis to impose Condition No. 10, it violates IDAPA. The Director should not be allowed to dictate who benefits from subordination and who does not. By demoting Bird's application, without any request by Bird to do so, the Director has abused his discretion. This court should amend Condition No. 13 to specify that it is protected under Paragraph 10(b)(b)(A)(i) of the Wild and Scenic Agreement.

F. Contrary to the Agencies' position, a determination that Condition Nos. 8 and 9 are unlawful does not mandate a denial of 74-16187.

Most of the Agencies' arguments made in its response brief are similar to the Department's, but several merit responses.

The Agencies assert that if Bird is successful on appeal in having Condition Nos. 8 and 9 determined to be unlawful, "it would only mean that Bird's application must be denied in its entirety." *Agencies' Response* at 10. This is simply not correct. There is a major distinction in recognizing an issue of concern and having legal authority to impose a remedy to address the concern. Even outside of administrative law, Idaho imposes statutes of limitations on bringing actions, mandates certain procedures for certain claims (such as claims under the Idaho Tort Claims Act) the violation of which bars claims for otherwise legitimate injury, and requires certain standards to be met at trial in order to be eligible for relief (i.e, the standard of care in a medical malpractice proceeding). There may very well be legitimate injury suffered by claimants, but our laws do not always provide the judicial officer with authority to dictate a remedy.

Such is the case here. The Agencies assert harm to its interests and claim that if the Director's remedy is not upheld, then 74-06187 must be dismissed entirely because its interests cannot be addressed. Because a judicial officer does not have authority to issue a remedy is not

a basis to automatically dismiss 74-16187. It means that the concerns cannot be addressed through conditions because the Director does not have authority to address those concerns with a lawful remedy. And what is particularly problematic in this case is that the IWRB has been provided a statutory structure to appropriate minimum flows to address its interests, which it has not yet chosen to avail itself of. The Agencies could also petition for a moratorium halting the processing of new water right applications, which it also has not done. For all of these reasons, the Agencies' positions on this issue are unavailing.

G. It is not a mischaracterization of the record in asserting that the Agencies are attempting to lay claim to all unappropriated water in the Lemhi River Basin.

Perhaps recognizing the likelihood of social unpopularity of the water right centered effects on the Agencies' positions articulated in testimony and in writing in this matter, the Agencies claim Bird has mischaracterized the record in claiming that the Agencies attempt to lay claim on all the unappropriated water in the Lemhi River Basin. *Agencies' Response* at 11, 16-17. The Agencies claim Bird has "descend[ed] into hyperbole." *Id*. at 18. It is not hyperbole—it is precisely what the Agencies' experts testified to, and precisely what the Agencies' have said in their briefing. And this is not just how Bird characterized the Agencies' position, it is how the Department characterized it as well:

> The Agencies contend that <u>all</u> of the remaining unappropriated water in Big Timber Creek is required to maintain fish passage and fish habitat in the creek. *Diluccia Test.*
> . . .
> The Agencies argue that <u>all</u> unappropriated flow in the Lemhi River Basin, no matter the quantity, is required to provide habitat for ESA-listed Species. *IDFG's Post-Hearing Brief* at 20.

R. 01534, 01536 (underlining in original). It is disingenuous to suggest that Bird is mischaracterizing the record when Bird is simply quoting from the record the Agencies helped create and from the Agencies' briefs submitted in this case. It is simply an objectively incorrect

statement to assert "the Agencies have never taken the 'legal position' that 'all unappropriated water in the Lemhi River' should be 'set aside." *Agencies' Response* at 16. If the Agencies "argue that all unappropriated flow in the Lemhi River Basin, no matter the quantity, is required to provide habitat for ESA-listed Species," then what else could the result be? Again, the Agencies provide the answer: "from an ESA perspective, **there is no water available in the Lemhi River basin for new water rights**." *Id*. at 17 (emphasis added).

The Agencies' position is black and white. Rather than petitioning IDWR to issue a moratorium on new appropriations in the Lemhi River basin, or appropriating minimum stream flow and/or channel-forming flow water rights, neither of which the Agencies have done, the Agencies' strategy is to either stop water development, or to be the arbiter of who gets it depending on which applications it decides to protest. Again, this is not Bird's interpretation of the Agencies' position. The Agencies engage in hair-splitting to assert that while existing irrigation is the local public interest, "new irrigation rights should not be issued at this time" but "the Agencies recognize that local public interests in new uses other than irrigation, such as DCMI uses, outweigh the local public interests in ESA recovery." *Id*. at 19. However, the Director has never engaged in this type of hair-splitting as he has held "[i]t is in the local public interest to divert water for irrigation use" with no distinction between existing or proposed irrigation. R. 01538. At the end of the day, it is not entirely clear why the Agencies' have raised these particular issues in response. These attempted distinctions should not divert the Court from the critical issues raised in Bird's cross-appeal, which are centered on whether the Director has authority provided by statute to impose a remedy in the form of certain permit conditions.

H. The Agencies are attempting to raise an issue on appeal that was not decided by the Director relative to whether high flows diverted under the Basin 74 General Provisions are limited to application on lands with a base water right.

In their response, the Agencies' claim "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 existing decreed water rights." *Agencies' Response* at 16. However, this was an issue that was not addressed in this contested case, even though the issue was raised at hearing, and it is improper for the Agencies to slip this issue into this appeal. The Director held that "questions related to when water users may divert high flow are questions of administration and not properly before the hearing officer." R. 0514. The Hearing Officer also made it clear that resolution of this issue was not properly before him:

> The Basin 74 General Provisions authorize water users to divert high flows from the Lemhi River or its tributaries under certain conditions. During the hearing, there was some discussion about whether high flows diverted under the Basin 74 General Provisions could only be applied to lands covered by existing, recorded water rights. That issue, however, is not before the hearing officer and a determination of that issue is not needed to reach a decision in the pending contested case.

R. 01432.

Further, the Agencies' conclusory statement is contrary to the plain language of the Basin 74 General Provisions, which contain no requirement for a base water right for a water user to divert high flows:

> The practice of diverting high flows in the Lemhi Basin, in addition to diverting decreed and future water rights that may be established pursuant to statutory procedures of the State of Idaho, is allowed provided:
>
> (a) the waters so diverted are applied to beneficial use.
> (b) existing decreed rights and future appropriations of water are first satisfied.

All that is required of the diverted high flows is that they must be applied to a beneficial use. We fully anticipate that this may become the subject of future litigation, but for purposes on this matter, it was not proper for the Agencies' to raise it in their response as the matter raises an issue that was not addressed before the agency below.

I. Bird has not mischaracterized the Wild and Scenic Agreement.

The Agencies next assert "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." *Id*. at 20. For convenience, Bird grouped the actual Wild and Scenic agreement and the integral partial decrees under the defined term of "Wild and Scenic Agreement." But in terms of future water rights, we disagree with this statement. And the Agencies seem to as well with the following sentence after the above-quoted sentence: "While the subordination provisions provided opportunities for future development, . . ." *Id*. That is Bird's point, and Bird has never claimed that appropriation of water is guaranteed or "mechanically approved until the subordinated water is used up" or, as may be implied by the Agencies, that he did not need to follow Idaho Code § 42-203A(5). The Wild and Scenic Agreement allowed for the development of 150 cfs of water that the United States' instream flow rights are subordinated to, which is a remarkable benefit to Idaho water users. The Agencies now claim there is no more unappropriated water (even though the Wild and Scenic Agreement protects the future development of this water supply) because it is need for channel-forming flows to improve habitat.

In terms of how the Wild and Scenic Agreement should be interpreted and applied in this proceeding, Bird has already addressed this issue above and in *Bird's Opening Brief*.

J. Condition Nos. 8 and 9 do not limit Bird's diversions to a "smaller quantity than applied for" under Idaho Code § 42-203A, rather, these conditions impose a minimum stream flow water right.

Bird has already explained in its opening brief and above in this brief that Condition Nos. 8 and 9 impose minimum stream flow water rights, which are unconstitutional and in violation of Idaho statutes. In its response, the Agencies posit a new argument—that Condition Nos. 8 and 9

"[in] actual effect . . . limit Bird's diversion to 'a smaller quantity than applied for" and that the Director was within his authority because Idaho Code § 42-203A expressly provides the Director with the authority to "grant a permit for a smaller quantity of water than applied for." *Agencies' Response* at 29. We disagree, as this interpretation stretches the plain language of this statute too far. "Quantity" of water is the diversion rate or volume of water on the permit—*i.e.*, reducing a permit from 20 cfs down to 10 cfs. This interpretation is supported by the plain language contained after the "smaller quantity of water applied for" language, which is, "**or** may grant a permit upon conditions." (emphasis added). The "or" language is disjunctive, and it is this latter portion of the statute that gives the Director authority to condition permits. See *City of Blackfoot v. Spackman*, 162 Idaho 302, 306-07, 396 P.3d 1184, 1188-89 (2017) (or is a disjunctive particle that means a choice between two options). The Director conditioned 74-16187—he did not approve it for a lesser quantity of water, and as set forth above, the challenged conditions violate the IDAPA. The statutory language is plain and unambiguous. Idaho law provides: "Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction." *Eller v. Idaho State Police*, 165 Idaho 147, 154, 443 P.3d 161, 168 (2019) (internal citations omitted). The Agencies' interpretation is not reasonable or persuasive.

K. Idaho Code § 42-703 does not provide the Director express authority to require a single water user to maintain gaging stations.

The Agencies argue that Idaho Code § 42-703 provides the Director with authority to require an individual water user to construct a gaging station. Similar to the immediately preceding section, this statutory interpretation is incorrect.

Idaho Code § 42-701(1) is the specific statute where the Director can require measuring devices, but *only* "at the point where the water is diverted." There is no provision in this statute that gives the Director authority to impose gaging station responsibility on an individual water

user. Idaho Code § 42-703 provides that gaging stations can be installed as required by the Director, but this is limited to "those using water in any district," not a singled-out water user. "Those" users have a "duty" to install gaging stations "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."

As previously described, Bird is within Water District 74W, which is an instrumentality of IDWR that performs an "essential **governmental** function." Idaho Code § 42-604 (emphasis added). The plural language from Idaho Code § 42-703—"*those* using"—makes it clear that this statute only authorizes construction of gaging stations through water districts for the benefit of all water users within the water district. This makes practical and legal sense, because as a governmental entity, Water District 74W has rights (such an eminent domain authority) that private citizens do not to place gaging stations anywhere on a stream (away from ditch headings where water users do have property rights). The Director cannot impose additional conditions where the Director has not statutory authority to do so to an individual user. The Agencies' arguments relative to Idaho Code § 42-703 and its interpretation are unavailing—the plain language of this statute does not give the Director a right to require an individual water user to install gaging stations.

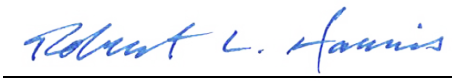
II. CONCLUSION.

It is evident that the parties to his proceeding disagree over where the line has been drawn on establishment of minimum stream flow entitlements. The decision on appeal from this Court will have far-reaching effects on water users because, if upheld, it will validate the Director's authority to circumvent a strict procedure to appropriate minimum flow water rights and do

indirectly what is prescribed directly. To allow the Director to circumvent the plain language and/or purposes of Idaho statutes that address a specific matter is untenable.

In response to Bird's cross-appeal, this Court should remove Condition Nos. 8-10 and revise Condition No. 11 as set forth herein. Once that is done, a revised permit for 74-16187 should be issued. This Court should not reverse the Director's decision to issue 74-16187, as argued by the Agencies, or otherwise insert or amend the conditions the Agencies have advocated for on their appeal.

Respectfully submitted this 30th day of December, 2020.



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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December 2020, true and correct copies of *Bird's Combined Opening Brief on Cross-Appeal and Response Brief* were served via Email and USPS Delivery, on the following:

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