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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 **STIPULATION and JOINT MOTION TO DISMISS AND REMAND FOR ISSUANCE OF PERMIT 74-16187**
IN THE MATTER OF APPLICATION FOR PERMIT NO. 74-16187 IN THE NAME OF KURT W. BIRD OR JANET E. BIRD	

PETITIONERS, the Idaho Water Resource Board ("Board") and the Idaho Department of Fish and Game ("IDFG"), CROSS-PETITIONERS Kurt W. Bird and Janet E. Bird ("Bird"), and RESPONDENT the Idaho Department of Water Resources ("IDWR") (collectively, the "Parties"), by and through their counsel of record and pursuant to the *Order Granting Third Unopposed Motion to Reschedule Oral Argument Date; Order Vacating Oral Argument* (Mar. 16, 2021), hereby submit this Stipulation and Joint Motion to Dismiss and Remand for Issuance of Permit 74-16187. The Parties request that this Court dismiss this proceeding and remand it to the Idaho Department of Water Resources for issuance of a permit for water right 74-16187 consisting of the elements and conditions to which the parties have herein stipulated.

STIPULATION

The Parties hereby stipulate and agree as follows:

I. This proceeding should be dismissed and remanded to IDWR for issuance of a permit having the following elements and conditions:

Permit Number: 74-16187
Owner: Kurt W. Bird or Janet E. Bird
Priority Date: October 12, 2018
Source: Big Timber Creek tributary to Lemhi River

Beneficial Use: Irrigation
Season of Use: March 15 – July 31
Diversion Rate: 6.40 cfs
Point of Diversion: NWNW, Section 20, T15N, R26E (Home Ditch)
Place of Use: 320 acres
SWSE, SESE, Section 8, T15N, R26E
SW1/4, Section 9, T15N, R26E
NENE, NWNE, Section 17, T15N, R26E

Conditions of Approval:

1. Subject to all prior rights.

2. Proof of Application of water to beneficial use shall be submitted on or before the date established by the Director.

3. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of approval, this water right is within State Water Districts 170 and 74W.

4. Prior to the diversion and use of water under this right, the right holder shall install and maintain acceptable measurement devices at the authorized point(s) of diversion and in accordance with Department specifications or shall obtain an approved variance from the Department to employ an alternative method to determine and record the amount of water diverted.

5. Prior to diversion of water under this right, the right holder shall install and maintain a locking controlling works, subject to the approval of the Department, in manner that will provide suitable control of the diversion.

6. When notified by the Department or by a watermaster with regulatory authority over this right, the right holder shall report the amount of water diverted in connection with this right. The report shall be submitted in the manner and frequency specified by the Department or the watermaster.

7. This right does not grant any right-of-way or easement across the land of another.

8. This right is only available when flow at the Big Timber Gage 13304050, located at Latitude 44°41'19.65", Longitude 113°22'13.46", Lemhi County (BT Gage) is at least 18 cfs. Any flows present as a result of the Idaho Water Resource Board's water transactions

program will be included ("counted") in determining whether the 18 cfs flow requirement is satisfied.

9. The right holder shall cease diversion under this right if the flow of Big Timber Creek is less than 18 cfs at the BT Gage. Any flows present as a result of the Idaho Water Resource Board's water transactions program will be included ("counted") in determining whether the 18 cfs flow requirement is satisfied.

10. This right benefits from the subordination described in Paragraph 10(b)(6)(A)(ii) of water rights 75-13316 and 77-11941 and may only be diverted when the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 cfs.

11. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the place of use.

12. Rights 74-32, 74-34, 74-7165, 74-15926, 74-15927, 74-15928, 74-15929, 74-15930, 74-15931 and 74-16187 when combined shall not exceed a total diversion rate of 52.77 cfs.

13. This right fully satisfies any and all claims of right or authorization to divert "high flow" water, as that term is defined in the Basin 74 "General Provisions" decreed in the Snake River Basin Adjudication, for use within the place of use for this right. This limitation applies to all acres within the place of use for this right, including any acres that are also covered by other water rights.

14. The right holder will allow IDFG to install and maintain fish screens on the right holder's diversions, including execution of an access agreement for such purposes, and will not protest IDFG applications for fish propagation water rights required for operation of the fish screens. The right holder will cooperate with IDFG to consolidate the right holder's diversions where feasible.

15. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

II. The Parties have entered into this stipulation solely for the purpose of resolving the pending litigation. This stipulation represents a compromise among the Parties regarding the elements and conditions to be included in permit 74-16187 and sets

forth the Parties' entire agreement on this question. Except as specifically provided in this stipulation, nothing in this stipulation waives the rights, positions, or arguments of the Parties as to any issue of fact or law raised in the above-entitled proceeding. This stipulation may not be used or held against any of the Parties other than to show the terms of their agreement on the elements and conditions of the permit for water right no. 74-16187. Nothing in this stipulation alters or amends the separate stipulation executed in January 2022 by the Board, IDFG, and Bird, which remains in effect according to its terms, and is not binding on IDWR.

JOINT MOTION

The Parties jointly move this Court for an order dismissing the above-entitled case, and remanding the underlying matter to IDWR for issuance of a permit having the elements and conditions to which the Parties have stipulated. The Idaho Supreme Court "has always held to the strong public policy favoring amicable settlement of litigation." *Quick v. Crane*, 111 Idaho 759, 780, 727 P.2d 1187, 1208 (1986); *see also Hammer v. City of Sun Valley*, 163 Idaho 439, 444, 414 P.3d 1178, 1183 (2016) (discussing the "'obvious public policy favoring the amicable settlement of litigation'") (citation omitted). This case arose from challenges to the elements and conditions of the permit as approved in IDWR's *Order on Exceptions; Final Order* (May 21, 2020). R.01506-47. The Parties' stipulation for issuance of a permit having the elements and conditions to which they have agreed represents an amicable settlement of the pending litigation. Public policy favors the settlement and provides good cause for granting this Joint Motion. The Parties therefore request that this Court enter an order dismissing this case and remanding the underlying matter to IDWR for issuance of a permit having the elements and conditions to which the Parties have stipulated.

Respectfully submitted this 13TH day of December, 2022.

/s/ Michael C. Orr
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the Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of December 2022, 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	☒ iCourt

2. Copies to the following:

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