

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

DEC 02 2020

By _____ Clerk
 _____ Deputy Clerk

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

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

Petitioners,

v.

KURT W. BIRD and JANET E. BIRD,

Cross-Petitioners,

v.

The IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

Case No. CV01-20-9661

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

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

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

Attorneys for Petitioners

LAWRENCE G. WASDEN
Attorney General
DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division
MICHAEL C. ORR (ISB # 6720)
ANN Y. VONDE (ISB # 8406)
Deputy Attorneys General

Attorneys for Cross-Petitioners

ROBERT L. HARRIS (ISB # 7018)
LUKE H. MARCHANT (ISB # 7944)
Holden, Kidwell, Hahn, & Crapo, P.L.L.C.
1000 Riverwalk Dr., Ste. 200
P.O. Box 50130
Idaho Falls, Idaho 83405
Telephone: 208-523-0620
Facsimile: 208-523-9518

Natural Resources Division
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: 208-334-2400
Facsimile: 208-854-8072
michael.orr@ag.idaho.gov
ann.vonde@ag.idaho.gov

rharris@holdenlegal.com
lmarchant@holdenlegal.com

Attorneys for Respondent

LAWRENCE G. WASDEN
Attorney General
BRIAN KANE
Assistant Chief Deputy
GARRICK L. BAXTER (ISB # 6301)
SEAN H. COSTELLO (ISB # 8743)
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: 208-287-4800
Facsimile: 208-287-6700
garrick.baxter@idwr.idaho.gov
sean.costello@idwr.idaho.gov

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Petitioners the Idaho Water Resource Board and the Idaho Department of Fish and Game (individually, “IWRB” and “IDFG”; collectively, “the Agencies”), by and through their attorneys of record, and pursuant to this Court’s *Order Granting Motion to Modify Briefing Schedule* (Oct. 28, 2020), hereby submit their brief in reply to *Respondent IDWR’s Response Brief* (Nov. 9, 2020) (“*IDWR Brief*”), and to the portions of *Bird’s Combined Opening Brief on Cross-Appeal and Response Brief* (Nov. 9, 2020) (“*Bird’s Brief*”) that respond to the *Opening Brief of Petitioners the Idaho Water Resource Board and the Idaho Department of Fish and Game* (“*Agencies’ Opening Brief*”).¹

ARGUMENT ON REPLY

The responses of IDWR and Bird confirm the primary problem in the *Final Order*: it did *not* fulfill the affirmative duty “to assess and protect”² the local public interests expressly identified in the *Final Order* itself—the local public interests in “recover[ing]” the fish species in the Lemhi River Basin listed under the Endangered Species Act (“ESA”) and in “protect[ing] the streamflow and habitat needed to recover ESA-listed species.”³ Rather, the *Final Order* assessed and protected “stream flow needs to support relevant life history stages” of the ESA-listed fish species, as determined by the USBR Study.⁴ IDWR argues that the USBR Study’s

¹ The Agencies will file a separate response brief in Bird’s cross-appeal.

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

³ R. 01534, 01541 (underling and brackets added).

⁴ Ex. 202 at 1.

streamflows “satisfy” ESA recovery requirements; Bird argues that protecting flows for “fish passage” as defined in the USBR Study is the same thing as protecting “recovery.” The USBR Study, however, explicitly disclaimed that it identified “flows for fish recovery,”⁵ and the record confirms that peak flow events that maintain, increase, and enhance fish habitat are essential to meet, or make incremental progress towards, ESA “recovery” goals in the Lemhi River Basin.⁶

For these and other reasons, the Agencies have argued that from an ESA “recovery” perspective, no water is available for new water rights in the Lemhi River Basin. While IDWR and Bird view this as an “unreasonable” or “surprising” position,⁷ it is not. It simply recognizes that from a “recovery” perspective, the Lemhi River Basin is in a deep “hole,” and the first rule for getting out of a hole is to “stop digging.”⁸ Approving new irrigation water rights in the

⁵ Ex. 202 at 24.

⁶ See, e.g., Ex. 201 at 9-10; Ex. 202 at 26; Tr., Vol. II, p.361-62, 391, 400-01, 428, 434, 440.

⁷ IDWR’s Brief at 7; Bird’s Brief at 33.

⁸ “The first law of holes, or the law of holes, is an adage which states: ‘if you find yourself in a hole, stop digging.’ Digging a hole makes it deeper and therefore harder to get out of, which is used as a metaphor that when in an untenable position, it is best to stop carrying on and exacerbating the situation.” https://en.wikipedia.org/wiki/Law_of_holes.

There is nothing unreasonable or surprising in recognizing that when a limit has been reached or exceeded, continuing the course of action that caused the problem will simply worsen the situation. As a federal court stated in a case dealing with water quality standards:

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

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

Lemhi River Basin (even with conditions that limit diversions) simply digs the ESA hole deeper, which does not protect recovery of the ESA-listed fish species but rather puts recovery even further out of reach.

This conclusion does not bind IDWR to NOAA Fisheries recovery goals or deny IDWR's discretion to weigh and balance the local public interests. It simply means, as IDWR has itself determined, that the local public interests in recovering the ESA-listed species and protecting the streamflow and habitat needed for this purpose outweigh whatever local public interests are associated with Bird's proposed development, and the application must be denied if the local public interests in ESA recovery are not protected.⁹ Indeed, protecting recovery is necessary to protect local people and water uses from ESA enforcement actions by NOAA Fisheries. While this key and undisputed fact was recognized in the *Final Order*,¹⁰ it is entirely ignored in IDWR's and Bird's briefs. Protecting existing water uses and water rights in the Lemhi River Basin, however, is far more important to the local community and economy than developing new irrigation water rights.¹¹

⁹ R. 01541. Bird is incorrect in asserting that the Agencies "have challenged the entirety of the *Final Order*." *Bird's Brief* at 33. The Agencies requested that the *Final Order* be set aside "in part" and remanded to address certain specific issues. *Agencies' Opening Brief* at 48. The Agencies agree with much of the *Final Order*, including its conclusions that the local public interests in protecting ESA recovery "outweigh" the local public interests associated with Bird's proposed development, and therefore Bird's application should "be denied" if the local public interests in ESA "recovery" are not protected. R. 01541.

¹⁰ R. 01518, 01534.

¹¹ Bird's testimony confirmed this point. Tr., Vol. I, p.139, ll.8-13. The Agencies acknowledge that in cases involving proposed uses other than irrigation—DCMI applications, for example—

Further, holding IDWR to its “affirmative *duty* to assess and protect”¹² the local public interests specifically identified in the *Final Order* does not require IDWR to implement or adopt NOAA Fisheries’ recovery and delisting goals. It simply requires IDWR to make its discretionary determination of whether to deny the application or to approve it with conditions on the basis of evidence in the record that establishes the meaning and implications of NOAA Fisheries’ recovery goals for the Lemhi River Basin. That is, based on record evidence of what IDWR calls “the characteristics of ESA recovery.”¹³ IDWR did not do so in this case, but rather looked only to a single document that expressly did not define, address, or interpret ESA recovery standards.

For these and other reasons discussed herein, the *Final Order* did not fulfill IDWR’s affirmative *duty* of assessing and protecting the local public interests in recovering the ESA-listed fish species and protecting the streamflow and habitat needed for this purpose. *Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 441, 448 (1985). The administrative record developed on these local public interests compels the conclusion that the application should have been denied;

the local public interest in the proposed use might outweigh the local public interests associated with ESA recovery. R. 01265 n.12.

¹² *Shokal*, 109 Idaho at 337, 707 P.2d at 448 (italics in original). The parenthetical is omitted in subsequent citations to *Shokal*.

¹³ *IDWR Brief* at 36. For this reason, it is flatly incorrect for IDWR to assert that “[i]t is not the Director’s responsibility through the local public interest inquiry to determine the characteristics of ESA recovery.” *Id.* It is too late, and contrary to the *Final Order*’s factual findings and weighing of the local public interest, to argue that “ESA recovery” does not mean “ESA recovery.”

or, at a minimum, approved only with the conditions of the *Amended Preliminary Order Approving Application* (“*Amended Preliminary Order*”), as clarified and supplemented by the additional conditions requested in the Agencies “exceptions” to the *Amended Preliminary Order*.¹⁴

I. IDWR HAD AN AFFIRMATIVE DUTY TO ASSESS AND PROTECT THE LOCAL PUBLIC INTERESTS IN “RECOVERY” OF THE ESA-LISTED SPECIES.

IDWR and Bird do not dispute that Idaho Code § 42-203A(5) imposes an “affirmative duty to assess and protect” the local public interest. *Shokal*, 109 Idaho at 337, 707 P.2d at 448 (italics in original).¹⁵ They also do not dispute the *Final Order* expressly determined that “recover[ing]” the ESA-listed fish species and “protect[ing] the streamflow and habitat needed to recover ESA-listed species” are local public interests that “outweigh the local public interests associated with Bird’s proposed development.” R. 01534, 01541 (underlining and italics added). The *Final Order* also expressly distinguished the local public interest in “recovering” the ESA-listed fish species from the local public interests in “reconnecting” Big Timber Creek, “maintaining the anadromous fisheries in Big Timber Creek and in the Lemhi River drainage,” and “maintain[ing] a portion of the unappropriated water in streams supporting anadromous fish for the protection of fish habitat.” R. 01534. The *Final Order* recognized, in short, that simply

¹⁴ R. 01470-89.

¹⁵ Subsequent citations to *Shokal* do not include the parenthetical.

“maintaining” sufficient flow for “fish passage” and “anadromous fisheries” is not the same thing as “recovering” the ESA-listed fish species.

IDWR and Bird argue that despite these local public interest determinations, IDWR was not actually required to assess or protect the local public interest in “recovery.” *See, e.g., IDWR Brief* at 36 (“It is not the Director’s responsibility through the local public interest analysis to determine the characteristics of ESA recovery”); *Bird’s Brief* at 20, 34 (arguing the local public interest is “fish passage”). These arguments are simply contrary to the *Final Order’s* express determinations of the local public interests implicated in this case, and should be disregarded.

The arguments of IDWR and Bird are also contrary to the administrative record. The *Final Order’s* determination that the local public interests in ESA recovery outweigh whatever local public interests are associated with Bird’s proposed development was based on extensive un rebutted evidence (including “technical” evidence) of the meaning and implications of “recovering” and “delisting” the Lemhi River Basin’s ESA-listed fish species. *See* R. 01534 (“These conclusions about local public interests are fully supported by the administrative record for this contested case”); *see also generally* Ex. 201 (expert report of Jeff DiLuccia); Ex. 202 (“USBR Study”); Ex. 203 (excerpts of the Idaho Office of Species Conservation’s *Upper Salmon Subbasin Habitat Integrated Rehabilitation Assessment*) (“IRA”); Ex. 204 (excerpts of NOAA Fisheries’ *ESA Recovery Plan for Idaho Snake River Spring/Summer Chinook Salmon and Snake River Basin Steelhead*) (“*ESA Recovery Plan*”); Tr., Vol. II, pp. 288-514 (DiLuccia testimony).

This record demonstrated that ESA “recovery” and “delisting” have specific meanings for the Lemhi River Basin, and are defined by specific milestones and habitat requirements, as

the *Final Order* also recognized. *See, e.g.*, R. 01518 (referring to “the amount of high-quality fish habitat needed to achieve recovery goals” and “the habitat capacity . . . needed to achieve ESA delisting”). For instance, the numeric recovery goal for Chinook salmon in the Lemhi River Basin is a “minimum abundance and productivity value” of 2,000 adult salmon. Tr., Vol. II, p.431, ll.9-19; Ex. 203 at 73; Ex. 204 at 167, 220. This is the population that NOAA Fisheries has determined is “needed to achieve a 95% probability of existence over 100 years (low risk status).” Ex. 204 at 167, Table 5.4-1 (parenthetical in original). At this time the Lemhi River Basin has only a fourth of the habitat capacity calculated to be necessary to meet this goal. Tr., Vol. II, p. 434, ll.3-16; Ex. 203 at 73.

The record also demonstrated, and the *Final Order* confirmed, that the Lemhi River Basin is nowhere near to meeting NOAA Fisheries recovery goals. Deep deficits in fish habitat quantity and quality are the primary limiting factor in reaching the Lemhi River Basin’s recovery goals, and depleted streamflow is the main reason for the deficits in fish habitat. *See, e.g.*, R. 01518-19, 01528; Ex. 201 at 6-10; Ex. 203 at 1, 4, 28-29, 44, 72-73; Ex. 204 at 168-69, 218-20, 222, 225-31; Tr., Vol. II, pp. 357, 429-34, 440.

Moreover, the *Final Order* prioritized protecting the local public interest in “recovery” over Bird’s proposed development because protecting recovery is not simply about protecting fish. Protecting recovery of the ESA-listed fish species is also essential to “provide local people with protection” from ESA enforcement actions by NOAA Fisheries. R. 01534; *see also* R. 01518 (“In the absence of a Section 6 Agreement, local water users are at risk of enforcement under the ESA if there is a take of an ESA-listed species.”); Tr., Vol. II, p. 382, l.2-p.383, l.5

(agreeing that “we’re avoiding” ESA enforcement actions in the Lemhi River Basin because of voluntary recovery efforts); *id.*, p. 550, ll. 18-22 (“the [WTP] is based on voluntary, locally driven efforts to develop projects that will, again, benefit and protect water users, existing water users in the basin”); *id.*, p.563, ll.15-19 (“the Board has committed significant funds and made a commitment on behalf of the State to support those recovery efforts in the interest of existing water users and local community”); Ex. 212 at 2 (“protecting the local agricultural community”).

While IDWR and Bird try to frame “recovery” as benefitting fish at the expense of the local people and the local economy, the administrative record and the *Final Order* confirm that the local public interests in recovering the ESA-listed species and in protecting existing water uses in the Lemhi River Basin are aligned rather than opposed. Recovering the ESA-listed fish species and protecting the streamflow and habitat needed for this purpose is essential to protecting existing water rights and uses, and the local economy, from the potentially devastating effects of ESA enforcement actions initiated by NOAA Fisheries. Tr. Vol. II, p.633, l.17— p.634, l.6; *id.*, p.705, ll.11-13; *id.*, p.707, ll.2-4. As the *Final Order* recognized, irrigation of agricultural lands “is critical for the survival of rural communities like Leadore,” R. 01534, and most of the water supply in the Lemhi River Basin has already been appropriated for this purpose. *See, e.g.*, 01520 (“During the irrigation season . . . most of the total flow in Big Timber Creek is diverted for irrigation use.”). The local public interest in protecting existing water uses and the existing agricultural economy of the Lemhi River Basin far outweighs any local public interest in approving new irrigation water rights, as Bird’s testimony confirms. Tr., Vol. I, p.139, ll.8-13.

The record also established that there is a substantial risk that NOAA Fisheries will bring ESA enforcement actions against local people in the Lemhi River Basin. NOAA Fisheries threatened such actions against Lemhi River Basin water users in 2000, which led the State of Idaho to intercede on behalf the local people to help negotiate a protective Section 6 Agreement.¹⁶ A Section 6 Agreement has not been finalized, however, which leaves local water users “at risk” of enforcement under the ESA. R. 01518. In the absence of a Section 6 Agreement, NOAA Fisheries has withheld enforcement largely because of the streamflow and fish habitat enhancement efforts of the IDFG, IWRB, and others. *Id.*; Ex. 206A, 2026B; Ex. 219 at 35; Ex. 190 at 3; Ex. 193 at 6; Ex. 194 at 9; Tr., Vol. II, pp.325-30, p.334, pp. 336-41, pp.378-83, p.392, ll.18-22. The ESA regulatory “cloud” remains over the Lemhi River Basin, however, and the threat of NOAA Fisheries enforcement against Lemhi River Basin water users is “very real.” Tr. Vol. II, p. 443, l.5, pp. 410, ll.12-13, p.424, l.24—p.425, l.5, p.494, l.16—p.495, l.4.

In sum, IDWR had “an affirmative *duty* to assess and protect” the local public interest in “recovering” the ESA-listed species and protecting the streamflow and habitat “needed to recover” the listed fish species. *Shokal*, 109 Idaho at 337, 707 P.2d at 448; R. 01534, 01541. This is the straightforward and unavoidable conclusion under *Shokal*. It is compelled by the plain language of the *Final Order* itself, and is fully supported by the administrative record.

This conclusion undermines the arguments of IDWR and Bird that the local public interests in “recovery” are not *really* interests in “recovery,” but rather in some other parameter,

¹⁶ 16 U.S.C. § 1535(c)(1).

such as “fish passage,” *Bird’s Brief* at 34, or the USBR Study’s determination of “stream flow needs to support relevant life history stages” of the ESA-listed fish species. Ex. 202 at 1.¹⁷ Likewise, it undercuts IDWR’s argument that NOAA Fisheries’ recovery and delisting goals have no role in, or relevance to, the local public interest evaluation in this case. *IDWR Brief* at 36. It should go without saying that it is impossible to protect the local public interests in “recovering” the ESA-listed species and protecting the stream flow and habitat “needed to recover” ESA-listed species” without an understanding of what ESA “recovery” is and the streamflow and habitat needed to achieve it, or to at least make progress towards it rather than simply digging the hole deeper.

II. PROTECTING THE LOCAL PUBLIC INTERESTS IN “RECOVERY” DOES NOT “BIND” IDWR TO NOAA FISHERIES RECOVERY GOALS OR DENY IDWR’S DISCRETION TO BALANCE AND WEIGH THE LOCAL PUBLIC INTEREST.

IDWR and Bird assert that requiring IDWR to protect the local public interests in recovering the ESA-listed fish species and the streamflow and habitat needed for this purpose would “bind” IDWR to NOAA Fisheries recovery goals, deny IDWR discretion to balance and weigh the local public interest, and amounts to a determination that the local public interest in ESA recovery is the only local public interest implicated in this case. *IDWR Brief* at 7, 23, 32-33; *Bird’s Brief* at 9. These assertions mischaracterize the Agencies’ arguments, and are belied by the plain language of the *Final Order*.

¹⁷ The USBR Study explicitly contradicts the assertion that its streamflows “satisfy” ESA recovery requirements, *IDWR Brief* at 13, 26-27, as will be discussed below.

The Agencies recognize that it is within IDWR's "sound discretion" to balance and weigh the competing local public interests at issue in this case. *Shokal*, 109 Idaho at 339, 707 P.2d at 450. Moreover, and contrary to the arguments of IDWR and Bird, the *Final Order* did weigh the competing local public interests. The *Final Order* expressly determined that the local public interests in recovering the ESA-listed species and the protecting the streamflow and habitat needed for this purpose "outweigh" the local public interests associated with Bird's proposed development, and that the local public interests in ESA recovery must be protected, even if that requires the application to "be denied." R. 01541 (italics and underlining added). These discretionary determinations were fully supported by the record, and explicitly recognized that there are local public interests in Bird's proposed development.¹⁸

IDWR does not have discretion, however, to ignore its own express determinations of the local public interests that must be protected. To the contrary, IDWR has "affirmative *duty* to assess and protect" these same local public interests. *Shokal*, 109 Idaho at 337, 707 P.2d at 448. IDWR is bound by the *Final Order*'s determination of, as Bird puts it, "the interest of concern." *Bird's Brief* at 11. The *Final Order* concluded that the "interest[s] of concern" are "recovering" the ESA-listed species and "protect[ing] the streamflow and habitat needed to recover ESA-listed

¹⁸ While the *Final Order* determined that Bird's proposed development is in the local public interest because irrigation "supports the local economy," R. 01534, it did not explicitly consider the economic detriments of approving Bird's proposed development, such as the increased risk of ESA enforcement actions that would have "devastating" consequences for the local economy. Tr., Vol. II, p.634, l.3; see *Shokal*, 109 Idaho at 339, 707 P.2d at 450 ("if the Department gives weight to the economic benefits of the project, it should also give consideration to the economic detriments.").

species.” R. 01534, 01541. These are the local public interests that “outweigh” whatever local public interests are associated with Bird’s proposed development, and unless these local public interest are protected, Bird’s application must “be denied.” R. 01541.

These conclusions do not deny IDWR’s “sound discretion” to determine “what the public interest requires.” *Shokal*, 109 Idaho at 339, 707 P.2d at 450. They also do not “bind” IDWR to NOAA Fisheries recovery goals, or mean that these recovery goals determine whether new applications will be approved. *IDWR’s Brief* at 32-33. They simply mean that in order to fulfill its affirmative *duty* of protecting the local public interests specifically identified in the *Final Order*, IDWR must base its discretionary determination of how to protect the local public interests in ESA recovery—i.e., whether to deny Bird’s application or approve it with protective conditions, and if so what conditions are necessary—on record evidence of “the characteristics of ESA recovery.” *IDWR Brief* at 36. That is, on the basis of evidence in the record establishing what it means to “recover” the ESA-listed fish species in the Lemhi River Basin, and what is required to meet NOAA Fisheries recovery and delisting goals, or at least make progress towards them rather than putting recovery even further out of reach.

III. THE APPLICATION SHOULD HAVE BEEN DENIED.

It was clear long before the administrative hearing in this case that the meaning and implications of “recovering” the ESA-listed species in the Lemhi River Basin would be an issue at the hearing. R. 00012-13, 00038, 00049, 00057, 00235. NOAA Fisheries makes “recovery” and “delisting” determinations for the ESA-listed fish species in the Lemhi River Basin. R. 01518; 16 U.S.C. § 1533(a)(2); 50 C.F.R. §§ 223.102, 224.101. NOAA Fisheries is the federal

agency that would prosecute actions for “enforcement under the ESA” against “local water users” and “local people.” R. 01518, 01534; Exs. 206A, 206B.

The Agencies therefore submitted extensive, unrebutted evidence of NOAA Fisheries’ recovery goals for the Lemhi River Basin, and the streamflow and habitat needed to achieve these recovery goals. *Agencies Opening Brief* at 22-23. This evidence included DiLuccia’s expert report (Ex. 201), excerpts of NOAA Fisheries’ *ESA Recovery Plan* (Ex. 204) and the Idaho Office of Species Conservation’s *IRA* (Ex. 203),¹⁹ and DiLuccia’s testimony.

A. The Record Confirms That From a “Recovery” Standpoint, There is No Water Available in the Lemhi River Basin for New Water Rights.

The evidence submitted by the Agencies fully supported the factual conclusion that, from an ESA “recovery” perspective, there is simply no water available for new water rights in the Lemhi River Basin.²⁰ For instance, the administrative record established, and the *Final Order* confirmed, the following facts:

¹⁹ The *IRA* “provides initial efforts to quantify necessary increases in available habitat capacity to support NOAA recovery plan goals.” Ex. 203 at i; *see also generally* Tr. Vol. II, pp.420-35 (discussing the *IRA*).

²⁰ This is a statement of verifiable technical fact under ESA recovery goals established by NOAA Fisheries. It is not an argument that no new water rights should ever be issued in the Lemhi River Basin for any purpose. In the Lemhi River Basin, however, the local public interests in recovering the ESA-listed species and protecting the streamflow and habitat needed for this purpose—which includes the local public interests in protecting the *existing* irrigation water rights and uses from ESA enforcement actions—entirely outweigh whatever limited local public interest there may be in approving *new* irrigation water rights. Bird agreed that existing water rights are “more important . . . without a doubt . . .” Tr., Vol. I, p.139, ll.8-13 (Bird testimony).

- “Recovery” and “delisting” are ESA terms that have specific meanings for the Lemhi River Basin, and are defined by specific milestones and habitat requirements.
- The Lemhi River Basin’s Chinook salmon populations have been far below the minimum low-risk threshold since the late 1960s, and have shown a relatively flat trend in total abundance since 1995.
- Populations of the ESA-listed fish species in the Lemhi River Basin are still nowhere near to meeting NOAA Fisheries recovery goals.
- Deficits in fish habitat quantity and quality have always been, and remain, the primary factors limiting progress towards NOAA Fisheries recovery goals for the Lemhi River Basin.
- Depleted streamflows have always been, and remain, the principle cause of the deficits in fish habitat quantity and quality in the Lemhi River Basin.
- Natural hydrograph “peak flow” events are necessary to increase and maintain fish habitat quantity and quality in the Lemhi River Basin.
- Natural hydrograph “peak flow” events have been nearly eliminated throughout the Lemhi River Basin.

See Agencies’ Opening Brief at 14-18, 22-23, 26-30, 33-34 (citing the *Final Order* and the administrative record).²¹

In short, the *Final Order*’s factual findings and the administrative record confirm that from an ESA recovery perspective, the Lemhi River Basin is in a deep “hole,” and approving new irrigation water rights will only dig the hole deeper. In order to meet ESA recovery goals in

²¹ *See also* R. 01518-19, 01528; Ex. 198 at 4, 26, 40; Ex. 199 at 12; Ex. 201 at 6-10; Ex. 202 at 26; Ex. 203 at 4, 18-19, 72-73, 102; Ex. 204 at 167-68, 218-20, 222, 225-31; Tr., Vol. II, pp. 291, 307, 352, 357, 359-62, 364, 367, 370-73, 400-01, 431-34, 440.

the Lemhi River Basin, or even make incremental progress towards them, there must be an increase in the quantity and quality of fish habitat in the basin. As IDFG's expert witness put it:

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

Tr. Vol. II, p.440, ll.8-16; *see also* Ex. 201 at 16 (stating that if the application were approved, the resulting diversion "would have adverse effects on the capacity and quality of critical habitat for ESA-listed fish species," and "would tend to undermine existing and planned efforts to provide sufficient flows to support recovery and de-listing").²²

These conclusions are not altered by Bird's argument that he simply seeks a permit for unappropriated water available during the spring runoff period. *Bird's Brief* at 3 n.3. ESA "recovery" in the Lemhi River Basin is a question of fish biology, fish population abundances, habitat capacities, streamflows, and NOAA Fisheries' recovery goals. The question of whether water is "appropriated" or "unappropriated" has nothing to do with whether streamflows are sufficient to provide and maintain fish habitat of quantity and quality needed to meet (or simply make progress towards) NOAA Fisheries recovery goals. Tr., Vol. II, p.441, l.24-p.442, l.11.

²² The same conclusions would apply even under the non-technical definition of the term "recovery." *See, e.g.,* Black's Law Dictionary at 1302 ("recovery. 1. The regaining or restoration of something lost or taken away") (8th ed. 2004); *see also* <https://www.lexico.com/definition/recovery> ("A return to a normal state of health, mind, or strength").

This fact was clear twenty years ago, when NOAA Fisheries first threatened ESA enforcement actions against local water users because irrigation diversions were killing salmon. Exs. 206A, 206B. There was also unappropriated spring runoff available at that time, but even so the possibility of appropriating *new* irrigation water rights was clearly beyond the pale. Indeed, it was necessary for the State of Idaho to intercede on behalf of the local community simply to protect the *existing* water uses and water rights. Tr. Vol. II, pp.326, ll.22-25; *id.*, p.334, ll.15-19; *id.*, p.378, ll.3-11; Ex. 219 at 35. The Lemhi River Basin’s populations of the ESA-listed fish have not made significant progress towards NOAA Fisheries’ recovery goals since then, principally because the basin lacks the streamflow and fish habitat needed for this purpose. *See, e.g.*, R. 01518-19; Ex. 199 at 12; Ex. 201 at 6-10; Ex. 203 at 1-2; Ex. 204 at 168-69, 222; Tr., Vol. II, pp.432-34, 440.²³

Appropriating new irrigation water rights in the Lemhi River Basin makes no more sense now than it did during the “crisis” of 2000. Ex. 219 at 35; *see also* Tr. Vol. II, p.696, ll.7-8 8 (“that kind of brought things home to us, that we needed to do something”). This is not an “unreasonable” or “surprising” position, *IDWR Brief* at 7; *Bird’s Brief* at 33, but rather is entirely

²³ This is not to say that recovery efforts such as maintaining the L6 minimum streamflow, reconnecting tributaries, and improving streamflow and fish habitat have been without benefit. These efforts have helped prevent further significant decreases in fish numbers, and played a crucial role in protecting local people and water uses from ESA enforcement actions by NOAA Fisheries. R. 01518-19, 01520; Tr., Vol. I, pp. 382-83, 392. The fact that fish population abundances have not significantly increased underscores the difficulty of making progress towards ESA recovery goals, and the importance of supporting recovery efforts.

consistent with the *Final Order*'s factual findings, the administrative record, and the history of ESA issues in the Lemhi River Basin.

B. The Agencies Submitted Extensive Technical Evidence.

Bird asserts that in this case the Agencies did nothing more than repeat “a mantra of more water means more fish . . . without any technical evidence to support DiLuccia’s sweeping declaration that more water means more fish.” *Bird’s Brief* at 34. IDWR asserts the Agencies have relied on “speculation” rather than evidence. *IDWR Brief* at 17-18, 41. These assertions are refuted by the evidence in the record.

The evidentiary record—which contrary to the arguments of IDWR and Bird includes “technical” evidence and quantitative analyses, *IDWR Brief* at 40; *Bird’s Brief* at 34—fully supports the conclusion that, from a recovery standpoint, there is simply no water available for new water rights in the Lemhi River Basin.²⁴ As an example, the Agencies submitted excerpts of the *IRA*, which “provides initial efforts to quantify necessary increases in available habitat capacity to support NOAA recovery plan goals.” Ex. 203 at i. DiLuccia explained the *IRA*’s findings and conclusions, Tr., Vol II. pp.420-35, including a table setting forth “[e]stimated life stage specific capacity requirements to accommodate ESA delisting and estimated available capacity for Chinook salmon in the Lemhi River.” Ex. 203 at 73. DiLuccia explained the table showed that “[t]he available [habitat] capacity” was estimated to be “357,000-and-change, and

²⁴ As previously noted, this is not an argument that no new water rights should ever be approved in the Lemhi River Basin for any purpose, but simply a statement of verifiable technical fact under ESA recovery goals established by NOAA Fisheries.

the deficit to support the recovery is basically a million and a half meters square of habitat. . . . [the] deficit is almost fourfold to support recovery.” Tr., Vol. II, p.434, ll.3-16 (underlining added).²⁵

Moreover, and unlike Bird, the Agencies submitted an expert report, and identified an expert witness (DiLuccia) qualified to explain “the characteristics of ESA recovery,” *IDWR Brief* at 36, and to opine as to whether approving new water rights in the Lemhi River Basin would put ESA recovery goals further out of reach. These are technical questions that require specialized knowledge of fish biology and fish habitat requirements, the current status of fish populations and fish habitat in the Lemhi River Basin, the factors that are limiting fish populations and fish habitat in the Lemhi River Basin, and how to achieve, or at least make incremental progress towards, NOAA Fisheries’ recovery goals for the ESA-listed fish species.²⁶

DiLuccia was the only witness—and probably the only person in the hearing room—who had these qualifications, and his credentials are a matter of record. *See Ex. 201 at 27-31*

²⁵ IDWR’s brief incorrectly states that the *ESA Recovery Plan* and the *IRA* were submitted by NOAA Fisheries and OSC. *IDWR Brief* at 34. These documents were submitted by the Agencies. The Agencies also submitted the USBR Study into evidence, but to rebut Bird’s reliance upon it, not to establish “recovery” standards. Because Bird’s offer to include a 13 cfs “bypass flow” condition on his permit was based on the USBR Study, *Bird’s Brief* at 4; R. 00286; Tr. Vol. II, p.138, ll.9-22; Ex. 202 at 1, the Agencies wanted to ensure that the record included a complete copy of the USBR Study.

²⁶ These subjects are not, however, the type of “technical” matters in which IDWR has specialized expertise. *See, e.g., In Re SRBA, Subcase No. 00-91017*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014) (recognizing the Director’s “specialized expertise in certain areas of water law”); Idaho Code § 42-1701(2) (establishing the Director’s technical qualifications).

(DiLuccia CV); *see generally* Tr., Vol. II, pp.288-399 (discussing qualifications and experience, including experience in Lemhi River Basin ESA issues).²⁷ DiLuccia testified as to a number of technical issues, including the current status of the ESA-listed fish populations and fish habitat in the Lemhi River Basin, the factors limiting efforts to meet NOAA Fisheries' recovery goals, the habitat and streamflow requirements needed to meet or make progress towards the ESA recovery goals, and efforts that have been and are being made to increase streamflow and improve fish habitat. DiLuccia's expert report cited and relied upon a large body of technical literature germane to the ESA recovery issues presented in this case, and included both qualitative and quantitative analyses of ESA issues and parameters in the Lemhi River Basin. *See generally* Ex. 201. During his testimony DiLuccia reviewed and explained a number of technical documents, including the 2004 Lemhi Conservation Plan (Ex. 198), a 2012 NOAA Fisheries "Biological Opinion" regarding diversions on national forest lands in the Lemhi River Basin (Ex. 199), the USBR Study (Ex. 202), the *IRA* (Ex. 203), and NOAA Fisheries' *ESA Recovery Plan* (Ex. 204). Tr. Vol. II, pp., 375-443.

There is no merit in Bird's assertion that the Agencies have never done anything more than repeat "a mantra of more water means more fish . . . without any technical evidence to support" it. *Bird's Brief* at 34. The record also undermines IDWR's assertions that the Agencies have relied on "speculation" rather than evidence. *IDWR Brief* at 17-18, 41.

²⁷ DiLuccia's expertise was not challenged during the hearing, and Bird did not offer a rebuttal expert.

C. IDWR Erred In Relying Exclusively on the USBR Study.

IDWR essentially ignored all of the evidence and testimony the Agencies submitted that expressly addressed the meaning and implications of ESA recovery goals in the Lemhi River Basin, and instead relied exclusively on the USBR Study for purposes of protecting the local public interests in recovering the ESA-listed fish species. *IDWR Brief* at 26-36. IDWR asserts that relying exclusively on the USBR Study was a permissible exercise of discretion, because the study's PHABSIM methodology "'determine[s] instream flows that will satisfy ESA requirements.'" *IDWR Brief* at 13, 26-27, 29, 32, 34, 38 (quoting Ex. 202 at 2).

The USBR Study, however, does not state that it determines the streamflow or habitat needed to "satisfy" ESA "recovery" requirements. To the contrary, the USBR Study disclaimed such a conclusion.

The USBR Study expressly distinguished its objectives from those of an earlier study that *was* intended to determine "flows for fish recovery": "The objective of the ES Engineering study was to determine flows for fish recovery . . . *This differed from our study objectives to determine target flows to improve passage, spawning, and rearing conditions . . .*" Ex. 202 at 24 (underlining and italics added). In short, the USBR Study explicitly recognized that its determinations of the "flow needs for relevant life history stages" of the ESA-listed fish species are ***not*** determinations of the "flows needed for fish recovery." Ex. 202 at 2, 24. DiLuccia's testimony confirmed this point. Tr. Vol. II, p.420, 11.2-6.

Further, the USBR Study expressly clarified that the “ESA requirement” the PHABSIM methodology “satisfies” is the requirement of avoiding “jeopardy” to a listed species. *See* Ex. 202 at 2 (“Reclamation participation is related to avoid jeopardy to the survival of ESA-listed anadromous fish The objective of this action is to restore flows needed to avoid jeopardy to listed species”) (underlining added); 16 U.S.C. § 1536(b)(3)(A) (“jeopardy”). While “jeopardy” and “recovery” are both ESA concepts, they are not the same thing. *See Cascadia Wildlands v. Thrailkill*, 806 F.3d 1234, 1244 (9th Cir. 2015) (“Although they are not necessarily mutually exclusive, recovery and jeopardy are two distinct concepts.”); *see also* Tr. Vol. II, p. 390 (discussing “jeopardy”). It cannot be assumed that the streamflow sufficient to avoid “jeopardy” to the ESA-listed fish species is also the streamflow needed to “recover” the ESA-listed species.²⁸

Moreover, the USBR Study is consistent with record evidence that conclusively established “peak flow” events that improve and maintain fish habitat are necessary for meeting “recovery” goals. *Agencies Opening Brief* at 26-28, 33-34; *supra* Parts III.A-B.²⁹ While the USBR Study did not attempt to estimate “spring runoff conditions necessary for maintenance of channel morphology and riparian zone functions,” it expressly recognized that “high spring flows that mimic the natural hydrograph should be a consideration in managing streamflows

²⁸ IDWR’s misunderstanding of the meaning and implications of “jeopardy” and “recovery” underscores the fact that the ESA recovery questions raised in this case involved technical and legal matters that are often outside IDWR’s areas of specialized expertise, and confirms the need for expert analysis and testimony on these issues.

²⁹ The factual findings in the *Final Order* also compel these conclusions. R. 01518-19, 01528.

outside the PHABSIM analysis.” Ex. at 26 (italics and underlining added). These statements not only confirm the importance of protecting “peak flow” runoff, but also confirm that the USBR Study is not the last word on “the streamflow and habitat needed to recover ESA-listed species.” R. 01541.

Indeed, had the USBR Study been an authoritative determination of “the streamflow and habitat needed to recover ESA-listed species,” then it would have been unnecessary for NOAA Fisheries to issue the *ESA Recovery Plan* or the OSC to have prepared the *IRA*. IDWR’s characterization of the USBR Study implies that these documents, and the field work and analyses that went into them, were superfluous and essentially a waste of time and money.

In sum, the USBR Study does not support IDWR’s argument that the streamflows identified in the study “satisfy” ESA requirements for “recovery” and “delisting.” To the contrary, the USBR Study and other record evidence conclusively contradict IDWR’s view that the USBR Study determines streamflows that “satisfy” ESA “recovery” requirements.³⁰

As previously discussed, IDWR’s affirmative duty to “assess and protect” the local public interests in recovering the ESA-listed fish species required IDWR to make its discretionary determination of how to protect the local public interests in ESA recovery—i.e., whether to deny Bird’s application or approve it with protective conditions, and if so what

³⁰ IDWR expends considerable effort in arguing that the USBR Study is “reliable, substantial, and competent evidence.” *IDWR Brief* at 26-29. The Agencies do not dispute this point insofar as the USBR Study determined the “stream flow needs to support relevant life stages” of the ESA-listed species. Ex. 202 at 1. But the USBR Study was not intended to, and did not, determine the streamflow and habitat needed “to recover” ESA listed species. *Id.* at 1, 24, 26.

conditions to impose—based on evidence in the record of “the characteristics of ESA recovery.” *IDWR Brief* at 36. That is, evidence in the record establishing NOAA Fisheries recovery and delisting goals for the ESA-listed fish species in the Lemhi River Basin, and their implications for purposes of “protect[ing] the streamflow and habitat needed to recover ESA-listed species.” R. 01541. IDWR, by relying entirely on the USBR Study and ignoring extensive evidence in the record expressly defining “the characteristics of ESA recovery,” *IDWR Brief* at 36, did not fulfill its “affirmative *duty* to assess and protect” the local public interests in “recovering” the ESA-listed fish species. *Shokal*, 109 Idaho at 337, 707 P.2d at 448; R. 01534, 01541.

D. The Record Does Not Support Bird’s Assertions That the Proposed Use Will Have No Impact on “Recovery.”

Bird asserts his proposed use of water will have no “measurable or meaningful” impact on the local public interests in recovering the ESA-listed fish species and protecting the streamflow and habitat needed for this purpose, *Bird’s Brief* at 33, because he “is merely try[ing] to use water available during peak runoff period” that would otherwise flow into the Columbia River. *Id.* at 3 n.3. Bird further asserts that his physical diversions “will not change” because approving the application would only “change the legal status of his right to divert [high flows] from a general provision to a water right.” *Bird’s Brief* at 1, 43. These assertions lack merit.

i. Bird Seeks to Appropriate a Portion of the Limited “Peak Flow” Needed to Maintain and Improve Fish Habitat.

Bird admits he seeks to appropriate “water available during peak runoff periods.” *Bird’s Brief* at 3 n.3 (underlining added). The *Final Order* found that this spring runoff water is available for at most a few weeks each year, if at all. R. 01517, 01531. In other words, Bird

seeks to appropriate some of the remaining “peak flow” that is essential for maintaining, increasing, and enhancing the fish habitat necessary to meet NOAA Fisheries recovery goals in the Lemhi River Basin, or even make progress towards them. *See, e.g.*, Ex. 201 at 9-10 (discussing “high flow events”).

The *Final Order* expressly recognized that existing irrigation diversions and “high flows” uses have already “nearly eliminated” high-energy spring runoff events that are essential to enhancing and maintaining the quality and quantity of fish habitat in the Lemhi River Basin. R. 01528; *see also* Ex. 198 at 39-30; Ex. 201 at 10; Ex. 203 at 19; Ex. 204 at 26; Tr., Vol. II, p.391, ll.14-15; *id.*, p.427, l.21—p.428, l.22. The significantly reduced frequency and magnitude of natural “peak flow” events are major reasons for the deep deficit of fish habitat in the Lemhi River Basin, and major impediments to meeting or making progress towards ESA recovery goals. *Agencies Opening Brief* at 26-28, 33-34; *supra* Parts III.A-B.

For these reasons, protecting the natural spring runoff from further appropriations is key to “protect[ing] the streamflow and habitat needed to recover ESA-listed species.” R. 01541. There is no merit in Bird’s argument that taking only a small portion of this “peak runoff” water will have no measurable or meaningful impact on ESA recovery. *Bird’s Brief* at 3 n.3, 33. Even “a small contribution to an impairment is still a contribution,” and in such circumstances “[i]t makes sense to stop.” *Fla. Wildlife Fed’n, Inc. v. Jackson*, 853 F. Supp. 2d 1138, 1170 (N.D. Fla. 2012). Approving an application for even a small amount of the remaining “peak flow” makes it more difficult to meet ESA recovery goals, especially if pending and future applications are also approved on grounds that each individually has only a limited impact. *See* Tr., Vol. II,

id., p.361, l.19—p.362, l.21 (discussing “what happens” if “we don’t have those . . . high flows and channel maintenance flows”); *id.*, p.664, ll. 6-10 (“thousand cuts”).

i. The Record Contradicts Bird’s Assertion That Diversions “Will Not Change” if the Application is Approved.

Bird also argues his proposed development “will not change” the amount of water he physically diverts because he already diverts “high flows” to the proposed place of use under the Basin 74 General Provisions, as he allegedly is “legally entitled” to do. *Bird’s Brief* at 1. This argument fails for several reasons.

It was Bird’s burden to prove his contention that the local public interests in ESA recovery will not be injured because his physical diversions allegedly “will not change,” *Shokal* 109 Idaho at 338-40, 707 P.2d at 449-51; IDAPA 37.03.08.040.04.c, but he did not do so. There is no data or analysis in the record to support the contention that the amount of water Bird physically diverts will not change if the application is approved, and the *Final Order* made no such finding.

Moreover, Bird’s testimony and arguments belie the contention that his physical diversions will not increase. Bird testified that he already diverts “high flows” onto the proposed place of use, and will continue to do so even if the application is approved. Tr. Vol. I, p.28, ll.12-13; *id.*, pp. 48, l.24—p.49, l.5; *id.*, p.88, l.23—p.89, l.12; *id.*, p.109, l.25—p.110, l.5; *id.*, p.130, ll.14-18. Physical diversions will increase if Bird diverts both permitted water and “high flows” onto the place of use.

Further, if it is true that Bird only seeks to change the “legal status” of his existing “high flow” diversions to “an actual water right,” *Bird’s Brief* at 1, there would have been no reason for Bird to object to the condition 12 of the *Amended Preliminary Order*, which prohibited “high flow” diversions onto the permitted place of use. R. 01451. That condition would have been entirely consistent with, and simply confirmed, a change in the “legal status” of existing “high flows” diversions to a “water right.” Bird, however, vigorously opposed the “high flows” condition, which implies an intent to divert both permitted water and “high flows.”

Finally, whatever legal “entitlement” Bird may have under the Basin 74 General Provision authorizing “high flows” uses, *Bird’s Brief* at 1, is limited to the 23 acres of the 320-acre place of use that are covered by Bird’s existing water rights.³¹ This Court expressly confirmed this interpretation of the “high flows” General Provision in the *Memorandum Decision and Order on Challenge* issued in SRBA subcase nos. 74-15051, *et al.* Ex. 189. That decision approved the language of the “high flows” General Provision because “[t]he authorized use of high flow water is part of the efficient administration of the ‘base’ water rights in the Lemhi Basin.” *Id.* at 28 (italics and underlining added; internal quotation marks in original).

³¹ Bird’s assertion that under the General Provision he is “legally entitled” to divert “high flows” to the place of use, *Bird’s Brief* at 1, puts the validity of this assertion squarely before this Court in this judicial review proceeding, regardless of whether it was “properly before” IDWR in the administrative proceedings. R. 01516. The same is true of Bird’s assertion that conditioning the permit to prohibit “high flows” diversions to the place of use “would be an unconstitutional taking of Bird’s right to divert high flows under the general provisions as decreed” in the SRBA. *Bird’s Brief* at 43; *infra* Part IV.B.

This conclusion was based in part on the Special Master's determination that the *Lemhi Decree* "establish[ed] certain base irrigation water rights and then, by general provision, allow[ed] an ancillary use of high flows on the same lands." *Id.* at 3 (underlining added); *see also id.* at 8, 26 (similar). It was also based on this Court's determination that under *State v. Idaho Conservation League*, 131 Idaho 329, 955 P.2d 1108 (1998), a general provision that does not amount to a water right may be included in the SRBA decree if "necessary for the administration of the existing water rights in the body of the decree." Ex. 189 at 16 (underlining added); *see also id.* at 18, 19, 21 (similar).

It follows that Bird is legally authorized to divert "high flows" to only the approximately 23 acres of his 320-acre place of use that are covered by existing water rights. R. 01517; Ex. 1 at 18.³² The fact that the language of the General Provision does not recite this limitation, Ex. 11 at 2, is irrelevant. The limitation is implied by definition, as a matter of law, under this Court's "high flows" decision and *State v. Idaho Conservation League*. Thus, even if it is assumed, *arguendo*, that Bird's physical diversions will not increase under the permit, his lawful diversions will increase, because the permit would authorize diversions to almost 300 acres that are not covered by a water right decreed in the SRBA or the *Lemhi Adjudication*.

³² The partial decrees for these water rights contain the statutorily required statement that the water rights are "subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights." Idaho Code § 42-1412(6); *see, e.g., Partial Decrees* for water right nos. 74-32, 74-34, 74-7165. This Court may take judicial notice of these partial decrees. I.R.E. 201.

Bird's unauthorized "high flow" diversions to the place of use already adversely affect the local public interests in ESA recovery. See R. 01528 (finding that existing irrigation diversions, "including high flow usage," have "nearly eliminated an important intermittent disturbance regime associated with the spring freshet and channel-forming flows.") (quoting Ex. 203 at 102). This fact may not be disregarded simply because the unauthorized diversions have been occurring for some time. Further, it would be contrary to the affirmative duty to assess and protect the local public interests in ESA recovery to issue a permit for Bird's unauthorized "high flow" diversions without considering their adverse effects on these local public interests. *Shokal*, 109 Idaho at 337, 707 P.2d at 448; see also R. 01462 ("Just because an applicant has already been negatively impacting the local public interests for years should not result in an automatic pass to continue such impacts.").

E. The Final Order Is Not Consistent With the State Water Plan.

IDWR recognizes that the *Final Order* was required to be "consistent" with the State Water Plan, Idaho Code § 42-1734(B)(4), and asserts this requirement was satisfied because IDWR "properly considered the policies identified in the State Water Plan within the local public interest inquiry." *IDWR Brief* at 46. This argument misses the mark even if it is assumed that the "local public interest" inquiry under Idaho Code § 42-203A(5) also determines "consistency" with the State Water Plan under Idaho Code § 42-1734(B)(4). For reasons discussed above, IDWR did not fulfill its affirmative duty of assessing and protecting the local public interests in recovering the ESA listed species. Thus, even under IDWR's view that the "local public interest" inquiry satisfies Idaho Code § 42-1734(B)(4), the *Final Order* was not consistent with

the applicable policies of the State Water Plan. *Agencies Opening Brief* at 46; Ex.21 at 26-28, 71-74.

Bird argues “the same legal principles associated with the proper use of a comprehensive land use plan” apply in this case, and therefore it is “improper” to consider the State Water Plan in determining “the result of a specific case.” *Bird's Brief* at 44. This argument is contrary to Idaho Code § 42-1734B(4), which requires IDWR to issue permits that are consistent with the State Water Plan. Every permit issuance is “a specific case.”

Bird also argues that the State Water Plan speaks exclusively in “generic” terms and the Agencies have improperly “cherry pick[ed]” the parts that support their position in this case. *Bird's Brief* at 44-45. This argument is contrary to the record because the State Water Plan specifically addresses a number of the issues and facts relevant to this case, including but not limited to the Lemhi River Basin, the IWRB’s Water Transactions Program (“WTP”), and the need to promote recovery of the ESA-listed fish species. *Agencies Opening Brief* at 46; *see also* Ex. 21 at 25-27, 71-74 (excerpts of the State Water Plan); Tr. Vol. II, Tr. Vol. II, p.526, l.5—p.529, l.16 (discussing policies of the State Water Plan).

Bird’s argument that Policy 2C of the State Water Plan required the IWRB to seek minimum streamflow water rights rather than file a protest to Bird’s application also lacks merit. This argument is essentially an attempt to obtain judicial review of a matter statutorily committed entirely to IWRB’s sole discretion: whether IWRB should have applied for new or additional minimum streamflow water rights in the Lemhi River Basin. Idaho Code § 42-

1504.³³ Further, there is no statute, rule, or judicial decision that requires the Agencies to seek a minimum streamflow water right rather than protest a permit as contrary to the local public interests in fish and fish habitat—and especially not when, as in the Lemhi River Basin, protecting existing irrigation uses and the local economy depends heavily upon protecting efforts to recover fish species listed under the ESA.³⁴ Moreover, the Agencies have demonstrated that “peak flow” events are “needed to recover ESA-listed species,” R. 01541, and it is not clear that “peak flow” events would qualify as “minimum flows” within the meaning of the minimum streamflow statutes. *See, e.g.*, Idaho Code § 42-1503 (“the minimum flow or lake level and not the ideal or most desirable flow or lake level”).

IV. ALTERNATIVELY, IF THE PERMIT IS APPROVED IT MUST INCLUDE ADDITIONAL CONDITIONS TO PROTECT THE LOCAL PUBLIC INTERESTS IN “RECOVERY.”

While the Agencies believe the record compels the conclusion that the application must be denied in order to protect the local public interests in recovering the ESA-listed species and protecting the streamflow and habitat needed for this purpose, the Agencies recognize that the decision of whether to deny the application or approve it with conditions is committed to

³³ The *Amended Preliminary Order* included a discussion of the Hearing Officer’s apparent view that IWRB should have applied for additional minimum streamflow water rights in the Lemhi River Basin. The Director removed this discussion as “dicta.” R. 01515.

³⁴ These arguments also apply to Bird’s assertions that the Agencies should have petitioned IDWR for a permitting moratorium. *Bird’s Brief* at 2, 35-36. The Agencies also note that in October 2019 the Lemhi Irrigation District requested that IDWR establish a moratorium on consumptive uses in the Lemhi River Basin. Attachment A. To the Agencies knowledge, no action has been taken on that request.

IDWR's "sound discretion." *Shokal*, 109 Idaho at 339, 707 P.2d at 450. The Agencies also recognize that approving the application with the conditions imposed by the *Amended Preliminary Order*, as supplemented and clarified by the additional conditions requested in the Agencies "Exceptions" could, arguably, be viewed as a permissible exercise of "sound discretion." R. 01470-92, 01552-54; *Agencies Opening Brief* at 48-49. The remainder of this brief, therefore, addresses this question. This section is not intended to waive any argument that the application should be denied.

While the Agencies agree that if the application is approved it must include the "bypass flows" conditions, these conditions alone do not "protect the streamflow and habitat needed to recover the ESA-listed species." R. 01541; *see, e.g.*, Tr. Vol. II, p.420, ll.2-6 (agreeing that the USBR Study did "not mak[e] any statement about what it's going to take to protect or recover the fish"); *id.*, p.430, ll.2-4 (agreeing that "reconnect alone is not enough"). Approving the application with only the "bypass flow" conditions would be contrary to the statutory requirement of protecting the local public interests in ESA recovery, *Shokal*, 109 Idaho at 337, 707 P.2d at 448, would not be supported by substantial evidence in the record as a whole, and would be arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *see also Am. Lung Ass'n of Idaho/Nevada v. State, Dep't of Agric.*, 142 Idaho 544, 547, 130 P.3d 1082, 1085 (2006) (discussing "arbitrary" and "capricious" standards); *Ackerschott v. Mountain View Hospital, LLC*, 166 Idaho 223, 234, 457 P.3d 875, 886 (2020) (identifying the elements of "abuse of discretion"). In order to avoid approving a permit that will simply dig the ESA hole deeper, it is also necessary to protect "peak flows" events, prohibit "high flow" diversions to the

place of use, and exclude WTP flows from the “bypass flow” determination. These conclusions are explained below.

A. “Peak Flow” Events Must Be Protected.

Bird’s application seeks to appropriate a portion of the limited “peak flow” water that remains. *Bird’s Brief* at 3 n.3; R. 01517, 01531. As previously discussed, the record shows and the *Final Order* confirms that natural hydrograph “peak flow” events are necessary to maintain and improve the fish habitat required to reach ESA recovery goals, but have been “nearly eliminated” throughout the Lemhi River Basin. R. 01528; *supra* Parts III.A-B.

Thus, the affirmative *duty* of protecting the local public interest in recovering the ESA-listed fish species requires that if the application is approved, it must include a condition providing some measure of protection for “peak flow” events. IDWR’s view that no protection for “peak flow” is necessary lacks support in the record. *Supra* Part III.A.-C. While the USBR Study did not quantify “peak flow” events, it explicitly recognized that “peak flow” events “that mimic the natural hydrograph should be a consideration in managing streamflows outside the PHABSIM analysis.” Ex. 202 at 26.

Removal of the “peak flow” condition of the *Amended Preliminary Order* was not justified by IDWR’s view that the Agencies failed to provide quantitative data suitable for crafting a “peak flow” condition. Idaho Code § 42-203A(5) expressly provides for an application to be denied rather than approved with conditions, and the Agencies took the position that the application should be denied. The Agencies more than carried their “initial burden” burden of providing evidence supporting denial of the application, which was all that was

required under *Shokal* and IDWR's rules of procedure. IDAPA 37.0308.040.04.b.ii. Contrary to IDWR's assertions, *IDWR Brief* at 18-20, this included evidence of the "harm" of allowing additional "peak flow" depletions. *See, e.g.*, Tr. Vol. II, p.361, l.19—p.362, l.21; *id.*, p.440, ll.15-16; *id.*, p.502, l.24—p.503, l.19; Ex. 201 at 10.³⁵ Thus, the "ultimate burden" of showing the application could nonetheless be approved with a "peak flow" condition fell on either Bird or IDWR. IDAPA 37.0308.040.04.c; *see also Shokal*, 109 Idaho at 339, 707 P.2d at 450 ("the burden of proof in all cases as to where the public interest lies . . . rests with the applicant.").

Further, imposing upon the Agencies the additional burden of providing the quantitative data necessary to craft a "peak flow" amounted to requiring the Agencies to provide evidentiary support for a position (i.e., that the application can be conditioned to fully protect the local public interests in recovering the ESA-listed fish species) with which the Agencies strongly disagree.

This requirement effectively denied to the Agencies their statutory right to assert and support the position that IDWR should "reject" the application and "refuse issuance of a permit therefor."

Idaho Code § 42-203A(5).

³⁵ For the same reasons, there is also no merit in Bird's contention the record lacked "substantial evidence" to support a "peak flow" condition simply because the Agencies argued the application should be denied rather approved with conditions. *Bird's Brief* at 24-24. The Agencies submitted more than enough evidence to warrant denial of the application because of the need to preserve the depleted spring runoff and "peak flow" events. Using some of this evidence to craft a "peak flow" condition, R. 01441-42, does not make the evidence any less "substantial." *See N. Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 522, 376 P.3d 722, 726 (2016) ("Substantial evidence is 'relevant evidence that a reasonable mind might accept to support a conclusion.'" (internal citation omitted)).

Thus, the *Final Order*'s determination that the record did not include specific quantifiable data that would support a "peak flow" condition left IDWR with two options: either deny the application entirely, *see* R. 01541 ("would be denied"); or remand to the Hearing Officer for additional hearings. Idaho Code § 67-5245(6)(b). IDWR erred by taking a different course of action—approving the permit without any protection for "peak flow" events. This option, however, was foreclosed by the *Final Order*'s determination that because the local public interests in protecting the streamflow and habitat needed to recover the ESA-listed species "outweigh" the local public interests in Bird's proposed use, the application "would be denied" in the absence of such protections. R. 01541.

B. "High Flows" May Not Be Diverted to the Place of Use.

The *Final Order* deleted the "high flows" condition of the *Amended Preliminary Order*³⁶ only because the *Final Order* determined that any question of the meaning and effect of the Basin 74 General Provision regarding "high flows" (hereafter, "General Provision") is an issue of "administration" among decreed water rights that was not properly before the Hearing Officer. R. 01515-16, 01530. IDWR and Bird support this reasoning, but also offer additional *post-hoc* justifications: the Director "does not have the authority to alter or amend the decreed use" of "high flows," and "it would be an unconstitutional taking of Bird's right to divert high flows

³⁶ Condition No. 12, which stated: "The right holder is prohibited from irrigating the authorized place of use for this right with high flows as described in the Basin 74 General Provisions." R. 01451.

under the general provision as decreed” in the SRBA. *IDWR Brief* at 45; *Bird’s Brief* at 43.

These arguments miss the mark.

In this case, the meaning and effect of the General Provision regarding “high flows” is a question of permitting, because it arises under the “local public interest” criterion of Idaho Code § 42-203A(5). To use Bird’s terminology, it is a question of appropriation, not of administration. *Bird’s Brief* at 41. Even if it were correct to pigeonhole all questions related to the General Provision as issues of “administration,” there is no “administration” exception to the “affirmative duty to assess and protect” the local public interest. *Shokal*, 109 Idaho at 337, 707 P.2d at 448. IDWR has an affirmative duty to follow this inquiry wherever it may lead, provided the interests at issue fall within the statutory definition of the “local public interest.” *N. Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 376 P.3d 722 (2016).

The “local public interest” inquiry in this case unavoidably leads to the question of “high flows” use. The *Final Order* found that local water users divert “high flows” when “the available supply exceeds the demands under existing rights,” R. 01527, and “[i]rrigation diversions, including high flow usage, ‘have nearly eliminated an important intermittent disturbance regime associated with the spring freshet and channel-forming flows.’” R. 01528 (quoting Ex 203 at 102) (italics and underlining added). “High flow” uses therefore have a direct impact on the local public interests in recovering the ESA-listed species and protecting the streamflow and habitat needed for this purpose. R. 01534, 01541. Moreover, Bird testified that he will continue his existing practice of diverting as much of the “high flows” as possible onto

the proposed place of use, even if the permit is approved. Tr. Vol. I, p.28, ll.12-13; *id.*, pp. 48, 1.24—p.49, 1.5; *id.*, p.88, 1.23—p.89, 1.12; *id.*, p.109, 1.25—p.110, 1.5; *id.*, p.130, ll.14-18.

The *Final Order* thus erred in summarily concluding that “high flow” use is exclusively a question of “administration” of existing water rights that was “not properly before the hearing officer” and was “not appropriate for this proceeding.” R. 01516, 01530. Further, the record supported the Hearing Officer’s determination that the condition prohibiting diversion of “high flows” to the place of use was necessary to “maintain the integrity” of the local public interest conditions and prevent them from being “circumvented.” R. 01447; *see Hardy v. Higginson*, 123 Idaho 485, 489, 849 P.2d 946, 950 (1993) (holding that a prospective water user should not be allowed “to circumvent” local public interest criteria).

IDWR argues that a condition prohibiting “high flow” diversions to the place of use is problematic because IDWR does not have the authority “to alter or amend the decreed [high flow] use” or to “to prevent Bird from using high flows, as decreed.” *IDWR Brief* at 45. A condition prohibiting “high flows” to be diverted to the place of use obviously would not “alter or amend” the General Provision, however. The argument IDWR is actually making, therefore, is the same as Bird’s argument that a condition prohibiting “high flow” diversions to the place of use “would be an unconstitutional taking of Bird’s right to divert high flows under the general provisions as decreed” in the SRBA. *Bird’s Brief* at 43. This argument necessarily assumes that the General Provision actually *does* authorize “high flow” diversions to Bird’s place of use.

For this reason, IDWR and Bird have put the validity of this assumption squarely before this Court. This assumption is *not* valid, however, for reasons previously discussed. *Supra* Part

III.D.ii. Bird is legally authorized to divert “high flows” only to the 23 acres of his 320-acre place of use that are covered by existing water rights. *Id.* That will be true even if the application is approved, because the new permit would not be one of “the existing water rights in the body of the [SRBA] decree.” Ex. 189 at 16 (brackets added). Thus, a condition prohibiting “high flow” diversions to the place of use would be entirely consistent with the “high flows” General Provision.³⁷

C. WTP Flows May Not Be Treated as “Bypass” Flows.

IDWR and Bird argue that the 18 cfs “bypass flow” for Reach 1 prevents Bird from diverting the 7.3 cfs secured by the WTP to “reconnect” Big Timber Creek to the Lemhi River. *IDWR Brief* at 37-38; *Bird’s Brief* at 40-41. This is not correct. The 7.3 cfs consists of water appropriated under senior water rights that is not available to Bird in any event. Tr., Vol. II, p.574, l.21—p.575, l.7; *id.*, p.592, l.12—p.593, l.3. In other words, the WTP flows are protected by senior water rights, not the “bypass flow” conditions.

This fact underscores the problem in IDWR’s argument that it lacks authority to assign the WTP flows “a special status.” *IDWR Brief* at 38; *see also Bird’s Brief* at 41 (“The ‘color’ of the water does not matter to fish.”). The Agencies are not asking IDWR to “assign” the WTP flows a special status. These flows already have a special status, because they consist of senior water secured through the WTP at great cost. The WTP is a legislatively approved program

³⁷ Because Bird intends to transfer his existing water rights to other lands before the permit is developed, R. 01517, a “high flows” condition should prohibit any “high flows” diversions to the place of use.

administered by the IWRB, and is specifically intended to protect not just fish, but also the property rights of local people and the traditional agricultural economies of the communities in the Lemhi River drainage and other subbasins of the Upper Salmon River Basin. Tr., Vol. II, p. 550, ll. 18-22; *id.*, p.563, ll.15-19; Ex. 212 at 2; Ex. 21 at 26, 37, 72-74. The Agencies are simply asking IDWR to acknowledge these facts and stop treating the WTP flows just like any other “water flowing in a stream.” *IDWR Brief* at 38.

The issue is not whether “the color of the water” matters to fish, *Bird’s Brief* at 41, but rather protecting the purposes and integrity of the WTP, a program crucial to supporting existing water uses and rural economies. IDWR’s view that WTP flows are simply “water flowing in the stream” means that any and all WTP flows secured in the Upper Salmon River basin—flows secured “specifically to help offset and remedy the effects of existing diversions,” R. 01509 (italics and underlining added)—can and apparently will be used to provide some or all of the “bypass flows” needed to approve additional diversions. This approach is directly contrary to and undermines the core purposes of the WTP, and the reasons for which so much staff time and effort goes into securing funding for the WTP and identifying transaction opportunities. Tr., Vol. II, pp.572-92.

Thus, IDWR has ample authority and discretion to condition the permit so that WTP flows do not “count” towards the Reach 1 “bypass flow.” Indeed, IDWR must do so in order to fulfill the “affirmative *duty*” to protect the local public interests in recovering the ESA-listed fish species. *Shokal*, 109 Idaho at 337, 707 P.2d at 448.

D. Local Public Interest Conditions Must Be Administered at the Field Headgate.

IDWR and Bird argue that administration of the local public interest conditions at the field headgate to the place of use is not necessary because the watermaster is able administer the “bypass flow” condition on another Big Timber Creek water right at the point of diversion. *IDWR Brief* at 46-47; *Bird’s Brief* at 45-46. The analogy is inapplicable because the Agencies’ request for field headgate administration was (and is) based upon inclusion of additional conditions—conditions that would prohibit diversions during “peak flow” periods, and would also prohibit diversions of “high flows” to the place of use. These differences, and the fact that timely and meaningful administration of these conditions is necessary to protect local public interests that “outweigh” whatever local public interests are associated with Bird’s proposed development, R. 01541, fully justify a condition requiring administration at the field headgate rather than the point of diversion.³⁸

The Agencies agree that under normal circumstances, administration at the point of diversion is appropriate, and reporting potential problems to IDWR’s Water Compliance Bureau might be sufficient to address them. But this is not a normal case. As the *Final Order* expressly recognized, the local public interests in ESA recovery in the Lemhi River Basin are sufficiently weighty to justify denying the application entirely if these local public interests are not protected.

³⁸ Bird testified that he would not object to a condition authorizing such administration. Tr. Vol. I, p.112, ll. 11-13.

Further, IDWR's assertion that the Agencies' request for field headgate administration is based on "speculation," *IDWR Brief* at 47, is contrary to the record. Bird diverts some of his decreed water rights, and their associated "high flows," using the same point of diversion and ditch that will carry the permitted water. R. 01517. The local public interest conditions of the new permit thus will apply to only some of the water diverted at the point of diversion, but the "'color' of the water," *Bird's Brief* at 41, cannot be determined at the point of diversion. Further, Bird provided testimony to the effect that it is not uncommon practice to move water diverted under senior water rights to pivots that may irrigate lands outside the senior rights' authorized places of use. Tr. Vol. I, p.120, l.24-p.121, l.19; *see also* Ex. 183A (watermaster recommendation). Field headgate administration is thus necessary to ensure timely and meaningful administration of conditions imposed to protect the local public interest in recovering the ESA-listed fish species. *See also Hardy*, 123 Idaho at 489, 849 P.2d at 950 (holding that a prospective water user should not be allowed "to circumvent" local public interest criteria).

V. BIRD IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES.

Bird asserts he is entitled to an award of attorney's fees because the Agencies allegedly pursued this appeal "without a reasonable basis in fact or law." *Bird's Brief* at 49; *see also* Idaho Code § 12-117(1) (same). To support this assertion, Bird attempts to analogize this case to *Rangen, Inc. v. IDWR*, 159 Idaho 798, 367 P.3d 193 (2016) and *Hoffman v. Bd. of the Local Home Improvement Dist. No. 1101*, 163 Idaho 464, 415 P.3d 332 (2017). *Bird's Brief* at 47-48. This case is different from *Rangen* and *Hoffman*, however. In those cases, a district court had issued a decision rejecting the appellants' arguments, and attorney's fees were awarded after the

appellants continued to pursue the same arguments, either in the Idaho Supreme Court or in further proceedings in the district court, without further developing their arguments or raising new issues.³⁹ *Rangen*, 159 Idaho at 812, 367 P.3d at 207; *Hoffman*, 163 Idaho at 471-72, 415 P.3d at 339-40.

No judicial decision has been issued yet in this case, and there is no merit in Bird's attempt to equate the *Final Order* with a judicial decision. The record also belies Bird's assertions that the Agencies have simply taken the same positions and made the same arguments in this proceeding that they made before the Director, without adding anything new. *Bird's Brief* at 48. In proceedings before the Director, the "peak flow" and "high flow" conditions were already in the permit proposed by the *Amended Preliminary Order*. The Agencies only requested that the Director add conditions to clarify and supplement the existing "bypass flows," "peak flow," and "high flows" conditions. In this judicial review proceeding, in contrast, the Agencies have argued the Director erred by removing the "peak flow" and "high flow" conditions, and that upon remand for further proceedings the application should be denied, or at a minimum approved with the conditions of the *Amended Preliminary Order* as clarified and supplemented by the additional conditions requested by the Agencies' "Exceptions." R. 01470-89.

In this proceeding the Agencies also developed and supported their legal and factual positions and arguments much more extensively, and in much more detail, than in the Agencies'

³⁹ In *Rangen*, the Idaho Supreme Court directly awarded attorney's fees on appeal; in *Hoffman*, the Idaho Supreme Court affirmed the district court's award of attorney's fees.

“Exceptions” to the Director. For the same reasons, there is no merit in Bird’s contention that the Agencies never “pointed” to any “technical” evidence supporting their position that from an ESA recovery perspective, there is no water available in the Lemhi River Basin for new water rights. *Bird’s Brief* at 48.⁴⁰

There is also no merit in Bird’s contention that “the primary reason the Agencies have protested” his application is “perceived public perception.” *Id.* This contention takes out of context, and mischaracterizes, testimony that approval of Bird’s application will impair the WTP’s efforts to enter into future transactions with water right holders. *See generally* Tr., Vol. II, p.602, l.11—p.605, l.10. The “primary reason” for the Agencies’ protests, in contrast, is to protect ESA “recovery,” which in the Lemhi River Basin is inextricably intertwined with, and necessary for, protecting existing water uses and the local economy.

The Agencies’ arguments in this proceeding have been well-grounded in both fact and law. There is no basis for an award of attorney’s fees against the Agencies.

CONCLUSION

For the reasons discussed herein and in the *Agencies Opening Brief*, the Agencies request that the *Final Order* be set aside in part, and remanded to IDWR for further proceedings as necessary. *Agencies Opening Brief* at 48-49.

⁴⁰ As previously noted, this is simply a statement of verifiable technical fact under ESA recovery goals established by NOAA Fisheries. The Agencies have never taken the position that no new water rights should ever be issued in the Lemhi River Basin for any purpose. *See, e.g.*, R. 01265 n.12 (discussing “uses other than irrigation, such as DCMPI”).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of December 2020, I caused the original of the foregoing to be filed with the Court, and true and correct copies to be served on the parties, by the methods indicated:

1. Original to:

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

GARRICK L BAXTER SEAN H COSTELLO IDAHO DEPARTMENT OF WATER RESOURCES 322 E. FRONT STREET, SUITE 648 P.O. BOX 83720 BOISE, ID 83720-0098	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email: garrick.baxter@idwr.idaho.gov sean.costello@idwr.idaho.gov
ROBERT L HARRIS LUKE H MARCHANT HOLDEN, KIDWELL, HAHN & CRAPO PLLC 1000 RIVERWALK DR., STE 200 P.O. BOX 50130 IDAHO FALLS, ID 83405	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email: rharris@holdenlegal.com lmarchant@holdenlegal.com


MICHAEL C. ORR

Respectfully submitted this 2nd day of December, 2020.

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


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

Attachment A



**Barker Rosholt
& Simpson LLP**

Travis L. Thompson

EMAIL: tlt@idahowaters.com

PHONE: 208.733.0700

WEB: idahowaters.com

Twin Falls

163 Second Ave. West

P.O. Box 63

Twin Falls, Idaho 83301

p. 208.733.0700

f. 208.735.2444

Attorneys

John A. Rosholt

Albert P. Barker

John K. Simpson

Travis L. Thompson

Scott A. Magnuson

Jonas A. Reagan

October 21, 2019

VIA EMAIL & U.S. MAIL

Director Gary Spackman
Idaho Department of Water Resources
322 E. Front St., Ste 648
Boise, Idaho 83702-7371

Re: Moratorium New Consumptive Use Applications (Basin 74)

Dear Director Spackman:

I am writing on behalf of our client the Lemhi Irrigation District (LID or District). The District represents water users in the Lemhi River Basin that irrigate over 58,000 acres. LID is an active participant in water resource matters that affect its landowners and has a keen interest in protecting water use for future generations.

As you may be aware, water users in the Lemhi Basin rely upon the diversion and use of “high flow” in the spring and early summer. This unique water use practice was originally decreed in the *Lemhi Decree* and confirmed through a general provision in the Snake River Basin Adjudication *Final Unified Decree*. See *General Provisions Basin 74*. The use of “high flow” benefits water users and the basin as a whole as it helps augment groundwater and tributary spring flows to the Lemhi River. The District believes that diversion and use of “high flow” is a critical water use practice given the basin’s lack of water storage facilities. “High flow” water use supplements and is paramount to the water users’ successful irrigation accomplished by their decree base rights.

Questions exist regarding the scope of the “high flow” use as well as its administration in the basin. Newly approved water rights with certain instream bypass flow conditions (i.e. water right 74-15613) have further eroded available “high flow” water supplies at times. Moreover, several new applications for permit have been filed in recent years that in the District’s opinion threaten continued “high flow” water use contrary to historical practice. See App. For Permit 74-16185 et al., new surface water applications filed fall of 2018. Whereas climate variability may contribute to less “high flow” in certain years, several new water rights may also deprive water users of the ability to divert and use that water as well.

Director Gary Spackman (IDWR)

October 21, 2019

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Apart from the “high flow” water use issue, various salmonid stocks listed as threatened or endangered under the Endangered Species Act (ESA) present additional challenges for Lemhi Basin water users. LID and other groups have worked on these issues for decades with the intent to reach a Section 6 Agreement to provide certainty and incidental take protection. Water users have participated in a variety of programs, including through agreements with the Idaho Water Resource Board (IWRB) to achieve certain flows and reconnection of tributaries. These efforts stand to be undermined by the diversion and use of additional water for consumptive use purposes.

Consequently, it is LID’s position that the Idaho Department of Water Resources should declare a moratorium, or at a minimum a stay on the processing of new consumptive use applications for permit in Basin 74. A moratorium on new water rights would provide water users with an opportunity to address the above issues in a comprehensive fashion to ensure that “high flow” water use can be clarified and administered properly going forward. Further, a moratorium would allow water users and the State of Idaho to further investigate how new appropriations can or cannot be developed in light of present ESA issues, including the opportunity to reach a long-term Section 6 Agreement. These two issues deserve the State’s attention and a moratorium would provide water users with the necessary time to address these issues without the prospect of litigating individual contested cases.

In close, LID requests the Director to utilize his statutory and regulatory authorities to declare a moratorium on new consumptive use applications for permit in Basin 74 as soon as possible. *See Idaho Code §§ 42-101; 1805(7); IDAPA 37.03.08.55.*

Sincerely,

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

cc: Carl Ellsworth, President (LID)