

District Court - SRBA
Fifth Judicial District
In Re: Administrative Appeals
County of Twin Falls - State of Idaho

SEP 21 2020
LODGED

By _____ Clerk
Deputy Clerk

**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. CV01-20-9661

**OPENING 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, and arises 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 (“IWRB”) and the Idaho Department of Fish and Game (“IDFG”) 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 position of the IWRB and IDFG in this proceeding is that the *Final Order* expressly did not protect the local public interests that the *Final Order* specifically identified: (1) the local public interests in efforts to recover the listed fish species; (2) the local public interests in protecting the streamflow and habitat needed to recover the listed fish species; and (3) the local public interests in developing a “Section 6 Agreement” that would protect local people from ESA enforcement actions by NOAA Fisheries.³ While the *Final Order* determined the

¹ Idaho Code § 42-203A(5)(e).

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

³ R. 01534, 01541. The agency record was filed in an 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

application would have to be denied unless it was conditioned to protect these identified local public interests, it only conditioned the permit to protect certain “bypass flows” derived from a study authored by the United States Bureau of Reclamation (“USBR Study”). This was legal error, and lacked support in the record. “Recovery” of the listed fish species under the ESA is a legal question determined by NOAA Fisheries⁴ rather than the USBR, and nothing in the *Final Order* or the record supports a conclusion that the “bypass flows” of the USBR Study “protect the streamflow and habitat needed to recover ESA-listed fish species.”⁵ As a result, the *Final Order* did not fulfill the affirmative statutory duty of protecting the local public interests that it expressly identified and confirmed,⁶ and was not consistent with the State Water Plan.⁷ For these reasons and others that will be discussed, the IWRB and IDFG request that IDWR’s order be set aside in part, and remanded for further proceedings as necessary.

II. THE COURSE OF THE PROCEEDINGS.

Bird’s application was filed on October 12, 2018, and protests were filed by the IWRB,

this brief, 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).

⁴ “NOAA Fisheries” refers to the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, United States Department of Commerce.

⁵ R. 01541 (underlining added).

⁶ *Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 441, 448 (1985).

⁷ Idaho Code § 42-1734B(4).

IDFG, and a number of other parties. R. 01506. The National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, United States Department of Commerce (“NOAA Fisheries”), filed a letter providing “comments” on Bird’s application. R. 00077; Ex. 205. Bird’s application was one of eighteen (18) applications filed together as a group, all seeking permits to divert from various tributaries of the upper Lemhi River. R. 00006-07. Most of these applications have been protested by the IWRB and IDFG, as well as several other parties that also protested Bird’s application.⁸ Bird’s application is the only one of the group that has moved forward, and it is generally anticipated that the outcome of the proceedings on Bird’s application will establish a template for resolution of the remaining applications and protests.

The IWRB and IDFG jointly moved for partial summary judgment on July 30, 2019 regarding the local public interests in recovering the listed fish species and their habitat, and a telephonic hearing on the motion was held on August 13, 2019. R. 00227, 01506. The Hearing Officer issued an *Order Granting Joint Motion for Partial Summary Judgment, In Part*, on August 21, 2019. R. 01165, 01506. This order determined, among other things, that it is in the local public interest “to recover fish species listed under the Endangered Species Act (ESA),” because “those efforts contribute to the development of a cooperative conservation agreement

⁸ While the letter covering the applications referred to eighteen (18) applications, at this time the IWRB and IDFG have been able to identify only fourteen (14) that remain pending. The IWRB and IDFG filed protests to all of the fourteen pending applications, and thirteen were protested by a number of the same parties that protested Bird’s application (the Lemhi Irrigation District, the Lemhi Soil & Water Conservation District, the High Bar Ditch Association, the Idaho Conservation League, and Carl Ellsworth). NOAA Fisheries has filed “comment” letters regarding at least six of the applications.

intended to promote conservation of listed species and to provide local people with protection from incidental take liability under the ESA.” R. 01169.⁹

An administrative hearing on the application and the protests was held in Salmon, Idaho, on August 28-29, 2019. R. 01506. Many witnesses were called and numerous exhibits were accepted into the record. R.01506-07, 01534.¹⁰ Post-hearing briefs were submitted on September 27, 2019. R. 01184, 01221, 01248, 01285. The Hearing Officer issued a *Preliminary Order Approving Application* on January 9, 2020 (“*Preliminary Order*”). R. 01301. The *Preliminary Order* approved the application but imposed a number of conditions on the permit, several of which were intended to protect the local public interests in recovering the listed fish species by limiting diversions under the permit. R. 01320, 01323, 01328, 01330, 01332. These conditions have come to be known, informally, as the “bypass flow” conditions, the “peak flow” condition, and the “high flows” condition.

The “bypass flow” conditions prohibited diversions under the permit unless flows in Reaches 1 and 5 of Big Timber Creek are at least 18 cfs and 54 cfs, respectively. R. 01332.¹¹

⁹ This conclusion was reaffirmed in the *Final Order* as “fully supported by the administrative record.” R. 01534. The *Final Order* “further” determined that “it is in the local public interest to protect the streamflow and habitat needed to recover the ESA-listed species.” R. 01541.

¹⁰ The IWRB and IDFG submitted an expert report, Ex. 201, and offered expert witness testimony (Jeff DiLuccia). Bird did not submit an expert report or offer expert witness testimony.

¹¹ The *Preliminary Order* relied upon flow measurements at the Upper Big Timber Creek Gage in Reach 7 for purposes of determining flow in Reach 5, and thus the 54 cfs “bypass flow” condition of the *Preliminary Order* refers to a flow of 115 cfs in Reach 7. R. 01319-20, 01332. The *Amended Preliminary Order* and the *Final Order*, in contrast, did not rely upon the Upper

(Reach 1 is the lowest reach of Big Timber Creek, which includes its confluence with the upper Lemhi River. R. 01509 & n. 3; R. 01521. Reach 5 is further upstream, and includes the permit's point of diversion. *Id.*) The "peak flow" condition prohibited diversions during periods when flows in Reach 7 (the highest reach of Big Timber Creek) exceed that reach's three-year exceedance flow of 237 cfs. R. 01323, 01332. The "high flows" condition prohibited the diversion of "high flows," as defined by the Basin 74 General Provisions decreed in the SRBA, onto the permitted place of use. R. 01328, 01332. The "bypass flow" and "peak flow" conditions were intended to directly protect the local public interests in recovering the listed fish species by precluding diversion of flows necessary for recovering the listed fish species and their habitat. R. 01318-20, 01322-23. The "high flow" condition was intended to prevent Bird from "circumvent[ing] the local public interest conditions by irrigating under the guise of high flow use" pursuant to the Basin 74 General Provisions. R. 01328.

The IWRB and IDFG filed a petition seeking limited clarifications or amendments regarding administration of the local public interest conditions. R. 01379. Bird filed a petition for reconsideration seeking to have the local public interest conditions removed or modified. R. 01336.¹² The Hearing Officer issued an *Order Granting Petitions, In Part and an Amended*

Big Timber Creek Gage for purposes of defining or administering the 54 cfs "bypass flow" requirement for Reach 5. R. 01438, 01451, 01535, 01543.

¹² The IWRB and IDFG also filed a response to Bird's petition for reconsideration, which had relied in part upon evidence that was not submitted at the hearing and arguments that had not been made in post-hearing briefing. R. 01391. Bird filed a motion to strike the IWRB's and IDFG's response. R. 01413. The Hearing Officer did not consider the IWRB's and IDFG's response, and did not address Bird's motion to strike. R. 01456 & n. 1.

Preliminary Order Approving Application (“Amended Preliminary Order”) on February 6, 2020. R. 01418, 01456. These orders granted some, but not all, of the IWRB’s and IDFG’s requests for clarification. These orders also limited the scope of the “peak flow” condition by authorizing diversions to continue until flow in Reach 7 met or exceeded the five-year (rather than three-year) exceedance flow for that reach, and to resume if flow dropped back below this threshold, or after the flow exceeded this “peak flow” for ten (10) days in a given year. R. 01441-42.¹³

The IWRB and IDFG filed exceptions to the *Amended Preliminary Order* on February 20, 2020. R. 01470. Among other things, the IWRB and IDFG requested a final order providing that any flows of water secured by IWRB and IDFG for purposes of “reconnecting” Big Timber Creek to the Lemhi River would not be “counted” towards satisfaction of the 18 cfs “bypass flow” for Reach 1; that “peak flow” be defined as the four-year exceedance flow; and that the local public interest conditions be administered and enforced at the field headgate for the permitted place of use rather than the point of diversion from Big Timber Creek. R. 01471-72. Bird filed a response to the IWRB’s and IDFG’s exceptions on March 5, 2020, which opposed the changes requested by the exceptions and also incorporated by reference the arguments made in Bird’s previously-filed petition for reconsideration of the *Preliminary Order*. R. 01493.

¹³ The *Preliminary Order*’s “peak flow” condition relied on flow measurements in Reach 7, but the *Amended Preliminary Order* relied on flows measured in Reach 5 for this purpose. *Id.*

The Director issued the *Order on Exceptions; Final Order* on May 21, 2020 (“*Final Order*”). R. 01506.¹⁴ The *Final Order* affirmed the “bypass flow” conditions but removed the “peak flow” and “high flows” conditions. R. 01511, 01534-39, 01542-43. While the *Final Order*’s findings recognized that “peak flow” events are needed to provide the habitat necessary to recover the listed fish species, it concluded there was insufficient evidence in the record to define and quantify periodic “peak flow” events. R. 01511, 01537. With respect to the “high flows” condition, the *Final Order* concluded that the question of when water users may divert “high flows” is one of administration that was not properly before the Hearing Officer. R. 01516, 01530. The *Final Order* also declined the IWRB’s and IDFG’s request that any “reconnect” flows provided through IWRB’s Water Transactions Program (“WTP”) not be “counted” towards the 18 cfs “bypass flow” for Reach 1 on grounds that the purposes for which the “reconnect” flows were secured is “irrelevant,” R. 01509, and the Reach 1 “bypass flow” requirement would prevent Bird from diverting any of the “reconnect” flows. R. 01537-38. The *Final Order* also denied the IWRB’s and IDFG’s request that the local public interest conditions be administered at the field headgate for the proposed place of use, rather than at the point of diversion on Big Timber Creek. R. 01512-13.

The IWRB and IDFG filed a joint notice of appeal and petition for judicial review in Ada County District Court, Fourth Judicial District, on June 18, 2020. R. 01548.

¹⁴ The Director had previously issued an order extending the deadline for issuing the *Final Order* due to the nature of the issues, and also because of the Governor’s COVID-19 order for temporary cessation of all non-essential governmental agency operations. R. 01502.

III. THE FACTS OF THE CASE.

a. The Application.

Bird's application seeks a permit to divert 6.4 cfs from Big Timber Creek to irrigate 320 acres of nearby lands. R. 01517. Approximately 23 acres of these lands are covered by four of Bird's existing water rights, which Bird intends to transfer to other places of use if the application is approved. *Id.*; Ex. 1 at 18. The proposed point of diversion is also the point of diversion for Bird's existing water rights and "high flows" diverted pursuant to the Basin 74 General Provision decreed in the SRBA. R. 01517. Bird intends to install pivots and sprinklers to apply the water diverted pursuant to the new permit. R. 01517. Bird currently flood irrigates the proposed place of use with "high flows," and will continue doing so if the application is approved. Tr. Vol. I, p.28, ll.12-13; *id.*, pp. 48, l.24—p.49, l.5; *id.*, p.88, l.23—p.89, l.12; *id.*, p.109, l.25—p.110, l.5; *id.*, p.130, ll.14-18.

b. The ESA Context.

While the Lemhi River Basin historically supported robust populations of anadromous, migratory, and resident salmonids, in the early 2000's Lemhi River Basin water users were confronted with ESA issues. R. 01518. Chinook Salmon and Steelhead had been listed under the ESA in the 1990s, and by this time the Lemhi River Basin's populations of these fish species had become severely depressed. Irrigation diversions impeded fish passage and completely or partially de-watered portions of the Lemhi River and its tributaries during critical times of the year. As a result, much of the basin's high-quality fish habitat was destroyed, degraded, or cut off, and fish often became entrained in irrigation systems or were killed by dewatering events.

Ex. 201 at 1-2, 6, 7-8, 20; Ex. 202 at 3, 8, 10, 15; Ex. 203 at i, 4, 18-19, 72, 102; Ex. 204 at 219-20, 220-21, 223-24.

In the year 2000, NOAA Fisheries threatened legal action against Lemhi River Basin water users for violations of the ESA, including actions for penalties and injunctions. Tr., Vol. II, pp.325-30; Exs. 206A, 206B.¹⁵ This precipitated a “crisis” for Lemhi River Basin water users, Ex. 219 at 35; *see also* Tr. Vol. II, p.696, ll.7-8 (“that kind of brought things home to us, that we needed to do something”), and led the State of Idaho to step in to assist the water users in their dealings with NOAA Fisheries. Tr. Vol. II, pp.326, ll.22-25; *id.*, p.334, ll.15-19; *id.*, p.378, ll.3-11; Ex. 219 at 35.

The State, Lemhi River Basin water users, and NOAA Fisheries began negotiations for a “Section 6 Cooperative 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. R. 01518; Tr. Vol. II, p.334, ll.15-19; *id.*, p.378, ll.3-11; Ex. 190 at 3.¹⁶ In a

¹⁵ Local efforts to protect the fish had been underway for years, Ex. 201 at 8, 23; Ex. 204 at 224-25, but NOAA Fisheries viewed these efforts as insufficient. Tr. Vol. II, p.328, l.22—p.329, l.5.

¹⁶ 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. IDFG’s witness at the administrative hearing, Jeff DiLuccia, was the State’s chief technical advisor during the Section 6 negotiations, and the principal author of the Lemhi River Basin conservation plan developed during the Section 6 negotiations. Tr. Vol. II., pp.302, l.21—p.303, l.12; *id.*, p.373, l.7—p.374, l.14; Ex. 198. The *Final Order* is incorrect in stating that a Section 6 Agreement to protect local people from ESA enforcement would be with the U.S. Fish & Wildlife Service (USFWS). R. 01518. Such an agreement must be with NOAA Fisheries, the agency that listed the fish species in question and has the authority to enforce the ESA against local water users. 50 C.F.R. §§ 223.102, 224.101; Exs. 206A, 206B.

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. Ex. 194 at 9; *see also* Ex. 193 at 6 (“Prosecutorial Discretion”); *see generally* Tr. Vol. II, pp.336-41 (discussing the interim conservation agreements).

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 stream flow in the Lemhi River and its tributaries than local water users were willing to provide. R. 01518; Tr. Vol. II, p.381, ll.9-13; *id.*, p.370, ll.22-24; *id.*, p.379, ll.1-4; *see also id.*, p.376, ll.19-24 (“the primary issue was flow . . . And NOAA was clear through these negotiations that they wanted more water”). 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. Tr. Vol. II, p.382, l.2—p.383, l.5; p.392, ll.18-22. 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). R. 01518, 01520; Tr. Vol. II, pp.301, l.8—p.302, l.14; Ex. 201 at 8, 20-26. The IWRB and IDFG have invested millions of dollars in these efforts, Tr. Vol. II, p.315, ll.21-25; *id.*,

p.524, ll.20-23, which are intended in large measure to protect local people from ESA enforcement actions. R. 01518, 01534; Tr. Vol. II, p.523, ll.9-19.

To date, the underlying ESA issues have not been resolved, and despite the efforts of the IWRB, IDFG, and others, the populations of the listed fish species remain severely depressed and at high risk of extirpation from the Lemhi River Basin. R. 01519; Ex. 199 at 12; Ex. 203 at 72; Ex. 204 at 168, 218, 220, 222. This is mainly because the Lemhi River Basin lacks the fish habitat necessary to support recovery objectives. R. 01518; Tr. Vol. II, p.432, ll. 2-9; Ex. 201 at 6-7, 16; Ex. 203 at 72-76. Depleted stream flows are the main reason for the lack of suitable fish habitat. *See, e.g.*, Tr. Vol. II, p.440, ll.11-13 (“The basin is flow-limited, and flow directly relates to habitat capacity.”); R. 01519 (“The quality and quantity of fish habitat is directly correlated to streamflow.”).

Recovery of the ESA listed species is still NOAA Fisheries’ objective, *see, e.g.*, Ex. 204 (excerpts of *ESA Recovery Plan for Idaho Snake River Spring/Summer Chinook Salmon and Snake River Basin Steelhead*) (NOAA Fisheries, Nov. 2017); Ex. 205 (NOAA Fisheries comment letter), and the Lemhi River Basin is “critical to Chinook salmon recovery.” Ex. 203 at 2. “[A] regulatory cloud is still there,” Tr. Vol. II, p. 443, l.5; *see also id.*, pp. 410, ll.12-13; , 424, l.24—p.425, l.5 (similar), and the threat of ESA enforcement actions against local water users by NOAA Fisheries remains “very real.” Tr. Vol. II, p.494, l.16—p.495, l.4. Such actions would have destabilizing and potentially devastating effects on the local economy of the Lemhi River Basin. Tr. Vol. II, p.633, l.17—p.634, l.6; *id.*, p.705, ll.11-13; *id.*, p.707, ll.2-4. In the absence of a formal Section 6 Agreement, the ongoing efforts by the IWRB, IDFG, and local

water users toward recovering the listed fish species and their habitat within the Lemhi River Basin are essential to protect Lemhi River Basin water users from ESA enforcement actions. R. 01518, 01520, 01541; Tr. Vol. II, p.382, l.2—p.383, l.5; p.392, ll.18-22.

ISSUES PRESENTED ON APPEAL

The IWRB and IDFG present the following issues in this appeal of the *Final Order*:

- Whether the *Final Order* erred in determining the “bypass flow” conditions are sufficient to protect the local public interests associated with recovering the listed fish species;
- Whether the *Final Order* erred in determining the USBR Study establishes the standard or measure for conditions necessary to protect the local public interests associated with recovering the listed fish species;
- Whether the *Final Order* erred in determining there is insufficient evidence in the record to impose a condition on the proposed permit that protects a portion of the remaining unappropriated “peak flow” in Big Timber Creek from diversion under the proposed permit;
- Whether the *Final Order* erred in determining that the question of when water users may divert “high flows” is solely a question of administration that is not properly raised or considered in this proceeding;
- Whether the *Final Order* erred in determining that flows the WTP has secured or will secure in the future for purposes of “reconnecting” Big Timber Creek to the Lemhi River will be “counted” towards satisfaction of the Reach 1 “bypass flow” condition; and
- Whether the *Final Order* erred in determining that the conditions to protect the local public interests in recovering the listed fish species can be administered effectively at the point of diversion.

ARGUMENT

The *Final Order* determined that it is in the local public interest “to recover” the fish species listed under the ESA, “because those efforts contribute to the development of a cooperative conservation agreement intended to promote conservation of listed species and to provide local people with protection from incidental take liability under the ESA.” R. 01534. The *Final Order* also determined that “it is in the local public interest to protect the streamflow and habitat needed to recover ESA-listed species.” R. 01541. The *Final Order* concluded that these local public interests “outweigh the local public interests associated with Bird’s proposed development,” and the permit application “would be denied” unless conditioned to protect the local public interests associated with recovery of the listed fish species. *Id.*

The *Final Order* further concluded, however, that “IDWR has addressed the local public interest requirement for Proposed Permit 74-16187” by conditioning the permit only to prevent depletion of the 18 cfs and 54 cfs “bypass flows.” R. 01510; *see also* R. 01541 (similar). For the reasons discussed below, this conclusion was contrary to constitutional and statutory provisions, in excess of IDWR’s statutory authority, made upon unlawful procedure, not supported by substantial evidence in the record as a whole, and/or arbitrary, capricious, or an abuse of discretion. Idaho Code §§ 67-5279(3)(a)-(e).

I. STANDARD OF REVIEW.

Judicial review of a final decision of the Director of IDWR is governed by the Idaho Administrative Procedure Act (“IDAPA”). Under IDAPA, a court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277. The

court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1). The court must affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence in the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3). Further, the petitioner must show that one of its substantial rights has been prejudiced. Idaho Code § 67-5279(4). Even if the evidence in the record is conflicting, the court may not overturn an agency decision based on substantial competent evidence in the record. *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The petitioner bears the burden of proving there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Ass'n v. Bd. of Comm'rs*, 132 Idaho 551, 976 P.2d 477 (1999).

II. THE FINAL ORDER DID NOT FULFILL THE STATUTORY DUTY OF ASSESSING AND PROTECTING THE LOCAL PUBLIC INTEREST.

Idaho Code § 42-203A(5)(e) imposes “the affirmative *duty* to assess and protect the public interest.” *Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 441, 448 (1985) (italics in original¹⁷); R. 01533. The *Final Order* concluded that the 18 cfs and 54 cfs “bypass flow” conditions derived from the USBR Study protect “the local public interests associated with the recovery of ESA-listed fish species.” R. 01541; R. 01510 (similar).¹⁸ This conclusion was

¹⁷ This parenthetical is not included in subsequent citations to *Shokal*.

¹⁸ In the *Final Order*, the “bypass flow” conditions are Conditions 8 and 9. R. 01543.

incorrect as a matter of law, contrary to the *Final Order*'s factual findings, and lacked support in the record.

a. The *Final Order* Was Required to Protect the Local Public Interests in Recovering the Listed Fish Species.

The *Final Order* specifically determined it is in the local public interest “to recover fish species” listed under the ESA, because recovery efforts contribute to development of a Section 6 Agreement that would protect local people from ESA enforcement actions. R. 01534 (underlining added). The *Final Order* also specifically determined it is in the local public interest “to protect the streamflow and habitat needed to recover ESA-listed species.” R. 01541 (underlining added). Thus, Idaho Code § 42-203A(5)(e) imposed upon IDWR the “affirmative duty” to protect these same local public interests. *Shokal*, 109 Idaho at 337, 707 P.2d at 448.

b. The *Final Order* Erred in Concluding the “Bypass Flow” Conditions Protect the Local Public Interests in Recovering the Listed Fish Species.

The *Final Order* concluded that conditioning the proposed permit with “bypass flows” defined by the USBR Study protected the local public interests identified in the *Final Order*. R. 01510, 01541. In effect, the *Final Order* used the “bypass flows” of the USBR Study as the measure of the “the streamflow and habitat needed to recover ESA-listed species.” R. 01541. For reasons discussed below, this was legal error and contrary to the record.

- i. Under Federal Law, NOAA Fisheries’ Recovery Standards Are the Measure of the Streamflow and Habitat Needed to Recover the Listed Fish Species.

“Recovering” the listed fish species means, as the *Final Order* recognizes, meeting federal standards for delisting the fish species under the ESA. See R. 01518 (referring to “recovery goals” and “ESA delisting”). The fish species in question were listed under the ESA by NOAA Fisheries, and under federal law NOAA Fisheries is also the agency with the authority to make “recovery” and delisting determinations. 16 U.S.C. § 1533(a)(2); 50 C.F.R. §§ 223.102, 224.101; see also Ex. 203 at 1, 8, 72, 73; Ex. 204 at 11, 167. The USBR does not make ESA recovery determinations regarding the listed fish species in the Lemhi River Basin. Tr. Vol. II, p. 344, l.19—p.345, l.6; *id.*, 419, l.21—p.420, l.6. As a matter of federal law, NOAA Fisheries’ recovery standards are the measure of “the streamflow and habitat needed to recover ESA-listed species.” R. 01541.

The IWRB and IDFG submitted extensive, unrebutted evidence of NOAA Fisheries’ recovery standards, including how they are interpreted and applied in the Lemhi River Basin. See generally Ex. 201 (IDFG expert report); Ex. 203 (excerpts of *Upper Salmon Subbasin Habitat Integrated Rehabilitation Assessment*) (Idaho Office of Species Conservation, June 2019); Ex. 204 (excerpts of NOAA Fisheries’ *ESA Recovery Plan* for the listed fish species); see also, e.g., Tr. Vol. II, pp. p.319, ll.1-6; *id.*, p.320, ll.15-23; *id.*, p.365, ll.18-23; *id.*, p.372, l.2—p.373, l.6; *id.*, p.385, ll.16-18; *id.*, p.418, ll.14—p.419, l.3; *id.*, p.424, ll.11—p.425, l.5; *id.*, p.429, l.13—p.430, l.1; *id.*, p.431, ll.20—p.432, l.8; *id.*, p.434, ll.17-23 (DiLuccia testimony). This included unrebutted expert testimony that “from a recovery perspective,” there is no water available in the Lemhi River Basin for new irrigation diversions. Tr. Vol. II, p.441, l.24—p.442,

1.11.¹⁹ The *Final Order* did not, however, consider this evidence in evaluating the local public interest in “protect[ing] the streamflow and habitat needed to recover ESA-listed species.” R. 01541; *see generally* R. 01533-42 (analyzing the “Local Public Interest”).

The *Final Order* erred as a matter of law by relying upon the “bypass flows” of the USBR Study instead of NOAA Fisheries recovery standards as the measure of the local public interest “in protect[ing] the streamflow and habitat needed to recover ESA-listed species.” R. 01541. This was contrary to the affirmative duty to assess and protect the local public interests “associated with the recovery of ESA-listed species” that were specifically identified in the *Final Order*. R. 01541; *Shokal*, 109 Idaho at 337, 707 P.2d at 448.

ii. The Record Does Not Support the *Final Order*’s Reliance on the USBR Study’s “Bypass Flows” as the Measure of the Streamflow and Habitat Needed to Recover the Listed Fish Species.

There is no support in the record for a conclusion that the “bypass flows” of the USBR Study are the measure of the local public interests in “protect[ing] the streamflow and habitat needed to recover ESA-listed species.” R. 01541. The USBR Study is not mentioned, referenced, or cited in the exhibits that set forth ESA recovery objectives for the listed fish

¹⁹ The *Final Order* incorrectly interpreted this testimony and related arguments of the IWRB and IDFG as asserting that all of the remaining unappropriated water in Big Timber Creek is required “to maintain fish passage and fish habitat in the creek,” R. 01534 (underlining added); *see also* R. 01536 (similar), and dismissed this as contrary to the USBR Study. *Id.* The testimony and argument actually offered by the IWRB and IDFG, however, was that all remaining unappropriated flow is required to achieve recovery and delisting of the listed fish species. *See, e.g.*, Tr. Vol. II, pp.442, 11.3-11; *id.*, p.557, 11.4-11; Ex. 201 at 16; R. 01240, 01259, 01262-63. The distinction is significant because recovery and delisting are legal determinations made by NOAA Fisheries.

species as they apply in the Lemhi River Basin: NOAA Fisheries' "ESA Recovery Plan," and the Idaho Office of Species Conservation's "Integrated Rehabilitation Assessment" ("IRA"). Exs. 203—204.²⁰ There is nothing in the testimony of IDFG's expert witness, Tr. Vol. II, pp.288-514, or his expert report, Ex. 201, to support a conclusion that the USBR Study defines recovery standards or "the streamflow and habitat needed to recover the ESA-listed species." R. 01541. To the contrary, IDFG's witness testified that the USBR has not make recovery determinations, Tr. Vol. II, p. 344, 1.19—p.345, 1.6; *id.*, 419, 1.21—p.420, 1.6, and agreed 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, 11.2-6. Bird did not offer any rebuttal evidence, or any affirmative evidence purporting to establish NOAA Fisheries' recovery standards for the listed species or defining "the streamflow and habitat needed to recover ESA-listed species." R. 01541. The *Final Order's* reliance on the USBR Study establishing the streamflows needed to recover the listed fish species lacked support in the record. Idaho Code § 67-5279(3)(d).

- iii. The *Final Order's* Reliance on the "Bypass Flows" as the Measure of the Streamflow and Habitat Needed to Recover the Listed Fish Species is Contrary to the USBR Study and the *Final Order's* Factual Findings.

The *Final Order's* reliance on the USBR Study for purposes of "protect[ing] the streamflow and habitat needed to recover ESA-listed species," R. 01541, is also contrary to the

²⁰ The *IRA* "provides initial efforts to quantify necessary increases in available habitat capacity to support NOAA recovery plan goals." Ex. 203 at i; *see also generally* Tr. Vol. II, pp.420-35 (discussing the *IRA*).

USBR Study itself. The USBR Study does not state or imply that it defines, informs, interprets, or implements the standards for making ESA recovery or delisting determinations for the listed fish species. *See also* Tr. Vol. II, p.420, II.2-6 (agreeing that “in this report, they’re not making any statement about what it’s going to take to protect or recover the fish”). Indeed, the USBR Study was published in 2004, thirteen (13) years before NOAA Fisheries issued its *ESA Recovery Plan*. Further, and in stark contrast to the USBR Study, the NOAA Fisheries *ESA Recovery Plan* and the *IRA* expressly and repeatedly refer to “recovery” and delisting” under the ESA, analyze the factors limiting recovery of the listed fish species, and discuss strategies for achieving recovery and delisting goals. *See, e.g.*, Ex. 203 at i, 1, 4, 5, 48-49, 73-76; Ex. 204 at 1, 167, 175, 232, 236. There is no analysis or discussion of this type in the USBR Study.

The *Final Order* relied on the USBR Study for other reasons: (1) the *Final Order* viewed the USBR Study’s “primary purpose” as determining “the streamflows required for optimum fish habitat and passage,” R. 01534²¹; and (2) the USBR Study stated that higher streamflows “provide only minor gains in usable habitat.” R. 01521, 01535. Even if the *Final Order*’s gloss on the “primary purpose” of the USBR Study is taken as correct, the USBR Study’s express qualifications of its findings mean they cannot be taken as determinations of “the streamflow and habitat needed to recover ESA-listed species.” R. 01541.

²¹ The USBR Study does not include the phrase “optimum fish habitat and fish passage,” and states its “objective” was “to identify stream flow needs to support relevant life history stages” of the listed fish species. Ex. 202 at 2.

The USBR Study expressly qualified the significance and utility of its streamflow determinations. For instance, the USBR Study stated that its methodology for determining the flows “at which habitat is optimized”—i.e., “PHABSIM”²²—did not take into account “flow or habitat needs of downstream migrants.” Ex. 202 at 26. Clearly, however, any determination of the streamflow and habitat needed to recover the listed anadromous fish species, R. 01541, must take into account “flow or habitat needs of downstream migrants.” Ex. 202 at 26.

The USBR Study also stated that its PHABSIM methodology did not estimate “spring runoff conditions necessary for maintenance of channel morphology or riparian zone functions.” Ex. 202 at 26. However, any determination of the streamflows required to recover the listed anadromous fish species, R. 01534, 01541, must take into account “spring runoff conditions necessary for maintenance of channel morphology [and] riparian zone functions.” Ex. 202 at 26. This is confirmed by the *Final Order*’s express factual findings and the supporting record. *See, e.g.*, R. 01519 (“Magnitude and timing of flows can influence instream and riparian habitat, and natural flow regimes are important in formation and maintenance of instream and floodplain habitats.”) (citation omitted).

The USBR Study also cautioned that “high spring flows that mimic the natural hydrograph should be a consideration in managing streamflows outside PHABSIM analysis.” Ex. 202 at 26. This conclusion is consistent with the *Final Order*’s factual findings, which recognize that periodic “peak flow” events are required for formation, maintenance, and re-

²² The acronym “PHABSIM” stands for “Physical Habitat Simulation” modeling. Ex. 202 at 1.

vitalization of the fish habitat necessary to recover the listed fish species. The *Final Order* recognized that un rebutted evidence in the record “broadly established the worth of high flows,” R. 01511, and that “periodic high flow events maintain the stream channel morphology and improve anadromous fish habitat.” R. 01537. The *Final Order* specifically found that the Lemhi River Basin lacks the amount of high quality fish habitat needed to support recovery objectives, and that lack of habitat is directly correlated to streamflows. R. 01518-19. The *Final Order* further found that natural flow regimes and “periodic peak flow” events are important in the formation and maintenance of the complex fish habitat that is essential for fish spawning, rearing, and survival. R. 01519. The *Final Order* also found that spring runoff events that enhance and maintain complex fish habitat often have not been available in the upper Lemhi River Basin due to early season irrigation diversions, R. 01519, which have “nearly eliminated an important intermittent disturbance regime associated with the spring freshet and channel-forming flows.” R. 01528 (citation omitted). As a result, the *Final Order* found, “the amount of off channel habitat for fish and the interchange of nutrients between aquatic and terrestrial/riparian environments has been significantly reduced.” R. 01519 (citation omitted).

These findings are fully supported by extensive, un rebutted evidence in the record. *See, e.g.,* Tr., Vol. II, p.391, ll.9-20 (discussing peak flows); *id.*, p.427, l.24—p.428, l.16-22 (same); Ex. 201 at 10 (“In most years these runoff events have been unavailable to the upper Lemhi due to early season water withdrawals.”); Ex. 198 at 39-40 (“Extended periods in the Lemhi basin without peak flows may degrade spawning and rearing habitat for fish. . . . Water diversions during the spring through the high water period often reduce or eliminate seasonal high volume

peak flows that can maintain good quality spawning and rearing habitat.”); Ex. 203 at 19 (“The many irrigation diversions in each watershed reduce the frequency and magnitude of peak flows”); Ex. 204 at 226 (“the mainstem Lemhi River upstream from Hayden Creek has a ‘reversed’ hydrograph, in which base flow conditions occur in April and early May when unimpaired streams are nearing peak flow conditions”); *id.* at 230 (“Habitat problems include . . . simplified stream channels lacking structure.”).

In sum, nothing in the USBR Study or the record supports a conclusion that the USBR Study defines “the streamflow and habitat needed to recover ESA-listed species.” R. 01541. Further, USBR Study does not support the *Final Order*’s reliance on the single statement in the study that “greater amounts of flow only provide minor gains in usable habitat,” Ex. 202 at 25, because this statement was specifically made within the context of the USBR Study’s express qualifications on the scope of its PHABSIM methodology, and the purposes and utility of its streamflow determinations. Ex. 202 at 26. The *Final Order*’s reliance on the USBR Study as the measure of “the streamflow and habitat needed to recover ESA-listed species,” R. 01541, is directly contrary to the *Final Order*’s express factual findings and the USBR Study itself. Idaho Code §§ 67-5279(3)(d)-(e).

iv. “Maintaining” the *Status Quo* Does Not Support Recovery.

The *Final Order* did not explicitly determine that the “bypass flow” conditions protect the local public interest in “protect[ing] streamflow and habitat needed to recover ESA-listed species.” R. 01541. The *Final Order* determined, rather, that the “bypass flow” conditions protect the local public interests in “maintaining critical habitat” and “maintaining fish passage

for adult populations.” R. 01535. The *Final Order*’s factual findings, however, do not support a conclusion that simply “maintaining” the *status quo* will “protect the streamflow and habitat needed to recover ESA-listed species.” R. 01541.

For instance, the *Final Order* specifically found that all spring Chinook Salmon populations in the upper Salmon River Basin “are at high risk of extinction . . . but the Lemhi River population appears to be at the highest risk.” R. 01519 (citation omitted). The *Final Order* also found that the Lemhi River Basin “does not currently have the amount of high-quality fish habitat needed to achieve recovery goals for ESA-listed species.” R. 01518 (underlining added). The *Final Order* further found that “natural flow regimes are important in formation and maintenance of instream and floodplain habitats,” R. 01519 (citation omitted), but “[i]rrigation diversions, including high flow usage, ‘have nearly eliminated an important intermittent disturbance regime associated with the spring freshet and channel-forming flows.’” R. 01528. (citation omitted).

These specific factual findings compel the conclusion that simply “maintaining” the existing critical fish habitat, R. 01535, is not sufficient to support recovery of the listed fish species in the Lemhi River Basin. These factual findings also compel the conclusion that stream flows and habitat capacity must increase to support recovery goals. These conclusions are supported by extensive, un rebutted evidence submitted by the IWRB and IDFG. *See, e.g., Tr., Vol. II, p. 372, 1.23—p.373, 1.6* (testifying it is “still the case” that streamflow is insufficient to achieve recovery goals); Ex. 204 at 220 (“[Lemhi River Basin spring Chinook Salmon]

population abundance and productivity risk is currently high and must be reduced to achieve the proposed status for the population.”) (underlining added).

The record also shows that approving new water rights to divert water from streams that are already critically depleted from an ESA recovery perspective will adversely impact existing efforts to recover the listed fish species. Tr., Vol. II, p.501, l.7 (“I think it definitely hurts.”); Ex. 201 at 8-10, 16 (discussing the effects of additional water withdrawals); Ex. 204 at 232 (“Because instream flows are already low due to irrigation withdrawals, new water development for agriculture or other purposes would further threaten spring/summer Chinook salmon habitat.”); Ex. 199 at 101 (“If the State does appropriate additional water for irrigation, productivity of the Lemhi River Chinook salmon and steelhead populations will likely decline.”); *id.* at 102-03 (“If the state of Idaho appropriates water to irrigate additional land in the Lemhi River drainage . . . then baseline conditions will degrade and the Chinook salmon and steelhead populations will likely decline.”). Thus, the *Final Order*’s determination that “maintaining” critical fish habitat and passage protects the local public interests in recovering the listed fish species is contrary to the *Final Order* express factual findings and the supporting record. Idaho Code §§ 67-5279(3)(d)-(e).

v. The “Bypass Flows” Do Not Protect the Local Public Interests in Developing a Formal Section 6 Agreement.

For all of the reasons discussed above, the *Final Order* also erred in concluding that the “bypass flow” conditions protect the local public interests in developing a formal Section 6 Agreement that shields local people from ESA enforcement actions. R. 01510, 01534, 01541. In

this case, it is NOAA Fisheries, not the USBR, that has the legal authority to determine whether to initiate ESA enforcement actions, whether to withhold enforcement actions as an exercise of discretion, and whether to enter into a formal Section 6 Agreement. Moreover, the unrebutted evidence in the record confirms that NOAA Fisheries will enter into a formal Section 6 Agreement only if streamflows are increased. See Tr. Vol. II, p.376, ll.16-24 (“NOAA was clear through these negotiations that they wanted more water”). It was legal error, and lacked support in the record, for the *Final Order* to conclude that the “bypass flows” conditions protect the local public interests in developing a Section 6 Agreement.

In sum, the *Final Order*'s reliance on the USBR Study for purposes of protecting the local public interests associated with recovering the listed fish species fails to meet IDWR's affirmative duty under Idaho Code § 42-203A(5)(e), *Shokal*, 109 Idaho at 337, 707 P.2d at 448, lacks support in the record, and was arbitrary, capricious, or an abuse of discretion. Idaho Code §§ 67-5279(3)(a),(b),(d),(e); see *Am. Lung Ass'n of Idaho/Nevada v. State, Dep't of Agric.*, 142 Idaho 544, 547, 130 P.3d 1082, 1085 (2006) (“An action is capricious if it was done without a rational basis. . . . It is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles.”) (citation omitted); *Ackerschott v. Mountain View Hospital, LLC*, 166 Idaho 223, 234, 457 P.3d 875, 886 (2020).²³

²³ “When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry requires consideration of *four* essential elements. Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.” *Id.* (italics in original; citation omitted).

c. The *Final Order* Erred in Denying Any Protection for “Peak Flow.”

The *Amended Preliminary Order* included a condition on the proposed permit that has come to be known, informally, as the “peak flow” condition. *See* R. 01451 (Condition 10).²⁴ This condition protected a portion of the remaining “[s]pring runoff due to snowmelt that typically redistributes substrate, removes fine sediments, and create pools and other complex habitats,” R. 01519, by requiring diversions under the permit to cease when flow in Reach 5 is greater than 217 cfs, and allowing diversions to resume when flow dropped below 217 cfs, or after it exceeded 217 cfs for ten days during the irrigation season. R. 01441-42, 01451.

The *Final Order* removed the “peak flow” condition solely because “[t]here is insufficient technical evidence in the record to quantify and protect these periodic high flow events.” R. 01511; *see also* R. 01537 (“there is no specific, quantifiable evidence in the record to establish high flow event needed to maintain optimum stream channel characteristics for Big Timber Creek.”). This was legal error and lacked support in the record.

i. There Was Sufficient Evidence to Quantify a “Peak Flow” Condition.

The record does not support the *Final Order*’s determination that there was insufficient “specific, quantifiable evidence” to define the “peak flow” events necessary to protect the local

²⁴ The *Amended Preliminary Order* and the *Final Order* sometimes used the term “high flows” in the context of discussing “peak flow” events. It is therefore important to recognize the distinction between the “peak flow” condition and the “high flows” condition. The “peak flow” condition pertained to events that maintain, alter, and enhance stream channel morphology and fish habitat, R. 01537, while the “high flows” condition pertained to “high flows” as defined in the Basin 74 General Provisions decreed in the SRBA. R. 01526. The “high flows” condition was Condition 12. R. 01451.

public interests in recovering the listed fish species. The *Amended Preliminary Order* defined the “peak flow” events to be protected based on the un rebutted testimony of IDFG’s expert witness, R. 01441-42, and the exceedance flows set forth in the USBR Study—a study the *Final Order* otherwise relied upon as “reliable, convincing scientific evidence” and “technical data.” R. 01509, 01535. Idaho Code § 67-5279(3)(d)-(e).

ii. Alternatively, the *Final Order* Should Have Denied the Application, or Remanded the “Peak Flow” Condition for Additional Hearings.

Even if the *Final Order* was correct in concluding there was a lack of evidence necessary to quantify a “peak flow” condition, denying protection for any of the remaining “peak flow” was legal error. The *Final Order* retained the *Amended Preliminary Order*’s factual findings regarding the importance of “peak flow” events for purposes of recovering the listed fish species. As previously discussed,²⁵ these factual findings compel the conclusion that protecting a portion of the “peak flow” that remains unappropriated is absolutely necessary “to protect the streamflow and habitat needed to recover ESA-listed species.” R. 01541 (underlining added); *see generally* R.01511, 01518-19, 01528, 01537. Extensive, un rebutted evidence in the record confirms this conclusion, as also previously discussed. *See, e.g.*, Tr., Vol. II, p.391, ll.9-20; *id.*, p.427, l.24—p.428, l.16-22; Ex. 201 at 10; Ex. 198 at 39-40; Ex. 203 at 19; Ex. 204 at 226, 230.

Under these circumstances, the appropriate alternative to protecting a portion of the remaining “peak flow” through a limiting condition was to deny the application entirely, as the *Final Order* itself implicitly recognized. *See* R. 01541 (“would be denied”). At most, the

²⁵ *Supra* pages 26-28.

perceived lack of “specific, quantifiable evidence” warranted a remand to the Hearing Officer for additional hearings on that narrow question. Idaho Code § 67-5245(6)(b). Regardless, the perceived lack of evidence did not excuse IDWR from its affirmative statutory duty to assess and protect the local public interests in protecting the “peak flow” needed to recover the listed fish species. R. 01541; *Shokal*, 109 Idaho at 337, 707 P.2d at 448.

iii. The Final Order Misapplied the Burdens of Proof in Denying Any Protection for “Peak Flow.”

The *Final Order*’s removal of the “peak flow” condition was also contrary to *Shokal*’s holding that the applicant has the ultimate burden of proof regarding the local public interest. 109 Idaho at 339, 707 P.2d at 450; *see also* IDAPA 37.03.08.040.04.c (similar). A protestant, in contrast, only has “the burden of going forward” to establish a claimed harm “peculiar to himself.” *Shokal*, 109 Idaho at 339, 707 P.2d at 450; *see also* IDAPA 37.03.08.040.04.b.ii (similar). The IWRB and IDFG carried their initial burden of bringing forward evidence that protecting at least a portion of the “peak flow” is necessary to protect the local public interests in recovering the listed fish species. This is confirmed by the above-discussed findings in the *Final Order*, and the extensive, unrebutted record evidence upon which those findings were based. *See, e.g.*, Ex. 201 at 10; Ex. 198 at 39-40; Ex. 203 at 19 (“The many irrigation diversions in each watershed reduce the frequency and magnitude of peak flows . . .”).

The *Final Order*, however, imposed an additional burden on the IWRB and IDFG: a requirement of coming forward with quantitative evidence specifically defining the magnitude, duration, and frequency of the “peak flow” events, such as a “flow characterization study.” R.

01511, 01536-37. The *Final Order* determined that unless the IWRB and IDFG met this requirement, the permit would not be conditioned to protect any portion of the remaining “peak flow.” R. 01510-11, 01537. In effect, the *Final Order* impermissibly shifted the “ultimate burden” of proof regarding the local public interests in protecting “peak flow” to the IWRB and IDFG, in contravention of *Shokal* and IDWR’s rules of procedure. Alternatively, the *Final Order* significantly increased the IWRB’s and IDFG’s “initial burden” of coming forward with evidence of the local public interest in protecting “peak flows,” while significantly relaxing Bird’s “ultimate burden” of persuasion. Either way, the *Final Order* was contrary to the burdens framework of *Shokal* and IDWR’s procedural rules. See Idaho Code § 67-5279(3)(c) (“unlawful procedure”).

d. The *Final Order* Erred in Allowing “Reconnect” Flows to be “Counted” Towards the Reach 1 “Bypass Flow.”

The IWRB’s Water Transaction Program (“WTP”) facilitates projects that “improve flows to tributary streams and rivers in the Upper Salmon River Basin,” including projects to “reconnect” tributaries to the Lemhi River that have historically been dewatered during the irrigation season. R. 01520 (citation omitted). In recent years the WTP has facilitated projects that have partially “reconnected” Big Timber Creek to the Lemhi River, by moving the points of diversion for some senior irrigation water rights in Reach 1 to pumping stations on the Lemhi

River. *Id.* These efforts have “generally restored a flow of 7.3 cfs in lower Big Timber Creek” during the irrigation season. *Id.*²⁶

The IWRB and IDFG requested, in their “exceptions” to the *Amended Preliminary Order*, that the Reach 1 “bypass flow” condition be modified or amended to provide that any “reconnect” flows that the WTP has secured, or secures in the future, will not be “counted” towards the 18 cfs “bypass flow” for Reach 1. R. 01508, 01471. The *Final Order* denied this request for two reasons: (1) the 18 cfs “bypass flow” condition exceeds the 7.3 cfs in existing “reconnect” flows, and therefore the purpose for which the WTP secured the “reconnect” flows “is irrelevant to IDWR’s consideration of Proposed Permit 74-16187,” R. 01509; *see also* R.01538 (similar); and (2) Lemhi River flows at L6, the point of measurement for the IWRB’s minimum streamflow water right 74-14993, are typically significantly higher than the flow needed to satisfy the minimum streamflow water right during periods when the proposed permit would be available. R. 01520, 01537.

The IWRB does not dispute that the 18 cfs “bypass flow” condition exceeds the existing 7.3 cfs in “reconnect” flows.²⁷ The IWRB also does not dispute that, in most years, the flow at

²⁶ The “reconnect” flows of 7.3 cfs are not sufficient, in and of themselves, to provide enough water for fish passage and habitat in Reach 1 of Big Timber Creek. R. 01509, 01534-35; Tr. Vol. II, p.498, ll.5-13. Even if it not completely dewatered, a tributary such as Big Timber Creek can be functionally disconnected from the Lemhi River for purposes of fish passage. Tr. Vol. II, p.307, l.22—p.308, l.12; *id.*, p.310, ll.8-23. Complete or functional dewatering events can and do still occur in Reach 1 of Big Timber Creek. Tr. Vol. II, p.596, ll.9-19; Ex. 236 at 1.

²⁷ The Reach 1 “bypass flow” condition, however, may be less than additional “reconnect” flows the WTP may “secure in the future.” R. 01508, 0101471.

L6 during the times the proposed permit can be expected to be available will likely exceed the level of the IWRB's minimum streamflow water right. For reasons discussed below, however, the *Final Order* erred as a matter of law, and was contrary to the record, in concluding that the "reconnect" flows should be "counted" towards the Reach 1 "bypass flow."

i. The *Final Order*'s Determination that the Purposes of the WTP Are "Irrelevant" to the Local Public Interest Analysis Lacks Support in the Factual Findings and the Record.

The *Final Order* determined that "efforts" to recover the listed fish species are in the local public interest, R. 01534, and recognized that the WTP is part of the ongoing recovery "efforts." R. 01509, 01520, 01537. The *Final Order* determined that "the WTP secures water specifically to help offset the effects of existing diversions," R. 01509, and that the WTP helps "to maintain flows in the Lemhi River drainage and to reconnect tributaries that were previously dewatered during the irrigation season." R. 01537. The *Final Order* also found 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 this investment "has been made to avoid ESA-based enforcement by the federal government against the State of Idaho or its citizens." R. 01518. These findings and determinations compel the conclusion that the WTP is very "relevant" to the local public interests in the "efforts" to recover the listed fish species specifically recognized in the *Final Order*, R. 01534, 01541—especially protecting local people from ESA enforcement actions by NOAA Fisheries—and are fully supported by "extensive documentation" in the record. R. 01537; Tr., Vol. II, p.523, ll.9—p.524, l.23; *id.*, p. 546, l.3—p.551, l.14; Ex. 212 at 2; Ex. 213; Ex. 219 at 9; Ex. 220 at 5-6.

The *Final Order*'s determination that the purposes of the WTP are "irrelevant" to the local public interest analysis in this case is thus directly contrary the *Final Order*'s express factual findings and the record. Further, the record does not support the *Final Order*'s conclusion that the relevance of the WTP is limited to the proposed permit's "direct effect on," or "the effectiveness of," the contracts for the Big Timber Creek "reconnect" project and the minimum streamflow water right at L6. R. 01509-10, 01537-38. The record establishes, and the *Final Order* recognizes, that the WTP's role in efforts to recover the listed species and protect Idaho citizens from ESA-based enforcement actions by NOAA Fisheries goes far beyond "reconnecting" Big Timber Creek and supporting the L6 minimum streamflow. R. 01520; *see generally* Tr. Vol. II, pp.547-52, 572-80; Exs. 212, 213, 215, 219, 220.

The record also does not support a conclusion that simply maintaining the existing "reconnect" flows or the L6 minimum streamflow is sufficient for purposes of recovering the listed fish species or developing a Section 6 Agreement. R. 01534, 01541. To the contrary, un rebutted evidence in the record confirms that the existing 7.3 cfs in "reconnect" flows are not sufficient for adult fish passage, R. 01509-10, 01513-14, 01534-35; Tr. Vol. II, p.498, ll.5-13, and that simply maintaining the minimum streamflow at L6 falls far short of NOAA Fisheries' requirements for a Section 6 Agreement. Tr. Vol. II, p.370, ll.22-24; *id.*, p. 378, l.19—p.379, l.18. The record also confirms that the WTP's continuing efforts to improve stream flows in the Lemhi River Basin are indispensable if a formal Section 6 Agreement for the Lemhi River Basin is ever to be reached, Tr. Vol. II, p.602, ll.1-6, and that the WTP is a major contributor to the ongoing habitat conservation and enhancement efforts that have helped protect local people from

ESA enforcement actions by NOAA Fisheries in the absence of a formal Section 6 Agreement. Tr., Vol. II, p.382, 1.2—p.383, 1.5.

ii. The *Final Order* Erred in Concluding the “Bypass Flows” of the USBR Study Render the Purposes of the WTP “Irrelevant.”

The *Final Order*’s determination that the Reach 1 “bypass flow” addresses the local public interests in the WTP was incorrect, because this determination was based on the USBR Study. R. 01509, 01538. As previously discussed, the *Final Order* erred as a matter of law in relying on the USBR Study as the measure of “the streamflow and habitat needed to recover ESA-listed species.” R. 01541. As a matter of federal law, NOAA Fisheries’ recovery objectives control the question of whether streamflows are sufficient to support recovery of the listed fish species. Moreover, nothing in the record—including the USBR Study itself—supports a conclusion that the USBR Study has any relevance or role in how NOAA Fisheries makes recovery and delisting determinations, or whether NOAA Fisheries will enter into a formal Section 6 Agreement. The *Final Order*’s conclusion that the USBR’s 18 cfs “bypass flow” makes the WTP’s purposes “irrelevant” to protecting “the local public interests associated with recovery of ESA-listed species,” R. 01541, was legal error, and lacked support in the record.

iii. The *Final Order* Undermines the IWRB’s Efforts to Support Recovery of the Listed Fish Species.

Unrebutted evidence in the record established that the purposes of the WTP can be undermined by approving new irrigation water rights in the Lemhi River Basin. Vol. II, p.523, 1.20—p.524, 1.3; *id.*, p.555, 1.20—p.556, 1.9. Allowing the “reconnect” flows, or any other “transacted” water secured by the WTP, to be “counted” for purposes of authorizing new

irrigation development is also contrary to the WTP's specific purpose of helping to "offset and remedy the effects of existing diversions." R. 01509. "Transacted" flows consist of appropriated water that would not be present in Reach 1 of Big Timber Creek or at L6 on the Lemhi River but for the efforts and investments made by the WTP. Tr., Vol. II, p. 602, ll.1-6. Allowing "transacted" water secured by the WTP to be "counted" towards the Reach 1 "bypass flow" condition has the effect of allowing applicants to "piggyback" on the WTP's efforts and investments, in order to authorize additional diversions of the very type that the "transacted" flows are specifically meant to "offset and remedy." R. 01509. This obviously undermines the purposes for which the WTP secures the "transacted" flows, and makes an applicant the economic beneficiary of "transacted" water paid for by the WTP, not the applicant.

The record further shows that allowing "transacted" water secured by the WTP to be "counted" for purposes of authorizing new irrigation diversions could impair the WTP's ability to obtain funding in the future. Funding for the WTP comes from entities such as the Bonneville Power Administration and the Pacific Coast Salmon Recovery Fund, and is provided specifically to support recovery of ESA-listed fish species. Tr. Vol. II, p.576, l.17; *id.*, p.589 l.25; Ex. 213; Ex. 219 at 8. Much of this funding comes in the form of grants that must be applied for and justified, and that require the "transacted" flows to be monitored. *Id.*; Tr., Vol. II, p. 577, ll. 2-20. Obtaining the funding is a complicated process that requires significant time and effort, from the IWRB itself and also board staff. Tr., Vol. II, p.589, l.3—p.592, l.7; Ex. 215 at 4.

The money to secure "transacted" water is provided to the WTP at the discretion of the funding entities, and is intended to support recovery of the listed fish species, not to underwrite

additional irrigation development. Allowing the “transacted” water to also be used for the entirely contrary purpose of supporting new irrigation development raises questions about IWRB’s commitment and ability to implement recovery projects, “puts [the IWRB’s] credibility in doubt to some extent,” and “could undermine [the IWRB’s] relationship” with the funding entities. Tr., Vol. II, p.599, ll.9-18.

In sum, the *Final Order*’s conclusion that “reconnect” water secured by the WTP should be “counted” towards satisfaction of the Reach 1 “bypass flow” condition was contrary to IDWR’s “affirmative duty,” *Shokal*, 109 Idaho at 337, 707 P.2d at 448, to assess and protect “the local public interests associated with recovery of ESA-listed species.” R. 01541. This conclusion was based on legal error, was contrary to the *Final Order*’s findings, lacked support in the record, and relied on an impermissibly narrow interpretation of “relevancy” for purposes of the local public interest analysis. See *Shokal*, 109 Idaho at 338, 707 P.2d at 449 (“the ‘public interest’ should be read broadly”). The *Final Order*’s denial of the IWRB’s and IDFG’s request that “reconnect” water not be “counted” towards satisfaction of the Reach 1 “bypass flow” condition, therefore, was contrary to Idaho Code §§ 67-5279(3)(a),(d),(e).

e. The *Final Order* Erred in Removing the “High Flows” Condition.

The *Amended Preliminary Order* included a condition on the proposed permit that prohibited diverting “high flows,” as defined in the SRBA’s General Provisions for Basin 74, onto the permitted place of use. R. 01447, 01451.²⁸ The *Final Order* determined, instead, that

²⁸ As previously noted, the *Amended Preliminary Order* and the *Final Order* sometimes used the term “high flows” in the context of discussing the “peak flow” condition, but the “peak flow”

“questions related to when water users may divert high flows are questions of administration” that were “not properly before the hearing officer” and “not appropriate for this proceeding,” and therefore removed the “high flows” condition. R. 01516, 01530, 01542-44. This was contrary to Idaho law and the record in this case.

In a permitting proceeding, assessing and protecting the “local public interest” is always appropriate—and statutorily required. *Shokal*, 109 Idaho at 337, 707 P.2d at 448. Therefore, if Bird’s continued diversions of “high flows” onto the newly permitted place of use can impact the local public interests in recovering the listed fish species, IDWR must “assess and protect” these impacts as part of the permitting process. There is no “administration” exception to this requirement. *See also Shokal*, 109 Idaho at 338, 707 P.2d at 449 (“the ‘public interest’ should be read broadly in order to ‘secure the greatest possible benefit from [the public waters] for the public.’”) (citation omitted; brackets in *Shokal*).

In this case Bird testified that he will continue his existing practice of diverting as much of the “high flows” as possible onto the proposed place of use, even if the permit is approved. Tr. Vol. II, p.109, l.25—p.110, l.5; p.130, ll.14-18. The “bypass flows” and “peak flow” conditions would not apply to Bird’s “high flows” diversions, however, because the Basin 74 General Provisions do not include any such limitations. R. 01526-27; Ex. 11 at 2. Further, the record established that the Water District 74W watermaster does not administer “high flows” uses; water users make their own decisions about when to divert “high flows.” Tr. Vol. I, p.137,

condition had nothing to do with the Basin 74 General Provisions. The “peak flow” condition was Condition 10; the “high flows” condition was Condition 12. R. 01451.

ll.3-12; *id.*, p.209, l.19—p.210, l.5. The record thus supported the Hearing Officer’s concern that Bird could potentially choose to divert “under the guise” of using “high flows” rather than under the new permit. R. 01447.

In sum, the record established the clear potential for the “bypass flows” and “peak flow” conditions to be “circumvented” and rendered “meaningless” if the permit was not also conditioned to prohibit the diversion of “high flows” onto the proposed place of use. R. 01447. Including the “high flows” condition was thus consistent with—and clearly required by—Idaho law. *See Shokal*, 109 Idaho at 337, 707 P.2d at 448 (“the affirmative *duty* to assess and protect the local public interest”); *Hardy v. Higginson*, 123 Idaho 485, 489, 849 P.2d 946, 950 (1993) (holding that a prospective water user should not be allowed “to circumvent” local public interest criteria).²⁹

The *Final Order*, however, did not address the impacts on the local public interests of continued “high flows” diversions onto the permitted place of use. The *Final Order* simply deleted the “high flows” condition on grounds that questions of “high flow” use are “questions of administration” that had no place in this permitting proceeding. R. 01516, 01539. This conclusion was contrary to IDWR’s affirmative duty to assess and protect the local public interests associated with recovering the listed fish species, including whether Bird’s continued

²⁹ The Hearing Officer determined that the question of whether “high flows” may only be diverted onto “lands covered by existing, recorded water rights” was irrelevant to the local public interest analysis, and did not resolve it. *See* R. 01462 (“Past use of water, authorized or unauthorized, does not insulate an applicant from the local public interest review under Idaho Code § 42-203A(5)(e). 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.”).

diversions of “high flows” onto the place of use would “circumvent” the “bypass flows” and “peak flow” conditions. *Shokal*, 109 Idaho at 337, 707 P.2d at 448; *Hardy*, 123 Idaho at 489, 849 P.2d at 950.

f. The *Final Order*’s Errors are Not Permissible Exercises of Discretion.

While IDWR has discretion to identify the elements of the local public interest and “what the public interest requires,” this discretion is not unlimited. *See Shokal*, 109 Idaho at 339, 707 P.2d at 450 (“sound discretion”); *see also N. Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 524-25, 376 P.3d 722, 728-29 (2016) (discussing the limits of IDWR’s discretion). In this case, the *Final Order* expressly identified the local public interests associated with recovering the listed fish species. R. 01534, 01541. The “affirmative *duty*” to assess and protect these local public interests attached with the making of these determinations of where the local public interest lies. *Shokal*, 109 Idaho at 337, 707 P.2d at 448. Just as IDWR may not rely upon its discretionary authority to adopt a definition of the “local public interest” that is contrary to statute, *N. Snake Ground Water Dist.*, 160 Idaho at 525, 376 P.3d at 729, IDWR may not rely upon its discretionary authority as a basis for declining to fulfill its affirmative statutory duty of assessing and protecting local public interests specifically identified in the *Final Order*.

IDWR’s discretionary authority did not include the option of assessing and protecting local public interests that are legally and factually distinct from those expressly identified in the *Final Order*, especially when the specifically identified local public interests “outweighed” the local public interests in Bird’s proposed development. *See, e.g.*, R. 01541 (protecting the “bypass flows” of the USBR Study rather than “the streamflow and habitat needed to recover

ESA-listed species”). This discretion also did not include the authority to decline to protect any portion of the “peak flow” that remains unappropriated, simply because a record that exhaustively documented the need to protect a portion of the “peak flow” did not also include sufficient “specific, quantifiable evidence” to define a “peak flow” condition. This discretion did not include the authority to dismiss as “irrelevant” to the local public interests in recovering the listed fish species an IWRB program specifically intended to promote recovery of the listed fish species. And, this discretion did not include the authority to disregard the impacts of “high flows” use on the local public interests in recovering the listed fish species as a question of “administration” that was not appropriate for this permitting proceeding.

III. THE *FINAL ORDER* IS NOT CONSISTENT WITH THE STATE WATER PLAN.

The IWRB is the “Water Resource Agency” authorized by Section 7 of Article XV of the Idaho Constitution, which among other things empowers the IWRB “to formulate and implement a state water plan for optimum development of water resources in the public interest.” *See also* Idaho Code § 42-1732 (establishing the IWRB as the “constitutional water agency” under Section 7 of Article XV); *id.* § 42-1734A(1) (“The board shall, subject to legislative approval, progressively formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest.”).

Idaho Code § 42-1734B addresses IWRB procedures for adopting a comprehensive state water plan, and provides, among other things, that all state agencies “shall exercise their duties in

a manner consistent with” the State Water Plan. Idaho Code § 42-1734B(4). “These duties include but are not limited to the issuance of permits[.]” *Id.* While the *Final Order*’s determination of the local public interests in recovering the ESA-listed fish species is consistent with the State Water Plan, the *Final Order*’s determination that the “bypass flow” conditions alone protect these local public interests is not consistent with the State Water Plan.

The substantive content of the State Water Plan is set forth in a number of discrete “Policies,” including, among others, policies that address “State Sovereignty,” “Federally Listed and Other Aquatic Species,” and the “Salmon/Clearwater River Basins.”³⁰ Ex. 21 at v-vi. These are enumerated as policies 1A, 2B, 6A, and 6B, respectively. *Id.* These policies emphasize “recovery” of the listed fish species in the Salmon River Basin, and the development of Section 6 Agreements that will protect local water users from federal enforcement actions, through a “programmatic approach” that includes the WTP’s efforts to enhance stream flows and tributary reconnections. Ex. at 26-28, 71-74. These policies also emphasize protecting the State’s sovereign authority to manage its water, fish, and wildlife resources, especially in ESA matters because of the heightened potential for the federal government to directly inject itself into the management of these resources. Ex. 21 at 8, 25-28.

The *Final Order*’s determination that IDWR must protect the local public interests “associated with the recovery of ESA-listed species,” R. 01541; *see also* R. 01534 (similar), is therefore consistent with the applicable policies of the State Water Plan. The *Final Order* was

³⁰ The Lemhi River Basin is a sub-basin of the Salmon River Basin, and is discussed in the State Water Plan. Ex. 21 at 26, 28, 74.

not consistent with the State Water Plan, however, in concluding that the local public interests associated with recovering the listed fish species are fully protected by the “bypass flows” conditions. R. 01510, 01541. This conclusion was incorrect for all the reasons discussed above. The *Final Order* therefore did not satisfy the statutory requirement that IDWR’s consideration of permit applications and issuance of permits must be consistent with the State Water Plan. Idaho Code § 42-1734B(4); Idaho Code § 67-5279(3)(a).

IV. THE *FINAL ORDER* ERRED IN DENYING ADMINISTRATION AT THE FIELD HEADGATE.

The *Final Order* denied the IWRB’s and IDFG’s request that the local public interest conditions be administered at the field headgate for the proposed place of use, rather than at the point of diversion on Big Timber Creek, because another water right on Big Timber Creek that is also conditioned with a “bypass flow” (water right 74-15613) has been administered successfully. R.01512-13. This analogy is inapposite, however, because for reasons explained above, the “bypass flows” conditions do not protect the local public interests associated with recovering the listed fish species. In order to protect these local public interests, the application must either be denied or, at a minimum, approved with the “peak flow” and “high flows” conditions as well. Water right 74-15613 does not include such conditions, however.

Further, because Bird’s existing water rights—which are not limited to protect “bypass flows” or “peak flow,” or to limit “high flows” diversions—use the same point of diversion as the proposed permit, it will not be possible to effectively administer the local public interest conditions for the proposed permit at the point of diversion. Given this, and the fact that the

local public interests in recovering the listed fish species “outweighs” Bird proposed development, R. 01541, the conditions protecting these local public interests associated with recovering the listed fish species should be administered at the field headgate.³¹

CONCLUSION

For the reasons discussed above, the *Final Order*’s determination that the “bypass flow” conditions protect “the local public interests associated with the recovery of ESA-listed species,” R. 01541, was contrary to the standards of Idaho Code §§ 67-5279(3)(a)-(e). This determination prejudiced substantial rights of the IWRB and IDFG. As the *Final Order* recognized, the IWRB and IDFG have been deeply involved in efforts to recover the listed fish species and protect local people from ESA enforcement actions for many years, and have invested significant time and resources in the Lemhi River Basin for these purposes, pursuant to their statutory authorities, duties, and responsibilities. *See, e.g.*, Idaho Code §§ 42-1732—42-1734C (IWRB); *id.* §§ 36-101, 36-106 (IDFG).

The IWRB and IDFG therefore request that the *Final Order* be set aside in part, and remanded to IDWR for further proceedings as necessary, regarding the following:


1. The determination that the “bypass flow” conditions protect the local public interests in efforts to recover the listed fish species, in protecting the streamflow and habitat needed to recover the listed fish species, and in developing a Section 6 Agreement or otherwise protecting local people from ESA enforcement actions;

³¹ Bird testified that he would not object to this type of administration. Tr. Vol. I, p.112, ll. 11-13.

2. The determination that the USBR Study establishes the standard or measure for protecting the local public interests in efforts to recover the listed fish species, in protecting the streamflow and habitat needed to recover the listed fish species, and in developing a Section 6 Agreement or otherwise protecting local people from ESA enforcement actions;
3. The determination that there is insufficient evidence in the record to impose a condition on the proposed permit that protects a portion of the remaining unappropriated “peak flow” in Big Timber Creek from diversion under the proposed permit;
4. The determination that the question of when water users may divert “high flows” is solely a question of administration that is not properly raised or considered in this proceeding;
5. The determination that flows the WTP has secured, or will secure in the future for purposes of “reconnecting” Big Timber Creek to the Lemhi River will be “counted” towards satisfaction of the Reach 1 “bypass flow” condition; and
6. The determination that conditions protecting the local public interests associated with recovery of the listed fish species will be administered at the point of diversion rather than the field headgate.

Respectfully submitted this 21st day of September, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of September 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


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