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

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

Petitioners,

v.

KURT W. BIRD and JANET E. BIRD,

Cross Petitioners.

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent.

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

Case No. CV01-20-09661

BIRD'S COMBINED OPENING BRIEF ON CROSS-APPEAL AND RESPONSE BRIEF

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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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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 Combined Opening Brief on Cross-Appeal and Response Brief.* This brief first addresses Bird's *Cross-Appeal and Cross-Petition for Judicial Review of Final Agency Action*, and then responds to the opening brief of the Idaho Water Resource Board ("IWRB") and the Idaho Department of Fish and Game ("IDFG")[1] filed on September 21, 2020 (the "*Opening Brief*"). The IWRB and the IDFG are referred to herein collectively as the "Agencies".

I. STATEMENT OF THE CASE

A. Nature of the Case.

Bird agrees with the Agencies that this is a judicial review proceeding under the Idaho Administrative Procedures Act (the "IDAPA") arising from a contested case concerning Bird's application for permit no. 74-16187 (hereafter, simply "74-16187"). Bird otherwise generally disagrees with most of the Agencies' *Statement of the Case* and the Agencies' overall characterization of what this case is about.

74-16187 should not be a controversial water right permit application. 74-16187 will not change the amount of water physically diverted by Bird that he is already legally entitled to divert—he is already diverting high flows under the Basin 74 General Provisions to the place of use for 74-16187. Bird desires to simply change the legal status of his right to divert from a general provision to an actual water right. Driven by the Agencies, this contested case became the forum for the Agencies to discuss and argue about *existing* Endangered Species Act ("ESA") issues in the Lemhi River Basin. While the Agencies contend the results of this contested case should be

1 Despite language in the IDFG's protest indicating that it protested to provide technical information and it did not support or oppose the application, R. 00044-00045, the IDFG's positions in this matter clearly demonstrate otherwise. As one of the primary and active protestants in this matter, with briefing urging the Department to deny 74-16187, it is disingenuous for the IDFG to maintain or suggest that it does not oppose 74-16187.

entirely dictated by the Agencies' policy positions, primarily relating to the ESA issues, it is a distraction from their primary legal position relative to Idaho's water, which is that the Agencies desire to lay claim to *all* the remaining unappropriated water not only in Big Timber Creek, but the entire Lemhi River Basin:

> The Agencies contend that all 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 all 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). The State of Idaho and the IWRB fought long and hard to arrive at the provisions contained in the Wild and Scenic Agreement (discussed in more detail below) entered in 2004, which includes preservation of 150 cfs of new water right development not subject to the priority dates of the wild and scenic water rights and 225 cfs of new water right development that is subject to the priority dates of the wild and scenic water rights. 74-16187 is an action to develop a portion of this preserved water negotiated for by the State of Idaho and the IWRB for the benefit of Idaho residents such as Bird.

Think of it. The IWRB, the agency charged with aiding Idaho's water users in developing and utilizing unappropriated water in our state, is now an aggressive protestant to water right permit applications in the Lemhi River Basin consistent with the very directives to develop new water consistent with the State Water Plan. 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 stop water development by protesting individual water right permit applications, advocating for their denial, and/or advocating for imposed minimum flows on the exercise of these

rights. If this court accepts the Agencies' legal positions that the local public interest in the contested case for 74-16187 mandates the setting aside of all unappropriated water in the Lemhi River Basin, that unfortunate precedent will effectively bar the approval of *any* new water right permits (surface or ground water) in the Lemhi River Basin.[2] *That* is the main issue on appeal.[3]

B. Course of Proceedings.

Bird's permit application for 74-16187 was filed on October 12, 2018. IDWR Exhibit 1. 74-16187 seeks a permit for the development of 6.4 cfs to be diverted from an existing point of diversion on Big Timber Creek (a tributary to the Lemhi River) for the irrigation of 320 acres—acres that historically have had Basin 74 "high flows" (discussed in further detail below) applied to them. The existing point of diversion, existing delivery system, and proposed place of use are depicted on Bird Exhibit 2.

74-16187 was protested by (1) the IDFG; (2) the IWRB; (3) the Lemhi Irrigation District ("LID"); (4) Beyeler Ranches LLC ("Beyeler"); (5) the Idaho Conservation League ("ICL"); (6) the Lemhi Soil and Water Conservation District ("LSWCD"); (7) Penny Jane Odgen-Edwards ("Odgen-Edwards"); (8) Purcell Ranch Partnership and (9) Kerry Purcell (collectively with Purcell Ranch Partnership "Purcell"); (10) High Bar Ditch Association ("High Bar"); and (11) Carl

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2 *See* Tr. Vol. 2 p. 556 LL. 12 through p. 559 LL. 19 (Testimony of IWR Representative Cynthia Bridge-Clark explaining the position of the IWRB, like IDFG, opposes 74-16187 because "there's a concern that there's not available water available for additional withdrawals for consumptive use from a fisheries recovery perspective.").

3 As described below, the Court must not get distracted by the ESA matters raised by the Agencies because the reality is that, given the late priority date of 74-16187, the exercise of *existing* water rights in the Lemhi River is what led to dewatered stream conditions (*Opening Brief* at 16), not the exercise of late-priority water rights such as 74-16187 that merely try to use water available during peak runoff periods that would otherwise be unused and flow out of Idaho into the Columbia River. There are already 109.96 cfs of existing Big Timber Creek water rights, and Bird fully expects that if a permit is issued, he will be regulated in priority just as existing water rights on Big Timber Creek have been regulated for decades by active watermasters in Water District No. 74W. *See* Bird Exhibit 10; *See also* Bird Exhibit 13 (watermaster records showing later-priority water rights being curtailed while water is delivered to senior priority rights).

Ellsworth[4] ("Ellsworth"). R. 01506. IDFG, IWRB, LID, Beyeler, ICL, LSWCD, Odgen-Edwards, Purcell, High Bar, and Ellsworth are referred to collectively in this brief at the "Protestants." With the protests, 74-16187 became an IDWR contested case before Hearing Officer James Cefalo (the "Hearing Officer").

The prehearing conference for 74-16187 was held on April 16, 2019. Prior to and at the prehearing conference, Bird stipulated to inclusion of certain conditions included on a water right previously issued to and developed by James Whittaker (74-15613, which is now a licensed water right). See Bird Exhibit 9. Bird has no intention of attacking or challenging the imposition of these same conditions or in any way seeking more favorable conditions that would place 74-16187 in a better position that Whittaker's more senior water right (74-15613). The conditions Bird stipulated to are:

5. To determine whether water can be diverted under this right, the right holder and/or the watermaster shall measure the flows in Big Timber Creek at an existing measuring station near the Townsite of Leadore, located in the NENWNW, Section 31, T16N, R22E. The Department retains jurisdiction to require the right holder to install and maintain additional measuring sites to insure required bypass flows are maintained during diversions under this right.

6. At any time the flow rate in Big Timber Creek is greater than 13 cfs at all locations from the confluence of Little Timber Creek and Big Timber Creek down to the confluence of Big Timber Creek and the Lemhi River, the right holder may divert water under this right at a flow rate equal to the difference between the measured flow and 13 cfs, but not exceeding the flow rate authorized by this right.

7. The right holder shall cease diverting water under this right if the flow of Big Timber Creek is 13 cfs or less at any location between the point of diversion and the confluence of Big Timber Creek and the Lemhi River.

On July 30, 2019, a *Joint Motion By IWRB And IDFG For Partial Summary Judgment* (the "*Motion*") was filed. R. 00227. The self-stated purpose of the *Motion* was a "narrow motion" which "seeks only to affirm certain important legal conclusions regarding the 'local public interest' reached in the Department's proceedings on 74-15613 (the 'Whittaker case') will continue to apply in this case." R. 00232. Because the *Motion* only selectively quoted from the final order in the

4 Ellsworth is also the Chairman of LID.

Whittaker case, Bird opposed the *Motion*, but overall agreed that the "local public interest" criterion of Idaho Code § 42-222 already includes, as one of its considerations, fish and wildlife and aquatic life considerations. *See Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 441, 448 (1985) (the legislature "must have included the public interest on the local scale to include the public interest elements listed in section 42-501[,]" which included "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality.").

In the Hearing Officer's *Order Granting Joint Motion for Partial Summary Judgment, in Part*, he concluded that the term "dewatered" as it was proposed in the Motion "appear[ed] to be no longer accurate." R. 01167. Based on proposed hearing exhibits, the hearing officer explained that "the lower section of Big Timber Creek has had flowing water throughout the entire irrigation season," and as a result, the hearing officer concluded that the IWRB/IDFG proposed fact "does not constitute an accurate, undisputed fact" and partial summary judgment on that fact was not appropriate. R. 01167-01168.

Bird raised concerns with the *Motion* because it failed to include a portion of the final order in the Whittaker case which concluded that "[i]rrigation is a beneficial use of water, and is a traditional use of water that gives rise to a presumption of public interest. The benefits that can be derived from diversion of water and irrigation as proposed by Whittakers, even for a short period of time, are real and substantial." Bird Exhibit 5 at 7-8. In light of this, the hearing officer held that while fish and wildlife considerations are in the local public interest, "Bird is not precluded from offering evidence on other local public interest factors and the hearing officer is allowed to weigh all the local public interest factors in the ultimate determination of the pending contested case." R. 01169. Further, the Hearing Officer held "[t]he proposed conclusions do not refer to other local public interest factors and do not attempt to compare the factors addressed against other

local public interest factors." *Id.* Relative to the other proposed facts asserted by the Agencies—with some restating/rewording of the proposed facts—the hearing officer granted the motion concluding that anadromous fisheries in Big Timber Creek is in the local public interest and that recovery of ESA listed species is also in the local public interest. *Id.*

As to the remaining procedural history before the administrative agency in this matter, Bird agrees with the summary contained in the procedural history section in the *Order on Exceptions; Final Order* (the "*Final Order*") issued on May 21, 2020, which is:

> On August 28 and 29, 2019, an administrative hearing for the protested application was held in Salmon, Idaho. Bird was represented by attorney Robert Harris. The Agencies were represented by attorney Michael Orr from the Idaho Office of the Attorney General. Beyeler Ranches LLC, High Bar Ditch Association, Carl Ellsworth, Lemhi Irrigation District and Lemhi Soil & Water Conservation District (collectively "Irrigators") were represented by attorney Travis Thompson. Idaho Conservation League was represented by attorney Matthew Nykiel. Protestants Penny Jane Ogden-Edwards, Purcell Ranch Partnership and Kerry Purcell represented themselves.
>
> Exhibits offered by Bird, the Agencies, and the Irrigators were admitted into the administrative record.[1] Kurt Bird, James Whittaker, Derek Papatheodore, Cindy Yenter, Jeff Diluccia ("Diluccia"), Cynthia Bridge-Clark, Amy Cassel, Matthew Nykiel, Penny Jane Ogden-Edwards, Carl Ellsworth, Merrill Beyeler, Carl Lufkin, R.J. Smith and Bruce Mulkey, offered testimony at the hearing. Bird, the Agencies, and the Irrigators filed post-hearing briefs.
>
> Prior to the hearing, the hearing officer took official notice of documents from the Department's records pursuant to IDAPA 37.01.01.602. For ease of reference, these documents were assigned exhibit numbers IDWR1 through IDWR20. During the hearing, the hearing officer also took official notice of historical streamflow records for the Lemhi River.
>
> On January 9, 2020, the hearing officer issued a *Preliminary Order Approving Application*. On January 23, 2020, Bird filed *Applicant's Petition for Reconsideration*. Also, on January 23, 2020, the Agencies filed *IWRB's & IDFG's Joint Petition for Clarification or in the Alternative Reconsideration*. These petitions were granted, in part, resulting in an *Amended Preliminary Order Approving Application* ("Amended Preliminary Order") issued February 6, 2020.
>
> On February 20, 2020, IWRB and IDFG submitted *IWRB's and IDFG's Exceptions to Amended Preliminary Order Approving Application and Memorandum in Support* ("Agencies' Exceptions") to the Director. On March 5, 2020, Bird filed *Applicant's Response to Exceptions*[2] ("Bird Response") with the Department.

R. 01506-07.[5] After the Director issued the *Final Order*, the Agencies appealed (R. 01548-01609) and Bird cross-appealed (R. 01623-01629).

C. Statement of Facts.

Relative to facts specific to the application for permit for 74-16187, Bird agrees with Findings of Fact 1-9 contained in the *Final Order*, R. 01517-01518, and would refer the Court to them rather than repeat them here. Bird generally agrees that there was evidence in the administrative record that is summarized with the remaining Findings of Fact 10-62, R. 01518-01528, but disagrees with parts of the Director's application of Idaho law to these facts in a lawful manner as set forth herein.

II. ISSUES PRESENTED ON CROSS-APPEAL

1. Whether the Director erred by including condition no. 8 in the permit approval for 74-16187 in violation of Idaho Code § 67-5279(3)(a).

2. Whether the Director erred by including condition no. 9 in the permit approval for 74-16187 in violation of Idaho Code § 67-5279(3)(a).

3. Whether the Director erred by including condition no. 10 in the permit approval for 74-16187 in violation of Idaho Code § 67-5279(3)(a).

4. Whether the Director erred by including condition no. 11 in the permit approval for 74-16187 in violation of Idaho Code § 67-5279(3)(a).

5. Whether the Director's actions prejudiced a substantial right of Petitioners.

III. ADDITIONAL ISSUE ON AGENCIES' APPEAL

1. Whether Bird is entitled to an award of attorneys' fees pursuant to Idaho Code § 12-117 and other applicable law.

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5 The only addition we would make to this procedural history is that Bird did not file exceptions with the Director.

IV. APPLICABLE STANDARD OF REVIEW

The applicable standard of review is the same for both Bird's cross-appeal and the Agencies' appeal. The applicable standard of review before this Court has previously been well explained by the Idaho Supreme Court:

> In an appeal from a district court where the court was acting in its appellate capacity under the Idaho Administrative Procedure Act ("IDAPA"), "we review the decision of the district court to determine whether it correctly decided the issues presented to it." *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). However, we review the agency record independently of the district court's decision. *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 452, 180 P.3d 487, 491 (2008). A reviewing court "defers to the agency's findings of fact unless they are clearly erroneous," and "the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505–06, 284 P.3d 225, 230–31 (2012). Substantial evidence is "relevant evidence that a reasonable mind might accept to support a conclusion." *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 212, 220 P.3d 318, 330 (2009) (quoting *Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 112, 44 P.3d 1162, 1167 (2002)).
>
> Idaho Code section 67–5279(3) provides that the district court must affirm the agency action unless it 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 on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.
>
> I.C. § 67–5279(3); *Clear Springs Foods*, 150 Idaho at 796, 252 P.3d at 77. Even if one of these conditions is met, an "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." I.C. § 67–5279(4). "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." I.C. § 67–5279(3).

N. Snake Ground Water Dist. v. Idaho Dep't of Water Res., 160 Idaho 518, 522, 376 P.3d 722, 726 (2016).

V. CROSS-PETITION LEGAL ARGUMENT

A. The local public interest criterion.

The Director's interpretation and application of the "local public interest" evaluation criterion under Idaho Code § 42-203A is at the center of both Bird's cross-appeal and the Agencies' appeal. Despite the weighing of varied factors that takes place in a local public interest analysis—clearly described by the Hearing Officer that he "is allowed to weigh all the local public interest factors in the ultimate determination of the pending contested case." R. 01169[6]—the Agencies assert ESA concerns are the *sole* local public interest consideration that must result in denial of 74-16187. *See, e.g., Opening Brief* at 20-21. This is not a correct statement of Idaho law. Further, as described below, Bird asserts that the local public interest criterion was improperly utilized as the legal basis to include conditions 8 through 11 within 74-16187. Because of its importance, a review of the standards and history of this evaluation criterion is useful.

Evaluation of the "local public interest" in the context of a new water right permit application is required under Idaho Code § 42-203A(5). Idaho law allows the Director to deny an application to appropriate water where the proposed use "will conflict with the local public interest as defined in section 42–202B, Idaho Code," or alternatively, allows the Director to "grant a permit upon conditions." Idaho Code § 42–203A(5). Idaho Code § 42-202B currently defines the "local public interest" as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." *See also N. Snake Ground Water Dist.*, 160 Idaho at 524, 376 P.3d at 728.

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6 "The relevant elements [of the local public interest] and their relative weights will vary with local needs, circumstances, and interests." *Shokal*, 109 Idaho at 339, 707 P.2d at 450. Consistent with this standard articulated by the Idaho Supreme Court, the Director concluded that environmental considerations "are encompassed by the local public interest review and should be **weighed** against all other local public interest factors." R. 01530 (emphasis added).

A water right permit applicant in Idaho faces a difficult path in seeking to obtain a water right permit. Not only does an applicant have nearly all of the burdens of proof contained in Idaho Code § 42-203A(5) placed on him or her, but Idaho law has developed in a manner giving fairly broad discretion to the Director, particularly in the evaluation of the "local public interest." "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to the sound discretion of the Director." *Hardy v. Higginson*, 123 Idaho 485, 491, 849 P.2d 946, 952 (1993) (citing to *Shokal*, 109 Idaho 330, 707 P.2d 441).

However, the Director's local public interest discretion is not absolute, as described in the *North Snake Ground Water District* case:

> The Director's interpretation of "local public interest" in this case is entitled to no deference because it is inconsistent with the plain language of the statutory definition provided in Idaho Code section 42–202B.
>
> . . .
>
> Nor is the Director's conclusion regarding local public interest supported by the record. The Director cited no evidence relevant to the statutory definition of local public interest in the pertinent section of the final order. **Because the Director exceeded his authority by evaluating local public interest based on factors not contemplated in the statutory definition, the district court did not err in setting aside the Director's conclusion.** We affirm the district court's order setting aside the Director's conclusion that the Districts' application was not in the local public interest.

N. Snake Ground Water Dist. 160 Idaho at 525, 376 P.3d at 729 (emphasis added). Statutory definitions are found in the Idaho Code, and based on the principles described in the *North Snake Ground Water District* case, it clearly follows that water right permit conditions imposed by the Director that ignore the Idaho Constitution, Idaho statutes, and other Idaho water law principles likewise must be set aside because they are unconstitutional, violate statutes, exceed statutory authority, and/or are arbitrary. This limit on the Director's discretion applies to conditions imposed on a water right permit under the "local public interest" as Idaho law is clear that an

applicant has a right to challenge the imposition of conditions placed on a water right permit based on these same principles:

> Because Hardy's water permits only give him an inchoate or contingent right to put the water to a beneficial use, it was not improper for the Director to impose conditions upon his whole permit based on the local public interest. However, . . . a permittee should be allowed to appeal any conditions imposed by a Director, **to ensure that such conditions were not imposed unreasonably or arbitrarily**, without fear of losing the State's consent to put the water to a beneficial use under the terms of the original permit.

Hardy, 123 Idaho at 491, 849 P.2d at 952 (emphasis added).

To hone in further on this point, the above bolded language limits the Director's discretion when local public interest conditions are imposed with parameters in the conditions that are "reasonable." And, in addition to the scope of the conditions being reasonable, such scope must also only be for what is "necessary." The Idaho Supreme Court in *Hardy* described that a remand to the Director for further proceedings was warranted "to determine what effect and to what degree Hardy's diversion above the sculpin pool might have on the sculpin, and in light of such findings, to determine what conditions are **necessary** to protect the sculpin pool and the public's interest." *Hardy*, 123 Idaho at 492, 849 P.2d at 953 (emphasis added). Accordingly, permit conditions should only include parameters that are narrowly tailored to protect the interest of concern. They cannot be overly broad or excessive.

In short, conditions imposed by the Department that ignore Idaho law or are imposed unreasonably or arbitrarily must be removed. If conditions are imposed, they can only include parameters that are narrowly tailored to protect the interest of concern.

The express limits of the Director's discretion on local public interest matters are not expressly delineated by statute or administrative rule. In fact, it does not appear that the current definition of local public interest as defined in Idaho Code § 42-202B(3) has not been incorporated

into updated administrative rules found at IDAPA 37.03.08.40.05.g-h and 45.01.e. The local public interest review requirement was first added in 1978 by the Idaho Legislature to the statutory review criteria of the Director required for approval of new water right permits. As originally enacted, the provision stated:

> [W]here the proposed use is such . . . that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, . . . the director of the department may reject such application . . . .

1978 Idaho Sess. Laws, ch. 306, § 1. The plain language of this provision provided the Department authority to consider matters other than the traditional issues of injury, enlargement, beneficial use, and speculation associated with proposed new appropriations or transfers. However, at the time, there was little guidance on the scope of issues that could appropriately be considered by the Director under the local public interest in a contested hearing until the Idaho Supreme Court decided *Shokal*, 109 Idaho at 339, 707 P.2d at 450.

The analysis in *Shokal* is particularly relevant to these proceedings for 74-16187 because of *Shokal*'s discussion of Idaho Code § 42-1501, Idaho's minimum stream flow statute, and its influence on the interpretation of the local public interest criterion in that case. The court identified the minimum stream flow statute as a "related statute" because it also contained public interest standards and because the legislature "approved the term 'public interest' in [Idaho Code §§ 42-203A(5) and 42-1501] on the *same day* . . . ." *Id.* at 338, 707 P.2d at 449 (italics in original). The court felt that the legislature "must have included the public interest on the local scale to include the public interest elements listed in section 42-1501[,]" which included "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality." *Id.*

However, over time, the Department relied upon the local public interest to impose conditions on water right permits and transfers in contested cases to address concerns that the being considering that were completely unrelated to the use of water. In 2003, the Legislature narrowed the definition of the local public interest by adopting this definition:

> "Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

2003 Idaho Sess. Laws, ch. 298 (codified at Idaho Code §§ 42-203B(3)).

Against the above backdrop, we conclude here with a critically important provision from the Idaho Constitution for purposes of understanding Bird's arguments on appeal. Article XV, § 3 of the Idaho Constitution provides that "[t]he right to divert and appropriate the waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes." Each of the 74-16187 conditions Bird contends are not lawful or proper are addressed below.

B. The Director erred by including Condition Nos. 8 and 9 in the permit approval for 74-16187 in violation of Idaho Code § 67-5279(3)(a).

In the *Final Order*, the Director included the following conditions within the permit issued for 74-16187:

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

R. 01543.

1. Condition Nos. 8 and 9 violate provisions of Idaho's Constitution and consequently, are in violation of Idaho Code § 67-5279(3)(a).

In the proceedings associated with James Whittaker's water right, 74-15613, a 13 cfs minimum flow condition was imposed. Bird Exhibit 9; R. 01524. Whittaker requested reconsideration of the inclusion of this condition as a violation of Idaho's minimum stream flow provisions, but the Director denied Whittaker's request, and he decided not to appeal. Bird Exhibit 5. Accordingly, Whittaker is bound by the 13 cfs minimum flow condition, and recognizing as a practical matter that Whittaker's senior water right condition would need to be met before 74-16187 could be diverted, Bird agreed 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. Unfortunately, the same 13 cfs condition was *not* included in the approval for 74-16187, and instead, the *Final Order* imposed new and additional minimum flow conditions.

Condition Nos. 8 and 9 collectively impose two minimum stream flow entitlements. The first minimum stream flow is an amount of 18 cfs measured at an Idaho Power gage at the Highway 28 bridge. The second minimum stream flow is an amount of 54 cfs to be measured at a new gage, to be constructed by Bird (referred to in the *Final Order* as the "Bird Gage"), in the SESW of Section 8, T15N, R26E. R. 01535. These minimum flow conditions are unconstitutional.

Of particular importance on this issue is precedent from both this Court in the case of *North Snake Ground Water Dist. v. Idaho Dep't of Water Res.* (In the Matter of Application for Permit No. 36-16976 in the name of North Snake Ground Water District, et al., August 7, 2015) (hereinafter "*Wildman Decision*")[7] and its subsequent affirming by the Idaho Supreme Court as reported in *North Snake Ground Water Dist. v. Idaho Dep't of Water Res.*, 160 Idaho 518, 376

7 This decision is available at https://idwr.idaho.gov/files/legal/CV-2015-083/CV-2015-083-20150807-Memorandum-Decision-and-Order.pdf.

P.3d 722 (2016). In that case, several ground water districts filed an application for water right permit with a priority date of April 3, 2013 for 12 cfs from unnamed springs and Billingsley Creek for "mitigation for irrigation and fish propagation" to be developed and used as mitigation in response to Rangen's persistent delivery call against ground water users. *Wildman Decision* at 2. The proposed place of use and points of diversion were on Rangen's property, and Rangen protested on that basis (among others). *Id.* at 3. Meanwhile, Rangen also filed a competing application for permit with the Department on February 3, 2014 for 59 cfs from the same water sources as the Districts' for fish propagation purposes. *Id.* While the ground water districts' permit application was challenged, Rangen's was not, and on January 12, 2015, Rangen's application for permit was approved for 28.1 cfs. *Id.* at fn. 2.

After the contested case hearing, the hearing officer approved the ground water districts' permit. Rangen filed exceptions with the Director, who reversed on the bases "that the application was filed in bad faith, and that the application was not in the local public interest." *Id.* at 4. The ground water districts appealed to this Court, where the Director's decision was reversed. The Supreme Court affirmed, and the ground water districts received their water right permit.

This Court's analysis section begins with this significant statement:

> An analysis of the nature presented here must begin with the simple guarantee that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied." Idaho Const., Art. XV § 3. **It is against this long-standing constitutional tenant that the Director's *Final Order* is evaluated.**

Wildman Decision at 5 (emphasis added, brackets in original). This Court further underscored this constitutional principle a few pages later in his decision when evaluating the Director's apparent problem with the permit that it did not propose the construction of new project works:

> Interpreting IDAPA 37.03.08.045.01.c. to contain a new construction or project requirement in order to perfect a water right is contrary to Idaho water law, and

> conflicts with the constitutional guarantee that "[t]he right to divert an appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied." Idaho Const., Art. XV § 3.

Id. at 8 (brackets in original). And, relative to evaluation of the exercise of the Director's discretion with the local public interest, this portion of the decision is important:

> The determination that Rangen is not lawfully permitted to divert water from Billingsley Creek via the Bridge Diversion created what the Director refers to as "a race to file an application to appropriate water." Since Rangen did not have the right to divert water via the Bridge Diversion, that water was unappropriated, and the race to appropriate it commenced. The Districts filed the instant application on April 3, 2013, thereby winning the race. Rangen came in second, filing its competing application on February 3, 2014.

Id. at 11 (internal citations and footnote omitted).

Finally, relative to the Director's abuse of discretion in his local public interest analysis, this Court articulated critically important legal principles to be applied in this matter by holding as follows:

> In finding that the Districts' application "could be characterized as a preemptive strike against Rangen to establish a prospective priority date earlier than any later prospective date borne by a Rangen application," the Director appears to penalize the Districts for being first in time. Implicit in the statement is a preference that Rangen should have the better right to appropriate the subject water, even though its competing application was filed well after the Districts'. **Such analysis is contrary to Idaho law.** Where, as here, water is unappropriated, first in time is first in right. See e.g., Idaho Const., Art. XV § 3 ("priority of appropriation shall give the better right as between those using water"); IDAPA 37.03.08.035.02. (providing, "the priority of an application for unappropriated . . . water is established as of the time and date of the application is received in complete form"). **The Director cannot, consistent with Idaho law, utilize the local public interest standard to sidestep this long standing constitutional principle under the circumstances presented here.** There is simply no reason under the prior appropriation doctrine, alleged historical use notwithstanding, why preference should be given to Rangen's application, which was filed later in time, and thus later in right, than the Districts'.

Id. at 12 (emphasis added).

Bird seeks unappropriated Idaho water under 74-16187. R. 01324 ("It is undisputed that there is unappropriated water in the Lemhi River Basin. Every year, tens of thousands of acre-feet of water flow out of the Lemhi River Basin during the snowmelt runoff period."). Since May 20, 1971, with the amendment of Idaho Code § 42-103, the water right permitting process to obtain a water right in Idaho has been mandatory. *See* 1971 Idaho Sess. Laws, ch. 177. For minimum stream flow rights, Idaho Code § 42-1503 likewise requires proceeding through an application/permit process. Bird has complied with Idaho Code § 42-103, but the Agencies have not complied with Idaho Code § 42-103 or Idaho Code § 42-1503 (an application for minimum stream flow water right). Nevertheless, utilizing the local public interest criterion as his legal basis, the Director granted the Agencies a minimum stream flow entitlement. To paraphrase this Court's prior decision, the "Director cannot, consistent with Idaho law, utilize the local public interest standard to sidestep this long standing constitutional principle under the circumstances presented here. There is simply no reason under the prior appropriation doctrine, . . . why preference should be given to [the Agencies who have not filed water right permit applications]." *Wildman Decision* at 12.

In sum, it was unlawful for the Director to utilize the local public interest standard to sidestep the Idaho Constitution and grant the Agencies a minimum flow water right through conditions in 74-16187. Condition Nos 8 and 9 violate multiple portions of Article XV of the Idaho Constitution ("[t]he right to divert an appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied[.]" and "priority of appropriation shall give the better right as between those using water"). Consequently, these conditions violate Idaho Code § 67–5279(3)(a) and should be removed by this Court from 74-16187.

2. In the alternative, Condition Nos. 8 and 9 violate both Idaho Code § 42-1501, *et seq.* and Idaho Code § 42-203A, and consequently, are in violation of Idaho Code § 67-5279(3)(a).

In the event this Court concludes that Condition Nos. 8 and 9 are constitutional—and we do not believe they are constitutional—the Director still violated Idaho statutory provisions found at Idaho Code § 42-1501, *et seq.*, and Idaho Code § 42-103. On this independent basis, Condition Nos. 8 and 9 should be removed from 74-16187.

Idaho's minimum stream flow water right provisions, found at Chapter 15 of Title 42 of the Idaho Code, sets forth the *only* mechanism available for appropriation of minimum stream flow water rights in Idaho. These provisions are intentionally restrictive. *Only* the IWRB may file an application for permit for a minimum stream flow water right. Idaho Code § 42-1503 ("Whenever the board desires to appropriate a minimum stream flow . . ."); Idaho Code § 42-1502(b) ("'Board' means the Idaho water resources board."). Any person may request that the IWRB file an application for permit for a minimum stream flow water right, but judicial review is expressly precluded of any denial by the IWRB to pursue such a request. Idaho Code §§ 42-1503, 42-1504.

As further evidence of the restrictive nature of minimum flow water rights, an approved minimum stream flow permit must be submitted to the legislature by the fifth legislative day of the session to give the legislative branch of Idaho's government an opportunity to veto the permit. Idaho Code § 42-1503. This process recognizes that while minimum flows may be in the public interest, they are subject to a strict process and review by those accountable, by vote, to the public and their interests: Idaho's elected representatives. The IWRB is certainly familiar with this process, as it has previously appropriated and maintained water right 74-14993, a minimum stream flow of 35 cfs on the main stem of the Lemhi River (the only minimum stream flow right established by the IWRB in the entire Lemhi River drainage). R. 01520.

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 same day, it is self-evident that the Legislature wanted these statutes and the policies they implement to function independent of one another. Indeed, 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/.

A minimum stream flow water entitlement developed either under Idaho Code § 42-1501, *et seq.*, or contained in a permit issued under Idaho Code § 42-203A appropriates unappropriated water with the issuance of a water right. To the Director's credit, there is no attempt to minimize the fact that the minimum flow conditions in 74-16187 lay claim to unappropriated water:

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

R. 01541. Subject to weather conditions, it is evident and obvious that Bird will exercise 74-16187 whenever water is available in priority under this right, and when the exercise of this right happens, it will then impose a minimum flow mandate—a water right—that will make water unavailable that would otherwise be available for appropriation. Use of the local public interest in this way is

precisely the type of end-run around Idaho's minimum stream flow statute that the 2003 legislation was intended to specifically address. It is not enough to simply assert that, because no piece of paper that looks like a decreed or licensed water right is issued for the minimum stream flow entitlement, then there is no problem establishing a minimum stream flow through parasitic conditions attached to another water right. 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 requires 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).

Despite the foregoing, the Director's position is that the minimum stream flow conditions contained in 74-16187 are not minimum stream flow water rights. The Director's attempt to distinguish is because, in his view, "[t]he condition requiring a bypass flow is only operative during times when Bird and/or Whittaker are diverting water pursuant to the specific permit or water right

containing the bypass flow conditions." R. 01516. The Hearing Officer described this same position in more detail this way:

> Although the bypass conditions included on the proposed permit may have similar effects to a minimum stream flow, the proposed permit does not constitute a minimum stream flow. The proposed permit conditions will affect high flow usage like a minimum stream flow. Water cannot be diverted for high flow uses unless the proposed permit is fully satisfied. Unlike a minimum stream flow, however, the streamflow thresholds included in the conditions for the proposed permit do not limit or restrict any other water rights and only apply when the water right is being exercised. If Bird chooses not to divert water for irrigation under the proposed permit, then the streamflow thresholds described above do not need to be satisfied.

R. 01444. The Director's attempts to draw a distinction in this instance fails the "Duck Test," which is well-described in the case of *Shannon v. City of Sioux City*, 2007 U.S. Dist. LEXIS 10619 at *6 (U.S. Dist. Ct. N. Dist. Iowa 2007):

> Despite the plaintiff's attempts to characterize the conflicting relationships otherwise, this court will "adhere to the time-tested adage: if it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck," [internal citation omitted] "even though some would insist on upon calling it a chicken."

See also Lake v. Neal, 585 F.3d 1059 (2009) ("The Duck Test holds that if it walks like a duck, swims like a duck, and quacks like a duck, it's a duck. . . . the plaintiff in this suit[] flunks the Duck Test. He says, in effect, that if it walks like a duck, swims like a duck, and quacks like a duck, it sure as heck isn't a duck."); *Renovate Am., Inc. v. Lloyd's Syndicate 1458*, 2020 U.S. Dist. LEXIS 158155 at *12 (U.S. Dist. Ct. S. Dist. California 2020) ("In the end, if an animal walks like a duck and quacks like a duck, it is in fact a duck regardless of any desire to label it a goose. Calling a duck a goose does not render the duck into a goose."); *Joyce Livestock Co. v. United States*, 144 Idaho 1, 18, 156 P.3d 502, 519 (2007) (The Idaho Supreme Court 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.).

Here, the imposition of minimum flow conditions on 74-16187 function precisely like an IWRB minimum stream flow right with the same elements. Both are ducks, regardless of the Director's desire to label 74-16187's minimum stream flow conditions as a chicken.

Further, it cannot reasonably be asserted that the 2003 amendment to Idaho Code § 42-203A (the water right permitting statute) does not apply in this case because the minimum stream flow conditions at issue with 74-16187 are found in the conditions of this water right permit. The contested case for 74-16187 was initiated by filing an application under Idaho Code § 42-203A, which mandates that the local public interest criterion is evaluated. 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 the new permit or the transfer approval. This is why the 2003 amended language is contained in Idaho Code § 42-203A(5) and Idaho Code § 42-222. Both these statutes describe the hearing process on contested permit and transfer applications. Given the specific statutes this language was added to, reading this added language as inapplicable to contested water right permit or transfer proceedings would lead to absurd results. Courts "will not read a statute to create an absurd result." *David & Marvel Benton v. McCarty*, 161 Idaho 145, 151, 384 P.3d 392, 398 (2016). Further, interpreting this language outside of the context of the statutes they are contained within violates statutory interpretation principles. "To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute and its legislative history. It is incumbent upon a court to give a statute an interpretation which will not render it a nullity. *State v. Ephraim*, 152 Idaho 176, 177-78, 267 P.3d 1291, 1292-93 (Ct. App. 2011) (internal citations omitted). This language from 2003 was not added in these statutes to address problems arising from procedures or situations described in other statutes.

For all the above reasons, Condition Nos. 8 and 9 should be removed from 74-16187. Condition Nos. 8 and 9 violate both Idaho Code § 42-1501, *et seq.*, and Idaho Code § 42-103, and consequently, are in violation of Idaho Code § 67-5279(3)(a).

3. In the alternative, 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)(d).

Turning now specifically to the 54 cfs component of the minimum flow conditions, there are also other legal issues with this condition as well.

It is undisputed what the Agencies wanted 74-16187 denied in its entirety 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."). Against this backdrop of the Agencies' stated intent, it was surprising that the Hearing Officer originally gave (and the Director affirmed) something they never asked for at the hearing. Conditions 8 and 9 are contrary to IDFG's technical analysis and conclusion that protective conditions were appropriate. *Id.* It appears that the Hearing Officer combed through the record to find a technical basis for these conditions even though they were never requested or advocated for by the Agencies. The Director agreed with the Hearing Officer. In neither instance was this a reasonable exercise of discretion under the local public interest.

Furthermore, there are technical issues with the 54 cfs minimum flow. This minimum flow was based upon numbers from a USBR study summarized with this chart:

37. The following table summarizes the recommended flow rates from the USBR Study for maintaining the optimum levels of habitat for spawning and adult populations of spring Chinook salmon, steelhead and bull trout and the recommended flow rates for fish passage:

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

Ex. 202 at 41-43.

R. 01522. As an initial matter, the basis for the 54 cfs amount is suspect, and therefore unreliable, for a couple of reasons. Reach 5 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. Based on these numbers, it takes more water for fish to pass through Reach 5 than it takes to spawn there, which is illogical—a fish will not spawn in an area that an adult cannot pass through. 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 amount to formulate a minimum flow amount.

In sum, even if Condition Nos. 8 and 9 are constitutional and do not violate Idaho statutes, the evidence in the record does not support this 54 cfs minimum flow amount. As described above, the Agencies did not advocate for a minimum flow determination—they wanted 74-16187 denied—and for that reason the Agencies did not submit any evidence in support of any minimum flow, let alone a discrete 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.

C. Whether or not Condition Nos. 8 and 9 are lawful, the Director erred by including Condition No. 10 in the permit approval for 74-16187 which is in violation of Idaho Code § 67-5279(3).

On their own, measurement conditions generally do not raise constitutional, statutory, or reasonableness concerns. This is generally because a measuring device is installed at or near the ditch heading, and such an applicant must show that he or she has the legal right to use the ditch. *See* R. 01531-01532 (describing these legal requirements and how Bird met these requirements). However, in this case, where Condition No. 10 was included to measure minimum flows that are unconstitutional, violate Idaho statutes, and/or are unreasonable, then this measurement condition likewise is unlawful. For all the same reasons described above concerning Condition Nos. 8 and 9, Condition No. 10 should be removed from the approval for 74-16187.

In addition, however, even if Conditions 8 and 9 are determined to be lawful, Condition. No. 10 should be removed because Bird has no property right, legal right, or other authorization to construct and maintain a measuring station at the Lower BTC Gage at the bridge on Highway 28. The Lower BTC Gage was installed and is maintained by the Idaho Power Company, and it is located within a state highway right-of-way. Bird has no agreement with Idaho Power to continue to maintain this site, nor does Bird have a legal right to force Idaho Power to enter into such an agreement.

As private citizens, Bird does not have inherent or statutory authority to install and maintain measuring devices on properties they do not own. Condition No. 10 states that the "right holder," which is in this case is Bird, "shall install, operate and maintain physical devices or structures that can accurately measure streamflow at the Bird Gage site and the Lower Big Timber Creek Gage

site." R. 0543. However, Bird has no automatic right under Idaho law to do that. While Idaho Code § 42-1106 does allow a private person to exercise the right of eminent domain to condemn a right-of-way for "any ditch, canal or conduit", this statute does not provide for the right to use eminent domain to install or maintain gaging stations. Instead, a state entity, such as Water District 74W, should maintain these measuring devices because distribution of water among appropriators from natural channels is an "essential **governmental** function," Idaho Code § 42-604 (emphasis added), and neither IDWR nor Water District 74W can delegate their statutory governmental authority to a private person or entity, such as Bird. This was well described in another decision written by this Court in the context of the Basinwide Issue. No 17 matter in the Snake River Basin Adjudication:

> Furthermore, the authority and responsibility for measuring and distributing water to and among appropriators is statutorily conferred to, and vested in, the Idaho Department of Water Resources and its Director. Idaho Code § 42-103 provides that "it shall be the duty of the department of water resources to devise a simple, uniform system for the measurement and distribution of water." Chapter 6, Title 42 of the Idaho Code governs the "distribution of water among appropriators" and directs that the Director and the watermasters under his supervision are statutorily charged with distributing water to water rights. In particular, Idaho Code § 42-602 vests in the Director, the "direction and control of the distribution of water from all natural water sources with a water district to canals, ditches, pumps and other facilities diverted therefrom." Similarly, Idaho Code § 42-603 instructs that the Director is "authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof."

Memorandum Decision, Basin Wide Issue 17, Subcase No. 00-91017, at 11-12.[8]

In short, the water district is a governmental entity that has power to access and maintain measuring devices such as those described in Condition No. 10. "Each water district created hereunder shall be considered an instrumentality of the state of Idaho for the purpose of performing

8 The decision is also available on the SRBA Court's website at http://164.165.134.61/S0091017XX.HTM.

the essential governmental function of distribution of water among appropriators." Idaho Code § 42-604. Because there is no statute that gives Bird the legal right to construct and maintain gaging stations on property that Bird does not own, Condition No. 10 as imposed by the Director is in excess of his statutory authority to include such a condition. Instead, if such devices are to be constructed and maintained, they should be constructed and maintained by the governmental entity that has statutory authority to utilize and maintain them, which is Water District 74W.

Finally, adding a third minimum flow measuring location is unreasonable and places greater burdens on the Water District 74W watermaster where 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. There is no reasoned explanation as to why the Director designated the Lower BTC measurement location as the place where the 18 cfs minimum flow is measured, particularly when there is already a measurement location at the flume. Condition No. 10 adds unnecessary complexity and burdens the watermaster, which is unreasonable. For this additional reason, Condition No. 10 should be removed.

D. The inclusion of Condition No. 11 is an abuse of the Hearing Officer's discretion in violation of Idaho Code § 67-5279(3)(e).

Water use in the Lemhi River basin is subject to the Wild and Scenic Agreement. R. 01525. One of the provisions in this agreement is that it establishes a minimum flow of 1,280 cfs at the Shoup gage, but under Paragraph 10(b)(b)(A)(i) of the SRBA partial decree, it completely subordinates this minimum flow right to "150 cfs (including not more than 5,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre)" of future water rights. R. 01530; IDWR Exhibit 13. The 5,000 acres with the 0.02 cfs/acre limit mean that only 100 cfs can be developed for irrigation. The other 50 cfs is for other purposes (presumably municipal, commercial, and

industrial uses). Paragraph 10(b)(b)(A)(ii) of the SRBA partial decree describes a second category of water use for 225 cfs (including the irrigation of up to an additional 10,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre) that is subject to the 1,280 cfs minimum flow. Importantly, the Wild and Scenic Agreement also provides the following:

> . . . 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.

IDWR has also tracked appropriations in Basin 74 in this manner. Bird Exhibit 20. To date, only approximately 50 cfs has been debited from the 150 cfs amount. There is no spreadsheet for the 225 category, a fact confirmed by the Director. R. 01530 ("As of today, no portion of the 225 cfs has been allocated.").

However, despite the foregoing, the Director unilaterally designated 74-16187 as part of the 225 cfs category based on his review of flow measurements. *Id.*; R. 01533. The Director has no authority to do this because it is contrary to the plain language of the Wild and Scenic Agreement, and Bird did not ask for it to be done. We fail to see how Bird's proposed irrigation under 74-16187 is any different than any future applications for irrigation that will come. We further fail to see why his application for permit is receiving second-class status when there remains plenty of room in first class.

Condition No. 11 is unprecedented because it has never been imposed before on any other water right. There is also no language in the Wild and Scenic Agreement that grants the Director any discretion of right to categorize what subordination provision new applications fall under. Based on the structure of the Wild and Scenic Agreement, new applications for water right are treated on a first-come-first-served basis, and it is undisputed that only approximately 50 cfs has been developed. Bird's 74-16187 should be protected under the 150 cfs portion of the Wild and Scenic Agreement, not the 225 cfs portion. If the Director is concerned that future municipal or other rights may not be filed soon enough to be covered by the 150 cfs provision, he has failed to recognize that 50 cfs of the 150 cfs provision provides for just such uses because only 100 cfs (5,000-acres worth) can be used for irrigation purposes.

If Bird's 74-16187 is being moved into the 225 cfs category, then what future water rights would qualify for the 150 cfs category? Bird's 74-16187 will be senior in priority to any such future rights. Based on the Director's logic, any new water right permit application will now be placed in the unsubordinated 225 cfs category, which completely caps the 150 cfs category at the current 50 cfs of issued water rights. Bird Exhibit 20. It is not in the local public interest to leave 100 cfs of water rights out of the 150 cfs category—the category that enjoys the benefits of subordination to the wild and scenic water rights. 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.

E. Substantial Rights of Bird Have Been Prejudiced.

Idaho law provides that even if an agency's decision violates the provisions of Idaho Code § 67-5279(3)(a)-(e), that decision will be affirmed "unless substantial rights of the appellant have been prejudiced." Idaho Code § 67–5279(4). "[D]irectly interested parties . . . generally have, as a procedural matter, substantial rights in a reasonably fair decision-making process and, of course, in proper adjudication of the proceedings by application of correct legal standards." *State Transp. Dept. v. Kalani-Keegan*, 155 Idaho 297, 314, 311 P.3d 309, 314 (2013). "[A]pplicants for a permit also have a substantial right in having the governing board properly adjudicate their applications by applying correct legal standards." *Hawkins vs. Bonneville County Bd. of Com'rs*, 151 Idaho 228, 233, 254 P.3d 1224, 1229 (2011).

Bird's substantial rights have been prejudiced because Condition Nos. 8 through 11 and the basis for their inclusion violate constitutional and statutory rights as set forth above. 74-16187, as currently issued, contains conditions that unconstitutionally and unlawfully restrict his right to appropriate and use the unappropriated water of the State of Idaho. To remedy the prejudice to Bird's rights, this Court must eliminate Conditions 8 through 10 and revise Condition No. 11 to provide that 74-16187 is protected under Paragraph 10(b)(b)(A)(i) of the Wild and Scenic Agreement.

VI. CONCLUSION ON CROSS-APPEAL

It must be remembered that the IWRB fought hard for additional water supplies contained in the Wild and Scenic Agreement entered into just over a decade ago. The time, effort, and expense associated with those negotiations will be wasted if we are now at a point where new appropriations of water are prohibited in the Lemhi River Basin when there is available water under the amounts preserved in the Wild and Scenic Agreement. Eliminating the appropriation of

water specifically reserved under the Wild and Scenic Agreement is not in the local public interest. In this proceeding, the IWRB has offered no explanation as to why it will not utilize the path given exclusively to it to appropriate minimum stream flow water rights. Instead, the IWRB chooses to protest individual water right permit applications and force farmers and ranchers (primarily) to incur legal expense in individual contested cases. This should offend those in the Idaho legislature. Bird's position is that the correct process should be followed in the appropriation of minimum stream flow water rights, not that anadromous fish issues should be ignored. The IWRB has a straightforward process available to it, that for unstated reasons, it chooses not to follow. This point was addressed by the Hearing Officer:

> If the Agencies believe a minimum stream flow should be created to protect fish habitat and aquatic life and promote recovery of ESA-listed species, the Agencies should file an application for a minimum stream flow as contemplated by Idaho Code § 42-1503. Instead of protesting every application for permit filed in the Lemhi River Basin,[9] which could result in numerous, nearly-identical hearings, the Agencies could instead participate in a single public hearing for each proposed minimum stream flow to determine the appropriate protected flow rates.

R. 01443. We agree with the Hearing Officer. The Agencies must participate in the minimum stream flow process described in Idaho Code § 42-1501, *et seq.*

As to the issues on cross-appeal, Conditions 8 through 11 should be removed from 74-16187. It was unlawful for the Director to utilize the local public interest standard to sidestep the Idaho Constitution and grant the Agencies a minimum flow water right through 74-16187. Condition Nos 8 and 9 violate multiple portions of Article XV of the Idaho Constitution ("[t]he right to divert an appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied[.]" and "priority of appropriation shall give the better right as between those using water"). Furthermore, Condition Nos. 8 and 9 violate both Idaho Code § 42-1501 *et seq.*

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9 Currently, there are eighteen applications proposing irrigation uses in the Lemhi River Basin. The Agencies have protested sixteen of the eighteen applications.

and Idaho Code § 42-203A. And even if Condition Nos. 8 and 9 are constitutional and do not violate Idaho statutes, there is no substantial evidence in the record to support this 54 cfs minimum flow amount. As described above, the Agencies did not advocate for a minimum flow determination—they wanted 74-16187 denied—and for that reason the Agencies did not submit any evidence in support of any minimum flow, let alone a discrete minimum flow amount.

Further, Condition No. 10 as imposed by the Director is in excess of his statutory authority to include such a condition. Instead, if such devices are to be constructed and maintained, they should be constructed and maintained by the governmental entity that has statutory authority to utilize and maintain these, which is Water District 74W. Condition No. 10 should be removed.

Condition No. 11 is unprecedented because it has never been imposed on any other water right. There is also no language in the Wild and Scenic Agreement that grants the Department any discretion of right to categorize what subordination provision new applications fall under. By demoting Bird's application, without any request by Bird to do so, the Director has abused his discretion and should amend Condition No. 13 to specify that it is protected under Paragraph 10(b)(b)(A)(i) of the Wild and Scenic Agreement.

The Director's actions have violated substantial rights of Bird, violated Idaho Code § 67–5279(3), and Condition Nos. 8 through 11 should be removed or amended by this Court from 74-16187 as set forth above.

VII. LEGAL ARGUMENT ON AGENCIES' APPEAL

A. The Agencies' own evidence in the administrative record does not support its position that there is no more water available for appropriation in the Lemhi River Basin. Furthermore, the Agencies misapprehend the burden of proof standards in a water right permit contested case.

As set forth above, Bird does not agree with the entirety of the *Final Order* but agrees with the portions of the *Final Order* not challenged by Bird on cross-appeal. Conversely, the Agencies

have challenged the entirety of the *Final Order* and want 74-16187 denied. We trust that IDWR will fully respond to its sister agencies' arguments in its response. Nevertheless, there are components to the Agencies' *Opening Brief* that warrant a response from Bird.

It is evident from review of the Agencies' arguments that they have considered the contested case hearing for a brand new 2018 priority water right permit as a forum to address *existing* ESA issues in the Lemhi River Basin. But that is not the point of a contested case hearing for a permit such as 74-16187. The question the Director is tasked with addressing is whether the application for permit at issue *in this matter* will have enough impact to local public interest concerns to outweigh Bird's local public interest factors to justify denial of 74-16187. The Agencies rely upon its thousands of pages of studies and other documentation introduced at the hearing to explain that anadromous fish recovery is a local public interest factor. But as a general matter, Bird does not challenge the conclusion that anadromous fish recovery is a component of the local public interest. What Bird strongly disagrees with is that 74-16187—a junior water right behind 109.96 cfs of senior Big Timber Creek water rights—will impact anadromous fish recovery in any measurable or meaningful way, let alone enough to fully outweigh the other local public interest factors associated with irrigation, supporting the local economy, and other factors in favor of developing Idaho's water supply. Surprisingly, in its strong advocacy for the denial of a permit for 74-16187, the IWRB is willing to sacrifice *all* remaining available Lemhi River Basin water: "This included unrebutted expert testimony that 'from a recovery perspective' there is no water available in the Lemhi River Basin for new irrigation diversions." *Opening Brief* at 22; R. 01536 ("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.").

As an initial matter, targeting extremely junior water right permit applications is misplaced. As the Director found based on Jeff Diluccia's testimony, the primary expert for the Agencies, the Section 6 Agreement discussions broke down over "disagreements about the **instream flows** needed to recover the ESA-listed species." R. 0518 (emphasis added). The *Opening Brief* confirms this fact, stating "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." *Opening Brief* at 16. The instream flows are those necessary for fish passage and to ensure there is no dewatering of streams to strand or entrain migrating anadromous fish causing them to die. Tr. Vol. II p. 376 LL. 19-24 ("I mean the primary issue was flow, was water, adding more water, a dewatered condition, a severely flow limited condition. That's what was the impetus for the potential – the take issue and pending enforcement action. And NOAA was clear through these negotiations that they wanted more water.").

The approach taken by the Agencies in the contested case for 74-16187 goes beyond fish passage and focused instead on improving stream habitat under the mantra of "more water means more fish." Tr. Vol. II p. 463 LL. 7-8. Based on this, the Agencies assert that all remaining unappropriated flow in the Lemhi River Basin is needed for anadromous fish habitat because these flows aid in channel formation. On this argument, the Agencies repeatedly state in their *Opening Brief* that evidence for the need for all the unappropriated water was "unrebutted." In our view, this misses the point of what the Director determined based on evidence in the record, and further misapprehends that it was the Agencies' responsibility to meet its burden of persuasion to provide evidence to support this local public interest factor with more than "Diluccia's testimony broadly establish[ing] the worth of high flows . . [,]" R. 01511, without any technical evidence to support Dillucia's sweeping declaration that more water means more fish.

When it comes to the local public interest, this is the single criterion under Idaho Code § 42-203A(5) where the burden of proof is on *both* the applicant and the protestant as described here (local public interest is question 5):[10]

BURDEN OF PROOF

The applicant has the initial burden of proof for issues 1, 2, 3, 4, 6, and 7 above and must provide evidence for the department to evaluate these criteria.

The initial burden of proof on issue 5, if applicable, lies with both the applicant and protestant as to factors of which they are most knowledgeable and cognizant. The applicant has the ultimate burden of persuasion, however, for these issues.

The Agencies argue that "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.'" *Opening Brief* at 24. First, NOAA Fisheries was not a protestant to 74-16187, and no one from NOAA testified at the hearing for any protestant about its recovery standards. At best, Diluccia testified about what his understanding of NOAA's standards are, and furthermore, while the language from the NOAA documents provide for stream flows and habitat improvement, we do not recall any specific statement about eliminating issuance of any new junior water rights in the Lemhi River Basin. If this were mandated by NOAA, then surely the IWRB would petition for a moratorium on the processing of any new water right applications. The IWRB has not done that.

Second, while the Agencies' expert testified that "more water means more fish" and no more water rights should be issued, his testimony was based on his view that channel-forming flows create more or better habitat in a linear fashion where every increase in channel-forming flows results in the same amount of more or better habitat. But he presented no technical analysis

10 This is taken from the standard letter to a water right permit applicant informing him/her that the application has been protested, a copy of which Bird was sent in a letter dated January 28, 2019 as contained in the water right backfile for 74-16187.

to support this conclusion. It is not enough for a protestant to simply say it wants all the water and then consider this position unrebutted with the burden now shifted to the applicant to disprove the position. In Bird's view, given the Wild and Scenic Agreement, lack of moratorium, and the statutory ability for the IWRB to appropriate minimum flows, this assertion without technical backup in a water right permit contested case misapprehends burden of proof standards. The broad statement of "more water means more fish" does not provide a hearing officer or the Director enough technical information that can be taken and weighed against other local public interest factors. Quantifying the benefit of the channel-forming flows is necessary for the decisionmaker to weigh local public interest factors, particularly those that are directly at odds with other local public interest factors. 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. When pressed further and asked how frequently he thinks flows like the 2009 water year he would like, Diluccia qualified his original statement when he testified "we were talking anywhere from three to five years would be beneficial." *Id.* p. 467 LL. 22-24. In addition to the lack of technical information, the testimony about three to five years is further evidence that the Agencies' position of "more water means more fish" is not literal.

Accordingly, it was not necessary for Bird to rebut Diluccia because his testimony did not satisfy the Agencies' initial burden on this local public interest factor. Without this technical information, there was nothing for Bird to rebut. It cannot be said that because of a lack of technical information, the Director's decision violated the IDAPA. On appeal, this Court "defers to the agency's findings of fact unless they are clearly erroneous," and "the agency's factual

determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *N. Snake Ground Water Dist.*, 160 Idaho at 522, 376 P.3d at 726. On this issue of channel-forming flows, there is substantial competent evidence in the record that the Agencies did *not* quantify its desired channel-forming flow amounts, frequency, or the resulting benefits to habitat. While the Agencies advocate for a different outcome, they have not shown that the Director's findings of fact are clearly erroneous.

Additionally, on the issue of a protestant's burden of proof, the Agencies argue "[t]he 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.'" *Opening Brief* at 23. This is simply not true. The Director did consider the Agencies' position but concluded there was insufficient evidence to accord enough weight to this factor to outweigh other local public interest factors. Importantly, the Agencies have not taken the position that irrigation is not a local public interest factor, even though a common theme throughout the *Opening Brief* is that because the Agencies have advanced a position on its local public interest issue, the Director must decide the issue in the Agencies' favor, as though the Director should dispense with any weighing of local public interest factors. *See, e.g., Opening Brief* at 21 ("The Final order specifically determined it is in the local public interest "to recover fish species" listed under the ESA, . . . Thus, Idaho Code § 42-203A(5)(e) imposed upon IDWR the 'affirmative duty' to protect these same local public interests."); *see also* IDAPA 37.03.08.040.04.b.ii (burden of proof on the local public interest).

This, of course, is not how the analysis of local public interest factors works in a water right permit contested case. The argument that the Hearing Officer and Director cannot weigh Bird's local public interest factors—and that fish and wildlife concerns are the only factors that

must be considered—is the very concern Bird had with the Agencies' *Motion* filed in the 74-16187 proceedings. In the *SJ Order*, the Hearing Officer was clear that "Bird is not precluded from offering evidence on other local public interest factors and the hearing officer is allowed to weigh **all** the local public interest factors in the ultimate determination of the pending contested case." R. 01169 (emphasis added). Further, the Hearing Officer held "[t]he proposed conclusions do not refer to other local public interest factors and do not attempt to compare the factors addressed against other local public interest factors." *Id.* The Director did perform a local public interest weighing analysis, and his decision to not deny 74-16187 did not violate the IDAPA.

Finally, on the issues relating to burden of proof, the Agencies subsequently argue that the Director incorrectly removed the "peak flow" condition (formerly Condition No. 10), or else incorrectly did not deny 74-16187, or else incorrectly did not remand the "peak flow" condition for an additional hearing, and overall, misapplied the burden of proof by not including the "peak flow" condition. *Opening Brief* at 32-35. These arguments are unavailing and inconsistent. As described above, the Agencies first argue that 74-16187 should be denied, but because it was not denied, the Agencies secondarily take issue with the Director's use of the USBR Study to establish the 18 cfs and 54 cfs minimum flows even though the Agencies did not submit technical studies or other evidence to support designation of any minimum flow amount. *Opening Brief* at 21-31. Now, the Agencies argue, the "peak flow" condition should be reinserted as it is based upon the *Final Order*'s characterization of the USBR Study as "reliable, convincing scientific evidence." *Id.* at 33. But this is the same USBR study that the Agencies previously asserted "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.'" *Opening Brief* at 28.

The Agencies cannot have it both ways. The USBR Study was focused on fish passage, not on habitat formation or habitat creation associated with peak flow events. The USBR Study itself expressly provides that it did not "estimate flow or habitat needs of downstream migrants or spring runoff conditions necessary for maintenance of channel formation morphology or riparian zone functions." R. 01511; IWRB Exhibit 202 at 26. The Director was correct to conclude that there was no technical basis for the "peak flow" condition. And on that point, it would not be proper to remand this matter for more hearings. Such a remand would provide the Agencies with a second bite at the apple when it had two full hearing days to present its evidence. It would also allow the Agencies the opportunity to change its strategy from outright denial of 74-16187 to imposition of a "peak flow" condition. At the time of the hearing on this matter, there was no technical evidence to support a "peak flow" condition.[11] The Director correctly removed the "peak flow" condition, correctly did not deny 74-16187, and correctly did not remand the "peak flow" condition for an additional hearing.

The final component of the Agencies' multiple alternative arguments is that the *Final Order* misapplied the burden of proof for a protestant because the Agencies "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." *Opening Brief* at 34. Yet, the Agencies contradict their own argument that they carried their initial burden by arguing that the Director improperly "imposed an additional burden . . . a requirement of coming forward with quantitative evidence specifically defining the magnitude, duration, and frequency of the 'peak flow' events." *Id.* IDAPA 37.03.08.040.04.b.ii provides that "[t]he protestant shall

11 As stated above, when asked "is there a number?" relative to magnitude and frequency of high flows, Diluccia responded, "Well, let me qualify that by saying that we haven't done it yet." Tr. Vol. II p. 466 LL. 6-8. Accordingly, a remand to take more evidence would be a futile exercise. The Agencies were provided an ample opportunity to prepare and produce technical evidence, and it was not provided.

bear the **initial** burden of coming forward **with evidence** for those factors relevant to criterion (e) of Section 42-203A(5), Idaho Code, of which the protestant can reasonably be expected to be more cognizant that the applicant." (emphasis added). One does not carry an initial burden of proof by not providing technical evidence of quantity, frequency, and duration of channel-forming flows, nor does a decisionmaker impose an "additional" burden on a party for requiring sufficient technical evidence in the first place. It was well within the Director's discretion to determine that there was insufficient technical evidence to support the Agencies' local public interest position. The Director did not misapply administrative rules or Idaho law.

B. The Director did not err by allowing "reconnect" flows to be "counted" towards the Reach 1 "bypass flow."

As set forth above, Bird's position is that the minimum stream flow conditions are not lawful. To the extent this Court determines they are lawful, then the question raised by the Agencies is whether water transacted through the IWRB's Water Transaction Program ("WTP") should count towards the 18 cfs component of the minimum stream flow conditions. As explained herein, allowing an end-run around the requirements of the water right permitting process and/or Chapter 15 of Title 42 of the Idaho Code raises these issues, and these issues could be avoided if the IWRB simply applied for a minimum stream flow water right rather than relying on an unlawfully imposed one. Nevertheless, if this Court determines that the 18 cfs component of the minimum stream flow conditions is lawful, then on the issue of fish passage flows, the very purpose of the USBR Study was to quantify such flows. The USBR Study was determined by the Director to be reliable, convincing scientific evidence for determining fish passage flows for the 18 cfs component of the minimum stream flow conditions, and the Agencies have not presented evidence otherwise. Nor do we believe they could. If the 18 cfs amount for fish passage is determined to be based on competent evidence, then the amount is what matters, not how the flows

that make up the 18 cfs are "counted." The "color" of the water does not matter to fish. What the Agencies are really arguing for are flows in excess of the 18 cfs amount for bypass flows, which proposes a higher amount that is not supported by evidence in the record. The Director already determined that "[p]rotection of a flow in excess of, or separate from, 18 cfs is not supported in the record." R. 0510. The Agencies have not presented sufficient evidence otherwise to change this determination.

C. The Director did not err by removing the "high flows" condition.

The Agencies next argue that the Director should not have removed a condition prohibiting Bird from exercising the right to divert high flows (original Condition No. 12, R. 01451) despite the plain language of the Basin 74 General Provisions. The Director determined that this issue "is not before the Director and a determination is not needed to reach a decision on the pending case." R. 01530. We agree with the Director.

The contested case for a permit application is not a forum to address all things water. The question of diversion of high flows under the Basin 74 general provisions is an *administration* issue, not an *appropriation* issue. The 74-16187 contested case is not a declaratory judgment action to interpret the Basin 74 general provision. And even though the Agencies try to get at this issue through the local public interest criterion, *Opening Brief* at 43, the administration of water rights is not something that either Bird or Protestants have direct involvement in. This is the Director's job.

As explained above, distribution of water among appropriators from natural channels is an "essential **governmental** function." Idaho Code § 42-604 (emphasis added). The authority and responsibility for measuring and distributing water to and among appropriators is statutorily conferred to, and vested in, IDWR and its Director. Idaho Code § 42-103 provides that "it shall

be the duty of the department of water resources to devise a simple, uniform system for the measurement and distribution of water." Chapter 6, Title 42 of the Idaho Code governs the "distribution of water among appropriators" and directs that the Director and the watermasters under his supervision are statutorily charged with distributing water to water rights. Idaho Code § 42-603 instructs that the Director is "authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof."

Simply put, the contested case for a permit application is not the proper forum to rule on the interpretation of a general provision that affects *all* water users in Basin 74. If the Agencies want the Director to rule on that issue, there are procedures to properly raise that issue where all affected persons would then be provided notice of the proceeding and given the opportunity to participate.

Further, on this issue, to the extent the Court considers reinserting this "high flow" condition, doing so would be improper because such a condition is contrary to the plain language of the Basin 74 general provisions. The second of the Basin 74 general provisions provides, in its entirety, the following:

> **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.**

Bird Exhibit 11. There is no language in this general provision which provides that the right to divert high flows is lost if a water right for the same water historically diverted as high flow water is later obtained by a water user. While the Hearing Officer used the contested case forum for 74-16187 to attempt to take away Bird's right to high flows with the inclusion of a condition which

unequivocally prohibits Bird's use of high flows, that would be an unconstitutional taking of Bird's right to divert high flows under the general provisions as decreed in the Snake River Basin Adjudication proceeding.

The imposition of a high flows usage ban, in our view, illustrates the problem with granting *de facto* water rights to the Agencies through conditions contained in a water right permit. 74-16187 will not change the amount of water physically diverted by Bird—he is already diverting high flows under the Basin 74 general provisions to the place of use for 74-16187. By granting minimum stream flow water rights to the Agencies through 74-16187, the Hearing Officer had no other choice but to then take away Bird's ability to divert high flows in order to fully grant the implied water right to the Agencies. Otherwise, the Hearing Officer concluded, Bird would be able to circumvent the minimum flow provisions of 74-16187 by calling the water diverted to the place of use "high flows." R. 01447. This entire approach is problematic as it requires a second condition to fully effectuate the first. Relative to the question of prohibiting use of high flows on Bird's property because 74-16187 was issued, the Director was correct to remove the condition prohibiting use of high flows from 74-16187.

D. The Director's issuance of 74-16187 is consistent with the State Water Plan.

The Idaho State Water Plan is a comprehensive plan under Idaho Code § 42-1734B (entitled "Board Procedures for Adopting a **Comprehensive** State Water Plan"(emphasis added)). In a similar context—the realm of land use planning—Idaho law mandates the creation of a comprehensive plan separate from a zoning ordinance. Idaho Code § 67-6508. The comprehensive plan reflects the "desirable goals and objectives, or desirable future situations" for land within a jurisdiction. Idaho Code § 67-6508; *Whitted v. Canyon County Board of Commissioners*, 137 Idaho 118, 122, 44 P.3d 1173, 1177 (2002). But "[a] comprehensive plan is

not a legally controlling zoning law, it serves as a guide to local government agencies charged with making zoning decisions." *Evans v. Teton County*, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003). A comprehensive plan is a planning document, but it is not to be used as a basis to deny more specific proposed actions described in ordinances, for example:

> Thus, we agree with the district judge that the Board erred in relying completely on the comprehensive plan in denying these applications, and should instead have crafted its findings of fact and conclusions of law to demonstrate that the goals of the comprehensive plan were considered, but were simply used in conjunction with the zoning ordinances, the subdivision ordinance and any other applicable ordinances in evaluating the proposed developments.

Urrutia v. Blaine Cty., 134 Idaho 353, 359, 2 P.3d 738, 744 (2000). There are significant differences with how planning documents are utilized as opposed to undertaking specific administrative actions:

> [T]here is a substantial difference between planning and zoning. Planning is long range; zoning is immediate. Planning is general; zoning is specific. Planning involves political processes; zoning is a legislative function and an exercise of the police power. Planning is generally dynamic while zoning is more or less static. Planning often involves frequent changes; zoning designations should not. Planning has a speculative impact upon property values, while zoning may actually constitute a valuable property right."

Giltner Dairy, Ltd. Liab. Co. v. Jerome Cty., 145 Idaho 630, 633, 181 P.3d 1238, 1241 (2008).

Because the Idaho State Water Plan is a comprehensive plan under Idaho Code § 42-1734B, the same legal principles associated with the proper use of a comprehensive land use plan described above apply here.

The Agencies argue that issuance of 74-16187 did not comply with the Idaho State Water Plan. *Opening Brief* at 45-47. This argument attempts to use a planning document to dictate the result of a specific case. This is an improper use of the Idaho State Water Plan. The inherent problem with arguing that a planning document should dictate the result of a particular contested case is that a planning document speaks in generic terms, and both sides of this contested case

could cherry pick parts of the Idaho State Water Plan it believes supports a result in a specific case. Just as the Agencies have picked certain policies and principles it believes support its position to deny 74-16187, Bird can pick certain policies and principles it believes support a position that issuance of 74-16187 is consistent with the Idaho State Water Plan and that the IWRB is not acting in accord. *See Bird Exhibit 21* (Policy 1, Optimum Use; Policy 1A, State Sovereignty; Policy 2C, Minimum Stream Flows). Indeed, it could be argued that the IWRB is not acting in accordance with the State Water Plan because it is not applying for minimum stream flow water rights in the Lemhi River Basin under Policy 2C ("The Idaho Water Resource Board **will exercise its authority** to establish and to protect minimum stream flow water rights on those water bodies where it is in the public interest to protect and support instream uses." (emphasis added)). Further, there is no policy position under the Salmon River Basin section of the Idaho State Water Plan directing the IWRB to protest individual water right applications for permit.

The Director is only required to make sure his actions are consistent with the planning document, and the appropriation of new water rights is most certainly not prohibited by the Idaho State Water Plan. His actions are consistent with this planning document. The Agencies' arguments otherwise are unavailing.

E. The Director was correct to deny imposition of administration at the field headgate for 74-16187.

As explained above, water right administration and enforcement are vested in the Director and the watermasters under his supervision are statutorily charged with distributing water to water rights as described in chapter 6 of title 42. Furthermore, the Director has statutory enforcement authority to ensure water users exercise their water rights within the confines of their elements. Idaho Code §§ 42-351 and 42-1701B. To meet these obligations, the Director has a Water Compliance Bureau with IDWR staff assigned to address these concerns. *See*

https://idwr.idaho.gov/files/general/ organization-chart.pdf (Tim Luke is the current chief of the Water Compliance Bureau).

Despite this, the Agencies have continually asked for extraordinary measures by requiring the watermaster to measure water subject to the conditions associated with 74-16187 at the field headgate, rather than at the stream like all other water users. *Opening Brief* at 47. The Agencies even suggest a telemetry-capable measuring device at the field headgate. However, the issuance of a water right permit is not a license for the Department to single out a permit holder and subject him or her to additional water administration requirements when the water district—an instrumentality of the Department—already has authority to enforce water rights under Idaho Code § 42-351. This requested change is therefore improper and unnecessary. Big Timber Creek is within a functioning water district (74W) and has an active watermaster, Derek Papatheodore, who testified at the hearing on this matter about his watermaster responsibilities and duties. His testimony was clear and convincing that he does not favor certain water users over others, and that he would administer 74-16187 as it is supposed to be administered. Tr. Vol. I. p. 201 through 215. There is already a water administration structure in place and requiring some users to have telemetry devices while others do not is inconsistent, inefficient, and unnecessary.

The Director explained that "[if] Bird is diverting water in excess of his rights, out of priority, or irrigating lands not authorized by water rights, notice of these activities should be conveyed to IDWR's Water Compliance Bureau." R. 01513. Further, the Director explained that there is already a water right (Whittaker's 74-15613) with a minimum flow water right condition that has been administered with no evidence of problems with such administration. The Director's decision on this issue is supported by substantial evidence in the record and Idaho law. The Agencies' arguments otherwise are unavailing.

F. Bird is entitled to an award of attorney's fees on appeal.

The Court should award attorneys' fees and expenses in any proceeding involving a state agency and a person if the Court finds the "nonprevailing party acted without a reasonable basis in fact or law." Idaho Code § 12-117(1); *see also Hoffman v. Board of the Local Improvement District No. 1101*, 163 Idaho 464, 473, 415 P.3d 322, 341 (2017) (County boards awarded attorney's fees where landowners pursued appeal without a reasonable basis in law).

Idaho Code § 12-117(1) provides the following:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency ... and a person ... the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees ... if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

In *Rangen, Inc. v. IDWR*, the Idaho Supreme Court described the reasonableness standard of section 42-117(1) as follows:

> In an appeal where the prevailing party sought attorney fees under section 12–117, the Court granted fees where the nonprevailing party **continued to rely on the same arguments used in front of the district court, without providing any additional persuasive law or bringing into doubt the existing law on which the district court based its decision**. Although the [nonprevailing parties] may have had a good faith basis to bring the original suit based on their interpretation of Idaho law, [they] were very clearly aware of the statutory procedures, failed to appeal separate appraisals when they had a right to appeal, and were clearly advised on the applicable law in an articulate and well reasoned written decision from the district court. **Nevertheless, [they] chose to further appeal that decision to this Court, even though they failed to add any new analysis or authority to the issues raised below. Accordingly, it was frivolous and unreasonable to make a continued argument, and [the prevailing party] is awarded its reasonable attorney fees.**

Rangen, Inc. v. IDWR, 159 Idaho at 812, 367 P.3d at 207 (emphasis added). In *Rangen*, the Department prevailed on appeal. There, Rangen had challenged decisions before the Department (through a petition for reconsideration before the Director), before the District Court (through a petition for judicial review of the Director's decision) and before the Idaho Supreme Court on appeal.

See 159 Idaho at 803, 367 P.3d at 198. Rangen did not prevail in any of those challenges. *Id.* In granting the Department's request for fees, the Idaho Supreme Court determined: "Rangen asserted substantially the same arguments on appeal as it did before the district court on judicial review and failed to add significant new analysis or authority to support its arguments." *Id.* at 812, at 207.

A similar analysis applies here and compels an award of attorneys' fees. A review of the briefing shows that the Agencies have advanced similar arguments as those advanced to the Director below. The Director considered and addressed the Agencies' arguments in the *Final Order*. The Petitioners have not added any "significant new analysis or authority to support their arguments." Further, the Agencies' position at the hearing was to deny 74-16187 outright, and consequently, they presented no technical analysis to justify imposition of channel-forming flow conditions. On appeal, the Agencies' have not pointed to any technical evidence that would justify reversing the Director's decision on that issue. Indeed, based on testimony at the hearing, it is evident that the primary reason the Agencies have protested 74-16187 is concern our perceived public perception. *See* Testimony of IWRB Witness Amy Cassel, Tr. Vol. II p. 603 LL. 6 through p. 605 LL. 4 ("this job is so much about optics . . . This is an impression. And I'm sorry if I mischaracterized that. This is my impression. No one has come up to me and said 'I don't want to participate any because the Department is issuing more water rights.'").

As described above, the Agencies' own evidence does not support the position that there is no more water available for appropriation in the Lemhi River Basin. On these issues, the Director's factual determinations are binding: "[T]he agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505–06, 284 P.3d 225, 230–31 (2012).

Substantial evidence is "relevant evidence that a reasonable mind might accept to support a conclusion." *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 212, 220 P.3d 318, 330 (2009); see also *N. Snake Ground Water Dist.*, 160 Idaho at 522, 376 P.3d at 726.

Since the Agencies have not advanced any new arguments or analysis and have pursued this appeal without a reasonable basis in fact or law, the Court should award Bird attorneys' fees on appeal under Idaho Code § 12-117.

VIII. CONCLUSION

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 9th day of November, 2020.

Robert L. Harris

Robert L. Harris
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November 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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